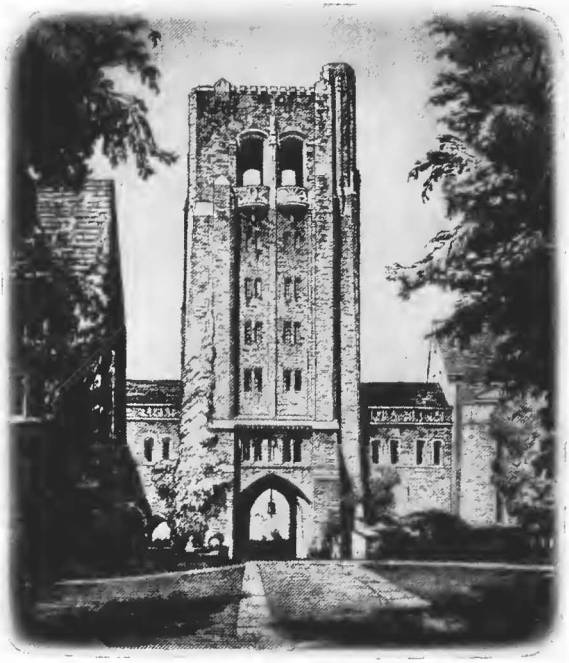
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DICTIONARY

OF

TERMS AND PHRASES

USED IN

AMERICAN OR ENGLISH JURISPRUDENCE.

BY

BENJ. VAUGHAN ABBOTT.

VOL. II.

L—Z.

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LAW DICTIONARY.

L.

L. As an abbreviation, is used in law books most frequently for Law; but sometimes for liber (*i.e.* book), lord, &c., or for a reporter's name. See ante, xxiv. As a Roman numeral it is also used in law, as in other books, as the representative of the number fifty.

With a line drawn above it, $\bar{L}$ denotes 50,000. *Shipley.*

LL. The plural form of the abbreviation for law; meaning laws, and generally a mode of citing old collections of statutes.

L.L. (also L. Lat.) and **L. F.** (also L. Fr.) are used as abbreviations of the terms Law Latin and Law French.

LL.B., LL.M., and LL.D., stand, respectively, for the three academic degrees, bachelor, master, and doctor of laws.

LA. The. The French definite article, feminine. It occurs in some compounds and phrases, as *Termes de la Ley* or terms of the law, the title of a law dictionary.

LÀ. There. French adverb of place; also of time. Is seen in some obsolete law French phrases, where it must be distinguished from the article.

LAAS. A gin, net, or snare. *Wharton.*

LABEL. 1. In former English conveyancing, something appended to a larger writing, to operate as a codicil. *Wharton.*

2. Also a narrow slip of paper affixed to a deed or writ to bear the seal. *Cowel.*

3. A term of heraldry. *Wharton.*

4. The outer moulding of a doorway. *Shipley.*

5. The vernacular meaning of label, — viz: a slip of paper, &c., affixed to the outside of any thing containing merchandise, for the purpose of bearing a statement of the contents, — has been drawn somewhat into discussion under recent statutes protecting trademarks.

Thus, while a label cannot (probably) be protected under copyright laws, it may, if sufficiently original and distinctive, be registered as a trademark. On the distinction between these, see *Browne Tradem.* § 537.

A careless speaker may apply the term trademark to a mere label, although such mere label is not protected. *Br. Tr.* § 83.

Labels composed of words in common use cannot be exclusively appropriated as trademarks, though they may become powerful auxiliaries. *Ib.* § 544.

For the purposes of the English trademarks registration act of 1875, a trademark may consist of a distinctive label. *Stat.* 38 & 39 *Vict. ch.* 91, § 10.

A mere label, such as is affixed to bottles or parcels of manufactured goods, is not a book such as may be copyrighted. Coffeen *v.* Brunton, 4 *McLean*, 516.

LABOR. In its vernacular sense of work, service of the more onerous and inferior kind, labor is often used in statutes, such as laws forbidding labor on Sunday, laws giving a lien or privileged remedy for wages of labor, &c., some of which have given rise to decisions on the meaning of the word. See also BUSINESS.

Labor, business, and work are not synonymes. Labor may be business, but it is not necessarily so; and business is not always labor. Labor implies toil; exertion producing weariness; manual exertion of a toilsome nature. Making an agreement for the sale of a chattel is not within a prohibition of common labor upon Sunday, though it is (if by a merchant in his calling) within a prohibition upon business. Bloom *v.* Richards, 2 *Ohio St.* 387.

In its technical sense, the phrase claim for labor embraces all sorts of services,

whether physical or mental, or whether the main ingredient was manual toil or professional or other skill; but, in its narrower and popular signification, it is restricted to claims arising from physical toil. Weymouth *v.* Sanborn, 43 *N. H.* 171.

The official services of a mayor of a city, under an annual salary, were deemed embraced in the term labor, in Robinson *v.* Aiken, 39 *N. H.* 211.

A statute providing that any person who shall perform any labor in building a house shall have a lien for the value of such labor, does not include services rendered by an architect in superintending the erection of the building; and he is not entitled to a lien for the value of such services. Stryker *v.* Cassidy, 17 *N. Y. Supreme Ct.* 18.

LABORER. In English statutes, this term is generally understood to designate a servant employed in husbandry or manufactures, and not dwelling in the home of his employer. Numerous statutory regulations for this class of persons have long existed in England, known as laborers' statutes. *Wharton; Mozley & W.*

In several of the states, laws exist giving laborers, *eo nomine*, a lien, or priority, or special remedy or security, for their wages; and, under these, several decisions have arisen as to what persons are included in the term.

A laborer, as the word is used in the Pennsylvania act of 1872, giving a certain preference of lien, is one who performs, with his own hands, the contract which he makes with his employer. Wentroth's Appeal, 82 *Pa. St.* 469.

Laborer includes not only those who perform labor with their own hands, but those who do so by the hands of another. Warner *v.* Hudson River R. R. Co., 5 *How. Pr.* 454.

A consulting engineer is not a "laborer or operative," within a charter rendering stockholders individually liable to such servants. Ericsson *v.* Brown, 38 *Barb.* 390.

Laborer does not include contractor. Aikin *v.* Wasson, 24 *N. Y.* 481.

Laborer, as used in the Pennsylvania lien law of 1872, does not include a hotel cook. Sullivan's Appeal, 77 *Pa. St.* 107.

A statute giving a preference to laborers and workmen employed on railroads for payment of wages, over any mortgage created by the company, does not extend to a civil engineer. The terms do not embrace persons engaged in the learned professions, but rather such as gain a livelihood by manual toil; those who depend on hand work, not on head work. They have always been construed, when found in such statutes, to mean persons engaged in manual occupations; the intent being to extend special protection to a class of persons who are dependent on manual labor for subsistence, and who cannot protect themselves. Pennsylvania, &c. R. R. Co. *v.* Leuffer, 84 *Pa. St.* 168.

LACHES. Slackness; neglect; remissness; delay or neglect in making a claim or enforcing a right, which, if not excused, as by ignorance or legal disability, will operate to bar a remedy which it is discretionary with the court to afford.

Jacob (*Dict.*) considers that "probably it may be an old English word; for when we say there is laches of entry, it is all one as if it were said there is a lack of entry; and in this signification it is used."

In modern law-books, laches is most frequently found in discussions upon the effect of a party's delay to assert his claim to some equitable right or remedy. The time within which a plaintiff may sue at law is quite definitely fixed by statutes of limitations, which cover the ground so fully that the only question mooted as to loss of the right to bring a legal action is whether it is "barred" by the statute. Courts of equity generally follow the statutes of limitations, in cases to which they apply. There is, however, a broad field of equitable jurisdiction, in which the appeal of the complainant is so far to the discretion or conscience of the chancellor, that he may refuse relief, upon the ground that, under the circumstances of the case, the complainant's delay to proceed has been so great that it would be inequitable to disturb defendant in his possession. It is in this class of cases that the doctrine of laches is chiefly discussed and applied; and, in this connection, the word signifies such a delay to sue, to make a demand or a tender, to take possession, or the like, as warrants a court of equity in refusing relief which it might probably have granted had the party taken seasonable steps to secure his rights.

A similar question is often raised in objection to a suit in admiralty, in reference to claims as to which no statute of limitations prescribes a definite rule. Admiralty courts exercise a discretion in refusing to entertain a suit, where unreasonable delay, operating to defendant's prejudice, is shown. The word laches is not inapplicable in connec-

tion with this feature of admiralty practice; but the phrase more commonly employed is to say that the claim has become "stale."

LADEN. Does not necessarily mean "fully" or "heavily laden." Searight *v.* Stokes, 3 *How.* 151, 169.

LADY. Has no definite legal signification in the United States, as designating a class entitled to any peculiar privileges. In England, it denotes a woman of rank; and is a title belonging to the wife of a knight or of a man of any degree above that of knight, except that it is said not to be applied to the wives of bishops.

As to the original application of this expression, which is from the Saxon "loaf day," it may be observed, that heretofore it was the fashion of those families whom God had blessed with affluence to live constantly at their mansions in the country, and that once a week, or oftener, the lady of the manor distributed to her poor neighbors, with her own hands, a certain quantity of bread; but the practice which gave rise to this title is now as little known as the meaning of it; however, it may be from that hospitable custom that to this day the ladies in this kingdom serve the meat at their own tables. *Encyc. Lond.*

Lady-day. 1. When speaking of lady-day, we ordinarily mean the 25th of March, being the Feast of the Annunciation of the Blessed Virgin Mary.

2. Sometimes, however, a different meaning is given to the phrase by local custom. (*Fawcett L. & T.* 113.) And, particularly, in parts of Ireland they speak of the 15th of August as lady-day, that day being, in the Roman Catholic Church, the festival of the Assumption of the Virgin. *Mozley & W.*

Lady's friend. An officer of the house of commons, whose duty it was, when parliamentary divorces were common, to take care that a husband who sued for a divorce made a suitably moderate provision for his divorced wife, if the house of lords had not provided for it. *Wharton.*

LÆSA MAJESTAS. Injured majesty; the crime of high treason; lese majesty.

LÆSIONE FIDEI. A class of suits or actions for breach of faith in civil contracts, which the clergy, in the reign of Stephen, introduced into the English spiritual courts, were termed suits *pro læsione fidei.* By means of these suits they took cognizance of many matters of contract which in strictness belonged to the temporal courts; upon the pretence that oaths and faith solemnly plighted, being of a religious nature, the breach of them belonged more properly to the spiritual than to the lay tribunal. This attempt to turn the ecclesiastical courts into courts of equity, on the ground that such acts were offences against conscience, was checked by the constitutions of Clarendon, A.D. 1164, which provided that such matters should be within the jurisdiction of the king's courts. But the power thus asserted, along with the jurisdiction assumed over express and implied or resulting uses, open or secret, is considered to have contributed to the development of the principal branches of modern equitable jurisdiction. *Brown; Mozley & W.*

LAGAN. Goods found adrift at sea. See LIGAN.

When mariners in danger of shipwreck cast goods out of the ship, and fasten a buoy to them, that they may find them again, these goods are called lagan. And lagan is used to denote that right which the chief lord of the fee had to take goods cast on shore by the violence of the sea, &c. *Jacob.*

LAITY. In England, where clergymen of the established church are a distinct rank or class, in legal cognizance, the word laity has a definite legal meaning, as including all persons who are not of the clergy. And laic or layman signifies an individual who is not in orders; not a clergyman.

In the United States, these words have no use as law terms; the employment of them is only conventional. Layman is probably here generally used to imply that a person is a member of or connected with a religious denomination, but not an ordained minister. Persons wholly unconnected with any religious body would not ordinarily be deemed embraced in the term the laity.

The laity are divisible into three states: 1. *Civil,* which includes all the nation, except the clergy, the army, and the navy. It is subdivided into *nobility,* as dukes, marquesses, earls, viscounts, and barons; *commonalty,* as knights of the garter, knights-banneret, baronets, knights of the bath, knights-bachelors, esquires, gentlemen, yeomen, tradesmen, artificers, and laborers. 2. *Military,* consisting of the militia of each county, raised from among the people, officered by the principal land-owners, and commanded by the lord lieutenant. 3. *Maritime,* consisting of the officers and mariners of the British navy. *Wharton.*

LAND. In many legal connections, is used as if meaning more than the soil or ground, and as if coextensive with "realty" and "real property."

Philosophically, it seems more correct to say that the word land means, in law as in the vernacular, the soil, or portion of the earth's crust; and to explain or justify such expressions as that whoever owns the land owns the buildings above and the minerals below, upon the view not that these are within the extension of the term land, but that they are so connected with it that by rules of law they pass by a conveyance of the land. This view makes land, as a term, narrower in signification than realty; though it would allow an instrument speaking of land to operate coextensively with one granting realty or real property by either of those terms. But many of the authorities, such as are cited below, use the expression that "land" means these incidents to the soil.

By English statutes, and according to usage in equity jurisprudence, land may be understood as including money left to be expended in land; upon the principle that, in equity, whatever ought to be done may be regarded as done.

Land signifies generally not only arable ground, meadow, pasture, woods, moors, waters, &c., but also messuages and houses. In a more restrained sense, it is arable ground. *Jacob; Mozley & W.*

Land, in its restrained sense, means the soil; but in its legal acceptation it is a generic term, comprehending every species of ground or earth, as meadows, pastures, woods, moors, marshes, furze, and heath. It includes also messuages (*i e.* dwelling-houses, with some adjacent land assigned to the use of them, usually called a curtilage), tofts (*i.e.* places where houses formerly stood), crofts (*i.e.* small inclosures for pasture, &c., adjoining to dwelling-houses), mills, castles, and other buildings; for with the conveyance of the land these structures upon it pass also. And, besides an indefinite extent upwards, it extends downwards to the globe's centre; hence the maxim, *cujus est solum ejus est usque ad cœlum et ad inferos*, or more curtly expressed, *cujus est solum, ejus est altum.* And water, by a solecism, is held to be a species of land. *Wharton.*

Land has a more comprehensive signification in law than in common parlance; for it comprehends not only ground, but also any thing that may stand thereon, as a house, a castle, or a barn. It has also an indefinite extent upwards as well as downwards; and no man may erect any building or the like to overhang another's lands, and whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface, so that the word lands comprehends not only the face of the earth, but every thing under it or over it. *Brown.*

Land is a comprehensive term, including standing trees, buildings, fences, stones, and waters; all of which will pass under the general descriptive word land, in a deed. Standing trees must be regarded as part of the land, so far that a sale of growing trees, with a right at any future time to enter and remove them, is an agreement conveying an interest in lands, which by the statute of frauds must he in writing. Kingsley *v.* Holbrook, 45 *N. H.* 313.

As used in New York statutes, land includes the land itself, all buildings and trees, and mines, minerals, &c.; and "lands" is coextensive with "lands, tenements, and hereditaments." 1 *Rev. Stat.* 387, § 2; *Id.* 750, § 10; 2 *Id.* 137, § 6.

Thus land, in modern New York conveyancing, includes not only the naked earth, but every thing within it, the buildings, trees, fixtures, and fences upon it, &c. Canfield *v.* Ford, 28 *Barb.* 336; Green *v.* Armstrong, 1 *Den.* 550; Mott *v.* Palmer, 1 *N. Y.* 564, 569; Baker *v.* Johnson, 2 *Hill*, 342.

In order to pass title to land, the word land, or something equivalent, should be used. A grant of a "stream and pond of water, and saw-mill thereunto belonging," does not convey to the grantee the land covered by the waters of the stream and pond. Nostrand *v.* Durland, 21 *Barb.* 478.

Lands, in a will, unless restrained by something else, is synonymous with "real estate," and sufficient to carry a future or contingent, as well as present, freehold estate. Pond *v.* Bergh, 10 *Paige*, 140.

The term landed estate, in a devise, is not necessarily descriptive merely of the realty, as distinguished from the personalty, but may have the effect to carry a fee. Bradstreet *v.* Clarke, 12 *Wend.* 601.

A devise using the word land, and no other, to designate the subject of it, will not pass rents reserved on a lease in fee, nor the right of entry under the condition annexed to the fee. Herrington *v.* Budd, 5 *Den.* 321.

A devise, in general terms, of the testator's lands in a county, passes his right to rents under perpetual leases on lands in such county. Hunter *v.* Hunter, 17 *Barb.* 25, 86.

A contract by the former husband of a woman "immediately to deliver up to her full and complete possession of the land," was held to mean, under the circumstances, the land, house, cistern, orchard, &c., then in his possession, in as good condition as they were at the time of the agreement, natural deterioration, decay, and inevitable accident excepted. Streeter *v.* Streeter, 43 *Ill.* 155.

The word land, when used alone, in Dutch deeds, means arable land only. Van Gorden *v.* Jackson, 5 *Johns.* 440.

In the Illinois mechanic's lien law, § 20, land means the land with such improvements as there are upon it at the time of the execution of the mortgage. Croskey *v.* Northwestern Manuf. Co., 48 *Ill.* 481.

Houses, fixtures, improvements, and even neat-cattle, horses, and mules, when attached to and used on a plantation, are within the term landed estate, in a statute authorizing taxation. Police Jury of St. Mary *v.* Harris, 10 La. Ann. 676.

Under 1 Rev. Stat. 388, § 3, — which declares that the terms "land, real estate, and real property," as there used, include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state, — iron gas mains or pipes belonging to a gas company, and laid, not on their own land, but under the streets of a city, are not real estate for the purposes of taxation. People *ex rel.* Citizens' Gas Light Co. *v.* Board of Assessors, 39 *N. Y.* 81.

Land is used in Tenn. Code, § 2420, regulating descents, as including not only lands, tenements, and hereditaments, but also all rights thereto and interests therein. Alexander *v.* Miller, 7 *Heisk.* 65.

Lands and tenements. A grant of "all my lands and tenements, wherever situate," is sufficient to convey any freehold interest of the grantor in any real property, and will pass a contingent remainder. By the term land, a reversion or remainder will pass, and a future estate, dependent on a precedent estate, is a remainder by the statute. The word tenements embraces not only what may be inherited, but whatever may be holden in tenure. Pond *v.* Bergh, 10 *Paige*, 140.

A joint-stock mining company borrowed money on debentures, whereby they charged "all the lands, tenements, and estate of the said company, and all their undertaking," as security therefor. It was held that neither unpaid calls nor future calls were within those terms; and that, in winding up, simple-contract creditors were entitled to resort to the assets of the company other than the real estate, and the "undertaking," as defined by this statute. King *v.* Marshall, 10 *Jur.* N. S. 921.

Land titles and transfer act. The Stat. 38 & 39 Vict. ch. 87, passed in 1875, for the establishment of a land-registry for the registration of titles to land, containing various provisions in reference to the transmission of land, and unregistered dealings with registered land, &c., analogous to the recording or registry laws, so long and widely used in the United States. *Mozley & W.*

Lands clauses consolidation act. A notable act of parliament, Stat. 8 Vict. ch. 18, passed in 1845, in which the clauses gathered from a great number of previous acts of parliament, authorizing acquisition of lands by public companies for the corporate uses, were consolidated. It embraced England and Ireland; and was amended by 23 & 24 Vict. ch. 106, passed in 1860, and by 32 & 33 Vict. ch. 18, passed in 1869. A similar act, Stat. 8 & 9 Vict. ch. 19, for Scotland, was amended by 23 & 24 Vict. ch. 106.

The object of these general acts is said to be, to provide legislative clauses, in a convenient form, for incorporation by reference in future special acts of parliament for taking lands, with or without the consent of their respective owners, for the promotion of railways and other public undertakings.

LANDING. Means a wharfage-place for craft, not a harbor for them, whether laden or empty. Hays *v.* Briggs, 74 *Pa. St.* 373.

LANDLORD. In modern usage, signifies one who, being the owner of a superior estate in realty, leases or lets it to another, in consideration of a rent or service reserved.

When the absolute property in or fee-simple of the land belongs to a landlord, he is then sometimes denominated the ground landlord, in contradistinction to such an one as is possessed only of a limited or particular interest in land, and who himself holds under a superior landlord. *Brown.*

LAND-REEVE. The designation, upon English estates, of a person whose business it is to overlook certain parts of a farm or estate; to attend not only to the woods and hedge-timber, but also as to the state of the fences, gates, buildings, private roads, drift-ways, and watercourses, and, likewise, to the stocking of commons, and encroachments of every kind, as well as to prevent or detect waste and spoil in general, whether by the tenants or others, and to report the same to the manager or land-steward.

LAND-TAX. A tax upon the beneficial owner of land, which has, in modern times (so Sugden says), superseded other methods of taxation in England, and appears to embody the principle upon which American state taxes are so largely laid upon the lands of the people.

The origin of this tax may be traced,

according to Blackstone, to the military tenures. The personal attendance required of tenants of knights' fee growing troublesome, the tenants found means of compounding for it, first, by sending others in their stead, and, in process of time, by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, under the name of escuage, or scutage. Of the same general nature were assessments of hidage upon all other rural lands, and of talliage in cities and boroughs. These three forms of charge for the support of government were superseded for a time by the introduction of subsidies. In the year 1692, there was a new assessment or valuation of estates throughout the kingdom, according to which the land-tax was imposed by 4 Wm. III. ch. 1, and has ever since continued a permanent charge on land; for, in 1798, by Stat. 38 Geo. III. ch. 60, this tax, which had long been annual, was converted into a perpetual one, and fixed at four shillings in the pound; but made subject, on the other hand, to redemption by the land-owner. It extends to real estates, and also to offices and pensions, but not (since 4 & 5 Wm. IV. ch. 11) to personal estates. The method of raising it is by charging a particular sum upon each county, according to a certain valuation; and this sum used to be assessed and raised upon individuals by commissioners duly appointed for that purpose (2 Burn's Justice, 61). Under Stat. 16 & 17 Vict. c. 74, facilities are afforded for the redemption of this tax; and it is now said to be, generally, redeemed.

LAND-TENANT. The correlative of landlord.

LAPSE, *n.* A slip or failure. Lapse, *v.*: to slip, fail, or pass away from the original destination. Lapsed: that which has failed or passed aside.

The noun lapse, as applied to a devise or a legacy, denotes the failure of a testamentary gift through the devisee or legatee dying in the testator's lifetime.

As applied to English ecclesiastical livings, lapse denotes a species of forfeiture by which the right of presentation to a church accrues to the ordinary by the neglect of a patron to present; to the metropolitan, by the neglect of the ordinary; and to the crown, by the neglect of the metropolitan.

LARCENY. Stealing; theft; the offence of taking and carrying away something of a personal nature, with a criminal purpose to profit by depriving another of property in it.

According to Lord Coke, larceny, by the common law, is the felonious and fraudulent taking and carrying away of the mere personal goods of another. 3 *Inst.* 107. Blackstone and Hawkins give definitions which do not materially differ from this. It scarcely embraces the cases recognized as larceny by modern decisions, of a taking by the general owner of goods from one who has a special property in them.

Jacob defines the offence as "a theft or felony of another's goods in his absence;" but this is not according to the modern use of the term, in which stealing from the person of the owner, such as picking pockets, is esteemed larceny. In New York, larceny from the person is treated as an aggravated form of the crime.

East's definition is: "The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his property, without the consent of the owner." 2 *East Pl. Cr.* 553. In Ransom *v.* State, 22 *Conn.* 153, 156, Storrs, J., cited this as "the most approved definition of larceny." In Reg. *v.* Holloway, Baron Parke pronounced this the most complete definition of any, yet said that "it wants explanation. It is defective, in not stating what the meaning of felonious, in the definition, is. It may be explained to mean that there is no color of right or excuse for the act; and the intent must be to deprive the owner, not temporarily, but permanently, of his property. A taking of goods with intent to return them is not larceny."

Mr. Bishop, speaking, apparently, of general American usage, says, in substance: The term larceny, in its widest

meaning, covers grand and petit, simple and compound, larcenies. But, when we would be precise, and exclude the compound larcenies, we use the phrase "simple larceny," which includes both grand and petit; and, descending further towards the minute, we say "grand larceny" or "petit larceny." Petit larcenies, however, having ceased to exist in England, and in a large part of our United States, the single word larceny means grand larceny, not of the compound sort. But, having no simple larcenies, we have no occasion for the correlative grand: so we drop it. He then presents, in a note, the leading definitions previous to his work, and himself proposes the following: The taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein; and, perhaps it should be added, for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious. 2 *Bish. Cr. L.* §§ 757, 758.

There must be a taking. If the accused was lawfully in possession and control of the goods before the criminal purpose was formed, the offence of larceny is not committed. So, if he induces the owner voluntarily to deliver possession, with intent to part with the property, this is not larceny.

And it will be observed that the definitions do not exclude a taking by force or fear; that is to say, they include robbery as a branch or species of larceny. This is not always understood in the ordinary use of the terms: they are frequently employed as indicating distinct crimes. But the authorities sustain the view that a robbery is a larceny, in the full sense of the latter word. Mr. Bishop expressly says that "robbery is a familiar form of compound larceny." 2 *Bish. Cr. L.* 757. And in Hickey *v.* State, 23 *Ind.* 21, where the indictment was for larceny, charging the defendant with having stolen two United States treasury notes, but the proof showed, unquestionably, a robbery, it was held that a conviction might be sustained. The court, indeed, use the expression, "We think that larceny is included within robbery;" but the evident meaning and effect of the decision is that robbery is a species or kind of larceny. The New York code commissioners proposed definitions of the two words which should treat them as distinct offences: larceny, to mean "the taking of personal property, accomplished by fraud or stealth, or without color of right thereto, and with intent to deprive another thereof;" and robbery, to mean "the wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear." *Rep. Pen. Code*, § 584; *Id.* § 280. But this was proposed as a measure of new legislation, not as expressing exactly the common-law usage of the words.

There must be a carrying or removal, or, in the technical expression, an asportation, *q. v.* Carrying away is the expression employed in most of the definitions. But modern cases are to the effect that the least removal of the property from its place of deposit by the owner is sufficient; and there seems to be now no force or meaning in the intensifying word "away."

The thing taken must be of a personal nature. Rights in action are not subjects of larceny, unless embodied in evidences of debt capable of caption; nor wild animals, unless reduced to possession. Real property is not a subject of larceny; hence many cases are found in which a prosecution for larceny is defeated by the consideration that the subject-matter, though in fact movable, was in law a part of the realty. Thus it is not larceny to remove and appropriate growing trees or crops, or things permanently affixed to the land.

There must be a criminal intent. A taking under a mistake of facts, or a claim of right, or for mere mischief, or as a temporary annoyance to the owner, is not larceny. The decisions are, however, not entirely agreed whether this intent must include a purpose to gain a profit or advantage to the offender, or whether an intent to deprive the owner permanently of his property is enough. Apparently, the English decisions lean towards the latter view; the American,

towards requiring a purpose of profit or self-advantage as an essential element.

Larceny was formerly divided into grand and petty larceny, differently punished: the former including the stealing of goods above the value of 12*d.*; the latter, of that value or under. This distinction was abolished in England by Stat. 7 & 8 Geo. IV. ch. 29, and now all larcenies are subject to the same incidents as grand larceny. We believe a similar distinction, the standard of value being different, prevails in some of the states, but it has lost most of its former importance.

Larceny is sometimes distinguished into simple and compound: the former being larceny uncombined with any recognized circumstances of aggravation; the latter, larceny under special conditions; such as, 1. Larceny in a dwelling-house of goods above the value of 5*l.* 2. Larceny in ships, wharfs, &c. 3. Larceny from the person, which is either by privately stealing, or by open and violent assault. 4. Larceny by clerks and servants. This distinction is of importance only as it is introduced by the statute of the jurisdiction, as a ground for increasing the punishment or modifying the proof or procedure.

In England, the law governing larceny has recently been consolidated by Stat. 24 & 25 Vict. ch. 96. The subject is regulated by statutes in many of the states, several of which modify the general or common-law definition.

For remarks on the distinctions between embezzlement, extortion, larceny, and robbery, see EMBEZZLEMENT.

The essential requisite of larceny is a taking with felonious intent. A taking of personal property of another, with intent to appropriate it to the use of the person taking, or permanently to deprive the owner thereof, is larceny. United States *v.* Durkee, 1 *McAll.* 196; Weston *v.* United States, 5 *Cranch C. Ct.* 493.

Larceny is a taking and a carrying away of personal property, with an intent to steal it. The intent renders the taking and carrying away felonious. A taking without a carrying away, or a carrying away without a taking, is not larceny. Commonwealth *v.* Adams, 7 *Gray*, 43.

Larceny implies a taking against the consent of the owner of the goods. People *v.* Nichols, 3 *Park. Cr.* 579.

If, by trick or artifice, the owner of personal property is induced to part with the custody or naked possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner parts with not only the possession, but the right of property also, the offence of the party taking the property will not be larceny, but that of obtaining goods by false pretences. Smith *v.* People, 53 *N. Y.* 111.

When one gives another a large bill to change in payment of a small sum, and the one to whom it is given retains the change, it will constitute larceny. Hildebrand *v.* People, 3 *Thomp. & C.* 82; 1 *Hun*, 19.

Larceny is the felonious taking and carrying away of the personal goods of another. The taking must be without the least color of right or excuse, and with intent to deprive the owner, not temporarily, but permanently, of his property. Fields *v.* State, 6 *Coldw.* 524.

To constitute larceny, the taking must he an actual and intended fraud upon the rights of another; the taking must include the purpose and intent to defraud; it must be an intentional taking without the consent of the owner, and intentional fraud, and an intentional appropriation. Mullins *v.* State, 37 *Tex.* 337.

Many definitions of larceny collated and reviewed, for the purpose of showing that an intent to deprive the person owning the thing taken of his property in it is an essential element. See State *v.* South, 28 *N. J. L.* 28.

Taking a horse which had run astray for years without a known owner, held, not larceny; because there could have been no intent to deprive an owner of his property in the animal. Johnson *v.* State, 36 Tex. 375; see also Ritcher *v.* State, 38 *Id.* 643.

Holloway, who was in the employment of a firm of tanners, clandestinely took skins from a warehouse of the firm, and carried them to the foreman, on the premises of the firm, and made pretence that he had done work on them, for which he asked payment. It appeared that he had no intent to remove the skins from the premises, or to deprive his employers of them, hut only to get paid for them as if the dressing had been his own work, after which he intended to leave them in possession of the firm. The exchequer chamber held that this was not larceny, for want of the element of an intent to permanently deprive the owner of his goods. Regina *v.* Holloway, 2 *Carr. & K.* 942; 1 *Den. Cr. Cas.* 370.

The mere possession of another's property, with intent to steal it, is no larceny, until the intention has ripened into the act. State *v.* Newman, 9 *Nev.* 48.

To say that a person has "taken" property, is not a charge of larceny. Robertson *v.* Lea, 1 *Stew.* 141.

Larceny is where a man knowingly takes and carries away the goods of another without any claim or pretence of right, with intent wholly to deprive the owner of

them, and to appropriate them to his own use. *Archbold,* cited 8 *Port.* 463.

Where the accused assisted in secreting a slave, with intent that she should escape from her master and become free, and without any intent to appropriate the slave to defendant's use as property, it was held there was no larceny, for want of the *animus furandi* or *lucri causa.* An essential element of larceny is the criminal intent to convert the goods. Thus, taking property to destroy it may be punishable as malicious mischief, but is not larceny. State *v.* Hawkins, 8 *Port.* 461.

When a clerk who has the possession of the employer's goods, in a store, for the purpose of selling them in the usual course of trade, feloniously removes them from the store, it is larceny. Marcus *v.* State, 26 *Ind.* 101.

To constitute larceny, the property must be taken *animo furandi.* Where defendant took a bird-cage, of trifling value, out of her neighbor's yard, through mischief merely, this was held no larceny. Crocheron's Case, 1 *City H. Rec.* 177.

The term simple larceny, in 2 Mich. Comp. Laws, § 5765, is confined to cases the circumstances of which do not aggravate the offence or increase the punishment. Pitcher *v.* People, 16 *Mich.* 143.

A man may be guilty of larceny in stealing his own property, when done with intent to charge another person with the value of it; as where property which has been levied on is stolen from the officer by the general owner. Palmer *v.* People, 10 *Wend.* 165.

The taking of one's own property from a bailee — *e. g.* a cart from a wheelwright having a lien thereon for repairs — is not larceny. Commonwealth *v.* Tobin, 2 *Brews.* 570.

Under some circumstances, a man may be guilty of felony in taking his own goods; as if he steals them from a pawnbroker, or any one to whom he hath delivered and intrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with intent to charge the hundred with the loss, according to the statute of Winchester; or where the owner delivers goods to a carrier, and afterwards secretly steals them from him, with an intent to charge him for them, &c., because the carrier had a special property, and the possession for a time. *Jacob.*

One who, at the time of finding the lost property, takes it with the intention of appropriating it, will be guilty of larceny, if he knows the owner, or if he has means of ascertaining the owner, or believes, with reason, that the owner will be found; but otherwise the conversion is not larceny. Wolfington *v.* State, 53 *Ind.* 343; Baker *v.* State, 29 *Ohio St.* 184; State *v.* Levy, 23 *Minn.* 104.

To constitute larceny, an intent to steal must accompany the original taking. State *v.* Wood, 46 *Iowa,* 116.

The snatching of bills from a person having them in possession, and retaining them, without the consent of such person, do not necessarily constitute larceny. To constitute that offence, the taking must be felonious, and the felonious intent must exist at the time of the taking. This intent is to be determined by the jury upon all the facts and circumstances of the case. 1877, Hart *v.* State, 57 *Ind.* 102.

A felonious intent must be shown in addition to a taking and carrying. Where regular customers of a saloon-keeper applied about midnight to be served, and he refused to get up and serve them, and they carried away refreshments, but next day offered to pay for what they had taken,— *Held,* that the circumstances disproved a felonious intent, and a conviction for larceny could not be sustained. Mason *v.* State, 32 *Ark.* 238, S. P. McCourt *v.* People, 64 *N. Y.* 583.

Inducing an owner of a chattel or of money, by a fraudulent trick or device, and with felonious intent, to part with the possession temporarily, and then appropriating the thing or money to one's own use, against the owner's consent, is larceny. Huber *v.* State, 57 *Ind.* 341; Loomis *v.* People, 67 *N. Y.* 322.

The fact that the owner voluntarily delivered the mere possession of property does not protect the recipient from the charge of larceny, if he receives it with a felonious intent, and if the owner did not intend to part with the title. Thus, where complainant, on the way to take passage for Italy, met the accused, who pretended he was a priest, and was also starting for Italy, and was induced to deliver to him $400, to be carried for complainant to Italy, this was held larceny. Macino *v.* People, 19 *N. Y. Supreme Ct.* 127.

LAST, *adj.* This word is used, in the vernacular sense, in legal phrases.

Last heir. In English real-property law, signifies the person to whom lands came by escheat for want of lawful heirs.

Last sickness. The illness of which a person dies.

Last will. Among wills, the one latest made has preference, and revokes previous ones. Hence the expression last will is often used for the will which takes effect, the operative will; and in this use "last" is redundant: it adds nothing to the meaning, or, rather, is fairly implied in "will." If several wills are in contemplation, the phrase, of course, designates the one made after others.

LAST, *n.* In old English law, signifies a burden; also, a measure of weight used for certain commodities of the bulkier sort. "Ballast," or the burden needed to trim a vessel, perhaps includes this word. So "lastage" was a tax or charge imposed in some markets for the

privilege of carrying merchandise as one pleased, or that of selling by last weight.

LATE. In such expressions as "J. B., late a resident of this state," means last, or recently, in a place or office. It is a legal term, and, as such, is in the superlative degree, and means last. In ancient times, when the addition of a man's residence was necessary in an indictment for a crime, the term late was always used as descriptive of his last residence, and was held a sufficient allegation of his residence in the most technical terms of the common law. A petition for letters of administration which avers that the decedent was "late a resident" of the county, is sufficient, under a statute which requires that letters shall be granted in the county of which decedent was a resident at the time of his death. The averment imports that decedent was *last* a resident of the county named. Beckett *v.* Selover, 7 *Cal.* 215.

Late, in such expressions as "the late W. C.," means, existing not long ago, but now departed this life. An averment, in an indictment, in laying the ownership of property involved in the offence, which says that it is "the property of the late W. C.," is defective and insufficient; for it lays the ownership in a dead person. Pleasant *v.* State, 17 *Ala.* 190.

LATENT AMBIGUITY. An ambiguity (*q. v.*) which does not appear upon a bare inspection of the language of an instrument, but is raised by some extrinsic evidence concerning the subject-matter.

The importance of distinguishing between latent and patent ambiguities lies in the application of the rule that, if the ambiguity is latent, parol evidence may be received to show what meaning was actually intended; but not so if it is a patent one. If the language is lucid on its face, but extrinsic facts raise a double meaning, as if a testator gives a legacy "to my nephew John," and evidence *aliunde* shows that he had two nephews named John, the inquiry into the extrinsic facts may be pursued as far as necessary to ascertain which meaning corresponds with the party's intent. But, if the language itself conveys two meanings, the question which is the one intended must be resolved by the rules of construction, aided, in proper cases, by a general consideration of the circumstances under which the instrument was made.

An ambiguity is properly latent in the sense of the law, when the equivocality of the expression or obscurity of intention does not arise from the words themselves, but from the ambiguous or delitescent state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by a mere development of extraneous facts without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words. *Rob. Frauds*, 14.

A latent ambiguity arises where words apply equally to two different things or subject-matters. The things must be different; and the parties must, on account of such difference, have intended one, and not the other; for, where the parties may have intended either of the two things in dispute, the term "latent ambiguity" does not apply. A contract for shipment of goods which does not specify which one of two available routes shall be employed, does not present a case of latent ambiguity. Webster *v.* Paul, 10 *Ohio St.* 534.

LATH; LATHE. The name of an ancient civil division in England, intermediate between the county, or shire, and the hundred. Said to be the same as what, in other parts of the kingdom, was termed a "rape." 1 *Bl. Com.* 116; *Cowel; Spelman.*

Lath-reeve. A civil officer placed in charge or superintendence of matters of common interest within a lath.

LATIMER. Is used by Sir Edward Coke for an interpreter. (2 *Inst.* 515.) It seems that the word is mistaken, and should be Latiner, because heretofore he that understood Latin, which, in the time of the Romans, was the prevailing language, might be a good interpreter. Camden agrees that it signifies a Frenchman or interpreter, and says the word is used in an old inquisition. It may be derived or corrupted from the French *latinier, q. d. latiner. Cowel; Jacob.*

LATIN. Three causes made the Latin language useful and important in early English jurisprudence: 1. Its conciseness, expressiveness, and adaptability to condensation fitted it, in early times, to be the medium of preserving the principles of jurisprudence, in the same manner as it has been widely preferred for communication of philosophic, scientific thought, and information generally. 2. The civil and canon laws, and many of the early European codes, were couched in Latin, and were received by the English people in that language; hence they might often be quoted in the original, as well as translated. 3. The conflict, after the Norman conquest, between the Saxon and

the French tongues naturally promoted the use of any neutral speech which might be available. Other influences of less importance co-operated with these; hence Latin was, in ancient English jurisprudence, the language of statutes and formal treatises; and, by Stat. 36 Edw. III. ch. 15, all pleas were directed to be debated in English, but to be recorded in Latin. English gradually predominated, however, until Stats. 4 Geo. II. ch. 26, and 6 Geo. II. ch. 14, declared that all judicial proceedings and records should be in English.

During the gradual decline in the use of Latin in the courts, faulty and erroneous employment of it was, of course, frequent. Early legal authorities discriminate three kinds: 1. Good Latin, allowed by grammarians and lawyers. 2. False, or incongruous Latin, which, in times past, would abate original writs; though not make void any judicial writ, declaration, or plea, &c. 3. Words of art, known only to the sages of the law, and not to grammarians. See LAW LATIN.

LATITAT. He lies hid. The name of a writ, in old English practice, requiring the defendant to answer in a personal action in the court of king's bench. It issued upon the theory that the defendant could not be found in the county of Middlesex, where the court was held, but was gone into some other county; and contained a recital that the defendant lies hid, and wanders about in the country, from the emphatic word of which, in the Latin form, the name is derived. The writ was abolished by Stat. 2 Wm. IV. ch. 39.

LATROCINIUM ; LATROCINY. Latin forms of, or equivalents for, larceny.

Latter part of the month. This phrase must be construed to mean all the last part of the month, and to include the whole of the last day. An action commenced on the last day of the month, on an obligation requiring performance "in the latter part," is prematurely brought. Bailey *v.* Ricketts, 4 *Ind.* 488.

LATTER-MATH. After-math, *q. v.*

LAUREATE; LAUREAT. An officer of the household of the sovereign, whose business consists only in composing an ode annually, on the sovereign's birthday, and on the new year; sometimes also, though rarely, on occasion of any remarkable victory. *Wharton's Hist. of English Poetry.*

LAW. 1. Nearly a volume would be required for an epitome of the interesting and valuable observations and discussions of legal writers upon the meaning, nature, and classification of law and laws; especially if one should include what has been said upon these words in their broadest sense of a rule of action, including the laws of natural phenomena, and the natural and divinely revealed laws of human duty. In jurisprudence, however, the more immediate concern is with law in the sense of the rules prescribed by human society for the government of human conduct; and these are either such as belong to the realm of international duties and obligations, and are included in the terms law of nations, international law, public law, or are such as govern the duties and obligations of the individual in his relations to the single state or nation of which he is a member, and to his fellows dwelling therein, and which are particularized by the phrase, municipal or civil law. This last is the most frequent use of the word law for the purposes of jurisprudence.

As used in this sense, law has been defined by Blackstone thus: A rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. This definition has been widely quoted, and generally with approval. It has been criticised, however, upon the ground that many of the prohibitions of the municipal law do not rest upon any wrongfulness of the act forbidden, but on considerations of expediency only. Thus Jacob advises modifying the latter clause to read "establishing and ascertaining what is right or wrong;" and Stephens (1 *Com.* 25) adopts the first part of Blackstone's definition as sufficient, — a rule of civil conduct, prescribed by the supreme power in a state. Other noteworthy definitions of the word in this broad sense have been those of Bracton; viz., a just sanction commanding honest things, and forbidding the contrary: of Austin; viz., a command to a course of conduct; a command being the expression of a wish or desire conceived by a rational being that another

rational being shall do or forbear, coupled with the expression of an intention in the former to inflict some evil upon the latter, in case he comply not with the wish: of Wharton; viz., an authoritatively inflexible rule enforcing justice, — a comprehensive director of human duty, — a moral science, having for its end the accomplishment of justice, which is simply practical virtue: of Jacob; viz., the rule and bond of men's actions, or a rule for the well-governing of civil society, to give every man that which doth belong to him: of Bouvier; viz., the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members: of Story (in 10 *Pet.* 18); viz., a rule or enactment promulgated by the legislative authority of a state; a long-established local custom which has the force of such an enactment.

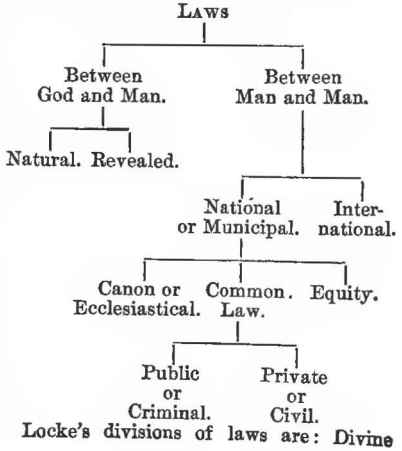
In the most enlarged sense in which the word law can be used, it applies not only to those rules, or systems of rules, which different governments lay down for the internal regulation of their respective communities, but also to those fixed and invariable principles in conformity with which nature carries on her operations. When, however, we wish to restrict the sense, or to limit the application, of the word, we use it ordinarily in conjunction with some other phrase; thus, when we apply it to those rules or principles of morality which our reason enables us to discover, and our conscience commands us to obey, we call it not unfrequently the law of nature; and when the same rules and principles are applied to the regulation of the conduct of nations in their intercourse with each other, it is then termed the law of nations, or international law. The word law, however, in a still more limited sense, signifies that body, or system, of rules which the government of a country has established for its internal regulation, and for ascertaining and defining the rights and duties of the governed, and it is then commonly called municipal, *i. e.* civil, law, and, in popular language, the law of the land. *Brown.*

The word law has various significations, and when used alone simply signifies a rule of action. This is the most enlarged sense in which the word can be used and applies not only to those rules or systems of rules which different governments lay down for the internal regulation of their respective communities, but also includes within it those fixed and invariable principles, in conformity with which nature carries on her operations. When, however, we wish to restrict the sense, or to limit the application of the word, we use it in conjunction with some other; thus when we apply it to those rules or principles of morality which reason enables us to discover, and conscience commands to obey, we call it the law of nature, and when the same rules and principles are applied to the regulation of the conduct of nations in their intercourse with each other, we call it the law of nations. In a still more limited sense, "law" signifies that body or system of rules which the government of a country has established for its internal regulation, and for ascertaining and defining the rights and duties of the governed. *Holthouse.*

Every law may be said to consist of several parts: Declaratory, whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down: directory, whereby the subject of a state is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs; remedial, whereby a method is pointed out to recover a man's private rights or redress his private wrongs; vindicatory, which signifies what penalty shall be incurred by such as transgress. See 1 *Bl. Com.* 53.

Laws are arbitrary or positive, and natural; the last of which are essentially just and good, and bind everywhere and in all places where they are observed. Arbitrary laws are either concerning such matter as is in itself morally indifferent, in which case, both the law and the matter, and subject of it, is likewise indifferent, or concerning the natural law itself, and the regulating thereof; and all arbitrary laws are founded in convenience, and depend upon the authority of the legislative power which appoints and makes them, and are for maintaining public order; those which are natural laws are from God; but those which are arbitrary are properly human and positive institutions. *Seld. Fort.* ch. 17.

Wharton exhibits the leading branches of the science of law thus:—



Locke's divisions of laws are: Divine

law, being the law of God, natural and revealed; civil law, being the municipal law; and law of reputation, being morality.

Austin's divisions of laws are: Divine law, being the revealed law of God; positive human law, being municipal law; positive morality, being morality; and laws metaphorically so called, being the laws of animate and inanimate nature.

That which is established by an ordinance which a board of supervisors have power to make is "established by law." People *v.* Edmonds, 15 *Barb.* 529.

2. In the broad sense heretofore considered, law includes all the systems for enforcing, by judicial measures and sanctions, human rights and duties, without reference to distinctions among the tribunals which have been constituted for the purpose. But, in a very frequent and important use, "law" excludes the methods and remedies of equity (*q. v.*) and of admiralty (*q. v.*), and confines the idea to the action of tribunals proceeding by fixed rules, and employing remedies which operate directly upon the person and property of the individual. Such is the meaning of the term in such phrases as courts of law; an action at law; a remedy at law. The import is that there are, to some extent, two systems of jurisprudence, — one, allowing a larger judicial discretion in the application of principles found in, or originally derived from, evident justice, and dealing primarily upon the conscience, or compelling the conduct; another, following stricter rules founded in general expediency or positive command, rather than in the justice of the particular case, and confining its remedies to mulcting or punishing the individual, in his property or person, for his misconduct; and that of these two the latter is the one intended. In this sense, the expressions "the law" and "the common law" are sometimes used interchangeably.

The word law, as employed in the constitution of the United States in defining the judicial power of the general government, is explained to mean the system of jurisprudence otherwise known as the common law, as it existed in the states at the time of the adoption of the constitution. It includes all those proceedings in which legal rights are to be ascertained and determined, whether they be the old long-settled proceedings of the common law, or new legal remedies, different, it may be, from the old common-law forms, but proceeding according to the general course of common-law principles, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered, as well as in contradistinction to those where, as in admiralty, a mixture of public law, maritime law, and equity is often found in one proceeding. Parsons *v.* Bedford, 3 *Pet.* 433, 446; Parish *v.* Ellis, 16 *Id.* 451.

The American colonies had adopted the common law of England, not in its full extent, but with varying limitations and qualifications. In general, the common law was adopted in each colony as far as it was found, by the courts administering jurisprudence, to be conveniently applicable to the peculiar situation of the people; and, as the people of each colony were independent of the rest in this respect, it has resulted that the phase of common law presented in each of the states differs, more or less, from that presented in the others. In none is it precisely coextensive with the common law of England.

The statutes passed in England in amendment of the common law, before the revolution that separated the colonies, and which are applicable to the situation of the people of this country, are generally considered as forming a part of our common law; and the same rule applies, of course, to the adjudications of the English courts previous to that time. The statutes of England since that date do not enter into our law; nor are the adjudications of the English courts, had since the revolution, considered of binding authority in the courts of this country: they have with us the weight of opinions, not that of precedents.

3. In another confined sense in which the word law is often used, it signifies an enactment; a distinct and complete act of positive law; a statute, as opposed to rules of civil conduct deduced from the customs of the people or judicial precedents; an act (*q. v.*) of the legislative body.

The use of the plural form, laws, gen-

erally indicates that the word is to be taken in this meaning.

Laws, in this sense of statutes, are called *enabling*, when they confer new powers; *remedial*, when their chief effect is to provide relief from evils or reform abuses; *penal*, when they impose punishment, pecuniary or corporal, for a violation of their provisions.

They are called *prospective*, when they will operate in the future only; *retrospective*, when they may also operate upon that which is past; and *ex post facto* (q. v.), when they assume to impose punishment for acts already done.

They are called *general* or *public*, when they affect the community at large; and *local* or *special*, when their operation is confined to a limited region, or particular class or interest.

A constitutional amendment or ordinance is a law within the restriction that no state shall pass any law impairing the obligation of contracts. See Pacific R. R. Co. *v.* Maguire, 20 *Wall.* 36.

An appropriation of money made by the constitution is an appropriation "made by law." The constitution is the supreme law in the state. State *v.* Weston, 4 *Neb.* 216.

Law, as used in section 426 of the New York code of procedure, directing the manner of proving laws, embraces private acts of a legislature, as well as public or general statutes. Every bill which has been passed by the legislature as provided by the constitution and statutes, and has been approved and assigned by the governor, or which he shall not return with objections within the prescribed period, or which, if returned with objections, shall be agreed to by the requisite number of each house, thereupon becomes a law, within the meaning of section 426 of the code, whether it affects all the people of the state alike, or merely creates a body politic. Persse & Brooks Paper Works *v.* Willett, 1 *Robt.* 131, 145.

4. In old English jurisprudence, law is found used to signify an oath, or the privilege of being sworn; as in the phrase, to wage one's law.

Law of arms. A phrase sometimes employed, equivalent to laws of war, *q. v.*

Law of the land. This expression, which recurs in many constitutional provisions to the general effect that individuals shall not be deprived of liberty, property, rights, &c., has been the subject of frequent discussion in American constitutional cases.

Mr. Sedgwick thinks that no better definition has been given than that suggested by Mr. Webster in his argument in the Dartmouth College case. "By the law of the land is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Every thing which may pass under the form of an enactment is not the law of the land." *Sedgw. Const. & Stat. Law* (2d ed.) 475.

The phrase, the law of the land, means general and public laws equally binding upon every member of the community. Van Zant *v.* Waddell, 2 *Yerg.* 270; Jones *v.* Perry, 10 *Id.* 59; State *v.* Burnett, 6 *Heisk.* 186.

When first used in Magna Charta, the phrase the law of the land probably meant the established law of the kingdom, in opposition to the civil or Roman law which was about being introduced. It is now generally regarded as meaning general public laws binding on all members of the community, in contradistinction from partial or private laws. James *v.* Reynolds, 2 *Tex.* 251.

After volumes written and spoken upon its exposition, the good sense of mankind has at length settled down to this, that the phrase was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Per Johnson, J., Bank of Columbia *v.* Okely, 4 *Wheat.* 235, 244.

It does not refer to any country or government which was foreign to the commonwealth adopting the constitution in which it is found, but to that land and that people therein which adopted such constitution. Thus, as used in the early constitution of Massachusetts, it means the common law of Massachusetts, embracing the great principles of Magna Charta, and all the maxims of law which were brought to this country by our ancestors on its settlement, and continued in practice, or afterwards recognized as parts of the common law, together with customs of their own which were permanent, uniform, and universal; but not including laws which, though part of the common law of England, were never adopted and approved in Massachusetts Bay, or usually practised upon in courts of law. State *v.* Knight, 43 *Me.* 11, 123.

It comprehends not only the common law, but also all acts in force at the time of making the constitution. Byrne *v.* Stewart, 3 *Desau.* 478.

It does not mean mere acts of the legisla-

ture. Saco *v.* Wentworth, 37 *Me.* 165, 171; State *v.* Doherty, 60 *Id.* 504.

It requires a judicial proceeding regularly conducted in a court of justice as contradistinguished from statutory enactment. Dorman *v.* State, 34 *Ala.* 216, 236; *Blackwell Tax Tit.* 17.

It requires judicial as well as legislative action before any person can be deprived of his life, liberty, or property. *Sedg. Const. & Stat.* 25.

It means the law as established in a fair, open trial, or after opportunity given for such trial, by due course and process of law; not a bill of attainder. Brown *v.* Hummel, 6 *Pa St.* 87.

It forbids that any member of the state shall be disfranchised or deprived of rights and privileges, unless the matter shall be adjudged against him upon a trial had according to the course of the common law. Until it has been ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, they cannot be taken from him. They cannot be taken by mere legislation. Taylor *v.* Porter, 4 *Hill*, 146.

Statutes which would deprive a citizen of the rights of person or property without a regular trial according to the course and usage of the common law, would not be tbe law of the land in the sense of the constitution. Hoke *v.* Henderson, 4 *Dev.* 15.

The requirement cannot be satisfied by merely passing a statute for the purpose of working the wrong. That construction would turn the provision into mere nonsense. The people would be made to say to the two houses: You shall be vested with the legislative power of the state, but no person shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for the purpose. In other words, You shall not do the wrong, unless you choose to do it. Taylor *v.* Porter, 4 *Hill*, 146.

It means due process of law warranted by the constitution, by the common law adopted by the constitution, or by statutes passed in pursuance of the constitution. Mayo *v.* Wilson, 1 *N. H.* 53.

That the phrases "the law of the land" and "due process of law," in the constitutions and bills of rights, are substantially equivalent, see Sears *v.* Cottrell, 5 *Mich.* 251; Webb *v.* Reinhard, 73 *Pa. St.* 370; Dorman *v.* State, 34 *Ala.* 216, 236; Taylor *v.* Porter, 4 *Hill*, 146; 2 *Kent Comm.* 13.

Law-merchant, or **law of merchants.** A body of rules deduced from the customs and usages general among merchants, and regulating subjects peculiar to their dealings; such as commercial paper, exchange, sale, and transportation of goods, and the like.

It is a system of law which does not rest exclusively on the positive institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world. 3 *Kent Comm.* 2.

Law of nations. A phrase equivalent to international law, *q. v.*

The law of nations consists of a system of rules or principles deduced from the law of nature, intended for the regulation of the mutual intercourse of nations. The law is founded on the principle, that the different nations ought to do to each other in time of peace as much good, and in time of war as little harm, as may be possible without injuring their own proper interests; and this law comprehends the principles of national independence, the intercourse of nations in peace, the privileges of ambassadors, consuls, and inferior ministers; the commerce of the subjects of each state with those of the others in times of war and of peace, or of neutrality; the grounds of just war, and the mode of conducting it; the mutual duties of belligerent and neutral powers; the limit of lawful hostility; the rights of conquest; the faith to be observed in warfare; the force of armistice, of safe conducts and passports; the nature and obligations of alliances; the means of negotiation, and the authority and interpretation of treaties. *Brown.*

The term law of nations is often used improperly as synonymous with the *jus inter gentes*, or international law. And in this sense it seems to be used by Blackstone, who speaks of it as a law to regulate the mutual intercourse of states. (1 *Bl. Com.* 43; 1 *Steph. Com.* 24, 25.) The *jus gentium* of the Roman lawyers was very different. The meaning of the phrase varied at different times; but in the main it was intended to designate the common law of all the nations which composed the Roman world, as contradistinguished to those particular systems which were respectively peculiar to the different communities or *gentes*. (*Aust. Jur. Lect.* xxxi.) The law of nations, in this its original sense, includes the modern international law, and also a great deal that is popularly ranked under municipal law. *Mozley & W.*

Law of nature. A term applied to such system of rules for human conduct as may be deduced from the organization, instincts, and wants of man, considered in his relations to God, to his fellow-men, and to the inferior creation, but independent of revelation from the Creator, or positive enactment or obligatory usages of society.

Law of the staple. An old English phrase, equivalent to law-merchant, *q. v.*

Laws of war. Such rules as obtain among civilized nations, regulating the conduct of hostilities, including the rights, obligations, and duties of belligerents and of neutrals, and such topics as armistice, blockade, capture, conquest, declaration of war, letters of marque, prisoners, privateering, prize.

Laws of the states. An enactment of congress governing the national judiciary provides that the laws of the several states are to be regarded as rules of decision in trials at common law in the courts of the United States. Act of Sept. 24, 1789, § 30; *Rev. Stat.* § 721. This expression, laws of the several states, is held not to be confined to the state laws which were in force at the time of its enactment in 1789. Thompson *v.* Phillips, 1 *Baldw.* 246. It draws into application all the laws which affect the right in litigation at the trial, which prescribe the rules of evidence necessarily incidental to the protection of such rights, and which declare the rule for the judgment to be rendered, so far as these matters are subjects of internal police or state regulation over which the people have delegated no power to the federal government, and on which the states can legislate in any manner, and to any extent not prohibited by their constitutions or by the constitution of the United States. The object of the enactment was to make the rules of decisions in the courts of the United States the same with those of the states, taking care to preserve the rights of the United States by the exceptions expressed in the reference to the laws of the Union; and justice to the citizens of the several states required this to be done. McNiel *v.* Holbrook, 12 *Pet.* 84.

The expression is construed to include the state laws relative to evidence as well as those governing property. Fowler *v.* Hecker, 4 *Blatchf.* 426. But it does not include laws prescribing details of practice. The state laws regulating practice, pleading, &c., are indeed adopted, to a very great extent, for the national courts; but this is not, by force, any construction placed upon the phrase, laws of the several states, in section 34 of the judiciary act, but by distinct enactments. And the expression does not preclude the courts of the United States from determining causes upon their own judgment, adversely to rules adhered to by the state courts, on questions of commercial or general law, which are not determinable in any given case by any positive statute or strictly local usage. The word laws, in this section, is not regarded as including within its scope decisions of state tribunals upon general principles of law, but as meaning the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. Swift *v.* Tyson, 16 *Pet.* 1. Or, as otherwise explained, it applies to the positive statutes of the state, and construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character; and it does not apply to questions of a more general scope, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, nor to questions depending on general commercial law. *Ib.;* Watson *v.* Tarpley, 18 *How.* 517.

Law worth; law worthy. Old English terms, meaning, apparently, privileged in regard to law; entitled to the benefit and protection of the laws.

5. Neither Webster nor Worcester give "law" as an adjective; it is, however, used with very much the force of an adjective in several combinations, some of which often, though not always, appear as compound words, while others cannot, consistently with usage in books of jurisprudence, be so explained. The following are leading examples:

Law agent. Any person entitled to practise as an agent for another in a court of law in Scotland. (*Stat.* 36 *&* 37 *Vict.* ch. 63.) *Mozley & W.*

Law burrows. A Scotch law term. Bouvier defines it as security that a person will keep the peace; Burrill says it is used in that sense, but properly means a process for obtaining such security.

Law charges. This phrase is used, under the Louisiana civil code, to signify costs

incurred in court in the prosecution of a suit, to be paid by the party cast. Rousseau *v.* His Creditors, 17 *La.* 206; Barkley *v.* His Creditors, 11 *Rob.* (*La.*) 28.

Law-day. 1. In old English law, signified the day of holding court-leet or sheriff's tourn; also, a day of open court, especially with reference to the courts of a county or hundred. *Termes de la Ley; Cowel.*

2. The day named in a mortgage, for the payment of the money to secure which it is given, is known as the "law-day." The phrase formerly marked the time when all legal rights were lost by the mortgagor's default. There is now no such time, until foreclosure; and the term serves only to engender confusion. Kortright *v.* Cady, 21 *N. Y.* 343, 345, 365, 367. See also 24 *Ala.* N. S. 149; 10 *Conn.* 280.

Law French. The French employed in old English law books and proceedings, characterized by many terms and idioms not used by classic French writers.

It is known that the Norman French, in which so many of the old reporters are found, is a language perfectly complete, full, sensible, and easy, to those who understand it; but, like other languages, dead letter to all who have not learned it. And the inducements to learn, or after having learned, to remember it, are now so few, that the majority of lawyers, and even the majority of well-educated lawyers, read it with difficulty and dissatisfaction, if, indeed, they read it at all. *Wall. Reporters,* 40.

Law helps the vigilant. A maxim which embodies the doctrine of laches and the spirit and purpose of the statutes of limitations. Also it expresses the ground upon which an active creditor, one who takes timely and vigorous proceedings, may obtain a priority over one who delays and sleeps upon his rights.

Law journal. A generic term for periodical publications devoted to exhibiting the progress of jurisprudence.

In England, this is also the specific title of a leading and well-known periodical.

The "Law Journal Reports" comprise reports of cases in all the superior courts in England. The reports of appeal cases in the house of lords are published among the reports of the respective courts from which the appeals are brought; so are the reports of appeals in the privy council from the admiralty and ecclesiastical courts; but otherwise the reports of privy counsel cases are, in general, published separately. The new series of these reports was commenced in the year 1832. The volumes are made up annually. There is a quinquennial digest connected with this publication, which is not confined to the Law Journal Reports, but extends also to cases in the Law Reports and the Law Times Reports. There is also published, during the long vacation, an issue of the statutes of the year. *Mozley & W.*

Law Latin. The Latin employed in old English law books and proceedings, characterized by many terms and idioms not found in classic Roman authors. See LATIN.

Law list. An annual publication of a quasi-official character, comprising various statistics of interest in connection with the legal profession. The contents include (among other information) the following matters: A list of judges, queen's counsel, and sergeants-at-law; the judges of the county courts; benchers of the inns of court; barristers, in alphabetical order; the names of counsel practising in the several circuits of England and Wales; London attorneys; country attorneys; officers of the courts of chancery and common law; the magistrates and law officers of the city of London; the metropolitan magistrates and police; recorders; county court officers and circuits; lord lieutenants and sheriffs; colonial judges and officers; public notaries. *Mozley & W.*

Law lords. Are peers in the British parliament who have held high judicial office, or have been distinguished in the legal profession. *Mozley & W.*

Law reports. This is a general term, in English and American jurisprudence, for the published volumes narrating the decisions of the courts. They contain the official reports of what the courts have decided; not, as a general rule, the trials, nor the extended testimony of witnesses and addresses of counsel, but a concise statement of the facts involved in particular questions of law, a brief memorandum of the positions assumed and authorities cited by counsel, and the deliberate opinions of the judges.

In America, the term is used generically for all books of this class. They number now upwards of 2,500 volumes. Of these, the federal courts have contributed about 225, and the several states various numbers.

In England, besides the generic use of the term, to designate the whole body of the volumes which exhibit the adjudications, it has been, for the past dozen years, employed as the distinctive title of a general official series, or rather two series, comprehending the principal courts as now organized. They are pub-

lished under the direction of a body called the council of law reporting, which consists of the attorney and solicitor general, the queen's advocate, and two representatives of each of the inns of court and the incorporated law society. The first or earliest of the two general series covers the period from 1866 to 1875, and is divided into three series, — the appellate series, the equity series, and the common-law series. These series are again subdivided as follows:

The appellate series contains three of these permanent series, — the house of lords reports, English and Irish appeals, including also peerage cases; the house of lords reports, Scotch appeals, and appeals from the English divorce court; the privy council reports. The volumes of these reports were published at irregular intervals of not less than a year each.

The equity series is divided into, — the chancery appeals; being the reports of cases in the lord chancellor's and lords justices' courts, the volumes of which series were published annually, — and the equity cases; being the cases before the master of the rolls, the vice-chancellors, and the chief judge in bankruptcy, the volumes of which series were published half-yearly.

The common-law series is divided into, — the queen's bench cases and exchequer chamber cases on appeal from the queen's bench; the common pleas cases and exchequer chamber cases on appeal from the common pleas; and the exchequer cases and exchequer chamber cases on appeal from the exchequer, the volumes of which three series were published annually; and the crown cases reserved; the probate and divorce cases; the admiralty and ecclesiastical cases.

The following publications are also issued under the direction of the council of law reporting: the statutes of each year, which are issued in numbers during the summer months, and are ultimately bound into yearly volumes; Indian appeals, being reports of appeals from the East Indies to the judicial committee of the privy council; Weekly Notes, being concise notes of decided cases, many of which are published in a more elaborate form in the reports.

Upon the passage of the supreme court of judicature act, and commencing with the year 1875, a new arrangement and nomenclature was adopted. This new issue is still continued, and consists of three series, which are divided into six "divisions," as they are called.

The first series contains the Chancery Division only; being cases determined by the chancery division of the high court of justice, by the chief judge in bankruptcy, and by the court of appeal, on appeal from the chancery division, and the chief judge, and in lunacy.

The second series embraces four divisions, viz.: The Queen's Bench Division, containing cases determined in the queen's bench division of the high court of justice, by the court of appeal on appeal from the queen's bench division, and by the court for crown cases reserved. The Common Pleas Division, containing cases determined by the common pleas division of the high court of justice, and by the court of appeal, on appeal from the common pleas division. The Exchequer Division, containing cases determined by the exchequer division of the high court of justice, by the court of appeal on appeal from the exchequer division, and by the divisional courts of appeal from inferior courts. The Probate Division, containing cases determined by the probate, divorce, and admiralty division of the high court of justice, by the court of appeal on appeal from that division, and by the ecclesiastical courts.

The third series reports the decisions of the courts of last resort, and is called the appeal cases. It contains the decisions rendered on appeals to the house of lords, English, Irish, and Scotch, and to the judicial committee of the privy council.

For some branches of this subject, see special titles, such as AGRARIAN; AMITTERE; BILL, II.; BREHON LAW; BY-LAW; CANON; CHARTER; CIVIL LAW; CODE; CONSOLATO DEL MARE; CONSOLIDATION OF CLAUSES; CONSTITUTION; CONSUETUDO; CRIMINAL LAW; CROWN LAW; ECCLESIASTICAL LAW; EX POST FACTO; MARTIAL LAW; MILITARY LAW.

LAWFUL. According to law; right-

ful; measured by rules of jurisprudence; justified, in substance rather than with respect to form, by the law of the land.

For the different shades of meaning between "lawful" and "legal," see LEGAL.

The words in a statute, "it shall be lawful for the court," are equivalent to saying "the court may," within the rule that "may" is held to be imperative where third persons have an interest in the application of the power. Davison *v.* Davison's Administrators, 17 *N. J. L.* 169.

A provision that it "shall and may be lawful" for a corporation to set aside a part of its capital, as an annuity fund, was held not imperative. Verplanck *v.* Mercantile Ins. Co., 1 *Edw.* 84.

A mere power conferred by charter on a corporation — *e.g.* where a canal-company charter provided that, if any boat should be sunk, and the owners should not raise it, it should be lawful for the company to raise it, and detain it for expenses — does not imply a duty to perform the act, nor render the corporation liable in damages for nonperformance. Lancaster Canal Co. *v.* Parmaby, 11 *Ad. & E.* 223; 3 *Per. & D.* 162; 1 *Eng. Railw. Cas.* 696.

Lawful age. Majority; generally the age of twenty-one years.

In some of the states, and for some purposes, a woman attains lawful age at eighteen. See McKim *v.* Handy, 4 *Md. Ch.* 228.

Lawful authorities. The expressions, "lawful authorities" and "competent authorities," used in our treaty with Spain, refer to persons who exercised the power of making grants by authority of the crown. As the language is not "all grants made by his majesty, or by his lawful authority," which might involve inquiry as to the authority of the individual making the grant, but is, "by his lawful authorities," it impliedly recognizes the existence of authorities invested with power to make grants, which must be deemed competent until the contrary is made to appear. United States *v.* Clarke, 8 *Pet.* 436, 449. S. P. Mitchel *v.* United States, 9 *Id.* 711.

Lawful discharge. Under the laws of Rhode Island, a discharge, according to the act for the relief of poor prisoners for debt, although obtained by fraud and perjury, is a lawful discharge, and not an escape; and, upon such a discharge, no action can be maintained for an escape, upon a bond for the liberty of the prison yard. Ammidon *v.* Smith, 1 *Wheat.* 447.

A discharge in insolvency which exonerates the debtor from his debts, and all arrest, imprisonment, and restraint of his person therefor, is a lawful discharge, within the meaning of a bond for the jail limits, requiring him to remain a prisoner until lawfully discharged. Mason *v.* Haile, 12 *Wheat.* 370.

Lawful funds, or money. The circulating medium or currency prescribed by government.

Lawful goods. Under a policy on "all kinds of lawful goods," whatever is not prohibited to be exported, by the positive law of the country, is lawful, even though it be contraband of war. The right of a hostile power to seize contraband goods does not destroy the right of a neutral to carry such goods. Seton *v.* Low, 1 *Johns. Cas.* 1; Skidmore *v.* Desdoity, 2 *Id.* 77; Juhel *v.* Rhinelander, *Id.* 120.

This is so, although such traffic was prohibited by a treaty. Seton *v.* Low, 1 *Johns. Cas.* 1.

And though the goods were owned by the subject of a belligerent nation. Skidmore *v.* Desdoity, 2 *Johns. Cas.* 77.

Lawful issue. A devise to A, for life, and on her death to her lawful issue, his, her, and their heirs, executors, administrators, assigns for ever, equally to be divided among them, share and share alike, gives A a fee-tail, which the statute converted into a fee. The words lawful issue are to be given the same effect as "heirs;" and superadded words may be rejected. Kingsland *v.* Rapelye, 3 *Edw.* 1. To similar effect, see *U. S. Dig.* tit. Devise, I. 4.

Bastard children may take, as the heirs of the mother, an estate of inheritance; but, under the term lawful issue they cannot take a remainder in an estate given to the mother for life, then to her "lawful issue." Black *v.* Cartwell, 10 *B. Mon.* 188.

Lawful issue, in a deed to one "for the term of his natural life, and, at his death, to his lawful issue for ever," are words of purchase, and not of limitation. Hancock *v.* Butler, 21 *Tex.* 804.

Lawfully possessed. This term, in a statute concerning forcible entry and detainer, does not involve inquiry into the lawfulness of the possession as regards title, but only in regard to the mode of obtaining it, and is equivalent to "peaceably possessed." McCartney *v.* Alderson, 45 *Mo.* 35.

LAWSUIT. This is not a legal expression, but rather a vernacular term, denoting any cause pending before the courts in which a controversy between two parties is brought up for adjudication. The technical terms are action at law, suit in admiralty or equity, civil action, prosecution, &c., according to the forum in which the proceeding is.

On an agreement to indemnify against lawsuits, an arbitration will be embraced, when the indemnity is against all suits commenced or to be commenced, and the arbitration is pending at the time. Packard *v.* Hill, 7 *Cow.* 434.

LAWYER. This vernacular term for a professional person whose business it is to conduct proceedings, or draught papers, by which rights may be secured or wrongs redressed, is but little used in technical jurisprudence, on account of its indefiniteness. It makes no discrimination between the functions of the advocate, barrister, counsellor, attorney, solicitor, proctor, conveyancer, &c.; as to which, see the several titles.

Lawyer defined as any person who, for fee or reward, prosecutes or defends causes in courts of record, or other judicial tribunals of the United States, or of any of the states, or whose business it is to give legal advice in relation to any cause or matter whatever. Act of July 13, 1866, § 9, 14 *Stat. at L.* 121.

LAY, *v.* A term in pleading, meaning to allege or state. Thus to lay an offence, or a wrong, is to allege the act for which the indictment or declaration seeks redress. To lay damages is to aver the amount of damages plaintiff has sustained. To lay the venue is to state the county in which the transaction in suit occurred, and where, therefore, the cause must be tried. It is sometimes used erroneously for lie, *q.v.*, as, to say that "the action would not lay."

LAY, *n.* A share of the profits of a fishing or whaling voyage, which is, by the usages of those employments, commonly allotted to each officer and seaman, as his compensation, and in lieu of fixed wages. This custom does not create any partnership in the profits of the voyage. The lay is regarded, in admiralty, as in the nature of wages for seamen in the common merchant service, and is governed, as respects forfeiture, by the same rules. Coffin *v.* Jenkins, 3 *Story*, 108.

LAY, *adj.* In English law, not clerical or ecclesiastical. See LAITY. In America, where clergymen are not a distinct rank, in a legal sense, lay is employed as opposed to professional. It is generally, but not necessarily, used in opposition to clerical.

Lay corporation. An artificial person, organized of secular persons, or for secular purposes; not ecclesiastical. Chiefly used in English law.

Lay fee. In the feudal law, is used to distinguish ordinary fees held of lay lords, from fees held by ecclesiastical tenures.

Lay impropriator. In English ecclesiastical law, a layman who holds a spiritual appropriation.

Lay investiture. In ecclesiastical law, the ceremony of putting a bishop in possession of the temporalities of his diocese.

Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy, till at length, it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands, by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture the elected bishops could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A.D. 773, by Pope Hadrian I. and the council of Lateran, and universally exercised by other Christian princes; but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, to confine them wholly to the clergy, which at length was completely effected,— the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England, as well as other kingdoms in Europe, even in the Saxon times; because the rights of confirmation and investiture were in effect, though not in form, a right of complete donation. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting those investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier; pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction; and Pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry V.

agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum*, and not *per annulum et baculum;* and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier,— the court of Rome found it prudent to suspend for a while its other pretensions.

This concession was obtained from King Henry the First, in England, by means of that obstinate and arrogant prelate, Archbishop Anselm; but King John (about a century afterwards), in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up, by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a license to elect (which is the original of our *congé d'eslire*), on refusal whereof the electors might proceed without it; and the right of appropriation afterwards, which was not to be denied without a reasonable and lawful cause. This grant was expressly recognized and confirmed in King John's Magna Charta, and was again established by Stat. 25 Edw. III. st. 6, § 3. But by the 25 Hen. VIII. ch. 20, the ancient right of nomination was in effect restored to the crown. See 1 *Bl. Com.;* also *Jacob* or *Tomlins.*

LAY-DAYS. A specified number of days, usually allowed by stipulation, in a charter-party, for loading and unloading the cargo. 3 *Kent Com.* 202. They are also called running days. 2 *Steph. Com.* 141.

LAY OUT. The phrase laying out, as used in the Connecticut statute relating to highways, includes not only the initiatory act of laying out the road by the selectmen, but also the acceptance of the survey by the town, and the recording thereof. Wolcott *v.* Pond, 19 *Conn.* 597.

The term laying out, in highway laws, has come to be used and understood as a technical word embracing all that series of acts which are made necessary to the complete establishment of a highway. Cone *v.* City of Hartford, 28 *Conn.* 363.

As used in Mass. Stat. of 1869, ch. 303, and 1871, ch. 382, § 1, "lay out" refers to the order to establish a highway, and does not include the grading. Hitchcock *v.* Board of Aldermen of Springfield, 121 *Mass.* 382.

"Lay out the road," or "lay off the road," imports that the jury should not only fix the course of the road as passing particular points, but also designate it after the manner of a survey, by its lines; in other words, lay down the whole ground covered by the road, or specify its width. Small *v.* Eason, 11 *Ired. L.* 94.

LE ROY. The old law-French word for the king.

Le roy le veut. The king wills it. The form of giving the royal assent in England to acts of parliament of a public nature. During the reign of a woman, the form is, *la reine le veut,* — the queen wills it; and a like variation is made in the similar formulas given below.

Le roy s'avisera. The king will consider. The form in which refusal of the royal assent, in England, to bills passed by both houses of parliament has been signified.

Le roy remercie ses loyal sujets, accepte leur benevolence, et aussi le veut. The king thanks his loyal subjects, accepts their benevolence, and wills it so. The form of giving the royal assent, in England, to a bill passed by parliament granting a supply.

LEAD. Occurs in some technical phrases.

To lead a use. A deed made previous to a fine and recovery, in old English conveyancing, for the purpose of directing to what uses they should operate, was said to lead the use.

When lands were conveyed by that species of conveyance termed a fine and recovery, the legal seisin and estate became thereby vested in the cognisee or recoveror; *i.e.*, in the person who was the object of that conveyance. But, if the owner of the estate declared his intention that such fine or recovery should inure or operate to the use of a third person, a use immediately arose to such third person out of the seisin of the cognisee or recoveror; and the statute of uses transferred the actual possession to such use, without any entry on the part of such third person. The deed by which the owners of estates so declared their intention with regard to the lands thus conveyed was termed either a deed to lead the uses, or a deed to declare the uses: when executed prior to the levying the fine, or suffering the recovery, it bore the former appellation; when executed subsequently thereto, it bore the latter. (1 *Cru. Dig.* 396.) *Brown.*

The expression leading a use was employed of a deed whereby a person covenanted to levy a fine, or suffer a recovery of lands, to certain uses upon which it was intended to settle the lands. The deed was then said to lead to the uses of the fine; and the fine, when levied, would, by virtue of the statute of uses, inure (*i.e.* take

effect) to the uses so specified. Or, if a fine or recovery were had without any previous settlement, and a deed were afterwards made between the parties, declaring the uses to which the same would be applied, this would be equally good as if the fine had been expressly levied, or the recovery suffered, in consequence of a deed directing its operation to those particular uses. So that the difference between a deed leading the use and a deed declaring the use was that the former was made previous to the fine or recovery, and the latter subsequently thereto. *Mozley & W.*

To lead in a cause. To have the charge or direction of the prosecution or defence of a cause, upon its trial. The counsel to whom is assigned the principal management of the case for each party is termed the leading counsel on that side.

To lead a witness. Signifies the practice of suggesting or implying to a witness, by form of question, what answer he is expected or desired to give. A question so phrased as to suggest the preference of the examining counsel as to the answer, or so as to furnish the witness with the answer, is called a "leading question."

A question is leading which puts into a witness's mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him. People *v.* Mather, 4 *Wend.* 229, 247.

Leading case. A reported decision which has come to be generally regarded with approval, as settling the law on the question involved. Compare CAUSES CELEBRES.

LEAKAGE. 1. Loss or waste, in liquids, which has arisen from a portion escaping from the cask or vessel. When leakage is predicable of "ullage" or "wantage" in a bottle, though the cork is not displaced, see Cory *v.* Boylston Ins. Co., 107 *Mass.* 140, 145.

2. An allowance made, in the collection of duties on liquid merchandise, to an importer, for loss, by portions of the liquid escaping from its receptacle.

LEASE. Is an assurance of property for life, or years, or at will, and for less time than he that leases has in the property; and usually made upon consideration of payment of a rent or other annual recompense, expressly covenanted to be paid for the use of the property. Lessor: one who grants a lease. Lessee: one to whom property is leased.

A lease is properly a conveyance of any lands or tenements, usually in consideration of rent, or other annual recompense, made for life, for years, or at will, but always for a less time than the lessor hath in the premises; for, if it be for the whole interest, it is more properly an assignment than a lease. He that letteth is called the lessor, and he to whom the lands, &c., are let is called the lessee. See 2 *Bl. Com.* 20; *Shep. Touch.* ch. 14; *Jacob; Brown.*

A lease for years is a contract between lessor and lessee for the possession and profit of lands, &c., on the one side, and a recompense for rent or other income on the other. *Bac. Abr.*, tit. Leases.

Lease is also sometimes, though improperly, applied to the estate,—*i.e.* the title, time, or interest the lessee hath in the thing demised; and then it is rather referred to the thing taken or had, and the interest of the taker therein; but it is more accurately applied to the manner or means of attaining or coming to the thing letten. See *Shep. Touch.* ch. 14.

A lease for years, in legal understanding, is a contract for the possession and profits of lands for a determinate period, with the recompense of rent. It is not necessary that this rent should be in money. If received in kind, it is rent in contemplation of law. United States *v.* Gratiot, 14 *Pet.* 526; 1 *McLean*, 454.

A lease is a contract for the possession and profits of lands and tenements, on one side, and a recompense of rent or other compensation, on the other. Vorhees *v.* Presb. Church of Amsterdam, 5 *How. Pr.* 58, 71; Dolittle *v.* Eddy, 7 *Barb.* 74; Jackson *v.* Harsen, 7 *Cow.* 323; Sawyer *v.* Hanson, 24 *Me.* 542.

In estimating the language which constitutes a lease, the form of words used is of no consequence; and it is not necessary that the term lease should be used. Whatever is equivalent will be equally available, if the words assume the form of a license, coveoant, or agreement, and the other requisites of a lease are present. Moore *v.* Miller, 8 *Pa. St.* 272.

A vote by one corporation to lease its railroad to another, and of the latter corporation to take the lease at a rental of a certain per cent upon its reasonable cost, do not constitute a lease, within the meaning of said acts. Peters *v.* Boston & Maine R. R. Co., 114 *Mass.* 127.

The word lease, in an instrument of lease, imports a covenant for quiet enjoyment, which runs with the land. Hamilton *v.* Wright, 28 *Mo.* 199; Maule *v.* Ashmead, 20 *Pa. St.* 482.

A lessor for a term assigned the rent and "within lease." No interest passed beyond the term. Demarest *v.* Willard, 8 *Cow.* 206.

Whether the term lease, spoken of the instrument, necessarily implies a seal, see Den *v.* Johnson, 15 *N. J. L.* 116.

Lease and release. The name of a mode of conveying lands, extensively

used in England, under the statute of uses. This kind of conveyance was thus contrived: A lease, or rather bargain and sale upon some pecuniary consideration for one year, was first made by the tenant of the freehold to the lessee or bargainee; *i.e.*, to the person to whom the lands were to be conveyed. This made the vendor stand seised to the use of the lessee or bargainee, and vested in the latter the use of the term for a year. To this the statute of uses immediately transferred the possession. Thus the bargainee, being in possession, became immediately capable of accepting a release of the freehold and reversion (which could only be made to a tenant in possession). Accordingly, a release was made to him, dated the day next after the day of the date of the lease for a year, which at once transferred to him the freehold. This method of conveying grew into extensive favor, and became adopted as the most common mode. It was deemed preferable to a bargain and sale, and to a covenant to stand seised to uses, because it effected a transfer of the legal estate under the rules of the common law; and therefore the declaration of uses upon it needed not to be confined to persons from whom a consideration moved. It was also preferred to a bargain and sale, and still more to a feoffment, because no additional ceremony was necessary to its operation; but the transfer of property in land might be effected by it in any part of the world, as instantaneously as the payment of money. And where the subject of conveyance was land in reversion or remainder, it was also preferable to a mere deed of grant; as the grantee had no need, if his title were called in question, to prove that there was a particular estate in existence at the time of the grant.

Leasehold. Any interest in land less than freehold might be so called; but, in practice, the word is generally applied to an estate for a fixed term of years. *Mozley & W.*

A dependent tenure, derived either from a freehold or a copyhold estate. *Wharton.*

Leases and sales of settled estates act. This is the Stat. 19 & 20 Vict. ch. 120, passed in 1856, the object of which is to enable a tenant of an estate for life, or for a term of years determinable with his life, or for any greater estate, to demise the land for periods which may last beyond his own life, subject to the provisions and restrictions in the act contained. (1 *Steph. Com.* 252, 253, 266, 279; *Wms. R. P.*) This act has been amended in some particulars by Stat. 37 & 38 Vict. ch. 33, passed in 1874. *Mozley & W.*

LEAVE, *v.* The expressions to leave a state and to remove from a state are not always synonymous; but in La. Code Pr. arts. 212, 214, authorizing holding a debtor to bail who is about to leave or remove from the state, they appear to be used as equivalents. Florance *v.* Camp, 5 *La.* 280.

That an agreement "to leave" a partnership includes release of good-will, see Van Dyke *v.* Jackson, 1 *E. D. Smith*, 419.

When a testamentary gift is made to the children whom a designated person "may leave," the word leave may be construed as synonymous with the word have, where a different construction would defeat the gift as void, and it is evident, from the general tenor of the will, that such was the sense in which the testator used the word. Du Bois *v.* Ray, 35 *N. Y.* 162. And see King *v.* Savage, 121 *Mass.* 303.

The verb leave is used in a variety of senses; including to forsake, to abandon, to depart from, to suffer to remain, not to carry away. In a statute providing that no slave shall be brought within the state to be disposed of, left, or sold within the state, "left" should be understood as meaning, that while a master may, from considerations of comity, bring his slave within the state, he must not suffer him to remain there. It is not confined to prohibiting the abandonment of slaves. Jackson *v.* Bullock, 12 *Conn.* 38.

LEAVE, *n.* Consent; permission. Thus the expression leave of court is often used to signify permission granted by the court to a party to do something which, without such permission, would not be allowable.

LEET. See COURT-LEET.

LEGACY. A gift of personal property by will. The term is equivalent to bequest (see BEQUEATH); and, when properly used, is opposed to devise, which signifies a testamentary disposition of realty. Legacy, when used in a will, may indeed be construed as including a disposition of lands; but this on the ground of construing the word according to the intent of the testator in view of the context and attendant circumstances, and not because a gift of real property is within the proper legal meaning of the word.

Legacies are called general, demonstrative, or specific; each of which is dis-

tinguished from the other by incidents which the law attaches to them respectively. A *specific* legacy is the bequest of a particular thing or money, specified and distinguished from all others of the same kind. A *demonstrative* legacy is where the thing or money is not specified or distinguished from all others of the same kind, but a particular fund is pointed out for its payment. A *general* legacy is one of quantity merely, and includes all cases not embraced in the two other classes.

Legacies are termed *absolute*, when given unconditionally, and to vest at once; *conditional*, when they are made dependent on some uncertain event.

They are *additional* or *cumulative*, when given to a legatee to whom the testator has given a prior legacy; and *alternative*, when one of two things is given, without absolutely designating which is meant.

A *residuary* legacy is where a testator, after making various dispositions, gives all the remainder of his personal property to some person, who is termed the residuary legatee.

The word legacy includes any gift of personal property, by will, as well one made in lieu of dower, or in satisfaction of an indebtedness, as those which are wholly gratuities. Legacy is the synonym of the word bequest. Orton *v.* Orton, 3 *Abb. App. Dec.* 411.

Legacy, in a will, may include real as well as personal property. Holmes *v.* Mitchell, 1 *Law Repos.* 107.

It relates to real or personal estate, according to the intention of the testator. Holmes *v.* Mitchell, 2 *Murph.* 228.

Though legacy, in a will, usually applies to personalty only, it may comprehend both real and personal estate. Williams *v.* McComb, 3 *Ired. Eq.* 450

Legacy duty. A tax or charge in favor of government, imposed upon personal property given by will, or distributable upon intestacy; by English statutes.

LEGAL. 1. Allowed by or conformable to law; obedient to the rules of law applicable to the subject; not inconsistent with the law of the land, as legal interest for use of money.

2. Cognizable in a court of law, as opposed to chancery; not dependent on equitable remedies for enforcement, as in the expressions legal assets, a legal estate or interest in lands.

3. Competent or sufficient to meet requirements of law; cognizable in courts of justice generally, as legal cruelty, legal representatives.

4. Implied or imputed by the courts as a matter of construction rather than in view of actual proof, as legal malice.

Legal and lawful are often used interchangeably; yet there is a slight shade of difference in the ideas suggested. Legal looks more to the letter of the law; lawful, to its spirit. Legal is more appropriate for conformity to positive rules; lawful, for accord with ethical principle. Legal imports rather that the forms of law are observed, that the proceeding taken is correct in method, that rules prescribed have been obeyed; lawful, that the act contemplated is rightful in substance, that moral quality is secured. Legal, moreover, is the proper antithesis of equitable, and the equivalent of constructive. Lawful estate or lawful malice are not much in use to mean an estate which a court of law particularly will protect, or malice which is imputed without evidence.

Legal assets. Such property of a testator in the charge of his administrator or executor as is directly liable to the order and process of courts of law, in opposition to equitable assets, *q. v.*

Legal cruelty. This phrase is used, in the law of divorce, to distinguish such degree of abuse, harshness, or violence, such character of cruelty, as warrants a divorce, from mere unkindness, amounting, perhaps, to cruelty in a certain sense, but not sufficiently aggravated to warrant a decree. See CRUELTY.

Legal cruelty (such as, under Ga. Code, warrants a divorce) may be defined to be such conduct on the part of the husband as will endanger the life, limb, or health of the wife, or create a reasonable apprehension of bodily hurt; such acts as render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife. Odom *v.* Odom, 36 *Ga.* 286.

Legal estate, or interest, or right, or title. A right in the nature of ownership, which is recognized by, and may be enforced in, courts of law, as distinguished from a merely equitable estate or interest. See EQUITABLE.

Thus one who holds a contract for the sale and conveyance of lands, for which he has paid the price, but has not yet received the deed, has an equitable estate; after the deed passes, he has the legal estate.

Where an interest in real estate can be enforced in a court of law, it is a legal interest, or a legal estate. Avery *v.* Dufrees, 9 *Ohio*, 147.

Legal holiday. A day designated by law as exempt from judicial proceedings, service of process, demand and protest of commercial paper, &c. See HOLIDAY.

A statute declaring a specified day a legal holiday imports, *ex vi terminis*, that it shall be *dies non juridicus*. The act of a clerk, in docketing a judgment on that day, is void, notwithstanding there are no words in the statute prohibiting it. *Re* Worthington, 14 *Bankr. Reg.* 388.

Legal incapacity. This expression implies that the person in view has the right vested in him, but is prevented by some impediment from exercising it; as in the case of minors, *femes covert*, lunatics, &c. An administrator has no right until letters are issued to him; therefore he cannot benefit (as respects the time before obtaining letters) by a saving clause in a statute of limitations in favor of persons under a legal incapacity to sue. Gates *v.* Brattle, 1 *Root*, 187.

Legal interest. In one of the uses of this phrase, it signifies that rate of payment for the use of money which is, by the law of the state or country spoken of, allowed to be exacted or reserved. See also LEGAL ESTATE.

Legal irregularity. A pleonastic, indefensible phrase, but somewhat in use, signifying that the irregularity mentioned is in some legal proceeding. "Legal" here does not properly qualify "irregularity." To call an irregularity legal, in the direct sense, is nearly a contradiction in terms.

Legal irregularity, in N. Y. Laws 1858, 574, ch. 338, relative to assessments for local improvements, means an omission of or irregularity in one or more of the statutory steps required in laying the assessment. Hay's Case, 14 *Abb. Pr.* 53.

Legal malice. That this expression is used as the equivalent of constructive malice, or malice in law, see Humphries *v.* Parker, 52 *Me.* 502.

Legal proceedings. This phrase is frequently used of judicial proceedings generally. In a stricter and more accurate sense, it distinguishes proceedings in courts of law, as opposed to those in equity.

Legal representative. One who represents the person and controls the rights of another, usually an executor or administrator. The term imports a higher authority than agent; for an agent acts for his principal, who retains the beneficial right; but the legal representative succeeds to the place of the former owner, and is vested with his title.

The term legal representative is used to describe a party in interest whose identity is uncertain, but who has succeeded, or will succeed, to the right of the deceased, either by operation of law or by grant. Morehouse *v.* Phelps, 18 *Ill.* 472.

The phrase legal representatives commonly means administrators or executors. People *v.* Phelps, 78 *Ill.* 147. See also Cox *v.* Curwen, 118 *Mass.* 198.

Legal representative, or personal representative, in the commonly accepted sense, means administrator or executor. But this is not the only definition: it may mean heirs, next of kin, or descendants. Warnecke *v.* Lembea, 71 *Ill.* 91.

The husband is not, by virtue of the marital relations, the legal representative of his deceased wife. Saltmarsh *v.* Candia, 51 *N. H.* 71.

The widow has been held, as matter of construction of a bequest, included in the term legal representatives of her deceased husband. Johnson *v.* Johnstone, 12 *Rich.* 259.

In the administration of the United States public lands laws, a difficulty having occurred at the land-office in respect to the form of patent certificates and of patents, arising out of applications to have them issued in the name of the assignee, or present claimant, thereby imposing upon the office the burden of inquiring into the derivative title presented by the applicant, a practice was adopted of issuing the patent certificate, and even the patent, to the original grantee, "or his legal representatives." This formula, "or his legal representatives," embraces representatives of the original grantee in the land, by contract, such as assignees or grantees, as well as by operation of law, and leaves the question open to inquiry in a court of justice as to the party to whom the certificate, patent, or confirmation should inure. Hogan *v.* Page, 2 *Wall.* 605; Galloway *v.* Finley, 12 *Pet.* 264.

Legal reversion. In the Scotch law, the period (seven years) within which a proprietor is at liberty to redeem land adjudged from him for debt. *Scotch Dict.*

Legal tender. That currency, circulating medium, or description of money, which, by law, a debtor may offer and a creditor must receive, in payment of debts.

LEGALIS HOMO. A lawful man; a person who stands *rectus in curia;* a person not outlawed, excommunicated, or infamous; it occurs in the phrase, *probi et legalis homines* (good and lawful men, competent jurors), and "legality" designates the condition of such a man. *Jacob.*

LEGALITY. 1. The quality or virtue in an act, proceeding, instrument, relation, &c., of conformity to law. Usually, conformity to the law as an entirety is intended; the noun is not used (like the adjective legal, *q. v.*) with any special exclusion of equity. Thus, to say that a specified act was of doubtful legality would convey the idea very distinctly that the act might probably be prohibited by law, and would seldom or never suggest that it might be one sustainable peculiarly in equity.

2. In old English law, legality describes the civil condition of a *legalis homo*, q. v. *Tomlins.*

LEGALIZE. To render lawful; to give authority of law to that which lacks it. Legalization; the conferring validity upon an act, contract, &c., which previous law does not authorize.

The general principle is that the legislature may legalize, *i. e.* give validity to, an act done without its authority, which it might have authorized beforehand; but none other.

LEGATE. The title of an ambassador or envoy from the pope to the court of a catholic sovereign or nation.

There have been three kinds: Legates *à latere*, being such as the pope commissions to take his place in councils, and so called because they have always been chosen from cardinals attending the pope, who are his confidants, and always *à latere*, or at his side. Legates *de latere*, or *legati dati*, those intrusted with apostolical legation; they acted under a special commission. Legates by office, or *legati nati*, those that were legates by virtue of their offices, as, in England, the Archbishop of Canterbury in former times.

LEGATEE. A person to whom personal property is given by will; the recipient of a legacy, *q. v.*

The word legatee means, in legal acceptation, a donee of personal or movable estate; but it may be construed to mean a donee of real estate, whenever a testator has plainly used it in that sense. Den *v.* Crawford, 8 *N. J. L.* 90, 111; Tucker *v.* Tucker, 5 *Ired. Eq.* 84.

The courts will apply the popular, rather than the technical, meaning to the term "legatee" in a will, and read it as "distributee," when, after looking at all the circumstances, and all the clauses of the will, this seems to have been the testator's meaning; and the alternative is between this disposition and a total failure of the depository scheme, for want of certainty. Lallerstedt *v.* Jennings, 23 *Ga.* 571.

LEGATION. An embassy; a diplomatic mission. The persons associated in the performance of diplomatic service, upon a commission from one power at the seat of government of another, are styled members of the legation.

LEGATUM. A legacy.

Legatum generis. A legacy by kind. A gift merely indicating the kind of thing, as "a horse," without designating which one.

Legatum liberationis. A legacy of a discharge.

Legatum nominis. A legacy of a debt or demand.

LEGEM; LEGES. These words, inflexions of the Latin lex, a law, occur in some phrases.

Legem amittere. To lose the law; to lose the protection of the law; to forfeit one's civil rights; to become outlawed, excommunicate, or infamous.

Legem facere. To make law; to wage one's law; to make oath with compurgators in support of one's cause. An ancient proceeding in English practice to establish the justice of a cause by the oath of compurgators, instead of witnesses or other evidence. In this and the next phrase, *legem*, like law (*q. v.*), seems used in the sense of oath.

Legem vadiare. To wage law; to offer or to give pledge to make defence, by oath, with compurgators.

Leges Angliæ. The laws of England, as distinguished from the civil law and other foreign systems. As in the famous phrase employed in narrating the attempt made in the parliament of Merton to enact for England the rule of the Scotch law, by which marriage of parents of an illegitimate child gives the rights of legitimacy: *et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.* And all the earls and

barons with one voice answered that they will not change the laws of England, which have hitherto been used and approved. *Stat. Merton,* ch. 9; 1 *Bl. Com.* 19.

Leges posteriores priores contrarias abrogant. Later laws abrogate prior laws contrary to them; a subsequent statute operates as a repeal by implication of an earlier statute to a contrary effect. Since implied repeals carry with them a tacit reproach that the legislature has ignorantly, and without knowing it, made one act repugnant to and inconsistent with another, they are not favored by the law; hence for a later statute to operate as a repeal of a former one, the later statute must expressly negative the former, or the provisions of the two statutes must be so far inconsistent that both cannot be sustained.

A modern extension of the doctrine is that a later law, which evidently deals with a subject completely, and appears intended to provide for it in full, may operate as a repeal of previous laws, although it might be possible, verbally, to retain both.

LEGISLATE. To make laws. Legislator: one authorized to make laws, or, sometimes, a member of the law-making body. Legislature: the body of persons in the state clothed with authority to enact laws.

Legislative power. That one of the three great departments into which the powers of government are distributed, — legislative, executive, and judicial, — which is concerned with enacting or establishing, and incidentally with repealing, laws.

Legit vel non? Does he read or not? The form of the question asked of the ordinary, when, in old English practice, a prisoner claiming benefit of clergy had the book presented to him to read. If the ordinary found the prisoner entitled to the privilege, the formal answer was, *legit ut clericus,* — he reads as a clerk, — and thereupon the clerk's privilege was extended to him. See BENEFIT OF CLERGY.

LEGITIM; LEGITIME. Terms of the Scotch and civil laws, designating the child's share of his father's property which the father may not will away, except for designated legal cause.

LEGITIMACY. Lawfulness; and, particularly, the status or civil condition of a child born in wedlock. Legitimate: lawful; authorized; made or done of right. Thus a child lawfully begotten is often, and an act of an agent within his power is sometimes, called legitimate. Legitimation: the act of changing the status of a bastard to that of a lawfully born child. This may be done by express statute, or, in some jurisdictions, by the marriage of the child's parents.

Legitimacy declaration act. The name of an English statute, 21 & 22 Vict. ch. 93, passed in 1858, which enabled any natural-born subject of the queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, to apply by petition to the court for divorce and matrimonial causes, praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage; or for a decree declaring either of the matters aforesaid; and also authorizing a similar proceeding to establish the validity of petitioner's marriage. *Wharton.*

LEGITIME. The Latin adverb, meaning lawfully, legitimately.

Legitime imperanti parere necesse est. To one lawfully commanding, it is necessary to yield obedience.

LEND. For one who has charge of a pistol belonging to another to consent that a third person should take it away for a temporary use, is to "lend" it, within a statute making it a misdemeanor to sell, give, or lend a pistol. Coleman *v.* State, 32 *Ala.* 581.

Lend, in a will, may be construed as equivalent to give, where the testator evinces a clear intention to part with the entire dominion over the property bequeathed. It has its appropriate meaning, when there is something to show that the testator did not intend the legal estate to pass. Booth *v.* Terrell, 16 *Ga.* 20.

Lend, in a bequest, is generally equivalent to "give." In special cases, it is limited to the vernacular, but this is where there is something to show that testator did not intend the title to pass. The words: I lend to P. four negroes during her life, then to her heirs, — give an absolute estate. Hinson *v.* Pickett, 1 *Hill* (*S. C.*), 37.

LESION. In case of a sale, it is competent for the purchaser to rescind the contract on account of *lesion, i. e.* the worsened value of thing sold, when it exceeds seven-twelfths of the price given. A purchaser cannot bargain away his right in this

respect, but he must exercise it within two years. In the contract of exchange there is no right of rescission *pour cause de lésion.* (*Code Civil*, 1706.) *Brown.*

LESSEE; LESSOR. The persons to and by whom respectively a lease (*q. v.*) is made.

Lessee, in a statute extending liability of railroad corporations for live-stock killed, to lessees of roads, should include a corporation operating a road under an assignment of a lease. The term should receive such construction as will give effect to the intention of the legislature; such as will meet any case of parties using a road as substitutes for the owners, exercising the rights of owners under some right or permission given, for a consideration to be paid to the owners. Burchfield *v.* Northern Central R. R., 57 *Barb.* 589.

In a covenant of lease made by "A, as agent for B," there being nothing in the body of the lease inconsistent, B is properly described as lessor. Devol *v.* Halstead, 16 *Ind.* 287.

Lessor of the plaintiff. The person who really prosecuted the old action of ejectment was so styled, because the action was founded on a fiction that he had granted a lease to the nominal plaintiff, John Doe, whose possession he was called upon to make good. See EJECTMENT.

LET. 1. In old English, as a verb, to hinder or obstruct; also a noun, a hindrance or obstruction; also an adjective, hindered, obstructed.

2. In modern English, as verb or adjective (we have never met it as a noun), it signifies to allow or permit, and allowed, permitted. In law, it means, particularly, to allow the use of property for a compensation. Thus used, it is the antithesis of the verb to hire, and is nearly equivalent to lease. To lease, however, usually implies a longer and more formal engagement, and especially a demise of realty by a written instrument; while letting may be of chattels, and by parol, and informal.

In a lease, the words "let and lease" do not make a covenant in law, or implied covenant. Lovering *v.* Lovering, 13 *N. H.* 513.

The words "let" and "to freight" do not necessarily constitute the charter-party a mere contract of affreightment. The general owner is owner for the voyage, notwithstanding that by the charter-party the vessel is navigated at his expense, and by his master and crew, and he retains the possession and management of her during the voyage; and especially where he retains a part of the vessel for his own use. The Volunteer, 1 *Sumn.* 551.

3. "Let" and "letting" have a somewhat peculiar use, in connection with the subject of constructing public works, or rendering services to government, to signify the act of awarding contracts. Public notice is usually given that proposals will be received for the work to be done; and the selection of one of the bidders, and execution of a contract to him, is often styled letting the contract. The letting, or putting out, is a different thing from the invitation to make proposals: the letting is subsequent to the invitation. It is the act of awarding the contract to the proposer, after the proposals have been received and considered. See Eppes *v.* Mississippi, &c. R. R. Co., 35 *Ala.* 33, 55.

An example of this use of the word is found in the act of congress of May 17, 1878, "to regulate the advertisement of mail lettings."

The act above mentioned directs that, before making contracts for mail transportation, except, &c., the postmaster-general shall cause to be published, in not exceeding ten newspapers published in the state or territory in which such service is to be let, one of which shall be published at the seat of government of such state or territory, once a week, for six consecutive weeks, preceding the time of letting, a notice in displayed type, not to exceed six inches of space in one column of a newspaper, of the following purport:

MAIL LETTINGS.

NOTICE TO CONTRACTORS.

POST-OFFICE DEPARTMENT,
Washington, D. C. —— —, 18—.

Proposals will be received at the Contract Office of this Department until — A.M. of —— —, 18—, for carrying the mails of the United States, upon the routes, and according to the schedule of arrival and departure specified by the Department, in the state (or territory) of ——, from ——, 18—, to ——, 18—. Lists of routes, with schedules of arrivals and departures, instructions to bidders, with forms for contracts and bonds, and all other necessary information, will be furnished upon application to the Second Assistant Postmaster-General.

—— ——,
Postmaster-General.

And no other advertisement of miscellaneous lettings shall be required; also, that no "sub-letting" or transfer of any mail contract shall be permitted, without the consent, in writing, of the postmaster-general.

LETTER. 1. One of the arbitrary signs employed in written language, and constituting the alphabet. Several of the letters of the English alphabet have a special significance in jurisprudence, as abbreviations and otherwise, — as to which see A; B; C; E; F, — or are employed as numerals, after the Roman system.

2. One who, for a compensation, allows his property to be used by another; a lender for hire.

3. A despatch or epistle; a communication in writing from the subscriber to the recipient, in the forms usual in correspondence.

To constitute a written communication a letter within postal laws, it need not be sealed up. A paper folded in the form of a letter, not sealed, containing an order for merchandise, is "mailable matter," within the meaning of section 10 of the act of March 3, 1845 (5 Stat. at L. 736); and the carriage of such a letter subjects the master of a steamboat running regularly on a mail route to a penalty. United States *v.* Bromley, 12 *How.* 88.

4. Letter is also a generic name for various written instruments used in commerce and jurisprudence, to attest a grant of some authority, power, or right. In this use, the plural form is often employed when one instrument only is meant. Thus the phrases, taking out letters of administration, granting letters-patent, do not import that two instruments were issued.

Letter-book. A book, usually kept by merchants and others having considerable correspondence, in which copies of letters sent are preserved.

These copies may be, and generally are, made by taking an impression from the original. And as the copy must, in these cases, be identical with the original as placed in the press, the effort has several times been made in the courts to have the letter-press copy received in evidence as equivalent to the original, and without exacting preliminary proof to explain non-production of the letter sent. But the established rule is that this is not allowable. The letter-press copy is surely an exact reproduction of the letter as draughted; but the letter itself still remains in the writer's hands, susceptible of any alteration he may choose to make. While he retains it, it is only a draught. It really has no inception as a written act until he deposits it in the post-office. Hence the press copy, to have any claim to credence as equivalent to the original, ought to be taken after the letter is posted; for it is not the instrument as drawn up, but the instrument as mailed, which affects the rights of parties. Any impression which the writer may take while he yet holds the paper under consideration is only secondary evidence of its contents, and is properly subject to all the checks and precautions applicable to secondary evidence.

Letter-carrier. An employe of the post-office, whose duty it is to collect letters at designated repositories, and bring them to the post-office of the town, for the mails; also to carry letters from the office, and deliver them to the persons addressed. The appointment of these carriers in various cities, and their duties and liabilities, are regulated by various provisions of the postal laws.

Letters of absolution. Absolvatory letters, used in former times, when an abbot released any of his brethren *ab omni subjectione et obedientia*, &c., and made them capable of entering into some other order of religion. *Jacob.*

Letters of administration. The instrument granted by the probate court, ordinary, surrogate, &c., formally conferring upon an administrator the title and authority to have the charge or administration of the goods and chattels of a person who has died intestate. It corresponds to letters testamentary granted to an executor.

Letter of advice. A letter communicating information. Advice, in this phrase, is not used in its sense of counsel, recommendation of a line of conduct, but in that of facts made known; knowledge communicated. The phrase most frequently occurs in respect to communications from factors, informing principals of their dealings.

Letter of attorney. Equivalent to power of attorney, which is the more common phrase. The written instrument executed by a principal, appointing and declaring the authority of an agent.

Letters clause, or close. Literally, closed letters; *i.e.*, letters sealed up. The term is the opposite of letters-patent,

and is applied to a class of grants, writs, &c., issued by the crown in Great Britain, and concerning private persons or purposes only.

Letters ad colligendum, or of collection. Should there be, temporarily, no authorized executor or administrator of a decedent estate, — as while a dispute as to whom shall be appointed is pending, — the court of probate usually issues letters to a collector (*q. v.*), authorizing him to collect, receive, and keep safely the assets of the estate, to await the appointment of a representative.

Letters of correspondence. In criminal trials, letters of correspondence may be produced in evidence against the panel. A letter of a third party found in the panel's possession is not of itself evidence of its contents against him. But a letter from the panel is evidence against him. *Bell.*

Letter of credit. The name of a commercial instrument made by one merchant and addressed to another, requesting him to advance money, or intrust goods to the bearer, or to a particular person by name; for which, when done, the writer's credit is pledged. Such letters are in common use among bankers for authorizing the bearer to draw money abroad. The letter of credit is not negotiable, but is only an authority from the banker who signs it, to the banker or other person to whom it is addressed, to honor the drafts of the person named in it, and who produces the letter; and consequently he alone is entitled to draw the drafts or to receive payment. *Grant Bankers*, ch. 15.

Letters of credit usually contain a request that some one will advance money or sell goods to a third person, and an undertaking on the part of the writer that the debt which may be contracted by the third person in pursuance of the request shall be duly paid. Birckhead *v.* Brown, 5 *Hill*, 642.

For various definitions of letter of credit as used in New York, see Union Bank *v.* Coster, 1 *Sandf.* 563; 3 *N. Y.* 203, 214; Mechanics' Bank *v.* N. Y. & New Haven R. R. Co., 4 *Duer*, 480, 586; 13 *N. Y.* 599, 630.

Letter of exchange. The old term for bill of exchange, *q. v.*

Letters of fire and sword. The name of a written authority which anciently issued from the privy council in Scotland, directed to the sheriff of a county, authorizing him to call for the assistance of the county to dispossess a tenant retaining possession contrary to the order of a judge or judgment of a court. *Jacob; Wharton.*

Letters of horning. In the law of Scotland, are letters running in the sovereign's name and passing the signet. They are directed to messengers-at-arms, as sheriffs in that part (*i. e.* persons specially appointed to perform particular duties appertaining to the office of sheriff), to charge the person against whom the letters are directed to pay or perform in terms of the "will" of the letters, which must be consistent with the warrant on which the letters proceed. The warrant on which the letters proceed is a decree either of the court of session or of some inferior court. *Bell.*

In untechnical language, we may describe letters of horning as the authority by which a person decreed to pay or perform any thing is ordered to comply therewith. The ancient common law of Scotland seems not to have authorized imprisonment merely as a means of paying a debt, or for any crime less than that of rebellion; or, what was equivalent to it, a contempt of the command to perform an act directed by his majesty's letters passing the signet. The authority of courts of justice thus came to be supplemented by "letters of horning." *Mozley & W.*

Letter of license. An instrument or writing, made by creditors to a trader who has become insolvent, allowing him longer time for the payment of his debts, and assuring him of exemption from arrests while going about his affairs. According to Tomlins, these letters of license give leave to the party to whom granted to resort freely to his creditors, or any others, and to compound debts, &c.; and the creditors severally covenant, that, if the debtor shall receive any molestation or hindrance from any of them, he shall be acquitted and discharged of his debt against such creditor, &c. They were formerly in frequent use; but since the great restriction of imprisonment for debt, and the establishment of systematic laws for settling insolvents' affairs, they have lost importance.

Letters of marque and reprisal. In the phrase marque and reprisal, *reprisal* signifies a taking in return, and *marque*, the passing over the marches or frontiers in order to do so. Letters of marque and reprisal have long been customarily granted by the law of nations whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs.

The form of applying for and granting these letters, provided by Stat. 4 Hen. V. ch. 7, passed 1416, was as follows: The sufferer

must first apply to the lord privy seal, and he shall make out "letters of request" under the privy seal; and if, after such request of satisfaction made, the party required do not within convenient time make due satisfaction to the party grieved, the lord chancellor shall make him out "letters of marque" under the great seal; by virtue of which he may attach the property of the aggressor nation, without hazard of being condemned as a robber or pirate. (1 *Bl. Com.* 258, 259.) This mode of granting letters of marque has been long disused; and the term itself is now applied to commissions granted in time of war to merchants and others to fit out privateers or armed ships, authorizing them to take the ships of the enemy, and directing that the prizes captured by them shall be divided between the owners, the captains, and the crew. (2 *Steph. Com.* 492–494.) *Mozley & W.*

Letters missive. 1. In English ecclesiastical law, a letter missive for electing a bishop is a communication which the king sends to the dean and chapter, together with his usual license, to proceed to elect a bishop on the avoidance of a bishopric, informing them of the name of the person whom he would have them elect. 1 *Steph. Com.* 666.

2. In English chancery practice, a letter missive is a communication from the lord chancellor to the defendant in a suit in equity, informing him that the bill has been filed against him, and requesting him to appear to it. Such a letter is usually issued to obtain appearance to a bill when defendant is a peer or a peeress; it being thought a milder or more complimentary mode of procedure than serving such a defendant with a subpœna in the first instance. 1 *Dan. Ch. Pr.* 366–369.

3. In civil-law practice, the phrase letters missive, or letters dimissory, is sometimes used to denote the papers sent up on an appeal, by the judge or court below, to the superior tribunal, otherwise called the "apostles," *q. v.*

Letters-patent. Literally, open letters; *i.e.*, letters issued open to view, instead of being sealed up, and addressed to, and intended to affect, the whole public. By such letters the crown in Great Britain, and the government of the United States or of a state in America, usually make any grant. They are especially used in the United States for securing to an inventor the exclusive right to his invention, and for vesting in a purchaser of public lands the complete title; but the instrument is popularly and usually termed a patent.

Letters-patent are writings sealed with the great seal of England, whereby a man is authorized to do or to enjoy any thing that otherwise of himself he could not. And they be so termed by reason of their form, because they be open (*patentes*), with the seal affixed, ready to be showed for confirmation of the authority given by them. *Cowel.*

The form of granting letters-patent in England, as regulated by Stat. 14 & 15 Vict. ch. 82, is as follows: Her majesty, by warrant under the royal sign-manual, addressed to the lord chancellor, commands him to cause letters-patent to be passed under the great seal, according to such warrant; and that such warrant shall be prepared by the attorney or solicitor-general, and shall set forth the proposed letters-patent, and shall be countersigned by one of the principal secretaries of state, and sealed with the privy seal. Such is the general course established by this statute, with certain exceptions therein specified. (1 *Steph. Com.* 619, 620.) For the old form of granting letters-patent, see 1 *Bl. Com.* 346, 347. *Mozley & W.*

Letters-patent are so called because they are open, with the seal affixed, and ready to be shown for confirmation of the authority thereby given. Peers are sometimes created by letters-patent, and letters-patent of precedence are granted to barristers. Aliens are made denizens by this means; and especially new inventions protected; hence the incorporeal chattel of patent-right. *Wharton.*

Letters of request. In English ecclesiastical law, a mode of commencing an original suit in the court of arches, instead of proceeding first in the consistory court. These letters dispense with the necessity of instituting a suit, in the first instance, in an inferior ecclesiastical jurisdiction, and authorize it to be instituted in the superior court; which otherwise could only exercise jurisdiction as a court of appeal. The judge of the inferior court, who signs the letters of request, by so doing waives or remits his own jurisdiction; and, generally speaking, at once the jurisdiction attaches to the appellate court, and this without any consent or even communication with the intended defendant. *Wharton.*

Letters of request are the formal instrument by which an inferior judge of ecclesiastical jurisdiction requests the judge of a superior court to take and determine any matter which has come before him. And this he is permitted to do in certain cases by the authority of an exception to the Stat. 23 *Hen.* VIII, ch. 9, which exception is to the effect, that a person may be cited in a court out of his own diocese, when any bishop or other inferior judge, having jurisdiction in his own right, or by commission,

make request or instance to the archbishop or bishop, or other superior, to take, hear examine, or determine the matter before him; but this is to be done in cases only where the law, civil or canon, affirms execution of such request of jurisdiction to be lawful and tolerable. Upon this exception it has been held that the dean of the arches is bound, *ex debito justitiæ*, to receive letters of request without the consent of the party proceeded against; but this power of requesting the decision of a superior court is generally employed at the desire of the parties. (*Rog. Ecc. Law*, 789; 2 *Lee*, 312, 319; *Hob.* 185.) *Holthouse; Brown.*

Letters rogatory or **requisitory.** A written request for the examination of a witness, addressed by one court to another in an independent jurisdiction; an unauthoritative commission to take testimony. Before the era of the statutes and conventions on this subject now quite common, any steps to obtain the testimony of a witness in a foreign jurisdiction rested upon the comity of courts towards each other. The request which a court issues, founded on comity, to a foreign tribunal, that it will cause the testimony of a witness residing within its jurisdiction to be taken and transmitted to the first court, for use in a cause there pending, is called letters rogatory.

Letters of safe-conduct. No subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which, by old statutes, must be granted under the great seal, and enrolled in chancery, or else are of no effect: the sovereign being supposed the best judge of such emergencies as may deserve exemption from the general law of arms. But passports under the sovereign's sign-manual, or licenses from our ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity. 1 *Chit. Com. Law*, 60.

Letter of recommendation. A written communication signed by one person, and certifying, either to a particular person or to the public at large, as to the good character, commercial credit, pecuniary means, skill or fidelity as an artisan, laborer, or servant, or the like, of a person named in the letter, and to whom it is usually given, to aid him in obtaining credit or employment. It is not an instrument regulated by law as to form, but is of purely popular use. But it sometimes comes in question in the courts in actions brought by the recipient, when he has sustained any loss through the insolvency or misconduct of the bearer, to recover therefor from the sender; which, in cases of wilful falsity or fraud, he may do.

Between the parties, the writer of a letter of recommendation does not appear to be absolutely bound for the truth of its favorable statements. In a recent English case a discharged servant sued her former mistress for libel in writing unfavorable accounts of her service; and to prove the falsity of the accounts relied on a letter of recommendation given by the mistress to the servant when she left, which was unqualifiedly favorable. But the defendant was allowed to prove the truth of the statements complained of, though inconsistent with the recommendation; and had a verdict.

Lettres of slains, or **slanes.** Letters subscribed by the relatives of a person who had been slain, declaring that they had received an assythment, and concurring in an application to the Crown for a pardon to the offender. These or other evidences of their concurrence were necessary to found the application. *Bell.*

Letters testamentary. The instrument granted by the probate court, ordinary, surrogate, &c., formally conferring upon an executor the authority to take charge of the estate, and execute the dispositions of the will. It corresponds to letters of administration granted to an administrator.

LETTRE. In French law, a letter. It is used, like our English "letter," for a formal instrument giving authority.

Lettres de cachet. Letters issued and signed by the kings of France, and countersigned by a secretary of state. It is said they were first made use of occasionally as a means of delaying the course of justice; but during the reign of Louis XIV. they were obtained by any person of sufficient influence with the king or his ministers; and persons were thus imprisoned for life, or for a long period, on the most frivolous pretexts, for the gratification of private pique or revenge, and without any reason being assigned for such punishment. They were also granted by the king for the purpose of shielding his favorites or their friends from the consequences of their crimes.

They were abolished during the revolution of 1789. *Wharton.*

Levandæ navis causa. For the sake of lightening the ship. This phrase is used, in discussing the law of general average, to denote a purpose of throwing overboard goods, which renders them subjects of general average.

Levant et couchant. Rising up and lying down. A term applied to cattle which have remained long enough upon land to have lain down to rest and risen up to feed; generally held to be the space of a night and a day, or, at least, one night.

Levari facias. That you cause to be levied. The name of a writ of execution at common law, commanding the sheriff to cause to be levied of the lands and chattels of the judgment debtor a sum mentioned, being that recovered by the judgment upon which the writ issues. The name, as is usual, is derived from the emphatic words in the Latin form of the writ. Under a *levari facias* the sheriff proceeded to sell the goods and chattels, and collect the rents, issues, and profits of the lands levied on, until the money was made. The writ was generally superseded by the *elegit* (q. v.), authorized by Stat. 13 Edw. I. (Westminster 2d), which proved to be a more effectual remedy. In the United States, the name has been applied to a writ authorizing the sale of mortgaged lands, to satisfy a judgment obtained by the mortgagee against the mortgagor, under a peculiar proceeding authorized by statute in some of the states.

Levari facias damna de disseisitoribus. A writ formerly directed to the sheriff for the levying of damages, which a disseisor had been condemned to pay to the disseisee. *Cowel.*

Levari facias quando vicecomes returnavit quod non habuit emptores. An old writ commanding the sheriff to sell the goods of a debtor which he had already taken, and had returned that he could not sell them; and as much more of the debtor's goods as would satisfy the whole debt. *Cowel.*

Levari facias residuum debiti. An old writ directed to the sheriff, for levying the remnant of a partly satisfied debt upon the lands and tenements or chattels of the debtor. *Cowel.*

LEVITICAL DEGREES. Those degrees of kindred enumerated by the laws of Moses recorded in Leviticus, ch. 18, and adopted by English and American law generally, as being so near that persons within them must not intermarry.

LEVY, *n.* and *v.* 1. The verb, in old English law, was used to signify to raise or lift up; to cast or throw up; to set or put up; to erect or build; to make or construct. To levy a house or mill, a dyke or pond, and to levy a nuisance, are examples of this use of the word.

2. Later, the verb became employed in the sense of to carry on proceedings incident to a fine of lands; thus, to levy a fine became a usual expression.

3. In modern practice, the verb levy is used as meaning to take into legal custody, in obedience to the writ, property to satisfy a process such as attachment or *fieri facias*, which calls for a seizure of lands or goods. And the noun levy means the act of taking property under process; the seizure. In this connection, the words are sometimes extended to include the entire execution of the process, the collecting the money; but, strictly, only the seizure is signified. Such kinds of property, and such interests or rights having the nature of ownership as are subject to levy, and may be taken to satisfy an attachment or execution, are termed *leviable.*

4. The verb levy is also used, in reference to the administration of government, in the sense of to exact by authority. Thus, to levy a tax sometimes means to assess or impose a tax (see, however, Valle *v.* Fargo, cited below); and to levy a military force, is for the sovereign power to call upon a vassal or district to furnish a quota of troops towards impending military operations. In this connection, the noun often signifies that which is called for or obtained by an authoritative requisition. Thus a tax levy means the total sum to be raised by a tax; the levies, in speaking of preparations for war, are the contributions of men which the sovereign has received or expects from his subjects, or from districts of country subject to him.

The phrase to levy bears different significations, according to its object. To levy war is to make war; to levy money is to exact it. And although its application to the first part of the execution of a writ of *fieri*

facias may be comparatively modern, yet the expression "to levy on goods and chattels" is one that has been long used in the English law; and, wherever found, it means to do the act or acts by which a sheriff sets apart and appropriates, for the purpose of satisfying the command of his writ, a part or the whole of the defendant's goods and chattels. The usual mode of levying, in England, is by seizing the goods, or, if they are collected in one place, by seizing part in the name of the whole. But actual touch is not necessary. It is enough if the officer, at the time of levying, have the goods in his presence, and peaceably under his control. Lloyd *v.* Wycoff, 11 *N. J. L.* 218, 227. Compare Princeton Bank *v.* Crozer, 22 *Id.* 383.

Applied to taxes, levy means not to assess a tax, but to collect it; raise it by execution; enforce payment. Hence a covenant that lessee shall pay all taxes to be levied during the term does not bind him to pay taxes assessed during the term, but which do not become due and collectible till after its expiration. Valle *v.* Fargo, 1 *Mo. App.* 344.

To constitute a valid levy of an execution on personal property, the sheriff must do such acts as would subject him to an action of trespass, but for the protection of the execution. Allen *v.* McCalla, 25 *Iowa*, 464; McBurnie *v.* Overstreet, 8 *B. Mon.* 300; Rives *v.* Porter, 7 *Ired. L.* 74; Minor *v.* Herriford, 25 *Ill.* 344; Westervelt *v.* Pinckney, 14 *Wend.* 123; Minor *v.* Smith, 13 *Ohio St.* 79.

It is essential to the valid levy of an execution on personal property that the officer should take actual possession of it. Banks *v.* Evans, 18 *Miss.* 35; S. P. State *v.* Poor, 4 *Dev. & B. L.* 384.

To constitute a levy, the officer must take actual control of the property Levy *v.* Shockley, 29 *Ga.* 710; Minturn *v.* Stryker, 1 *Edm. Sel. Cas.* 356; Brown *v.* Pratt, 4 Wis. 513.

To constitute a valid levy under an execution, the property levied must be at the time in the power or the view of the sheriff. Linton *v.* Ford, 46 *Pa. St.* 294; Dresser *v.* Ainsworth, 9 *Barb.* 619; McDonald *v.* Gifford, 6 *Phil.* 315.

To make a valid levy, the sheriff must have the goods within his view, and under his power. Merely seizing a few articles outside of a warehouse or store, and proclaiming a levy on the goods locked up in the store, and not within view, is not a good and valid levy; he ought, if necessary, to break open the store, and actually seize the goods, and take an inventory of them. Haggerty *v.* Wilber, 16 *Johns.* 287.

To make a valid levy on personal property, the sheriff must have the property within his power and control, or at least within his view, unless the defendant acknowledges a levy by executing a delivery bond. Cawthorn *v.* McCraw, 9 *Ala.* 519; S. P. Loury *v.* Coulter, 9 *Pa. St.* 349; Duncan's Appeal, 37 *Id.* 500; Cary *v.* Bright, 58 *Id.* 70.

To constitute a levy, the officer should enter upon the premises where the goods are, and take actual possession of them (if they are such that possession of them can be taken). The goods should be brought within his view, and subjected to his control; and it is proper also, if not necessary, that an inventory should be taken. The officer should assert his title to them by virtue of the execution; and his acts should be public, open, and unequivocal, and, it would seem, such as to subject him to an action as a trespasser but for the protection of the execution. Beekman *v.* Lansing, 3 *Wend.* 446. See also Westervelt *v.* Pinckney, 14 *Id.* 123; Green *v.* Burke, 23 *Id.* 490; Camp *v.* Chamberlain, 5 *Den.* 198; Connah *v.* Hale, 23 *Wend.* 462.

To constitute a levy, the officer must take actual possession, and for this purpose the goods should be within his view, and subject to his disposition and control, though it is not necessary that he should remove them, or continue in actual possession. A waiver of these requisites may bind the defendant, but is not a levy, and cannot affect conflicting executions. Ray *v.* Harcourt, 19 *Wend.* 495; Van Wyck *v.* Pine, 2 *Hill*, 666. And see Gordon *v.* Gilfoil, 27 *La. Ann.* 265.

An officer need not take entire manual possession of property levied on. Very *v.* Watkins, 23 *How.* 469; Robuck *v.* Thornton, 19 *Ga.* 149; Barker *v.* Binninger, 14 *N. Y.* 270; Bond *v.* Willett, 31 *Id.* 102; Bullitt *v.* Winstons, 1 *Munf.* 269.

If the property is present, subject to the officer's control, and he openly states that he levies upon it, asserting his authority over it by virtue of the execution, these things are enough. Barker *v.* Binninger, 14 *N. Y.* 270; Sheffield *v.* Key, 14 *Ga.* 528; Hill *v.* Harris, 10 *B. Mon.* 120; Jayne *v.* Dillon, 28 *Miss.* 283; Caldwell *v.* Fifield, 24 *N. J. L.* 150; Roth *v.* Wells, 29 *N. Y.* 471; Price *v.* Shipps, 16 *Barb.* 585; Artizans' Bank *v.* Treadwell, 34 *Id.* 553; Pugh *v.* Calloway, 10 *Ohio St.* 488; Moss *v.* Moore, 3 *Hill* (*S. C.*), 276.

Merely looking at the goods, and making a memorandum of a levy, is not a levy. Camp *v.* Chamberlain, 5 *Den.* 198. And see Morgan *v.* Johnson, 27 *La. Ann.* 539.

The sheriff, in view of certain goods of the judgment debtor's, and in presence and with the knowledge of the judgment debtor, and of a third party, in whose possession the goods were, touched a part of them, saying that he levied, and made a memorandum at the time on the execution, and afterwards told the attorney of the execution creditor that he had levied on double enough to pay the judgment. This was held a sufficient levy as against the possessor as well as against the debtor. Taking an inventory, though desirable, is not absolutely necessary. Watts *v.* Cleaveland, 3 *E. D. Smith*, 553.

The sheriff called upon the defendant in the execution, at his place of business and at his house, and informed him that he made a levy upon the personal property then visible; and it was understood between the defendant and the sheriff this should be considered a levy upon enough besides upon the same premises to satisfy the execution; but the sheriff made no inventory or other seizure; and the defendant requested him not to remove any property, or disturb his family by any further levy, and promised the judgment should be settled. It was held that, as against his executors, this was a sufficient levy upon the personal property of the defendant, but that it was not sufficient to hold the real estate. Mills *v.* Thursby, 11 *How. Pr.* 121.

The officer went with the debtor on his farm, and saw and inventoried several articles; and the debtor entered on the inventory cattle, some of which were in another field of the same farm, but hidden from view by an intervening hill. This was held no levy, as against a subsequent purchaser without notice. Van Wyck *v.* Pine, 2 *Hill*, 666.

Levy and collect. Power given to a municipal corporation to levy and collect a tax does not imply power to sell the land for non-payment. And if the tax be declared by law a lien on the land, although the corporation might enforce it in equity, if they assume to sell for non-payment, the purchaser cannot enforce the lien. The power is not one which can be delegated by assignment, either express or implied. McInerny *v.* Reed, 23 *Iowa*, 410.

Levy war. The phrase levying war is used in the federal constitution in defining treason against the United States. The verbal meaning is not materially different from making war, though the term is technical, is used as the accurate significant word in all the constitutional discussions, and very probably could not be replaced in an indictment by "making war."

An assemblage of men, for the purpose of revolutionizing, by force, the government established by the United States in any of its territories, as a step to, or as the means of executing, some greater projects, amounts to levying war, and is treason. The travelling of individuals to the place of rendezvous is not sufficient; but the meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, is such an actual assemblage as constitutes a levying of war. A mere conspiracy to subvert, by force, the government of the country is not treason, within the purview of the constitution, which declares that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. To constitute levying war, there must be an actual assemblage of men, designing to effect, by force, a treasonable purpose. *Exp.* Bollman, 4 *Cranch*, 75.

The meaning of the term levying war, and the history of its introduction into the constitutional definition of treason, explained. 2 *Burr's Trial*, 401; United States *v.* Mitchell, 2 *Dall.* 348; United States *v.* Vigol, *Id.* 346.

The term is used in the United States constitution in the same sense as in Stat. 25 Edw. III., from which it is borrowed. To constitute a levying war, there must be an assemblage of people with force and arms to overthrow the government or resist the laws. The words embrace not only those acts by which war is brought into existence, but also those by which war is prosecuted. They levy war who create or carry on war. The offence is complete whether the force be directed to the entire overthrew of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws. United States *v.* Greathouse, 2 *Abb. U. S.* 364.

LEVY COURT. The name of a court of subordinate jurisdiction, formerly held in each of the counties of Maryland, of much the same grade, and clothed with substantially the same powers, as the county courts or common pleas courts in other states. When Washington County was ceded as part of the District of Columbia, the levy court of that county became, and for many years was, the local court at the federal capital.

LEWDNESS. A general term for conduct involving or expressing sexual desire, in unlawful circumstances, or in ways that offend the public or tend to demoralize others. The word is used vaguely, and does not admit of a precise definition. Lewd: lustful; libidinous; especially applied to that which is publicly so.

Lewdness signifies lustful licentiousness; an offence against the public economy, when of an open and notorious character; as by frequenting houses of ill-fame, which is an indictable offence, or by some grossly scandalous and public indecency, for which the punishment at common law is fine and imprisonment. *Wharton.*

Lewdness includes private, illicit sexual intercourse, as well as public acts of indecency. Commonwealth *v.* Lambert, 12 *Allen*, 177.

Lewd means lustful, libidinous; but does not import criminal indulgence. Snow *v.* Witcher, 9 *Ired. L.* 346.

LEX. Law.

1. In Roman law. A rule for the government of mankind in society, or of a whole community. The word was frequently used in this general sense, and was then synonymous with *jus*. In a more limited and more proper use of the word, it signified a written law or statute enacted or ordained by the body of the people; particularly the law of the twelve tables. Such laws often received the name of the senator or magistrate by whom they were proposed; as the *lex Aquilia*, *lex Cornelia*, and others explained below.

2. In old English law. A body or collection of law; particularly, the Roman or civil law. Also, the oath of a party with compurgators was termed his law, and is so expressed in such phrases as *legem facere*, *legem vadiare*, &c. Sometimes in the sense of legal rights; civil rights; the protection of the law; as in the phrase *legem amittere*.

Lex Angliæ. The law of England. The common law. Sometimes equivalent to the curtesy of England. See CURTESY.

Lex Aquilia. The Aquilian law. A Roman law regulating compensation for causing the death of or injury to the slave or beast of another. Proposed by the tribune C. Aquilius Gallus, and passed A.U.C. 672.

Lex Atilia. The Atilian law. A Roman law regulating the appointment of guardians. Proposed by the tribune L. Atilius Regulus, and passed A.U.C. 443.

Lex commissoria. A Roman law authorizing an agreement between a debtor and creditor, that property pledged by the debtor to secure the debt should become the absolute property of the creditor, if the debtor failed to pay at the time appointed.

Lex Cornelia. The Cornelian law. A Roman law providing remedies for injuries to person or property. Passed by L. Cornelius Sulla, as dictator.

Lex Falcidia. The Falcidian law. A Roman law prohibiting wills by which more than three-fourths of the testator's estate was given to another than the heir. Proposed by the tribune P. Falcidius, and passed A.U.C. 713.

Lex fori. The law of the forum; the law of the place or country where a remedy is sought. This phrase is usually contrasted with *lex loci contractus*, signifying the law of the place where a contract is sought, as distinguished from the law of the place where an action arising out of the contract is brought, termed the *lex fori*. The necessity for this distinction grows out of the rule that the *lex loci contractus* governs in determining the nature, construction, and validity of the contract, while the *lex fori* governs any remedy sought in an action arising out of the contract. A similar distinction is made between the *lex rei sitæ* — the law of the place where the thing in controversy is situated — and the *lex fori*. The general rule as to the *lex fori* is, that it governs as to the nature, extent, and form of the remedy; including all questions as to the proper parties to bring a suit, or to be joined as defendants therein; whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or barred by statutes of limitation; rights of set-off; the admissibility and effect of evidence; the modes of proceeding, and the forms of judgment and execution. See FORUM; also LEX LOCI.

Lex Julia majestatis. The Julian law of majesty. A Roman law comprehending and re-enacting all previous laws for the punishment of offences against the state, originally passed by C. Julius Cæsar, and again promulgated, with additions, by Augustus.

Lex loci. The law of the place; the local law. This phrase may mean either *lex loci contractus*, — the law of the place where the contract in question was made, or was to be performed; or *lex loci rei sitæ*, — the law of the place where the subject-matter in controversy is situated; or *lex loci domicilii*, — the law of the place of domicile of the parties; or *lex fori*, — the law of the place where the remedy is sought; and is sometimes used, in a general way, to designate the whole body of law relating to the conflict of laws of different places or countries, in regard to the same person or thing. But by *lex loci*, used without qualification, is generally intended the

law of the place where a contract under consideration was made or was to be performed, or where an act was done, or a right acquired, relative to personal property. The general principle which is applied in such cases is, that the contract is to be construed by the law of the place where the contract was formed; but the procedure by the law of the forum. Thus a Scotch court would refuse to enforce a contract without consideration, if made in England, though it might enforce the same contract if made in Scotland; but would hold it outlawed by the term prescribed by Scotch law, not by that of England. *Trayn. Max.*

Lex loci contractus. The law of the place of the contract. The local law which governs as to the nature, construction, and validity of a contract; which is, generally, the law of the place where the contract is made, except where it is to be performed in a different place, in which case the law of that place controls. The phrase usually occurs contrasted with the term *lex fori*, q. v.; sometimes contrasted with *lex loci rei sitæ*, or *lex rei sitæ*, in reference to contracts affecting real property.

Lex loci contractus is an ambiguous phrase, denoting either the law of the place in which the contract is to be performed (*in eo loco unusquisque contraxisse videtur in quo ut solvetur se obligavit*), or the law of the place in which the contract is formed.

According to the former of these two senses, it is the *lex loci solutionis;* according to the latter of them, it is the *lex loci actus;* and it is desirable that these two phrases should be used for distinction's sake, when any thing is to turn on the distinction. The former phrase, namely, the *lex loci solutionis*, regulates the mode of recovery upon the contract; and the latter phrase, viz., the *lex loci actus*, regulates the formalities or ceremonies requiring to be observed upon entering into a contract. In each case the law of the place denoted by the phrase is to be singly regarded, unless, indeed, *pro majori cautela. Brown.*

Lex loci rei sitæ. The law of the place of the situation of the thing; the law of the place where the property in question is. A more proper form of the phrase, and one often used, is *lex rei sitæ*. It occurs frequently in discussions of the law of real property, under the principle that the tenure, mode of enjoyment, transfer, and descent of real property is regulated by the law of the place where it is located. This rule extends to the capacity of the parties to a transfer, to any legal restraints upon alienation, to the forms and solemnities of conveyance or devise; but does not apply to mere personal contracts indirectly affecting real estate; these are governed by the *lex loci contractus.*

The phrase *lex loci rei sitæ* denotes the law of the place of the situation of the property, as does also the phrase *lex loci situs;* but the former phrase is exclusively applicable (and ought to be confined) to real property, including leaseholds, and the latter, to personal property, exclusive of leaseholds. There are also certain differences between the two laws expressed by the two respective phrases; thus, the *lex loci rei sitæ* is a paramount law, and regulates the devolution of lands, whether upon a testacy or an intestacy; it also determines what shall be the forum, so that it is never in conflict with the *lex fori;* and, lastly, it completely disregards the *lex domicilii.* The *lex loci situs*, on the other hand, is different in all these three respects, being subsidiary to the *lex domicilii*, being frequently in conflict with the *lex fori*, and having absolutely no influence upon the devolution of property. *Brown.*

Lex mercatoria. The law-merchant; the general law or custom of merchants. A body of rules and usages as to mercantile matters adopted by all commercial nations, and forming a portion of the common law.

Lex neminem cogit ad vana seu inutilia peragenda. The law compels no one to do vain or useless things.

Lex non cogit ad impossibilia. The law does not compel the doing impossible things. Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, the law will, in general, excuse him. For instances of the application and qualification of this doctrine, see *Broom's Max.* 242–251.

Lex non scripta. The unwritten law. A term applied to the common law, not in the literal sense of a law not reduced to writing, but as distinguished from the law enacted by legislation.

Lex prætoria. The prætorian law. A Roman law, commanding every freedman who made a will to give a moiety of his estate to his patron. The same name has been applied to equity as a

system of law, from its resemblance to the remedial jurisdiction exercised by the Roman prætor.

Lex scripta. Written law. Particularly, statute law, as distinguished from the common law, or from law derived from usage.

Lex talionis. The law of retaliation. A familiar example is the provision of the Mosaic law, punishing an injury by the infliction of a similar injury. In modern times, the expression has generally been applied to the infliction of death, imprisonment, seizure of property, or other harsh treatment, by one nation upon the subjects or citizens of another, in retaliation for like acts of the latter.

Lex terræ. The law of the land. Equivalent, in general, to the expression due process of law.

LEY. Law. The old French equivalent of the English word law, and the Latin *lex*. Frequently used, like those words, in the technical sense of an oath with compurgators, or the mode of trial with compurgators. Thus the expression *ley gager* is equivalent to wager of law, or to make wager of law; in Latin, *legem vadiare*. So *fesans de ley* — doing of the law — corresponds to *legem facere*.

LIABILITY. Amenability or responsibility to law; the condition of one who is subject to a charge or duty which may be judicially enforced. Liable: amenable or chargeable in some judicial proceeding.

Liability may include punishment for crime as well as amenability to civil remedies. United States *v.* Ulrici, 3 *Dill.* 532.

An act of congress declaring that, on commission of a certain act, the property involved shall be liable to forfeiture, does not mean that the property shall not vest in the government until after a seizure; but only expresses the contingency that government may not discover the forfeiture, or may not choose to prosecute. The Mary Celeste, 2 *Low.* 354.

LIBEL, *n.* 1. The name of a wrong, also an offence, consisting in a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals. This definition, propounded by Alexander Hamilton in argument in People *v.* Croswell, 3 *Johns. Cas.* 337, 354, has been widely approved and often adopted.

The word is also used as a verb, signifying to publish a libel of a person.

The principle is, that defamation conveyed by word of mouth only is slander, and actionable as such only. If conveyed in any other manner, it is libel; the tendency of all other modes of communication being to make a more distinct and permanent, and therefore more injurious, impression. Such acts as burning a man in effigy are doubtless cognizable under the law of libel. In a New York case, the plaintiff, a young woman, complained that the defendant, a young man, took her chemise from the lines in the yard of her house where it was hanging to dry, did it up in a parcel, and sent it to her by a third person as messenger; and the judge charged the jury that these facts would warrant a suit for libel, as they tended to imply that plaintiff had left the article with defendant in some interview growing out of an improper intimacy. In a case cited, 1 *Show.* 314, an action was maintained for scandalizing the plaintiff by carrying a fellow about, dressed with horns, bowing at the plaintiff's door. In such cases there is no element of permanence in the mode of communication adopted; yet libel is applicable.

The words — when words are employed — or the imputation need not be as distinctly injurious or aspersive as is necessary to sustain an action of slander: any injurious tendency is sufficient.

A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. Commonwealth *v.* Clap, 4 *Mass.* 163; Clark *v.* Binney, 2 *Pick.* 113; Ryckman *v.* Delavan, 25 *Wend.* 186, 198; Root *v.* King, 7 *Cow.* 613.

Any publication the tendency of which is to degrade or injure another person, or to bring him into contempt, ridicule, or hatred, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society, is a libel. Dexter *v.* Spear, 4 *Mas.* 115. To substantially the same effect is White *v.* Nicholls, 3 *How.* 266, 291.

A libel is a malicious defamation, expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputa-

tion of another, and thereby exposing such person to public hatred, contempt, or ridicule. Armentrout *v.* Moranda, 8 *Blackf.* 426.

A libel is a publication, without justification or lawful excuse, of words calculated to injure the reputation of another, and expose him to hatred or contempt. Whitney *v.* Janesville Gazette, 5 *Biss.* 330.

A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous intent. State *v.* Farley, 4 *McCord*, 317.

Every thing, written or printed, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been. O'Brien *v.* Clement, 15 *Mees. & W.* 435.

A libel is that which is written or printed, and published, calculated to injure the character of another by bringing him into ridicule, hatred, or contempt. Gathercole *v.* Miall, 15 *Mees. & W.* 318, 344.

In a strict sense, libel is taken for a malicious defamation, expressed either in printing or writing; in a larger sense, the notion of libel may be applied to any defamation whatever, expressed either by signs or pictures. *Hawk. Pl. Cr.*

It is not necessary that the words should be slanderous to sustain an action for libel. Any publication that tends to degrade or injure the character of a person, or bring him into contempt, hatred, or ridicule, is as much a libel as though it contained charges of infamy or crime. Johnson *v.* Stebbins, 5 *Ind.* 364.

See numerous definitions collected, and remarks upon the difficulty of framing an exhaustive definition of the wrong of libel, in *Towns. Sland.* 75, § 20.

For criticisms on several early definitions as insufficient, see *Stark. Sland.* 4.

2. The first formal pleading of the person complaining in a suit in admiralty or in the ecclesiastical courts, corresponding with the declaration at law, the bill in equity, or the complaint or petition in civil actions under the reformed codes, is called the libel.

In the spiritual court, a libel is the declaration or written charges on the plaintiff's behalf, in the civil litigation. It consists of three parts: The major proposition, which shows a just cause of the petition; the narration, or minor proposition; the conclusion, or conclusive petition, which conjoins both propositions.

In the Scotch law, it is the statement of complaint or grounds of charge, on which either a civil action or criminal prosecution takes place. *Wharton.*

The form of a libel is either simple or articulate. The simple form is when the cause of action is stated in a continuous narration, when the cause of action can be briefly set forth. The articulate form is when the cause of action is stated in distinct allegations or articles. *Bouvier.*

Libel is from the Latin *libellus*, a little book. Hence it signifies —

1. The original declaration of an action in the civil law. (*Termes de la Ley; Cowel.*)

2. Articles drawn out in a formal allegation in the ecclesiastical court, setting forth the complainant's ground of complaint. (3 *Bl. Com.* 100; 3 *Steph. Com.* 314.)

3. The charge on which, in Scotland, a civil or criminal prosecution takes place. (*Bell.*)

4. An obscene, blasphemous, or seditious publication, whether by printing, writing, signs, or pictures. (4 *Bl. Com.* 150, 151; 4 *Steph. Com.* 259, 260.)

5. A defamatory publication upon a person, by writings, pictures, or the like. All contumacious matter that tends to degrade a man in the opinion of his neighbors, or to make him ridiculous, will, if published, amount to libel. Thus libel differs from slander, in that slander consists in oral defamation only, whereas a libel must consist of matter published; also, the scope of the offence of libel is more extensive than that of slander. Libel may be punished criminally, whereas a person guilty of slander can only be proceeded against civilly. (3 *Bl. Com.* 125, 126; 4 *Id.* 150, 151; 3 *Steph. Com.* 381–383; 4 *Id.* 258.) *Mozley & W.*

LIBELLANT; LIBELLEE. The party who files a libel, or the complainant or plaintiff in an admiralty or ecclesiastical suit, is termed the libellant; the party against whom it is filed, or defendant, is termed the libellee.

LIBELLUS. A little book.

Libellus conventionis. The civil-law term for the statement of a plaintiff's claim in a petition presented to the magistrate, who directed an officer to deliver it to the defendant; equivalent to our "libel," a pleading.

Libellus famosus. The civil-law term for a defamatory publication; equivalent to our "libel," a tort.

LIBER, *n.* A book. A subdivision of a literary work; used in many codes or digests of the law, as the Pandects.

Liber assisarum. The book of assizes or pleas of the crown, being the fifth part of the year-books. *Wharton.*

Liber feudorum. A code of the feudal law, compiled by direction of the Emperor Frederick Barbarossa, and published at Milan, A.D. 1170. *Wharton.*

LIBER, *adj.* Free; exempt from the power or authority of another; exempt from a charge or burden.

Liber homo. A free man.

1. In the Roman law, every man not a slave; a freedman was comprehended in the term.

2. In early English law, a man competent as a juror. The term subsequently used was *liber et legalis homo*, and the modern equivalent is "good and lawful man."

In London, a man could be a *liber homo* either by service, as having served his apprenticeship; or by birthright, being a son of a *liber homo;* or by redemption, *i.e.* allowance of mayor and aldermen. There was no intermediate state between *villein* and *liber homo;* but a *liber homo* could be vassal of another. *Bouvier.*

3. In old European law, an allodial proprietor, as distinguished from one holding under a superior, as a vassal or feudatory. In a wider sense, one not under any superior other than the state, whether an owner of allodial land or not.

Liberos et legales homines are the terms which have always been used in the *venire facias,* and their legal import and signification is freeholders, without just exception. State *v.* Glasgow, *Cam. & N.* 38.

Liberum maritagium. Frank-marriage. A peculiar tenure of lands, in the nature of a tenure in tail special, where a man seised of land in fee-simple gives it to another, with daughter, sister, &c., in marriage, to hold to them and to their heirs.

Liberum servitium. Free service. A tenure of lands by service not unbecoming a freeman; as military service, payment of a certain sum of money, &c. A villein might hold by this kind of service, and did not thereby become a free man.

Liberum tenementum. Frank tenure; freehold. An estate in fee, or for life or other indeterminate period, held by a freeman, as distinguished from the tenure of a villein, termed *villena gium.*

Also, a plea of freehold. Where the defendant in an action of trespass to real property pleads in justification that the *locus in quo* is his freehold, or the freehold of some third person by whose command or license he acted, his plea is termed a plea of *liberum tenementum;* and this is the proper plea where defendant desires to set up his own or another's ownership of the premises as a defence. The plea admits the possession of the plaintiff, and the commission of the trespass as alleged; but compels the plaintiff to make a new assignment, setting forth the further facts on which he relies.

LIBERATE. Deliver ye. The name of an old English writ which used to issue out of chancery, under the great seal. It might be directed to the treasurer, chamberlain, and barons of the exchequer, &c., for the payment of any yearly pension or other sum of money granted under the great seal; or to the sheriff, for the delivery of land or goods taken upon forfeiture of a recognizance; or to a jailer, for the delivery of a prisoner who had put in bail for his appearance. It is said to have been most in use for the delivery of goods on an extent; for until the liberate no property in the goods passed to the conusee in the recognizance.

LIBERTY. 1. Liberty is often used in jurisprudence in its general vernacular sense of freedom; exemption from bondage or servitude. Thus the law, in common with philosophy, speaks often of liberty as a condition or right of persons. It is distinguished as *natural* liberty, which implies freedom from all positive human laws; *civil* liberty, or the natural liberty of the individual, as abridged by and enjoyed under reasonable municipal laws; and *political* liberty, which is the exemption of a community or state from the control of any other. This, at least, seems the more convenient sense in which to employ the phrase political liberty, though earlier writers use it as an equivalent of civil liberty.

2. In a more technical sense, liberty signifies, particularly in early English law, a franchise or personal privilege being some part of the sovereign power, vested in an individual, either by grant or prescription.

3. In a secondary sense, derived from the one last mentioned, the region, territory, or place the inhabitants of which enjoy special privileges or franchises, is designated by the word liberty, more commonly pluralized. Examples are the expressions: the northern liberties of Philadelphia; and the jail liberties, —

which latter are the district in which a prisoner may walk at large, without rearrest or liability of escape.

Liberties, or franchises, are royal privileges subsisting in the hands of subjects; also, districts in regard to which such privileges have been granted by the crown to individuals, conferring on them or their bailiffs the exclusive jurisdiction of executing legal process therein. Such districts are, in consequence, exempt from the sheriff's jurisdiction; but the practical importance of this exemption is diminished by the fact that it is now usual to insert a *non omittas* clause in the writs directed to the sheriff ("that you omit not by reason of any liberty within your bailiwick," &c.), specially authorizing him to enter into such privileged places. And by Stat. 13 & 14 Vict. ch. 105, a liberty may now, on petition to the crown by the court of quarter sessions, be made to merge for the future in the general county jurisdiction. (2 *Steph. Com.* 630.) *Mozley & W.*

Liberty of the press. This expression imports freedom from any censorship over what shall be published; exemption from control in advance over the dissemination of ideas by printing. It does not import that one may not be mulcted in damages or punished for what he has published, if, after the act, it is shown to be contrary to law, but that he shall not be restrained beforehand. In some countries of continental Europe, government assumes the power of restricting the press, by prohibiting seditious and libellous publications; and enforces regulations, in the nature of a censorship, to preclude the appearance of what is deemed unlawful. The favorite idea in England and America has been, that every person may freely publish what he sees fit; and any judgment of the law upon it shall be reserved till afterwards. But to suppose that he cannot be brought into judgment afterwards is a misconception of what is meant by the liberty of the press.

Liberty of speech. Freedom to express one's sentiments by word of mouth, uncontrolled by any censorship or restrictions of government beforehand. Like the liberty of the press, this liberty is not an exemption from punishment or damages after the act; nor does it give any right of speaking to the interruption of lawful assemblies, or to the disturbance of the peace. It only means that government shall not inquire beforehand what an individual intends to say, to restrict him.

Liberty to hold pleas, signifies to have a court of one's own, and to hold it before a mayor, bailiff, &c. *Tomlins.*

LIBRA. A pound. Denotes the sum of money equivalent to a pound sterling. Occurs in early English records and writings, generally with some qualifying words annexed; as, *librœ arsœ*, pounds in coin tested by assaying; *librœ numeratœ*, pounds reckoned by number, not by weight; *librœ pensatœ*, pounds weighed, or reckoned by weight.

LICENSE, *n.* In its general sense, permission; consent that a person may do some act which without such consent he might not lawfully do. License, *v.*: to permit; to give formal authority from a proprietor or officer. Licensed: authorized by formal permit. Licensee: one who has received seignorial or official permission, in form, to do acts for which such permit is required. Licensor: one who has given a legal permission, known as a license.

There is some distinction between the uses of these words, in different branches of the law of contracts, or when permission between individuals is under discussion, and in the law of government, or when official permits are meant.

1. As used in the law of real property, a license has, by earlier and respected authorities, been defined to be an authority to do an act on the land of another, without passing any estate in the land. It may be oral as well as written, or even implied from acts; hence the word often, but not necessarily, signifies a writing conferring such authority. In the real-property use of the word, the distinctions are important between *executory* licenses, which are permissions given but not yet performed (these are generally revocable, unless founded on a consideration or coupled with an interest), and *executed* licenses, which are such as have been acted upon; these cannot be revoked.

A license is, technically, an authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land; as to hunt in another's land, or to cut down a certain number of trees. Cook *v.* Stearns, 11 *Mass.*

533; Mumford *v.* Whitney, 15 *Wend.* 380, 390, 392.

The words license and empower need not import any thing different from grant. In their broad and general sense they are used indiscriminately. A mere license, strictly speaking, passes no interest, but only makes an action lawful, which, without it, would have been unlawful; but if the instrument passes an interest, then it becomes a grant. Washburne *v.* Gould, 3 *Story C. Ct.* 157.

Distinction between a license to enter on lands and a grant of an interest. See Jamieson *v.* Millemann, 3 *Duer*, 255.

Distinction between license and easement. See Mumford *v.* Whitney, 15 *Wend.* 380; Wolfe *v.* Frost, 4 *Sandf. Ch.* 72; 1 *Washb. R. P.* 148.

2. In the law of contracts, irrespective of real property, license is often used in its general sense of a permission granted by one, in virtue of an ownership, authority, or power vested in him, to another, to do some act which the latter might not do without such leave.

3. In the law of patents, license has a use which is even technical, meaning an instrument by which a patentee confers upon another a limited right to make or use the invention; to work the patent. A similar use of the word is noticed in the law of copyright, when it signifies a permit given by the proprietor of a copyrighted work to reprint it, publish extracts from it, multiply copies, &c.

If an instrument vests in the grantee the exclusive right, either for the whole country or for a particular district, of making and using the thing patented, and of granting that right to others, it is an assignment. Any conveyance short of embracing the entire monopoly, either for the whole country or for a particular district, is a license. *Curt. Pat.* § 212.

An assignment which does not convey to the assignee the entire and unqualified monopoly which the patentee holds in the territory described, or an undivided interest in the entire monopoly, is a mere license. Sanford *v.* Messer, 5 *Fish. Pat. Cas.* 411.

A licensee of a patent is one who has transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest. Potter *v.* Holland, 1 *Fish. Pat. Cas.* 327.

Distinction between an irrevocable license to manufacture under a patent-right, and a transfer of an interest. See Pitts *v.* Jameson, 15 *Barb.* 310.

A license to make and use a machine need not be in writing, as it need not be recorded, and conveys neither an interest in the patent itself, nor a power authorizing a third person to construct the patented invention. Baldwin *v.* Sibley, 1 *Cliff.* 150.

4. In the administration of civil government, a license is an official permit to carry on a business or trade, or perform other acts which are forbidden by law except to persons obtaining such permit. Vocations which, for various reasons of public policy, need especial surveillance, and others which are fit subjects for the exaction of a revenue, are customarily restricted to persons who make application for a formal permit, and pay the fee, and comply with other regulations prescribed by the general law. This system enables the authorities of the state or city to register all persons engaged in the trade or vocation in question, and exercise some control over their dealings, and hold them to answer for any misconduct or disobedience of law. These licenses are always in writing, in an official form, and for a limited term.

License, as used in the acts of congress regulating the coasting trade, signifies permission or authority. Gibbons *v.* Ogden, 9 *Wheat.* 1, 213; Sinnot *v.* Davenport, 22 *How.* 227, 240; United States *v.* Cutting, 3 *Wall.* 441, 443.

A permit and license are substantially the same thing, in a statute relative to granting the privilege of selling liquors. State *v.* Watson, 5 *Blackf.* 155.

A license to a person to follow any particular trade or business is not an appointment to office, nor does it confer any of the powers or privileges of a public officer. It is a mere permission to follow his calling, whatever it may be. Its object is to control the business and prevent its being conducted in a manner injurious to the public welfare. People *v.* Acton, 48 *Barb.* 524; 33 *How. Pr.* 52.

There is a clear distinction between a license granted or acquired as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which, without such license, would be illegal. A tax is a rate or sum of money assessed on the person, property, &c., of the citizen. A license is issued under the police power of the authority which grants it. If the fee required for the license is intended for revenue, its exaction is an exercise of the power of taxation. The tax assessed upon insurance companies by the city council of Augusta, by ordinance of Jan. 5, 1874, although called a "license tax," is more properly a tax than a license fee, or a fee exacted in order to secure the right to

engage in a business which, without paying for and obtaining such authority, would be illegal. Home Ins. Co. *v.* City Council of Augusta, 50 *Ga.* 530, 537.

Distinction between a license fee and a tax. See Ash *v.* People, 11 *Mich.* 347; Chilvers *v.* People, *Id.* 43; People *v.* Mayor, &c. of New York, 7 *How. Pr.* 81.

A municipal corporation empowered to "license, regulate, and restrain theatrical amusements," may exercise the taxing power as a means of effecting this object. Hodges *v.* Mayor, &c., 2 *Humph.* 61.

Although the term license, in a power to license employments, implies power to prohibit, yet it is the generally received doctrine that, in the case of useful employments, prohibition cannot be exercised under authority to license. Curtis *v.* Smith, 42 *Iowa*, 665.

A power in a city charter to tax or entirely suppress all petty groceries, should not be construed as conferring the right to license liquor retailers, where the word license is used in other parts of the charter to express its ordinary meaning. Leonard *v.* Canton, 35 *Miss.* 189.

In the New York pilotage act (Laws 1853, ch. 469, § 29, as amended by Laws 1857, ch. 243), providing that vessels sailing under register to or from the port of New York, by way of Sandy Hook, shall take a licensed pilot, or, in case of refusal, shall pay pilotage, the words licensed pilot include only pilots licensed by the board of commissioners established by the act; and pilots licensed under the laws of New Jersey are not entitled to claim the benefit of that provision. Brown *v.* Elwell, 60 *N. Y.* 249.

5. In international law, license is often used of a permission granted by a belligerent power, authorizing some special commerce or trade between its subjects and those of the enemy.

Licensing acts. This expression is applied by Hallam (*Const. Hist.* ch. 13) to acts of parliament for the restraint of printing, except by license. It may also be applied to any act of parliament passed for the purpose of requiring a license for doing any act whatever. But generally, when we speak of the licensing acts, we mean the acts regulating the sale of intoxicating liquors. These acts are of two kinds. The first class of these enactments has in view the subject of revenue, and requires excise licenses to be taken out for the sale of certain liquors. The second class has in view the proper regulation of the places where such sale is carried on, and the prevention of the abuses to which they are naturally liable. By these acts a magistrate's license is required, in addition to the excise license. *Mozley & W.*

LICENTIA. Leave; license; permission.

Licentia concordandi. Leave to agree. This term was applied, in old English practice, to the leave granted, in an action for levying a fine of lands, to the defendant to come to an agreement with the plaintiff; which was one of the regular and formal steps in the proceeding.

Licentia loquendi. Leave to speak. An imparlance, or, rather, leave to imparl or speak with the plaintiff.

Licentia surgendi, or leave to arise, was a permit anciently given by the court to a tenant, who had been essoigned *de malo lecti* in a real action, to arise from his bed; and the name was also given to the writ thereupon. The law of such cases was, that the tenant might not arise or go out of his chamber until he had been viewed by knights thereto appointed, and had a day assigned to him to appear, in order that it might be known whether he caused himself to be essoined deceitfully or no; if the demandant could prove that he was seen abroad before the view or license of the court, he should be taken to be deceitfully essoined, and to have made default. (*Bracton; Fleta.*) *Jacob.*

LICENTIOUSNESS. 1. In its original and more general sense, licentiousness means doing what one pleases, unrestrained by any regard for the rights of others. It differs from liberty, in conveying a strong implication that rights of others exist and are disregarded; a notion which "liberty" does not involve.

2. In a narrower sense, licentiousness is equivalent to lewdness (*q. v.*), which seems the more proper technical term.

LICET. 1. It is lawful; it is allowable.

2. Although. In this sense, the word imports a direct affirmation.

Licet sæpius requisitus. Although often requested. The emphatic words, in the Latin forms of pleading at common law, of an allegation that a party has been often requested to perform the acts the non-performance of which is complained of. The phrase is literally translated in the modern forms, and is sometimes used to designate the clause containing such an averment.

LICITATION; LICITACION. The civil and Spanish law terms for a species of auction, authorized where joint owners of property incapable of partition desired a division of value. By this proceeding, co-heirs or other co-proprietors of a thing in common and undivided might

have it judicially awarded to the one who would pay for the other's share at the highest valuation. So, by *licitatio fructus*, the produce of a farm in suit might be sold to the claimant bidding highest, for them, subject to paying the other if the latter prevailed. *Hunt. Rom. L.* 840.

LIE. To subsist; to exist; to be sustainable, &c. Thus the phrase, "an action will not *lie*," signifies that an action cannot be sustained, or that there is no ground upon which to found the action. A right is often said to lie in franchise, or in grant, according as it is founded on or derived by franchise or grant. See LYING.

LIEGE. A term of the feudal law which is differently explained. Upon the whole, it seems probable that it was originally used as a noun, with the meaning of a bond or tie. Then it came to be used as an adjective, signifying bound, united by the reciprocal tie of allegiance, in the expressions *liege lord*, the sovereign or lord paramount, who was bound by the feudal relation to protect the vassal; and *liege man*, who was reciprocally bound for obedience and service. At last, by elision of "lord" and "man" from these phrases, it again came to be used as a noun; meaning either a sovereign or a subject, a lord or a vassal, according to context and circumstances. My liege is said to have been a usual expression in addressing the sovereign. The king's lieges was a term equivalent to subjects.

Liege, in old records, signifies full, absolute, perfect, pure. *Liege* widowhood was pure widowhood. *Cowel.*

Liege is a word borrowed from the feudists, and hath two significations in the common law; sometimes being used for *liege lord*, by which is meant the king, who acknowledgeth no superior, and to whom allegiance is due. Sometimes it is used for *liege man*, who is one that oweth allegiance to his liege lord. (*Skene; Cowel;* 1 *Bl. Com.* 367; 2 *Steph. Com.* 400.) *Mozley & W.*

Liege homage. Homage which, when performed by one sovereign prince to another, included fealty and services, as opposed to *simple homage*, which was a mere acknowledgment of tenure. (1 *Bl. Com.* 367; 2 *Steph. Com.* 400.) *Mozley & W.*

Liege poustie. A Scotch law term, derived from the Latin *legitima potestas*, and meaning a state of health implying a lawful power of disposing of property, in contradistinction to "death-bed;" death-bed dispositions being formerly void by the law of Scotland. *Bell.*

LIEN. This term is used in somewhat different senses in different systems of jurisprudence; but all involve more or less the notion of a right vested in a creditor to control the enjoyment or forbid the disposal of some specific property until its owner has discharged the debt.

At common law, liens were dependent on possession; and a lien consisted in a mere right to retain possession until the charge or debt was paid.

In equity, liens were more liberally recognized and treated; they might exist without possession, and be judicially enforced by a decree of foreclosure and a sale of the property. Thus, upon familiar principles of long-established equity jurisprudence, a vendor of land who has put the purchaser in possession, without receiving payment of the price, or holding any distinct security for payment, is understood to retain a lien, known as the "vendor's lien," for the balance remaining due; and upon a default in payment he may, without rescission of the contract and taking back the land, maintain a suit to have a sale of so much as may be necessary for payment of his demand. Many other liens are allowed in equity.

In the maritime law, likewise, liens do not depend upon or require possession. Thus, one who has furnished supplies to a vessel out of her home-port, on a lawful contract of the master, is not restricted to a personal demand against the master or owners, but may pursue the vessel in the admiralty; and although he never acquired any possession or actual control over her, nor received any written mortgage or hypothecation, he may have a sale of the vessel herself. Similar liens exist for seaman's wages, for damages for collision, and for some other demands arising in the management of vessels. They are known as maritime liens.

The substance of all the above rights was known and liberally recognized and enforced in the civil law; but the terms privilege and tacit mortgage are more commonly employed to denote them.

By statutes in various jurisdictions, a

great variety of liens have been created, particularly for the protection of laborers and those who furnish materials towards the construction and improvement of property. What are known throughout the United States as "mechanics' liens" are a notable example of this class. It has long been found that the usage under which an owner of land desiring to build upon it does not himself buy the materials or hire the workmen, but makes a contract for the erection with a builder who purchases the materials and employs the services, is prolific of frauds and losses to material-men and laborers. The builder may collect the contract price from the owner, and refuse to pay his subordinates, who cannot have a remedy by suing the owner, because they have no contract with him; nor by reclaiming what they have contributed, since it is inextricably involved in the building. Under the mechanic's lien laws, material-men or laborers may file a notice, pursuant to directions of the statute, setting forth their demands, and may thereby acquire a right to be paid out of the value of the property; and, by proceedings prescribed by the statute, the property may be sold, and payment made out of the proceeds. Similar liens exist for other kinds of demands; being wholly the creature of statute, they are only to be ascertained by examining the statute of the jurisdiction. Judgments, also, are by statute, in almost all the states, declared liens on real property of the defendant for a certain term of years.

A lien is a right to retain and possess the property of another until some existing claim upon it is extinguished. The essence of the right is possession; and the chattel on which the lien attaches is regarded as in the custody of the law; but the lien being a mere right of retainer, is not attachable as personal property, or as a chose in action, of the person who is entitled to it. The word lien is also used to designate the various charges of debt, upon land or personalty, which are recognized in courts of law and in chancery, although neither connected with nor dependent upon possession. In courts of equity the word denotes a charge or incumbrance, where there is neither *jus in re* nor *jus ad rem*, nor possession of the thing. A lien may result from the common law; it may originate from usage; it may be created by statute; or it may arise from the contract of the parties. It rests upon the idea that the party having it has a right in or to the property until his claim has been paid. The origin of the right has been ascribed to the Roman law. Chancellor Kent divides common-law liens into two classes, viz.: general lien, which is the right to retain all the property of another for a general balance of accounts, and which has been termed "an encroachment of the common law;" and particular lien, which is the right to retain a thing for a charge on account of labor employed or expenses bestowed upon the property detained. The lien, under the common law, exists only while the party continues in actual possession of the property. *Houck, Law of Liens*, I.

Lien is used in the law in two significations: personal lien, such as bond, covenant, or contract; and real lien, a judgment, statute, recognizance, which oblige and affect the land. It signifies an obligation, tie, or claim annexed to or attaching upon any property, without satisfying which such property cannot be demanded by its owner. *Jacob.*

Lien is a right in one man to retain that which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied. It is neither a *jus in re* nor a *jus ad rem; i.e.*, it is not right of property in the thing itself, or a right of action to the thing itself. It is either particular, as a right to retain a thing for some charge or claim growing out of or connected with the identical thing; or general, as a right to retain a thing not only for charges and claims specifically of or connected with the identical thing, but also for a general balance of accounts between the parties, in respect to other dealings of a like nature.

Particular liens may arise in various ways: by an express contract; by an implied contract, resulting from the usage of trade, or the manner of dealing between parties; or by mere operation of law, from the relation and acts of the parties, independently of any contract. General liens, not being favored in law, must be maintained upon one of the first two grounds.

The civil law derived its own liens, whether they were pledges or hypothecations or simple privileges, from similar sources. *Wharton.*

Lien is a qualified right of property which a person has in or over a thing, arising from such person's having a claim upon the owner of such thing. Thus the right which an attorney has to keep possession of the deeds and papers of his client until such client has paid his attorney's bill is termed the attorney's lien upon those deeds, papers, &c. There are two sorts of lien; viz., particular and general. A lien may exist over real and personal property equally; but there is this difference in the two cases, namely, that the lien on personal property is dependent on possession, and ceases when the possession ceases; whereas the lien on real property is independent of possession, and, indeed, implies that the person claiming

the lien is out of the possession, — *e.g.*, in the case of a vendor's lien for unpaid purchase-money, or of a purchaser for his deposit. The lien is, however, in all cases commensurate only with the interest of the person through whom it arises. *Brown.*

Lien is the right of one man to retain property in his possession belonging to another, until certain demands of the party in possession are satisfied. McFarland *v.* Wheeler, 26 *Wend.* 467. And see Trust *v.* Pirsson, 1 *Hilt.* 292.

Lien is familiarly understood to be a binding, or attachment of the thing spoken of, for the benefit of him who is entitled thereto. Green *v.* Johnson, 2 *Hawks*, 309.

Lien, as used in the United States bankrupt act of 1841, signifies an obligation, tie, or claim annexed to or attaching upon any property, without satisfying which such property cannot be demanded by its owner. It includes mortgages. Storm *v.* Waddell, 2 *Sandf. Ch.* 494, 507.

The term lien, in common acceptation, denotes a legal claim or charge on property, either real or personal, for the payment of any debt or duty, although the property be not in the possession of him to whom the debt or duty is due. Thus an attachment is denominated a "lien" in the statutes; and the term lien is used in the same sense in the act of congress of 1841, establishing a uniform system of bankruptcy throughout the United States. Downer *v.* Brackett, 21 *Vt.* 599.

An attachment under mesne process is not, in the strict sense of the law, a "lien" on the property attached, although it bears a close resemblance to it. *Re* Cheney, 5 *Monthly Law Rep.* 19.

An attachment on mesne process is not a common-law lien: it is a contingent and conditional charge, until the judgment and levy. *Exp.* Foster, 2 *Story C. Ct.* 131.

Lien, as used in Ga. Rev. Code, § 1980, protecting "any lien or claim under contract with" the client, includes attorneys' liens arising by operation of law. Jones *v.* Groover, 46 *Ga.* 568.

Lien, as used in the Pennsylvania act of 1867, p. 44, relating to mortgages, embraces any charge or right upon the land by means of which a sale thereof could be compelled. Wright *v.* Vickers, 81 *Pa. St.* 122, 132.

In a letter from the sellers of goods to the buyer, who had returned them, in which letter the sellers asserted an absolute sale, and notified the defendant that they would treat the goods returned to them as received upon consignment from the defendant, and would apply the proceeds upon their "lien" for the price, was held not to use the word lien in the technical sense, but to be equivalent to "claim or demand" for the price, and to be not inconsistent with an absolute or unconditional delivery. Stone *v.* Browning, 49 *Barb.* 244.

LIEUTENANT. Originally, and in its more general sense, one holding the place of another; a deputy or vicarious officer. It is particularly and more commonly used as the title of an army officer next below a captain.

Lieutenant signifieth him that occupieth the king's or any other person's place, or representeth his person; as the lord-lieutenant of Ireland. Especially is it used of a military officer of a company next in command to the captain. *Cowel.*

Commissions of lieutenancy were commissions for mustering the inhabitants of a district for the defence of the country. These commissions of lieutenancy were introduced by the Tudors, and superseded the old commissions of array. (1 *Bl. Com.* 411, 412; 2 *Steph. Com.* 585, 586.) *Mozley & W.*

LIFE. For some purposes, life is recognized as commencing from conception; particularly for those in which beneficial interests of the child are involved, such as its capacity to inherit. For others, it dates from quickening; thus, except under recent statutes, quickening was necessary to constitute producing abortion an offence. For a third class of purposes, the child must be born able to exist independent of the mother, before its life is deemed to have commenced.

Life annuity. An engagement to pay an income yearly during the life of some person; also, the sum thus promised; an annuity limited for a life. See ANNUITY.

Life assurance; life insurance. That kind of insurance which involves an engagement to pay a sum upon the death of the insured, or of a third person in whose life the insured has an interest, either whenever it occurs, or in case it occurs within a prescribed term. See INSURANCE.

Life-estate. A right or ownership in some subject of property, usually, but not necessarily, realty, limited by a life or lives. See ESTATE FOR LIFE.

Life interest. Some claim or right of enjoyment, usually not amounting to ownership, and limited by a term of life, either that of the person in whom the right is vested, or that of another.

Life-land; life-hold. Land held on a lease for lives. *Wharton.*

Life-peerage. Letters-patent sometimes confer the dignity of baron for life merely; these do not enable the grantee to sit and vote in the house of lords.

Life policy. A short expression for a policy of insurance upon life; the usual written contract employed in engagements to pay a sum in case of death of a person designated.

Life-rent. 1. In English law, a rent which a man receives for term of life, or for sustentation of life. *Cowel.*

2. In Scotch law, a right which entitles a person to use and enjoy property during life, without destroying or wasting its substance. The proprietor is called the *fiar;* the subject of the property, which is either a sum of money or heritage, is called the *fee;* and the person in possession the *life-renter. Bell.*

LIGAN. Goods left adrift at sea, but attached to something in the nature of a buoy, in hope of preserving them to their owner. See LAGAN.

LIGEANCE. An old form of allegiance, *q. v.*

LIGHT. Besides the vernacular sense of this word, two or three somewhat technical uses of it are found.

1. It is nearly equivalent to window, except that openings are termed lights when their use for admitting illumination is the prominent idea; windows, when their use to give opportunity to look out is uppermost. 6 *J. B. Moore*, 47; Swansborough *v.* Coventry, 9 *Bing.* 305.

2. It signifies an easement or right to have one's building illuminated through openings in its walls, free from obstruction by buildings on adjoining lands; as in the phrase ancient lights, *q. v.*

Lights. The right which a man has to have the access of the sun's rays to his windows, free from any obstruction on the part of his neighbors. (1 *Steph. Com.* 660, 661.) It is a species of easement. This is sometimes spoken of as "the right to light and air;" sometimes as "ancient lights," because the possessor must have enjoyed them for a certain time before claiming the right in question. This period is now twenty years. (*Stat.* 2 *&* 3 *Wm. IV.* ch. 71, § 3; 1 *Steph. Com.* 691, 692.) *Mozley & W.*

3. The lamps and other burning signals, required by statute regulating or protecting navigation, to be maintained on board ship, or at dangerous points on the coast, are called lights.

Light-house. An edifice of peculiar structure, many of which are erected by commercial nations, at exposed or dangerous points along the coast, for the purpose of maintaining a light for guidance of vessels at night. They are erected in the United States by congress, and are regulated by Rev. Stat. 913, tit. 55.

Light-house board. A commission authorized by congress, consisting of two officers of the navy, two officers of the corps of engineers of the army, and two civilians, together with an officer of the navy and an officer of engineers of the army as secretaries, attached to the office of the secretary of the treasury, at Washington, and charged with superintending the construction and management of light-houses, light-ships, and other maritime signals for protection of commerce.

Light-ship; light-vessel. A vessel moored usually at a spot where a light-house cannot so well be erected, for the purpose of sustaining a light for guidance of vessels approaching the coast.

LIGHTER. A small vessel employed in unlading (lightening) vessels whose draught prevents their coming to wharf. Lighterage: the business of bringing in cargo from vessels too large to come to wharf; also, the price or charge for such service by means of small vessels. Lighterman: the master or manager of a lighter; a person engaged in lighterage.

Lighterage, in the sense of the price paid for unloading ships by lighters or boats, does not embrace a charge for taking a boat to another pier instead of the usual one of delivery. Western Transportation Co. *v.* Hawley, 1 *Daly*, 327.

LIKEWISE. As used in a will, was held equivalent to "also," rather than to "in like manner." State Bank *v.* Ewing, 17 *Ind.* 68.

LIMIT, *v.* To fix the extent or length; to mark the end; to set a bound.

To limit an estate, means to mark out or to define the period of its duration; and the words employed in deeds for this purpose are thence termed words of limitation, and the act itself is termed limiting the estate. Thus, if an estate be granted to A for the term of his natural life, the words term of his natural life would be the words of limitation, and the estate itself would be limited to A for that period. *Brown.*

LIMIT, *n.;* LIMITATION. Limit is chiefly used in its vernacular sense of a boundary, restriction, or termination of a subject in any respect; while limitation has a technical use, when restriction of duration, termination in respect to efflux of time, is the idea involved.

Limitation of actions. A term prescribed by positive law within which one having a right of action must bring suit, or he will become barred.

Theoretically, a person who has a demand against another might well be allowed to prosecute it any time; and this is thought to have been the earliest view. But before long the allowing the privilege of suing to last for ever was found very inconvenient. The earliest statutes, passed to fix a time beyond which a right of action should not be deemed to endure, dated the term allowed for suing from some notable period; thus requiring a new law whenever the term became too long. But in 1540 and 1623 acts were passed prescribing definite periods, within which the various causes of action must be sued. *Ang. Lim.* ch. 2.

These laws, called statutes of limitation, are not founded upon any actual probability that the demand has been paid or is otherwise unfounded, but are deemed statutes of repose; that is, they rest upon the will of the community that controversies shall not stand open for ever, but, after a reasonable time accorded to a party to make his complaint, if he has not done so, he shall be barred.

The principal English statutes of this description are: the famous original limitation law, Stat Jac. I. ch. 16, the general principles of which underlie and are embodied in the American statutes; also Stat. 3 & 4 Wm. IV. ch. 42 (modified by 37 & 38 Vict. ch. 57), relating more particularly to actions on specialties; 9 Geo. III. ch. 16, for suits by the crown; and 3 & 4 Wm. IV. ch. 27, for actions of ejectment and similar suits. In the United States, the various states all have their statutes of limitations. Provisions of this nature also exist in acts of congress. Criminal proceedings are subject to limitations as well as civil, varying with the statute of the jurisdiction. But independent courts of equity and admiralty are not deemed technically governed by these statutes, in their full extent, though they apply the principle of the statute as matter of judicial discretion.

For full exhibits of the English and American statutes, and their practical operation, see Wharton's and Bouvier's dictionaries.

The word limitation, as applied to actions, signifies the period of time which the law gives a man to bring his action for the recovery of any thing; and this period of time within which a man must bring his action in order to recover the thing sought is limited by the legislature in some cases to two years, in some to six years, and so on. The acts of parliament which prescribe these limits within which actions must be commenced are thence called the statutes of limitation, and the subject generally is termed limitation of actions. *Brown.*

The limitation of an estate is the marking out, in a deed or other instrument in writing, of the estate or interest which a person is intended to hold in any property comprised therein. Thus, when it is said, with reference to a conveyance to A and his heirs, that the word heirs in a deed is a word of limitation and not of purchase, the meaning is, that the word heirs marks out the nature of the estate taken by A, which is an estate in fee-simple; and that the heirs of A take nothing directly (*i.e.*, take nothing by purchase) under such a limitation.

Limitation is also used to signify a condition in law, as opposed to a condition in deed. Thus, when an estate or interest in land is so expressly confined and limited by the words of its creation that it cannot endure beyond a particular contingency, this is a limitation or condition in law; as when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, &c. The estate ceases when, in the one case, the tenant ceases to be parson of Dale, or when, in the other, he marries. On the other hand, a condition in deed is where an estate is granted expressly upon condition to be void upon a given contingency, or so that the grantee continues unmarried, or provided he goes to York, &c. (2 *Bl. Com.* 155; 1 *Steph. Com.* 300.) *Mozley & W.*

Limitation of assise. In old English practice, a certain time prescribed by statute, within which a man was required to allege himself or his ancestor to have been seised of lands sued for by a writ of assise. *Cowel.*

LIMITED. Confined within positive bounds; curtailed; restricted in duration, extent, or scope.

Limited administration. An administration of a temporary character, granted for a particular period, or for a special or particular purpose, as distinguished from an ordinary administration which is not granted subject to such limitations or conditions. Such, for instance, is an administration *durante minore ætate*, which becomes necessary when an infant has been appointed sole executor, or the person upon whom the right to administration devolves is an infant, in which case administration is

granted to some other proper person for a limited period; viz., until the infant attains the full age of twenty-one years, and is capable of taking the burden of the administration upon himself.

Limited company; limited liability. Any liability may be spoken of as limited when bounds are set to it, or it has been curtailed or restricted. There is, however, a technical use of the above phrases in the English law of partnerships and companies, which is frequent and important, and appears in the names of many business establishments, in such forms as The London Hotel Company (limited). The meaning is, that the liability of the individuals interested in the concern is limited by law, analogously to the restriction which is attained in the states by limited partnership laws, or general acts of incorporation with a restricted individual liability of members. The object of requiring "limited" to appear in the name of the concern is to protect the community from giving it undue credit, in reliance on the wealth of shareholders.

The liability of the members of a joint-stock company may be either unlimited (which it seldom is) or limited; and if the latter, then the limitation of liability is either the amount, if any, unpaid on the shares (in which case the limit is said to be by shares), or such an amount as the members guarantee in the event of the company's being wound up (in which case the limit is said to be by guaranty). Where the limit is by shares, the memorandum of association must contain a declaration that the liability is limited, and the amount of the capital must be divided into shares of a fixed amount; and each member must take one share at least, and write the number he takes opposite to his name in the memorandum of association. On the other hand, when the liability is limited by guaranty, the memorandum must contain a declaration that, in the event of the company being wound up, each member will contribute towards the liabilities what may be required, not exceeding a specified amount.

The memorandum of association is to be registered with the registrar of joint-stock companies; and with it articles of association, signed by each member, may, in the case of a company limited by shares, and shall, in all other cases, be delivered to the registrar. If the company be limited by guaranty, or unlimited, these articles must state the number of the shares where the capital is divided into shares, and the proposed number of the members where the capital is not so divided. The registrar retains and registers the memorandum and articles thus delivered to him, and certifies under his hand that the company is incorporated, and in the case of a limited company, that it is limited; whereupon the subscribers of the memorandum, together with such persons as may from time to time become members of the company, are constituted a body corporate with perpetual succession, a common seal, and power to hold lands; and this certificate is conclusive evidence that the statutory requirements with respect to registration have been complied with. The unpaid-up capital is called up when wanted, or at certain agreed periods; the successive demands for it are thence technically described as calls. *Brown.*

Limited divorce. A divorce *a mensa et thoro* only; or a judicial separation of husband and wife not dissolving the marriage tie. See DIVORCE.

Limited executor. The appointment of an executor may be either absolute or qualified. It is absolute when there is no restriction, condition, or limitation imposed upon him in regard to the testator's effects, or no limitation in point of time. It may be qualified by limitations as to the time or place wherein, or the subject-matter whereon, the office is to be exercised; and when so qualified the executor is frequently, in reference to his limited or qualified powers, termed a limited executor. Thus, if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death, or at an uncertain time, as upon the death or marriage of his son, such an executor, with reference to the time he should begin to execute his office, would be a limited executor. So, also, an executor may be a limited executor, with reference to the place in which he is empowered to execute his trust; as if a testator should make A his executor for his goods in Cornwall, B for those in Devon, and C for those in Somerset. *Brown.*

Limited jurisdiction. This term is ambiguous, and the books sometimes use it without due precision. It is sometimes carelessly employed instead of "special." The true distinction between courts is between such as possess a general, and such as have only a special, jurisdiction, for a particular purpose, or are clothed with special powers for the performance. Den *v.* Hammel, 18 *N. J. L.* 73.

Limited partnership. A form of partnership authorized by statute in many of the states to be formed, in which the firm consists of one or more general partners, jointly and severally responsible as ordinary partners, and by whom the business is conducted; and one or more special partners, contributing in cash payments a specific sum as capital

to the common stock, and who are not liable for the debts of the partnership beyond the fund so contributed. These special partners must refrain from dealing in the business, except in matters permitted by the statute; and the forms of law must be strictly observed in creating the partnership, else the special partners are liable as general ones.

LINCOLN'S INN. One of the inns of court within which the chancery courts are held, with the exception of the rolls court, which sits in Rolls Yard, Chancery Lane. *Mozley & W.*

LINE; LINEA. 1. These words, the first English, the second its Latin equivalent, are used in the law of relationship and descent to signify the connection between persons who are descended from a common ancestor; the course of descent; the order in which relatives stand towards each other.

Several forms are mentioned. The *direct* line is composed of persons immediately descending one from another. An individual being particularly in view, called in the language of the subject the *propositus*, his father and mother, grandfather and grandmother, great-grandfather and great-grandmother, and so on, upwards, are his relatives in the direct line *ascending;* while his son and daughter, grandson and granddaughter, and so on, downwards, are his relatives in the direct line *descending*. Again, the *paternal* line is that course of relationship which is traced through the father of the *propositus*, and the *maternal*, that which is traced through his mother. The expression *collateral* line involves the consideration of two direct lines. Thus the *propositus* and his nephew are related in the collateral line. The course is traced from the *propositus* backwards in one direct line to the grandfather, thence downwards by a direct line, but through another son of the grandfather, to the nephew in question.

2. Line is also used in law, as in the vernacular, for boundary; the conceived limit of lands covered by one title upon any one of its sides; and as a unit of measurement, being the one-twelfth of an inch.

Linea recta semper præfertur transversali. The right line is always preferred to the collateral.

It is a rule of descent that the lineal ancestors, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

LINEAL. Is used in the law of descent more narrowly than line; it implies direct course; immediate descent. Collateral relationship is not called lineal, though the expression collateral line is not unusual.

Lineal consanguinity. That relationship which subsists between persons each of whom is descended in a direct line from another, as between son, father, grandfather, great-grandfather, and so upwards in the direct ascending line, or downwards in the direct descending line.

Lineal descent. Descent in a right line, as where an estate descends from ancestor to heir in one line of succession, through father and son, successively.

Lineal warranty. A warranty where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty; as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son. It was abolished by Stat. 3 & 4 Wm. IV. ch. 74, § 14. *Wharton.*

LIQUIDATE. To adjust or settle an indebtedness; to determine an amount to be paid. Liquidated: adjusted, certain, or settled in respect to amount. Liquidation: the act of determining what amount shall be payable; of adjusting an uncertain indebtedness. Also, in a broader and secondary sense, the comprehensive proceeding of ascertaining and adjusting all the indebtedness of a party, and applying assets to discharge it; as when it is said that a bank has gone into liquidation.

A debt or demand is liquidated whenever the amount due is agreed on by the parties, or fixed by the operation of law. Hargroves *v.* Cooke, 15 *Ga.* 321.

Under the English bankruptcy act, 1869, a person in embarrassment, instead of suffering himself to be made a bankrupt, may summon a meeting of his creditors, and

prevail with them by special resolution to declare that his affairs shall be liquidated by arrangement. A trustee is thereupon appointed, with or without a committee of inspection; and when that is done, the general provisions of the act applicable to the proof of debts, &c., in the case of bankruptcy are made applicable to the proof of debts, &c., in the liquidation. The property of the liquidating debtor vests in his trustee, who has the like powers as a trustee in bankruptcy. The close of the liquidation and the discharge of the liquidating debtor depend upon the creditors, who may make a resolution to that effect in a general meeting. *Brown.*

Liquidated damages are damages the amount of which is fixed or ascertained, as opposed to those unascertained or uncertain. The parties to a contract frequently insert a stipulation that the one shall pay to the other some specified sum of money in the event of a breach of the contract; and in such a case it frequently becomes a nice question whether such sum is to be considered in the nature of a penalty merely, and covering the damages which one party may sustain in the event of a breach committed by the other, but liable to be reduced to a sum appearing to be just to the court and jury; or whether the full sum specified is to be actually paid to the injured party as liquidated or settled damages, without reference to the extent of the injury sustained. The general doctrine of the courts is, that the intent of the parties governs; and if the language of the contract and attendant circumstances clearly show that they designed an absolute adjustment of the damages beforehand, their agreement will be enforced. But the courts lean towards treating such agreements as a penalty only, leaving the injured party to prove the actual loss. Thus, if the agreement uses the word penalty, this is usually conclusive that only a penalty was intended. But employing the term liquidated damages does not afford an inference that the parties intended to liquidate them.

LIQUOR. In a statute restricting the sale of liquors, should be understood to mean only spirituous or intoxicating liquor. State *v.* Townley, 18 *N. J. L.* 311, 321.

"Liquors" commonly includes all that are spirituous, vinous, or inferior fermented, including malt. People *v.* Crilley, 20 *Barb.* 246.

Liquor dealer. Selling an occasional drink out of a bottle is not carrying on the business of a retail liquor dealer. United States *v.* Jackson, 1 *Hugh.* 531.

LIS. A controversy; a dispute; particularly, a legal controversy; an action or proceeding in law.

Lis mota. A controversy begun; a dispute arisen. This refers to the origin of a controversy, before judicial proceedings are taken: and the term is used to express the distinction between declarations made *ante litem motam* and *post litem motam*, which is important in settling the admissibility of such declarations as evidence in matters of pedigree.

Lis pendens. A suit pending; the actual pendency of a judicial proceeding. A term frequently used to denote the pendency of a proceeding, actual or constructive notice of which will affect rights of persons not parties to the proceeding in the property which is the subject-matter of, or is affected by, the proceeding. In equity practice, filing the bill and serving a subpœna generally created a *lis pendens*. Statutes in many of the United States require the filing of a notice of the *lis pendens* to be effectual, as such, where real property is intended to be affected by the suit.

Inasmuch as any suit or action involving title would, when decided, naturally affect the land according to its result, in whosesoever hands the land might be at the date of the decision, Stat. 2 & 3 Vict. ch. 11, § 7, enacted that no *lis pendens*, unless or until the same was registered, and duly re-registered, should bind a purchaser or mortgagee not having express notice thereof. By the Stat. 13 & 14 Vict. ch. 35, § 17, a special case to which appearances have been entered is made a *lis pendens*. Lastly, by Stat. 30 & 31 Vict. ch. 47, § 2, if a suit or action is not prosecuted in a *bona fide* manner, the court may order the registration of it as a *lis pendens* to be vacated, and that even without the consent of the person registering the same. *Brown.*

LIST. Is used, without deviation from its vernacular meaning of a catalogue, roll, or orderly statement of names, to denote various tabular statements used in law proceedings; as the argument list or trial list, which are names of the calendar or docket of causes ready to be heard or tried. In the law of taxation, the "list" is the official enumeration of taxable property; "listers" is the name

applied in some of the states to persons whose business it is to ascertain and prepare formal statements of the property subject to taxation; and property that has been made known by its owner to the proper officer, and enumerated in his table, is called "listed."

LITERA. The Latin word for which "letter" is the English equivalent. It is used, also the plural, *literæ*, in the Roman law and in the law Latin in the same way as we use "letter" and "letters," to signify various official documents; as *literæ cambii*, a bill of exchange; *literæ patentes*, letters-patent; *literæ procuratoriæ*, letters of attorney.

LITERAL. 1. In American and English law, generally means, according to language; following expression in words. Thus a literal construction of a document is one which adheres closely to its words, without making differences for probable purpose or extrinsic circumstances; a literal performance of a condition is one which complies exactly with its terms.

2. In the civil law, literal is used in the sense of documentary; written. A literal contract is one which has been reduced to writing. Literal evidence means documentary proof.

LITERARY. Pertaining to polite learning; connected with the study or use of books and writings.

Literary property. A distinction is to be taken between literary property (which is the natural, common-law right which a person has in the form of written expression to which he has, by labor and skill, reduced his thoughts), and copyright, which is a statutory monopoly, above and beyond natural property, conferred upon an author to encourage and reward a dedication of his literary property to the public. See COPYRIGHT.

"Literary property" may be described as the right which entitles an author and his assigns to all the use and profit of his composition, to which no independent right is, through any act or omission on his or their part, vested in another person. Keene *v.* Wheatley, 9 *Am. Law Reg.* 44.

There remains in the author, notwithstanding the copyright statute, a common-law title to his works before publication. Jones *v.* Thorne, 1 *N. Y. Leg. Obs.* 408.

The exclusive right of an author in a manuscript yet unpublished rests upon the same foundation as that which sustains every other species or description of property. Its sole foundation is "the right which every man has to the exclusive possession and control of the products of his own labor." This right is not confined to the paper on which it is written. It extends to the written composition; and he is entitled to the aid of a court of equity to enjoin a publication of it, though the material property has, with his consent, been vested in another. Woolsey *v.* Judd, 4 *Duer*, 379; 11 *How. Pr.* 49.

Literary purposes. The mere occupancy of a house by a professor of a college is not an occupancy for literary purposes, within the meaning of acts exempting property so used from taxation, although the same stands on land of the college. Kendrick *v.* Farquhar, 8 *Ohio*, 189.

In statutes exempting property devoted to literary purposes, "literary" has no fixed legal signification, but is to be taken in its ordinary and usual meaning. Literary institutions are those where the positive sciences are taught, or persons eminent for learning associate for purposes connected with their professions. This is the popular meaning of the term: it is not properly used as descriptive of a school for the instruction of youth. Common Council of Indianapolis *v.* McLean, 8 *Ind.* 328.

LITIGANT. A party to a lawsuit. May mean either a plaintiff or defendant; but is usually spoken of active parties, not of nominal ones.

LITIGARE, Lat.; **LITIGATE**, Eng. To prosecute or contest a judicial proceeding; to carry on or defend a suit. Litigated: involved in a suit; questioned or brought forward for determination in a judicial proceeding.

LITIGIOUS. 1. In a use peculiar to jurisprudence, litigious means subject to a lawsuit; open to judicial controversy; that which may be claimed and determined in the courts. Thus, in French law, litigious rights are rights which may be brought forward and contested in a suit, either pending or apprehended.

2. In a vernacular use, litigious is a word of opprobrium applied to persons who are too ready to sue; who are overfond of litigation; will prosecute groundless claims, or unjustly defend well-founded ones.

3. In ecclesiastical law, a church is said to be litigious when two rival presentations are offered to the bishop upon the same avoidance of the living.

LITIS CONTESTATIO. Contesta-

tion of suit; the interposing a contesting statement; coming to an issue. The phrase is used in a similar sense in both the canon and the civil law. In the ecclesiastical courts, the general answer of the defendant denying the charges against him formed the *contestatio litis;* in admiralty practice, also, it is the joining the general issue.

Litis dominium. A civil-law expression for ownership, control, or direction of a suit. By a fiction, the employment of an attorney or proctor in a suit was authorized, and he was supposed to become, by the appointment from his client, the *dominus litis.*

LITISPENDENCIA; LITISPENDENCE; LITISPENDENCY. Expressions equivalent, in substance, to the more common *lis pendens*, q. v.

LITTLETON. A judge of the English common pleas, in the reign of Edward IV., who was celebrated as the author of a treatise of tenures, upon which Chief Justice Coke has written an extensive comment, known as Coke upon Littleton.

Littleton, otherwise called Lyttleton, was born at Frankley, in Worcestershire, in the early part of the fifteenth century; studied at the Inner Temple; received from Sir William Trussel, one of his clients, a grant of the manor of Sheriff Hales, in Staffordshire, for his life, "for his good and notable counsel;" was called to the degree of the coif, July 2, 1453, and was also appointed steward of the court of marshalsea of the king's household; received a patent as king's sergeant on May 13, 1455; and on April 17, 1466, he was made a judge of the court of common pleas. He died at Frankley, Aug. 23, 1481, and was buried in Worcester Cathedral. *Foss' Judges of England.*

LIVE, *v.* Occasional acts of intercourse cannot constitute a violation of a statute punishing those who "live together" in adultery or fornication; unless the parties implicated dwell together, the punishment is not incurred. State *v.* Gartrell, 14 *Ind.* 280; Richardson *v.* State, 37 *Tex.* 346.

A charge that the jury may find the defendant guilty of "living in adultery," if a single act of adultery be proved, is bad. McLeland *v.* State, 25 *Ga.* 477.

A married man who visits and remains with his paramour one night in every week, for seven months, at her residence, a half mile from his own house, is guilty of the offence of living in adultery, within the meaning of such a statute of Alabama. Collins *v.* State, 14 *Ala.* 608.

A previous engagement or agreement between the parties, the consummation of which was an act of criminal intimacy, does not have the effect to constitute the one act "a living together in adultery or fornication." Smith *v.* State, 39 *Ala.* 554.

Living, as used in Mass. Gen. Stat. ch. 107, § 14, requiring a libel for divorce to be heard in the county where the adverse party is "still living," means "residing" or "having a domicile," and does not apply to another county where such party is merely serving a term in the state prison. Hanson *v.* Hanson, 111 *Mass.* 158.

A child *en ventre sa mère* at the time of its father's death will take under a devise to his children "living" at his death. Picot *v.* Armistead, 2 *Ired. Eq.* 226.

Lives, in a devise of "the farm on which F now lives," was held equivalent to "subsists" or "obtains a livelihood," rather than to "dwells" or "resides;" so that the devise was construed as operative to pass all of several tracts united in one, which were farmed by F, and as not restricted to the one tract on which his dwelling stood. Kendall *v.* Miller, 47 *How. Pr.* 446.

LIVE, *adj.* The term live animals, as used in act of Congress of May 16, 1866, 14 Stat. at L. 48, imposing a duty on live animals, includes singing-birds. Reiche *v.* Smythe, 7 *Blatchf.* 235.

Live fowl are not embraced within a prohibition upon the dealings in "horses, mules, and live-stock." The Matilda A. Lewis, 5 *Blatchf.* 520.

LIVERY. 1. The act or form whereby possession of lands was, in former English law, given or assumed. Livery, in respect to realty, corresponds to delivery, spoken of chattels; not that livery and delivery are synonymous: the latter word imports a corporal transfer of a kind of which land is not susceptible in the same degree as chattels; but the two terms signify the two modes of vesting possession appropriate to the two kinds of property, respectively.

2. A contract of hiring of work-beasts, particularly horses, to the use of the hirer. It is seldom used alone in this sense, but appears in the compound, livery stable.

3. A suit of clothes, cloak, gown, hat, &c., which a nobleman or gentleman gave to his servants or followers, with cognizance or without. Formerly, great men gave liveries to several who were

not of their family, to engage them in their quarrels for that year; afterwards, it was ordained by Stat. 1 Rich. II., and several other acts, that no man of any condition whatsoever should give any livery but to his domestics, his officers, or counsel learned in the law. But most of these statutes are repealed by 3 Car. I. ch. 4. *Jacob.*

4. A delivery of possession to those tenants who held of the king *in capite*, or knights service; as the king, by his prerogative, had *primer seisin* of all lands and tenements so holden of him. *Jacob.*

5. An old English writ, which lay on behalf of the ward in chivalry, on coming of age, to obtain possession of his lands. During the existence of the feudal tenures and customs, the male heir, when he arrived at the age of twenty-one years, or the heir female, at the age of sixteen, might sue out this writ of livery or *ouster le main;* that is, of delivery of their lands out of their guardian's hand; for in the feudal times the lord was entitled to the wardship of the heir, and was the guardian in chivalry. This wardship gave the guardian the custody of the body and lands of such heir till he or she attained the age of twenty-one if a male, or sixteen if a female. 2 *Inst.* 203. This guardianship was not subject to accounting, but might be terminated by the writ of livery. By Stat. 12 Car. II. ch. 24, such wardships are abrogated, and the writ of livery abolished.

6. The members of a company of the city of London, chosen out of the freemen.

7. We have noticed livery and unlivery used, in decisions on maritime law, for the act of lading and unlading a vessel.

Livery of seisin, is the expression appropriate when the purpose of transferring the possession — that is, of livery — is to consummate a conveyance of the title. In the common-law modes of conveyancing, this ceremony was of essential importance to the vesting of the land in the transferee. In American conveyancing practice it has become obsolete; delivery and registration of the deed completes the transfer of title.

Livery signifies a delivery of possession of lands, tenements, and hereditaments, unto one that hath a right to the same, being a ceremony in the common law used in the conveyance of lands, &c., where an estate of fee-simple, fee-tail, or other freehold passeth. And it is a testimonial of the willing departing of him who makes the livery, from the thing whereof the livery is made; and of willing acceptance of the other party receiving the livery; first invented that the common people might have knowledge of the passing or alteration of estates from man to man. Conveyance by feoffment is by no means perfected by the mere words of the deed; the ceremony of livery of seisin is very material to be performed, for without this the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feodal investiture, or delivery of corporeal possession of the land or tenement, which was held absolutely necessary to complete the donation. This investiture was, probably, at first intended to demonstrate, in conquered countries, the actual possession of the lord; and that he did not grant a bare litigious right, which the soldier was ill-qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of the by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate, and that such as claim title by other means might know against whom to bring their actions. In all well-governed nations some notoriety of this kind has ever been held requisite in order to acquire and ascertain the property of lands. But the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed, by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. With our Saxon ancestors the delivery of a turf was a necessary solemnity to establish the conveyance of lands. And to this day the conveyance of our copyhold estates is usually made from the seller to the lord or his steward, by delivery of a rod or verge, and then from the lord to the purchaser, by delivery of the same, in the presence of a jury of tenants.

Conveyances in writing were the last and most refined improvement; the mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, being liable to be forgotten and misrepresented, and found frequently incapable of proof. Written deeds were introduced in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet for

a very long series of years these were never made use of but in company with the more ancient and notorious method of transfer by delivery of corporeal possession.

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold, in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made, for they are not objects of the senses; and in leases for years, or other chattel interests, it is not necessary, the solemnity being appropriated to the conveyance of a freehold. (*Bract.* lib. 2, ch. 18; *Litt.* § 66; 2 *Bl. Com.* 313.) *Jacob.*

The expression livery of seisin simply means delivery of the land, *traditio*. It is of two kinds, being either in deed or in law. Livery in deed, *i.e.* in fact or act, was performed by delivery of part of the actual thing in lieu and as a symbol of the whole, — *e.g.*, by delivery of the ring of a door, or of a branch of a tree, or a turf of the ground, — accompanied with these or the like words spoken by the feoffor: "Here I deliver you seisin of this house (or land), in the name of the tenements contained in this deed, and according to the form and effect thereof." And thereupon the feoffee entered upon or took possession of the house or land. A separate livery was wanted for lands in several counties. Livery in deed could only be made to the feoffee personally.

Livery in law, *i.e.* constructive or implied delivery, was performed off the land, but in sight of it, the feoffor saying these or the like words: "I give you yonder land, enter and take possession;" and if the feoffee thereupon, or at any time thereafter during the life of the feoffor, entered upon the land, the livery was good, but otherwise it was void. One such livery sufficed for various counties. Livery in law might be made either to the feoffee personally, or to his lawfully constituted attorney. *Brown.*

Livery-stable keeper. One whose business it is to keep horses for hire, or to let, or to keep, feed, or board, horses for others. Act of July 13, 1866, § 9, 14 *Stat. at L.* 116.

LLOYD'S. An association in the city of London, the members of which underwrite each other's policies.

In the times of William the Third and Queen Anne, when coffee-houses in London were the fashionable places of resort, Lloyd's coffee-house, at the corner of Abchurch Lane, Lombard Street, became the wonted resort of seafaring men, and those that did business with them. There, and subsequently in Pope's Head Alley, and ultimately on the west side of the old Royal Exchange, to which place the coffee-house was successively removed, the underwriters of London congregated, having formed at this centre an association among themselves, and with it a system of agency radiating everywhere.

Lloyd's underwriters now meet and carry on their business in subscription rooms over the Royal Exchange, still called Lloyd's. The affairs of the subscribers to these rooms are managed by a committee, chosen from their own number, called Lloyd's committee, and presided over by a chairman. Agents (generally called Lloyd's agents) are appointed by the committee in all the principal ports of the world, whose business it is to forward accounts of all departures from and arrivals at their ports, as well as of losses and other casualties; and, in general, all such information as may be supposed to be of importance in guiding the judgment of the underwriters. These written accounts, which arrive daily, and almost hourly, from some part or other of the world, are posted up as fast as they come in, and are called Lloyd's Written Lists. These written lists are copied into three books, called Lloyd's Book, and are subsequently printed and filed, and copies are distributed to subscribers. See *Arn. Mar. Ins.* (4th ed.) 135.

Lloyd's bonds. The name of a class of evidences of debt, used in England; being acknowledgments, by a borrowing company made under its seal, of a debt incurred and actually due by the company to a contractor or other person for work done, goods supplied, or otherwise, as the case may be, with a covenant for payment of the principal and interest at a future time. These are valid securities, if issued *bona fide*, and within the company's powers of borrowing; but, when found to be a mere device for evading provisions restricting the corporate power to borrow, they have been disallowed.

LOAD-LINE. This word indicates the depth to which a ship is loaded so as to sink in salt-water. Section 6 of the merchant shipping act of 1875 (38 & 39 Vict. ch. 88) prescribes that every owner of a British ship, before entering his ship outwards from any port in the United Kingdom, shall mark, in white or yellow on a dark ground, a circular disk, twelve inches in diameter, with a horizontal line eighteen

inches in length, drawn through its centre, and the centre of this disk is to indicate the maximum load-line in salt-water to which the owner intends to load the ship for that voyage. *Mozley & W.*

LOAN. When spoken of chattels, is a bailment without reward, either for use and return *in specie*, or for consumption and return in kind. When spoken of money, return of the *res* is never implied; nor is a reward for use excluded. A loan of money implies that the borrower may expend it, being bound only to return an equivalent sum; and, unless the contrary is agreed, that he will pay interest.

Loan society; loan-fund society. A kind of club or incorporated society, of comparatively recent introduction, whose associate purpose is the raising of a fund by the contributions of members who have money to spare, which may be placed in the hands of members desiring the use of money, upon interest; which interest becomes, in due time, the basis of dividends to the members. A general method has been for the society to collect contributions and dues from members, until a sufficient sum is in the treasury, and then to put up the loan to the highest bidder; whoever will give the best interest, other terms being favorable to the society, receives the loan. As soon as further contributions suffice, another loan is made, and so on. It is noticeable that although "loan" is used in the corporate name and in the course of dealing, the contract of the borrowing member has been sustained, in the courts, against the objection that the rate of interest promised was above that allowed by the usury laws, upon the ground that the transaction is not a loan, but an appropriation of partnership funds.

LOCAL. Pertaining to place; belonging or confined to a particular place or a limited region.

The word is used without material departure from the vernacular meaning, in several technical phrases which are of importance.

Local act, law, or statute. 1. Statutes are distinguished as general or local, according to whether they are intended to operate throughout the entire jurisdiction, or only within a single city, county, or other division or place. A law which applies only to a limited part of the state, and the inhabitants of that part, is local. Local acts, as general ones, may be either public or private; yet public is sometimes used, though not, happily, as the antithesis of local. The division is of importance, (1) because under some legislatures a division is made between public or general laws, and local ones, in printing the acts of a session; and (2) because in several of the states the constitutions impose restrictions on the enactment of local laws; as, for instance, that no private or local bill shall embrace more than one subject, and that shall be expressed in its title.

The expression "local acts of parliament" embraces acts relating to a parish, city, county, or other locality. The majority of such acts, though public in their character, are passed as private bills, and are accordingly placed, with rare exceptions, among the local and personal acts. If, however, an act relating to a particular locality is passed as a public bill, it will, in general, be printed among the public general acts. The expressions "local bill" and "local act" are obviously elastic. In general, they are applied to local measures of a public character, as the establishment of a market, pier, or harbor. Bills relating to private estates are generally called estate bills, and, when passed into law, are included under the private acts. *Brown.*

The expression "local and personal acts" is applied to the second category of acts of parliament, as classified for publication, comprising generally acts which have been passed as private bills, except that they receive the royal assent in the form of public acts. These acts, when passed, are to be judicially noticed as public acts. Sometimes, however, acts of parliament which have been passed as private bills, are, if deemed specially important, printed amongst the "public general acts." On the other hand, there has grown up of late years a practice of printing among the "local and personal acts" certain local acts, which have been passed as public bills. Such acts have received the name of "public local acts."

The subjects of the local and personal acts have, in the sessional papers of the house of lords, been classified as follows:

1. Bridges and ferries. 2. Canals, rivers, navigation, tunnels. 3. Charitable foundations and institutions. 4. County affairs. 5. Drainages and embankments. 6. Ecclesiastical affairs. 7. Estates. 8. Fisheries. 9. Gaslight companies. 10. Harbors, docks, &c. 11. Town improvements. 12. Enclos-

ures and allotments. 13. Markets and fairs. 14. Parish affairs. 15. Personal affairs. 16. Railways. 17. Small debts courts and courts of conscience. 18. Tithes. 19. Trading and other companies. 20. Turnpike and other roads. 21. Waterworks.

Acts, however, upon the above subjects are not at all exclusively to be found among the "local and personal acts." *Mozley & W.*

Legislation, to be local, within the meaning of the New York constitution, must apply to and operate exclusively upon a portion of the territory of the state, and upon the people living therein. A law is not local that operates upon a subject in which the people at large are interested. Healey *v.* Dudley, 5 *Lans.* 115.

A law relating to the city of New York is not to be regarded as a local statute, within the provision of the constitution requiring the objects of local statutes to be expressed in the title, if it in any manner affects any part of the state outside the limits of the city, as is the case with the city tax levy bills. People *v.* Stephens, 2 *Abb. Pr.* N. S. 348.

An act enabling a particular foreign corporation to sue and be sued within the state, is not a private or local bill. Fall Brook Coal Co. *v.* Lynch, 47 *How. Pr.* 520.

2. In decisions of United States courts, and in discussions involving the relative authority of state and national laws, such expressions as "the local law," "the local statute," are sometimes used for want of a better, or to avoid the repetition of "the law of the state," "the state statute," to signify not a law which operates in a portion of the state in distinction from one which rules the whole, but a law enacted by or depending on state authority, as opposed to any law on the same subject of another state, or of congress, or the general commercial law.

Local action, or venue. Actions are divided into local and transitory. Various statements of the distinction are observable in the text-books; the true idea seems to be, that actions which are required to be tried in a particular county, by reason that the subject-matter in controversy is in some way located in or connected with the locality, are local; while those the venue for which depends on the residence of parties are transitory. Actions for trespass to lands, or of ejectment, which are naturally required to be tried where the lands lie; actions against officers for official acts, which must be brought in their locality of office; actions on real covenants; and actions of replevin, — are examples of local actions. Actions on ordinary contracts, or for injuries to persons, are transitory.

The expression "transitory actions," in statutes requiring transitory actions to be brought in the county where one of the parties resides, should be construed as referring to the common-law division between local and transitory actions, and not to a division introduced by any English statute. Pearce *v.* Atwood, 13 *Mass.* 324, 354; Eames *v.* Carlisle, 3 *N. H.* 130.

The test whether an action is transitory or local is not the subject causing the injury, but the object suffering it. Injuries to persons, or to personal property, are therefore transitory, not local. Mason *v.* Warner, 31 *Mo.* 508.

If an action is founded on privity of estate, it is local; if on privity of contract, it is transitory. Henwood *v.* Cheeseman, 3 *Serg. & R.* 500.

Local allegiance. That measure of obedience which is due from a subject of one government to another sovereignty, founded on the fact that he is temporarily domiciled or localized within the jurisdiction of the latter. Aliens, while residing within the United States, owe a local allegiance, by which they are amenable to the municipal laws.

Local allegiance is that which is due from an alien or stranger born, for so long time as he continues within the sovereign's dominions and protection; and it ceases the instant such stranger transfers himself from this kingdom to another. But if an alien seeking the protection of the crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to our enemies for purposes of hostility, he may be dealt with as a traitor. *Wharton.*

Local chattel. A thing is local that is fixed to the freehold. *Kitch.* 180.

Local courts. Courts whose jurisdiction is confined to a certain district or municipality. In discussions involving the relative authority of the state and national courts and governments, the expression often signifies the courts of the state, in opposition to the United States courts.

Local government. Signifies power conferred upon the people of a particular locality, district, or municipality, to govern their own affairs. The expression has more definite meaning in England, where important statutes exist,

known as the local government acts, regulating the administration of local affairs by the people concerned, than it has yet acquired in America.

Local government board. A department of the government, established by Stat. 34 & 35 Vict. ch. 70, passed in 1871. To this department were transferred all the powers and duties of the poor-law board, which then ceased to exist, as well as certain powers that had been exercised by the home secretary, or in the privy council, under certain acts of parliament specified in the schedule to the above act. 3 *Steph. Com.* 49, 176.

Local improvement, means an improvement made in a particular locality, by which the real property adjoining or near such locality is specifically benefited. Rogers *v.* City of St. Paul, 22 *Minn.* 494.

Local marine board. The title of a commission established at each of certain English seaports for carrying into effect the provisions of the merchant shipping acts. Such a board consists of the mayor or provost, and the stipendiary magistrate; four members appointed by the board of trade from persons residing or having business at the port, or within seven miles thereof; and six members elected by the owners of foreign-going ships and of home-trade passenger ships registered at that port. *Stat.* 17 *&* 18 *Vict.* ch. 104, § 110.

Local option. Laws which have been passed in some of the United States, giving to each county or municipality the power to regulate or prohibit the sale of intoxicating liquors, have been styled, in the parlance of temperance legislation, local-option laws.

Local purpose. An appropriation of money to pay a debt of the state is not within a constitutional restriction upon appropriations for local or private purposes, although the debt was incurred for improvements of a local character or use. People *v.* Densmore, 1 *Thomp. & C.* 280.

LOCALITY. In Scotch law. 1. The adjustment of the increase of a minister's stipend among the several heritors liable to pay it.

2. Lands "secured to a widow by her contract in life-rent;" *i. e.*, secured to her by her marriage settlement for the period of her life. *Bell.*

LOCATE. 1. To inquire for and ascertain the place in which some subject-matter already belongs, as to locate the calls in a deed or survey.

2. To determine the place to which some subject-matter shall be assigned; to fix or establish the situation of any thing, as to locate a railroad.

The Mass. Stat. 1874, ch. 29, § 11, regulating proceedings of a street-railway corporation to extend the location of its tracks, whenever it can be done without entering upon those of another corporation, includes the location of additional tracks not connected with its existing tracks except by the tracks of another corporation South Boston R. R. Co. *v.* Middlesex R. R. Co., 121 *Mass.* 485.

Locate anew, as used in the Mass. highway laws, is equivalent to the words "view and relocate," as ordinarily used in a petition to the county commissioners. Hyde Park *v.* Commissioners of Norfolk, 117 *Mass.* 416.

3. In reference to structures, locate has been held in some decisions, such as those cited below, to involve construction. But, *query*, whether this is not straining the proper meaning of the word; a truer reason for holding that a railroad is not located by having its line marked out, seems to be that to choose a line is not locating, unless the choice is adhered to; a selection of a route is not location, if another route is afterwards adopted; — not because construction is involved in the term, but because permanence is.

Locate, as used in the act relative to plank-road companies, Laws of 1851, 193, ch. 109, § 2, is synonymous with erect, or put up; staking out ground, digging a cellar, and getting together materials for building, is not locating the building. Moule *v.* Macedon & Bristol Plank Road Co., 6 *How. Pr.* 37.

An engagement of a railroad company to "locate" a depot upon a certain tract of land, within six months, is complied with by staking off ground for the site of the depot, building a platform, and beginning to use the spot for depot purposes. Completing the erection of the building is not necessary. Waldron *v.* Marcier, 82 *Ill.* 550.

A subscription to the stock of a railroad company provided that it should be void, "unless said company locate its road" on a certain route. A second subscription was made, on condition that said road "shall be located" on said route. Subsequently, the directors voted that the road "be and the same is hereby located" on said route; but the road was constructed on another route, which was not nearly so favorable to the subscriber. It was held that the word locate meant to construct the road, and that the subscription was avoided by the abandonment of the first route. N. & N. W. R. R. Co. *v.* Jones, 2 *Coldw.* 574.

LOCATIO. Letting for hire. The term is used in both the civil and common law to denote that species of bailment by which a thing is let for compensation.

Locatio custodiæ. Letting to keep. A bailment of goods to be kept carefully for compensation.

Locatio mercium vehendarum. Letting of goods to be carried. A bailment of goods to be carried for compensation.

Locatio operis. Letting of work. A bailment of a thing for the purpose of having some work and labor or care bestowed upon it for compensation.

Locatio rei. Letting of a thing to hire. A bailment of a thing, to be used by the bailee for compensation to the bailor.

LOCATION. 1. Place; situation. 2. The act of determining or fixing the place, route, or region to which some subject shall be assigned.

3. The Anglicized form of the civil-law term *locatio* (q. v.); not very common, except in Scotch law.

LOCATIVE. In the language of conveyancing, and particularly of titles under the public-land laws, calls in a grant, patent, deed, survey, &c., which make exact or specific reference to physical objects by which the boundaries of the land intended may be exactly ascertained, are termed locative calls.

LOCATOR. In the civil and Scotch laws, a letter; one who lets; he who, being the owner of a thing, lets it out to another for hire or compensation. *Story Bailm.* § 369; 1 *Stair Inst.* b. 1, tit. 15, §§ 1, 5, 6.

In the land laws, one who locates land, or intends or is entitled to locate.

A claim as "locator" signifies that portion of the land located, agreed to be given by the owner of the warrant, as compensation to the locator of it for his services. Hollingsworth *v.* Barbour, 4 *Pet.* 466.

LOCUM TENENS. Holding the place. A deputy or representative.

LOCUS. Place; the place. This word is found in many Latin phrases; among which are *lex loci*, *in loco parentis* (q. v.), and the following:

Locus delicti. The place of the fault; the place where an offence was committed.

Locus in quo. The place in which; the place where any thing is alleged in pleading to have been done; particularly, the place where a trespass is alleged to have been committed.

Locus pœnitentiæ. Place for repentance; space for reconsideration and withdrawal. An opportunity of withdrawing from a proposed contract, before it becomes binding; or of abandoning a criminal intention, before the crime is actually committed.

Locus rei sitæ. Place of situation of a thing. The place where real property is situated is the proper forum of proceedings concerning it; and the local law has a peculiar application to such property. See LEX REI SITÆ.

Locus sigilli. The place of the seal. The initial letters of these words, L. S., are frequently used in copies of sealed instruments, to mark the place of a seal in the original; and, when so used, are generally surrounded by a scroll. In some of the United States, such a scroll upon an original instrument has all the efficacy of a proper seal. See SEAL.

LODE MAN; or LOADSMAN. The pilot conducts the ship up the river or into port; but the loadsman is he that undertakes to bring a ship through the haven, after being brought thither by the pilot, to the quay or place of discharge. (*Roughton*, fol. 27.) *Jacob.*

Lode manage. The hire of a pilot for conducting a vessel from one place to another. *Cowel.*

LOGS. In some cases, the word logs might be held to include masts or spars. But where a contract was made to sell certain logs, the contract being based on the scale of B, and his scale bill being incorporated in the contract, it was held that a mast included in such scale-bill did not pass. Haynes *v.* Hayward, 40 *Me.* 145.

LOG-BOOK; or LOG. The maritime name of a journal usually kept by the officers of a vessel, in which all important matters occurring during the voyage, the course of winds, the character of weather, the distance made from day to day, the behavior of the crew, their offences, illnesses, deaths, &c., are recorded.

By the U. S. Rev. Stat. § 4290, every vessel making voyages from a port in the United States to a foreign port, or being of the burden of seventy-five tons or upwards, between Atlantic and Pacific ports, shall have an official log-book. And in this book must be entered various matters occurring during a voyage, such as offences by either of the crew, punishments inflicted, any case of illness,

injury, or death, of birth or marriage, of discharge of seaman, &c. The record thus made becomes evidence in various suits involving rights of seamen.

An official log-book is required by law to be kept in every ship (except those employed exclusively in the coasting trade of the United Kingdom), in a form sanctioned by the board of trade, either in connection with, or distinct from, the ordinary log-books. Every entry in every official log must be made as soon as possible after the occurrence to which it relates. Among the occurrences which must be entered are offences committed by any of the crew, and punishments inflicted for the same; also, every case of illness or injury happening to any member of the crew; every death happening on board, and the cause thereof; every birth happening on board; every marriage taking place on board, with the names and ages of the parties. *Mozley & W.*

That part of the log-book relating to transactions while the ship is in harbor is termed the *harbor-log*; and that part relating to what happens while the ship is at sea, is termed the *sea-log*. *Young's Naut. Dict.*

LONG PARLIAMENT. The name generally given to the parliament which met in November, 1640, under Charles I., and was dissolved by Cromwell on the 10th of April, 1653. The name long parliament is, however, also given to the parliament which met in 1661, after the restoration of the monarchy, and was dissolved on the 30th of December, 1678. This latter parliament is sometimes called, by way of distinction, the long parliament of Charles II. *Mozley & W.*

What is known as the long parliament assembled in 1640–41, and was never formally dissolved. It enacted the triennial bill, providing that parliament, if not actually then sitting, should be *ipso facto* dissolved at the expiration of three years from the first day of its session, and the chancellor was to issue new writs within three years from the dissolution; with additional provisions for the case of his omission to do so. This triennial act was repealed upon the restoration of Charles II., and is to be distinguished from the triennial act so called *par eminence* (6 W. & M. ch. 2).

The other legislative acts of the long parliament were the following:

They annulled the judgment against Hampden in the case of ship-money, and declared ship-money and also the taxes of Charles I., on foreign merchandise, illegal.

They abolished the court of star chamber; also, the court of high commission; also, the court of the president and council of the north; also, the court of the president and council of Wales; also, the courts of the duchy of Lancaster and of the county palatine of Chester.

They declared it illegal to impress his majesty's subjects, or to compel them to go out of the country to serve in foreign wars.

They passed an act declaring that they could not be dissolved without their own consent.

They abolished episcopacy and established presbyterianism.

They deprived the king of the control of the militia and forces, and assumed that control to themselves; and eventually they laid nineteen propositions before the king, of which the principal were the following: That privy councillors and officers of state should be approved in parliament; that the education and marriage of the king's children should be under the control of parliament; that the militia and forces and all fortresses and magazines should be given up to the nominees of parliament; that all judges should hold office during good behavior; and that all popish lords should be deprived of their votes. *Brown.*

LONG VACATION. In the parlance of the English courts, signifies the recess from the 10th of August to the 24th of October at common law, and to the 28th October in chancery, in every year. *Wharton.*

LOOSE. Cattle which are under care of a servant, but without halters, cannot be said to be "turned loose." Sherborn *v.* Wells, 3 *B. & S.* 784.

The phrase "at large without a keeper," in Me. Rev. Stat. ch. 23, § 2, means without the charge of any one having the right of control. Such charge does not necessarily imply physical power of control, but includes the human voice, gestures, and similar methods of guiding animals, regard being had to their nature, age, and dispositions. Jennings *v.* Wayne, 63 *Me.* 468. Compare AT LARGE.

LORD. In English law. 1. A title of honor or nobility, belonging in strictness to the degree of baron, but applied also to the whole peerage; as in the expression the house of lords. 1 *Bl. Com.* 396–400.

2. A title of office; as lord mayor, lord commissioner, &c.

3. A feudal superior or proprietor; one of whom a fee or estate is held. The fundamental principle of the feudal tenure was that all lands were originally granted out by the sovereign, and are therefore holden either mediately or immediately from the crown. The grantor was called the proprietor or lord, being he who retained the dominion or ultimate property of the feod or fee.

Lord is derived from Saxon words signifying a loaf of bread, and to give, because such great men kept extraordinary houses, and fed all the poor; for which reason they were called givers of bread, a thing now

much out of date, great men being fond of retaining the title, but few regarding the practice for which it was first given; monarch; governor; master. *Encyc. Lond.* Compare LADY.

Lord in gross. He who is lord not by reason of any manor; as the king in respect of his crown, &c. Very lord is he who is immediate lord to his tenant; and very tenant, he who holds immediately of that lord. So that, where there is lord paramount, lord mesne, and tenant, the lord paramount is not very lord to the tenant. *Wharton.*

Lord-lieutenant. 1. The viceroy of the crown in Ireland.

2. The principal officer of a county, originally appointed for the purpose of mustering the inhabitants for the defence of the country. Lords-lieutenant of counties are supposed to have been introduced about the reign of Henry VIII., for they are mentioned as known officers in the 4 & 5 Ph. & M. ch. 3, though they had not been long in use; for Camden speaks of them in the time of Queen Elizabeth as extraordinary magistrates, constituted only in times of difficulty and danger. They are generally of the principal nobility, and of the best interest in the county; they are to form the militia in case of a rebellion, &c., and march at the head of them, as the crown shall direct. They have the power of commissioning colonels, majors, captains, and subaltern officers; also to present to the sovereign the names of deputy-lieutenants, who are to be selected from the best gentry in the county, and act in the absence of the lord-lieutenant.

Lord mayor. The chief officer of the corporation of the city of London is so called. The origin of the appellation of lord, which the mayor of London enjoys, is attributed to the fourth charter of Edward III., which conferred on that officer the honor of having maces, the same as royal, carried before him by the sergeants. *Pull. Laws & Cust. Lond.*

Lord mayor's court. This is a court of record, of law and equity, and is the chief court of justice within the corporation of London. Its legal style is "the court of our lady the queen, holden before the lord mayor and aldermen in the chamber of the guildhall of the city of London." In legal consideration, and in conformity with the style of the court, the lord mayor and aldermen are supposed to preside; but the recorder is in fact the acting judge. All persons, as well freemen as non-freemen, not being under any general incapacity which would disable them from suing in the superior courts at Westminster, may sue in this court. As a court of common law, it has cognizance of all personal and mixed actions arising within the city and liberties, without regard to the amount of the debt or damages sought to be recovered; and, if the gist of the action arise within the city, the residence of the plaintiff or defendant therein is immaterial. *Emmerson, City Courts; Pull. Laws & Cust. Lond.; Brand. For. Attach.*

Lord ordinary, is the judge of the court of session in Scotland, who officiates for the time being as the judge of first instance. *Darling Pract. Ct. of Sess.*

Lord treasurer, or **lord high treasurer.** The style of an officer formerly existing in England, who had the charge of the royal revenues and customs duties, and of leasing the crown lands. His functions are now vested in the lords commissioners of the treasury. *Mozley & W.*

Lords commissioners. When a high public office in the state, formerly executed by an individual, is put into commission, the persons charged with the commission are called lords commissioners, or sometimes lords or commissioners simply. Thus we have, in lieu of the lord treasurer and lord high admiral of former times, the lords commissioners of the treasury, and the lords commissioners of the admiralty; and whenever the Great Seal is put into commission, the persons charged with it are called commissioners or lords commissioners of the Great Seal. *Mozley & W.*

Lords justices. 1. Persons appointed to administer government temporarily during an emergency. (2 *Steph. Com.* 477; 3 *Id.* 331.)

2. Two judges appointed, under Stat. 14 & 15 Vict. ch. 83, passed in 1851, to assist the lord chancellor in hearing appeals from the master of the rolls and the vice-chancellors. They also heard appeals from the chief judge in bankruptcy, and had original jurisdiction in lunacy. The lords justices sometimes sat separately from the lord chancellor, and sometimes with him. In the latter case, the court was called the full court of appeal. (3 *Steph. Com.* 331; *Haynes Eq.*; *Hunt Eq.*)

By section 4 of the judicature act of 1875, the existing lords justices of appeal are to be among the judges of the new court of appeal under that act. There is one lord justice of appeal for Ireland, with similar powers. *Mozley & W.*

Lords spiritual; lords temporal. The lords spiritual compose one of the constituent parts of parliament, and consist of two archbishops and twenty-four bishops. By the act of union with Ireland (39 & 40 Geo. III. ch. 67), four Irish lords spiritual, taken from the whole body by rotation of sessions, were added, who ranked next after the spiritual lords of Great Britain; but under the Stat. 32 & 33 Vict. ch. 42, these

Irish lords spiritual have ceased. The lords temporal consist of all the peers of the realm, by whatever title of nobility distinguished, and form another constituent part of parliament. *Mozley & W.*

LORD'S DAY. A designation of the first day of the week in its aspect of a day of rest and religious observance, selected with a view to avoid the secular tone and heathen origin of "Sunday," on the one hand, and any adoption of Jewish observance which might be implied from "Sabbath," on the other; and to denote the distinctively Christian origin of the selection. It is more accurate in its implications, and better corresponds with the legal character and sanctions of the day, than either "Sunday" or "Sabbath," but is less convenient, because it cannot well be compounded; it cannot be employed in such expressions as Sunday contracts, Sabbath breaking.

LOSS. Is used somewhat technically in the law of insurance, and more particularly in marine insurance, to mean the injury or destruction of the thing insured by one of the contemplated perils; the occurrence of the casualty insured against, and consequent damage.

Losses, in this sense, are *total* or *partial*, according as the subject insured is considered to be wholly destroyed, or only injured. They are called *actual* or *constructive*, according as there is a real destruction, or only such injury as entitles the assured to abandon the remnant to the insurer, and claim the full value.

LOST. A deed voluntarily destroyed by the grantee is not lost, within the rule which would allow him to prove the contents by secondary evidence. Thompson *v.* Thompson, 9 *Ind.* 323.

An allegation that a note has been lost is fully supported by proof that it has been destroyed by fire. McGregory *v.* McGregory, 107 *Mass.* 543.

LOT. 1. A share; one of several parcels into which property is divided. Used particularly of land.

Lot, when used of land, does not imply any thing as to the size of the parcel denoted. Edwards *v.* Derrickson, 28 *N. J. L.* 39.

2. A device for determining the distribution of property or assignment of risks or duties, &c., by appeal to chance.

3. A contribution or share of a tribute or impost; as in the phrase, scot and lot, *q. v.*

LOTTERY. A scheme for the distribution of prizes by chance, among buyers of the chances.

Such schemes were formerly very common, were authorized by law, and were even set on foot, in many instances, by the authorities, for raising revenue for public or benevolent purposes. In view of the ill effects of the element of gambling involved, they are now very generally made unlawful.

A lottery is a distribution of prizes by chance or lot, where a valuable consideration is given for the chance of drawing a prize. United States *v.* Olney, 1 *Abb. U. S.* 275.

A lottery is a scheme for the distribution of prizes by chance. Randle *v.* State, 42 *Tex.* 580; Commonwealth *v.* Manderfield, 8 *Phil.* 457; 1 Leg. Gaz. Rep. 37; *Bouvier.*

Lottery, in an act prohibiting and punishing lotteries, must be understood in its general sense of a scheme for the distribution of prizes by chance. We must not confound the decision of certain questions by lot with a lottery. One, or two, or more persons may be obliged to do a certain thing, or go to a given place, upon a specified day, and they may legally decide by lot which of them shall do the said thing, or go to the said place. The members of a deliberate body may, by lot, determine their seats. A division of property under some circumstances may be made by lot, and yet not a lottery. Sacred history contains several instances where property has been parted and divided by lot: Psalms xxii. 18; Matthew xxvii. 35; Acts i. 26; Leviticus xvi. 8. The term as used in the criminal law refers to something in which there are supposed prizes and blanks. On the other hand, the disposal of any species of property, by any of the schemes or games of chance popularly regarded as innocent, comes within the terms of the law. The raffles which occur daily at the street corners, in bar-rooms, at fairs, and at other places, are as clearly violations of the criminal law as the most elaborate and carefully organized lotteries by which the ignorant and credulous are swindled out of their hard earnings. Commonwealth *v.* Manderfield, 8 *Phil.* 457.

Payment of prizes in money is not one of the essential ingredients of a lottery. Whenever the scheme of distribution is such that if the payment of the prizes were in money it would be a lottery, it will be equally so although the prizes are payable in lands or in chattels. Governors of Almshouse *v.* American Art Union, 7 *N. Y.* 228.

It does not appear from the authorities defining the term lottery, that, in order to constitute one, the lot must be actually cast or drawn by the managers of the

game, or that a personal participation of the party paying, such as drawing a number with his own hand, would so change the character of the scheme that it would not be a lottery. Fleming *v.* Bills, 3 *Oreg.* 286.

The game known as keno is not a lottery, within the meaning of the internal revenue laws. United States *v.* Hornibrook, 2 *Dill.* 229.

A raffle is not a lottery, in the sense of S. C. act of 1762. State *v.* Pinchback, 2 *Mill Const.* 128.

Where a wheel is revolved on a pivot with a fixed index, which, when the wheel stops, points to one of the figures on its face, corresponding with other figures on checks or paddles, which are sold to the players before each revolution of the wheel, the holder of the number so pointed out winning a greater sum than the price paid for it, and the others losing, this is a "device of like kind" with a lottery, within the Ala. Rev. Code, § 3616, prohibiting illegal lotteries. Chavannah *v.* State, 49 *Ala.* 396.

A scheme of an art union, although incorporated, which proposes to distribute among the shareholders, by lot, pictures or works of art, purchased with a fund raised by their subscriptions, is a lottery, within the prohibition of N. Y. Const. 1846. The legislature cannot authorize such an enterprise, and the managers are liable to the penalty imposed by 1 Rev. Stat. 664, § 22. Governors of Almshouse *v.* American Art Union, 7 *N. Y.* 228; 32 *How. Pr.* 341. Compare People *v.* American Art Union, 7 *N. Y.* 240; People *v.* Payne, 3 *Den.* 88.

A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved or prize lots forms a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a lottery, within the operation of a law imposing a tax on lotteries, for purposes of revenue. Various definitions of the term lottery collected. United States *v.* Olney, 1 *Abb. U. S.* 275.

If a tract of land is divided into lots of unequal value, and these are sold to a number of purchasers at a uniform price, and are distributed among those purchasers by drawing, or lot, and a deed is given to each purchaser for the lot drawn by him, this transaction is a lottery. Wooden *v.* Shotwell, 23 *N. J. L.* 465; 24 *Id.* 789; Seidenbender *v.* Charles, 4 *Serg. & R.* 151.

A ticket which purports to "entitle the holder to the prize drawn by its corresponding number," in a scheme called a "prize concert," the prizes to consist of "gifts," and a part of the tickets to represent blanks, is a lottery ticket, in the sense of Mass. Gen. Stat. ch. 167, § 6. Commonwealth *v.* Thacher, 97 *Mass.* 583.

A "gift sale" of books, according to a scheme by which the books are offered for sale at prices above their real value, and by which each purchaser of a book is entitled, in addition, to a gift or prize, to be ascertained after the purchase by a correspondence, unknown to the purchaser, between certain numbers indorsed on the books offered for sale, and the different gifts or prizes proposed, was held a lottery, within the meaning of New Hampshire statute against disposing of property, real or personal, by lottery. State *v.* Clarke, 33 *N. H.* 329.

A gift exhibition was conducted as follows: Each person at the door of the show got a ticket with a number upon it. At the close of the exhibition, one of the proprietors called at will any number, and the person holding the corresponding ticket presented himself, when, if the exhibitor liked his appearance, he presented him with one of the articles advertised as gifts. It was also one of the terms of the project, that, at the option of the proprietors, the distribution of presents should be dispensed with. Held, that, notwithstanding this control or reserve of power in the proprietors, the whole contrivance must be considered a lottery. State *v.* Shorts, 32 *N. J. L.* 398.

A ticket issued by the managers of a concert stated that the bearer was entitled "to admission to a grand concert, . . . and to whatever gift might be awarded to its number," to which was added the number of the ticket. Held, that the enterprise was a lottery, within 1 N. Y. Rev. Stat. 664. Negley *v.* Devlin, 12 *Abb. Pr.* N. S. 210.

In a prosecution for the alleged sale of a lottery ticket, it appeared the ticket was as follows: "Chicago Industrial College and Home Festival. This ticket is a receipt for $5, in payment for and delivery of a copy of a steel-plate engraving, and admission to our concerts and lectures, for which it is sold. By order of the officers. Thomas & Co., General Agents." Besides the ticket, a steel-plate engraving was delivered to the purchaser, and also a bill, entitled "Grand National Festival, to erect in the city of Chicago an Industrial College and Home for Unfortunate Females," in which it was proposed to give a series of musical receptions, and a course of lectures, at the close of which, and after the sale of 200,000 copies of steel-plate engravings, to distribute to the purchasers thereof, "in a just and legal manner," $200,000, in presents, amounting in number to 3,012 Held, this was "a scheme for the distribution of prizes by chance," and constituted a lottery, within the meaning of the statute. Thomas *v.* People, 59 *Ill.* 160.

Lottery-ticket dealer. Any person, association, firm, or corporation, who makes, sells, or offers to sell, lottery tickets, or fractional parts thereof, or any token, certificate, or device, representing, or intending to represent, a lottery ticket, or any fractional part thereof, or any

policy of numbers in any lottery, or who manages any lottery, or prepares schemes of lotteries, or superintends the drawing of any lottery. Act of July 13, 1866, § 9, 14 *Stat. at L.* 116.

Lottery is a kind of public game at hazard, in order to raise money for the service of the state. It was appointed by the authority of parliament, and managed by commissioners selected by the lords of the treasury. It consisted of several numbers of blanks and prizes, which were drawn out of wheels, one of which contained the numbers, and the other the corresponding blanks or prizes. The 6 Geo. IV. ch. 60, utterly abolished it. *Wharton.*

Lotteries have been frequently resorted to both by states and by individuals for the purpose of raising money, but they are proscribed by the morality and industry of England. They were declared a nuisance and prohibited by 10 & 11 Wm. III. ch. 17; and even foreign lotteries are forbidden by the 6 & 7 Wm. IV. ch. 66, to be advertised in England.

For an epitome of former English statutes authorizing and regulating lotteries, see *Jacob* or *Tomlins.*

LOUAGE. This is the contract of hiring and letting in French law, and may be either of things or of labor. The varieties of each are the following:

1. Letting of things, — *Bail à loyer,* being the letting of houses; *Bail à ferme,* being the letting of lands.

2. Letting of labor, — *Loyer,* being the letting of personal service; *Bail à cheptel,* being the letting of animals. *Brown.*

LOW-WATER MARK. That line, upon the shore of any tidal waters, to which the water recedes at the ebb of the tide. For most purposes, the line ordinarily marked is taken, disregarding extreme recessions, such as occur only occasionally and under concurrence of unusual causes.

In Pennsylvania, this term, used as the limit of a riparian owner's title, means ordinary low-water mark, unaffected by drought. Stover *v.* Jack, 60 *Pa. St.* 339.

A boundary of lands upon "low-water mark" should be construed as meaning the line to which the tide, at its ebb, usually recedes, and not as carrying title to the extremest line to which the water ever recedes. That place to which the tide might ebb under an extraordinary combination of influences, a few times during a generation, could not form such a known boundary as would enable the owners of flats to ascertain satisfactorily the extent to which he could build upon them. High and low water marks, when referred to as boundaries, in descriptions, should be ascertained by the same rule; viz., the place to which the water ordinarily ascends or recedes. Gerrish *v.* Proprietors of Union Wharf, 26 *Me.* 384.

LUCRATIVE. An office to which there is attached a compensation for services rendered is lucrative. State *v.* Kirk, 44 *Ind.* 401.

Offices are "lucrative" to which pay, supposed to be an adequate compensation, is affixed for the performance of the duties. The offices of county recorder and county commissioner are lucrative, within the meaning of a constitutional provision that two lucrative offices shall not be held by the same person at the same time. Hence a county recorder, by accepting the office of county commissioner, vacates that of recorder. Dailey *v.* State *ex rel.* Huffer, 8 *Blackf.* 329.

LUCRATIVE SUCCESSION. A term of Scotch law for a transfer of property from one person to another, being such as the grantee would in due time inherit from the grantor: this, if made without paying value, renders the grantee liable for the grantor's debts, previously contracted.

LUCRI CAUSA. For the sake of gain. A phrase descriptive of the intent or motive with which property is taken in cases of theft. Such an intent seems to have been essential to constitute theft a crime in the civil law. But the authorities have not always agreed as to whether such a motive must exist to render the taking of property larceny, at common law. See LARCENY.

LUNACY. Insanity; unsoundness of mind; particularly such as is acquired, not congenital. Lunatic: an insane person; and, more strictly, one who, having had reason, has lost it, as distinguished from one who never enjoyed reason.

The early common-law authorities made only a very general classification of persons of unsound mind, calling those lunatics who were born with natural powers of mind, but had incurred loss of them from subsequent causes. Etymologically, the word means moon-struck; and its use sprang from an idea that superinduced insanity was attributable to the baneful influence of the moon's rays; but long after that notion died out the word was retained. Moreover, because the phrase insane person is lengthy, and for want of any single noun to signify both classes of persons lacking reason, lunatic is not infrequently used in the comprehensive

sense of a person who either never had, or has lost, his reason. Thus, for a period between the most ancient and most modern writings on the subject, lunacy appears as a common legal designation of insanity. But the older and stricter use of the word is as the antithesis of idiot. See IDIOCY; INSANITY. And progress in medico-legal science, developing new classifications of mental disease, and introducing a new nomenclature, has deprived "lunacy" of much of its character as a technical term, and practically remitted it to the vernacular.

Lunacy is the common legal designation of insanity, or the state of being *non compos mentis*. The law takes notice of three degrees of lunacy: lunacy which exempteth in crime; lunacy which excuseth in contract; and lunacy which placeth the party and his property under the protection of the crown. *Brown.*

Lunatic is defined by Blackstone as a person who hath had understanding, but by disease, grief, or any other cause, has become *non compos mentis;* that is, of mind so unsound as to be incapable of managing himself or his affairs. But by 16 & 17 Vict. ch. 70, § 2, passed in 1853, it is enacted that in that statute the word lunatic shall be construed to mean any person found by inquisition idiot, lunatic, or of unsound mind, and incapable of managing himself or his affairs. *Mozley & W.*

A lunatic is an insane person; one who has lost the use of his reason; and, strictly, one who has lucid intervals, sometimes enjoying his senses and sometimes not. *Burrill;* Matter of Barker, 2 *Johns. Ch.* 232; Beverley's Case, 4 *Coke,* 124 *b.*

Lunacy includes both the forms of mental alienation known respectively as mania and dementia. Matter of Vanauken, 10 *N. J. Eq.* 186.

Lunatic, as used in provisions of N. Y. Rev. Stat., relative to annulling marriage, extends to every person of unsound mind other than idiots. 2 *Rev. Stat.* 143, § 29.

Lunacy acts. British statutes regulating the issuing and execution of commissions for ascertaining the insanity of some individual. See DE LUNATICO INQUIRENDO.

Lunacy, commission of. An authority in writing authorizing an inquiry into the mental condition of some person alleged to be of unsound mind.

Lupinum caput gerere. To bear a wolf's head. An ancient phrase, signifying outlawry; in allusion to a reward offered for bringing in an outlaw's head, like a wolf's.

LUSHBOROW. A name of a species of base coin, made abroad, in likeness of English money, and brought into England during the reign of Edward III.

Other forms of the word are lusburgh, lushburgh, and luxenburgh.

LYEF-YELD; LEF-SILVER. A small fine or pecuniary composition, paid by a customary tenant to a lord, for leave to plough or sow. *Tomlins.*

LYING. See LIE.

Lying at a wharf, means floating in the space of water, called the dock, appropriated to the wharf. Dewees *v.* Adger, 2 *McCord,* 105.

Lying in grant. A phrase applied to incorporeal rights, incapable of manual tradition, and which must, even when livery of seisin (*q. v.*) was required to constitute a conveyance of lands, pass by mere delivery of a deed.

Lying in wait. Being concealed until a victim of a proposed crime shall arrive. It is mentioned in some of the statutes dividing murder into degrees as one of the evidences of deliberate intention to kill, which marks murder in the first degree.

Lying on. When these words are used in any instrument in the description of the metes and bounds of land, they import in law, as well as in fact, that it extends to and borders upon the boundary designated in the description. Roe *v.* Doe, 4 *Houst.* 328.

Lying up. On the meaning of these words in an insurance policy, see Dows *v.* Howard Ins. Co., 5 *Robt.* 473.

M.

M. Occurs in some legal abbreviations. See Table prefixed to Vol. I. It is also used as signifying one thousand.

United States treasury notes issued under the act of Congress of Oct. 12, 1838, bore the letter M, signifying that they bore interest at the rate of one mill per centum, and not one per centum interest. United States *v.* Hardyman, 13 *Pet.* 176.

Persons convicted of manslaughter, in

England, were formerly marked with the letter M on the brawn of the thumb. *Bouvier; Cowel.*

MACE. A large staff, made of the precious metals, and highly ornamented. It is an emblem of authority, and is carried before certain public functionaries by a "mace-bearer." *Wharton.*

Macer. A mace-bearer; an officer attending upon the court of session in Scotland. *Bell.*

MACHINE. The term machine, in patent law, includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result. But when the result or effect is produced by chemical action, or by the application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. Piper *v.* Brown, 4 *Fish. Pat. Cas.* 175.

As used in the law of patents, "machine" includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result. How distinguished from process. Corning *v.* Burden, 15 *How.* 252, 268.

For some extended explanations of the different kinds of machines which may be protected to inventors, under the patent laws, see Union Sugar Refinery *v.* Matthiessen, 2 *Fish. Pat. Cas.* 600.

Coal-cars held not such machines as are subject to mechanic's lien. New England Car-Spring Co. *v.* Baltimore, &c. R. R. Co., 11 *Md.* 81.

Machinery. Is somewhat more extensive in meaning than machine. Thus, dies used in connection with a machine for manufacturing tinware, by means of which sheets of tin are cut into proper shape to be made up, though not machines, are yet covered by a policy of insurance on the machinery in a building on C Street, used for the manufacture of tinware. Seavey *v.* Central, &c. Ins. Co., 111 *Mass.* 540.

Machinery, in a statute regulating the taxation of the real estate and machinery of corporations, includes the mains or pipes of a gas company. Commonwealth *v.* Lowell Gas Light Co., 12 *Allen*, 75.

Machinery, upon a view of the whole agreement, held, to embrace a steam-engine and a rolling-mill. Lowber *v.* Le Roy, 2 *Sandf.*, 202.

Machine-shop. In a policy of insurance, cannot be deemed to include an organ factory. Goddard *v.* Monitor, &c. Ins. Co., 108 *Mass.* 56.

MADE. See MAKE.

A statute awarding poundage to an officer making judicial sales, on all moneys actually made and paid to him, does not entitle him to poundage on the price agreed upon at a sale on execution, where, before confirmation of the sale, the judgment debtor pays the judgment, and the sale is set aside. Even if the officer has received the money, it is not to be deemed made and paid; for he holds it only as security that the purchaser will fulfil his contract in case the sale shall be confirmed. Fiedeldey *v.* Diserens, 26 *Ohio St.* 312.

MADRAS REGULATIONS. Certain regulations prescribed for the government of the Madras presidency. *Mozley & W.* Compare BENGAL REGULATIONS; BOMBAY REGULATIONS.

MAGISTER. Master.

Magister navis. The master of a vessel; he who has the whole care and government of the vessel.

Magister societatis. The master of a partnership; the managing partner or other person appointed by the members of a partnership to manage its affairs.

Magistralia brevia. In old English practice, writs which were drawn up by the masters in chancery, to suit the facts of the particular case, the ordinary forms not being appropriate, were called *magistralia brevia;* that is, masters' writs. See *Burrill.*

MAGISTRATE. A person intrusted with power as a civil officer; one vested with public civil authority; one charged with the execution of municipal laws.

A person intrusted with the commission of the peace for any county, city, borough, or other jurisdiction. *Mozley & W.*

Of magistrates, some are supreme, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior, secondary sphere. *Wharton.*

An alderman of a city is a magistrate, within an enactment allowing deeds to be acknowledged before a magistrate. Gordon *v.* Hobart, 2 *Sumn.* 401.

The word magistrate, in such a statute, includes an American consul at a foreign port. To fix any definite meaning to the word is difficult; it seems intended to indicate a class of officers exercising an authority similar to that of justices of the peace. It means any ministerial officer exercising like powers with a justice of the peace when acting in his ministerial capacity. Scanlan *v.* Wright, 13 *Pick.* 523.

MAGNA ASSISA. The name of an ancient writ allowed for summoning a jury of grand assise; and commencing with the words *magna assisa eligenda.* This species of extraordinary trial was instituted by Henry II. in parliament, by way of alternative offered to the choice of a tenant or defendant in a writ of right instead of the duel. The writ issued to the sheriff to

return four knights, who were to elect and choose twelve others to be joined with them, and these formed the grand assise or great jury, which was to try the matter of right. It was abolished by 3 & 4 Wm. IV. ch. 27. *Wharton.*

MAGNA CHARTA. The great charter. A famous state paper of early English times, having been granted by, or rather extorted from, King John, on the demand of the barons of the time, in revolt against the usurpations and excesses of the crown.

It appears to have been called Magna Charta on account of its great importance; but some such special designation of it was needed to distinguish it from the Charta de Foresta, or charter of the forest, which was granted about the same time. The provisions of the great charter extend not only to the administration of justice (regulating the various jurisdictions, temporal and ecclesiastical), but also to the personal liberty of the subject, the limits of taxation of his property, the rights of foreign merchants within the realm, as well during peace as in times of war, and also the liberties and privileges of the church. It contains, also, numerous provisions of a purely temporary nature, intended to remedy the prevailing abuses of the times. Many of its provisions have been repealed; but it continues to be regarded as first in importance among the sources of English constitutional law; and many of its principles reappear in provisions of the bills of rights or constitutions of the various states.

For a full abstract of Magna Charta, see *Wharton Dict.*, tit. Magna Charta; for the particular meaning of the term *charta*, and the distinction between a charter and a constitution, see *ante*, CHARTA; CONSTITUTION.

MAIDEN. An instrument formerly used in Scotland for beheading criminals. It consisted of a broad piece of iron, about a foot square, very sharp in the lower part, and loaded above with lead. At the time of execution it was pulled up to the top of a frame about ten feet high, with a groove on each side for the maiden to slide in. The prisoner's neck being fastened to a bar underneath, and the sign given, the maiden was let loose, and the head instantly severed from the body. It was the prototype of the French guillotine. *Wharton.*

Maiden assise. An assise or session of an English criminal court at which no capital conviction takes place, no prisoner is condemned to die. In such a case, the sheriff of the county presents the judges with white gloves. *Encyc. Lond.; Tomlins; Wharton; Brown.*

At the present day, when the number of capital offences is so much fewer than it was, a maiden assise is understood to be one at which there are no prisoners to be tried. *Mozley & W.*

Maiden rent. A fee payable by the tenants of some feudal manors, to the lord, upon the marriage of the tenant's daughter. One account of its origin is that it was a commutation for the lord's relinquishment of a still earlier right of lying with the daughter on the first night after the marriage. Other explanations are to the effect that it was only a pecuniary exaction, like any other item of feudal revenues.

MAIM. To deprive a person of a member or part of the body, the loss of which renders him less capable of fighting; to commit mayhem, *q. v.*

To maim a domestic animal implies permanent injury: disfiguring is a lower grade of the same offence, and need not be permanent; and however slight it may be, yet, if it lessen the animal's value, and be done with malicious intent, the offence is complete. State *v.* Harris, 11 *Iowa*, 414.

In this respect, "to wound" is distinguishable from "to maim;" for the latter implies a permanent injury, whereas a wound is any mutilation or laceration which breaks the continuity of the outer skin. Reg. *v.* Bullock, 11 *Cox Cr. Cas.* 125.

In New York, since the 2 Rev. Stat. 665, § 36, a blow aimed at and delivered upon the head cannot constitute the crime of assault and battery with intent to maim. Foster *v.* People, 50 *N. Y.* 598.

MAIN SEA. That part of the sea not within the body of a county. Baker *v.* Hoag, 7 *N. Y.* 555; 3 *Barb.* 203; 7 *Id.* 113.

MAINOUR, or MEINOUR. An old term for a thing stolen; spoken particularly of such thing when the thief is caught having it upon him, or, as it were, in his hand. To be "taken with the mainour," meant to be caught with the subject of larceny in one's possession, *in manu. Cowel.*

MAINPERNOR. A surety for the appearance of a person taken upon a writ of mainprise.

According to Blackstone, and several authorities following his explanation, mainpernors differed from bail in that a man's bail might imprison or surrender him up before the stipulated day

of appearance: mainpernors could not do either, but were merely sureties for his appearance at the day. Bail were sureties only that the party would be answerable for the special matter for which they stipulate: mainpernors were bound to produce him to answer all charges whatsoever. 3 *Bl. Com.* 128. For some other distinctions, see *Jacob*, tit. Mainprise.

MAINPRISE. Taking in hand; taking into custody. The receiving into friendly custody a man who might otherwise be committed or detained in prison, upon security given for his appearance at a time and place specified. The writ commanding the sheriff to take such security and set the man at large was also termed a writ of mainprise. It is no longer in use.

One of the means of remedying the injury of false imprisonment was by a writ called a writ of mainprise, directed to the sheriff (either generally, when any man was imprisoned for a bailable offence, and bail had been refused; or specially, when the offence or cause of commitment was not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called mainpernors, and to set him at large. The word mainprise is used in various ways: thus, when a man is committed to those who undertake he shall appear at the appointed day, he is said "to be let to mainprise;" and a man who may be so mainprised or delivered to mainpernors, is said to be mainpernable. Where an offence was not bailable, the justices were frequently, by act of parliament, directed "to commit such offender or offenders to the common jail of the county, there to remain without bail or mainprise." *Brown.*

MAINTAIN; MAINTENANCE. 1. In their technical meaning, these words, verb and noun, signify the offence of officiously intermeddling with or promoting a lawsuit, done by one who has no concern in it, either as party or attorney. Maintainor: a person chargeable with the offence of maintenance. Maintained is the technical word said to be necessary in an indictment for this offence.

For the distinction between champerty and maintenance, see CHAMPERTY.

Maintenance, in general, signifies an unlawful taking in hand or upholding of quarrels and sides, to the hindrance of common right. *Co. Lit.* 368 *b*; *Hawk. Pl. Cr.* 393.

Maintenance is the assisting another person in a lawsuit, without having any concern in the subject. Wickham *v.* Conklin, 8 *Johns.* 220.

The intermeddling of a stranger in a suit, for the purpose of stirring up strife, and continuing litigation. Dorwin *v.* Smith, 35 *Vt.* 69.

An officious intermeddling in a suit that no way belongs to one, by assisting either party, with money or otherwise, to prosecute or defend it. Andrews *v.* Thayer, 30 *Wis.* 228.

The purchase of a dormant title to lands from a party not seised, by a stranger out of possession, if made wittingly, to disturb the tenant in possession, is maintenance, and is punishable by indictment. Swett *v.* Poor, 11 *Mass.* 549; Everenden *v.* Beaumont, 7 *Mass.* 76; Wolcot *v.* Knight, 6 *Mass.* 418; Brinley *v.* Whiting, 5 *Pick.* 359.

Maintenance is where one officiously intermeddles in a suit which no way belongs to him. The term does not include all kinds of aid in the prosecution or defence of another's cause; it does not extend to persons having an interest in the thing in controversy, nor to persons of kin or affinity to either party, nor to counsel or attorneys, for their acts are not officious, nor unlawful. The distinction between champerty and maintenance is that maintenance is the promoting, or undertaking to promote, a suit, by one who has no lawful cause to do so; and champerty is an agreement for a division of the thing in controversy, in the event of success, as a reward for the unlawful assistance. Bayard *v.* McLane, 3 *Harr.* (*Del.*) 208.

It is not maintenance for a person to promote a suit or defence, in which he has, or believes that he has, a legal interest. McCall *v.* Capehart, 20 *Ala.* 521.

A person interested in a suit may take an assignment of a chose in action, to advance his own interests, without subjecting himself to the charge of maintenance. Blackerby *v.* Holton, 5 *Dana*, 520.

An action for maintenance will not lie for carrying on, or assisting in the prosecution of, a suit in the name of another, if he has a legal or equitable interest in the land or subject of controversy. Wickham *v.* Conklin, 8 *Johns.* 220.

Any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor from the charge of illegal maintenance, whether this interest is great or small, vested or contingent, certain or uncertain. Thallhimer *v.* Brinckerhoff, 3 *Cow.* 623, 647.

Where there is consanguinity or affinity between the suitor and him who gives aid to the suit, such assistance is not unlawful maintenance. *Id.*

A person who has a community of interest with a co-defendant in a suit to rescind a sale to the latter is not guilty of maintenance in taking a transfer, pending such suit, of the property in litigation, and

the rents, hires, and damages that may accrue in the suit, and in assuming a liability for said co-defendant's share of the costs and expenses of the litigation. Thompson *v.* Marshall, 36 *Ala.* 504.

It is not maintenance for an attorney, after final judgment, to purchase the subject-matter of the litigation. McMicken *v.* Perin, 18 *How.* 507.

Where several tax-payers joined in a bond to defray each one his proportion of the expenses of defending any suit brought against any one of their number for the recovery of a tax which they proposed to resist, or of the cost of any other legal mode of contesting it, this was held not to be maintenance, because the obligors each had an interest in the controversy. Gowen *v.* Nowell, 1 *Me.* 265.

Advancing money to a poor person, to enable him to maintain a meritorious defence, is not maintenance. Perine *v.* Dunn, 3 *Johns. Ch.* 508.

It is not maintenance for one or more individuals to contribute sums of money to employ and pay counsel to carry on a criminal prosecution, unless such aid is given through malicious motives. Commonwealth *v.* Dupuy, *Bright.* 44.

Champerty is the unlawful maintenance of a suit in consideration of a bargain to have a part of the thing in dispute, or some profit out of it; and the promise to pay the expenses or costs seems to be essential to constitute it. Meeks *v.* Dewberry, 57 *Ga.* 263.

2. Maintain and maintenance are also used in their vernacular sense of continue, keep up, supply the needs of, support; in deeds, statutes, wills, &c., drawn into construction before the courts.

Maintenance in this sense may denote the provision made, either by deed, or by will, or by the order of the court of chancery, for the support, including education, of children during their minorities; of a widow, or wife under separation from her husband; of an aged parent, &c. Thus used, it is equivalent to "support." We have not found maintainor in use in connection with this meaning of "maintain."

The power to "maintain" as well as construct a railroad does not imply a power to change the location after it has been constructed. Moorhead *v.* Little Miami R. R. Co., 17 *Ohio*, 340.

A statute prescribing that partition fences "shall be maintained throughout the year, equally by both parties," is not limited to repairs simply, but applies as well to the rebuilding of a fence destroyed by fire. Rhodes *v.* Mummery, 48 *Ind.* 216.

The term maintenance, in a statute authorizing the putative father of a bastard to be "charged with the maintenance of the child," includes expenses of the mother's confinement, and even necessaries of food and clothing for the mother during nursing, if destitute, so far as preserving her health and strength is indispensable to the subsistence of the child. Judson *v.* Blanchard, 4 *Conn.* 557.

MAJESTAS. Majesty. It was used in the Roman law to denote the supreme power in the state; also, as a contraction for *læsa majestas* or *crimen læsæ majestatis*, *i.e.* treason.

MAJOR. In its original form as a Latin word, meaning greater, *major* appears in one or two maxims.

Major hæreditas venit unicuique nostrum a jure et legibus quam a parentibus. A greater inheritance comes to every one of us from right and the laws than from parents.

Major in se continet minus. The greater contains within itself the less.

Majore pœna affectus quam legibus statuta est, non est infamis. One affected with a greater punishment than is provided by the laws is not infamous.

Majori summæ minor inest. In the greater sum the less is included.

The plural, *majores*, is said to have been used (*Bouvier*) among the Romans, and in genealogical tables of more modern times, to signify male ascendants beyond the sixth degree; also (*Burrill*), in old English law, to denote persons of higher rank.

MAJOR. 1. The title of an officer in the army ranking next above a captain.

2. One who has attained the age of full civil rights and responsibilities; the opposite of minor or infant.

3. An old law Latin form of the civic title mayor.

MAJORITY. 1. The rank of a major in the army.

2. The civil condition or status of one who has attained full age.

Twenty-one years of age is the period of complete legal majority for both sexes throughout the United States. In this respect there is no distinction between citizens and aliens domiciled in the United States as to all acts done within the United States. 8 *Op. Att.-Gen.* 62.

3. The greater portion of a body of persons; more than half of those con-

sidered as joining in an election, or a vote.

With reference to elections, majority is usually distinguished from plurality. A candidate has a plurality of votes when he has more than any other one person: he has a majority, only when he has more than all his competitors combined. Mr. Cushing says that majority is sometimes used in the sense of plurality (*Cush. Leg. Ass.* § 117). But such use is not to be commended; the distinction is important, and should be preserved in the use of the terms. Whether a majority is necessary to an election, or a plurality will suffice, must be determined by the law governing the election.

Judge Bouvier says that "some question exists as to whether a majority of any body is more than one-half the whole number, or more than the number acting in opposition. Thus, in a body of one hundred voters, in which twenty did not vote on any particular question, on the former supposition, fifty-one would be a majority; on the latter, forty-one. The intended signification is generally denoted by the context, and where it is not, the second sense is generally intended; a majority on a given question being more than one-half the number of those voting." We do not understand that the parliamentary question here presented turns on any doubt or variance in the meaning of the word majority. In a body of one hundred voters, fifty-one is a majority, — is a majority at all times, not only if twenty do not vote, but when no voting is under way. While debate is proceeding, fifty-one is a majority just as truly as when the vote is taken. If a question is put, and forty-one vote "aye," thirty-nine "no," and twenty are silent, it may well be, that the whole number being one hundred, and there being no positive law requiring a majority of all competent votes to be cast, the forty-one votes will carry the question; but this is not because the word majority means "more than the number opposing," but because the will of the majority is inferred from the proportions of the vote. Those who are silent are supposed to assent that the question shall be determined by those who vote. It is on the presumption that the largest number of votes cast show the will of the majority, and not on any idea that less than half compose the majority, that the forty-one votes carry the day.

The expression "a majority of the body," used in a charter speaking of a corporate body, can only mean a majority of the individuals comprising that body. Taylor *v.* Griswold, 14 *N. J. L.* 222, 239.

The phrase "a majority of the electors," in constitutional provisions that elections shall be determined by vote of a majority of the electors, means a majority of the electors actually voting, not of all qualified to vote. Everett *v.* Smith, 22 *Minn.* 53.

Construction of the word majority, as used in the bankrupt act, explained. *Re* Gilday, 11 *Bankr. Reg.* 108.

MAKE. This verb occurs, without great departure from the vernacular meaning, in several phrases.

Make an assignment. This usually means the assigning all one's property for the benefit of one's creditors. The phrase may import only the transfer of some right in action or evidence of debt; as to make an assignment of a policy, or of a contract. "To assign" is more frequently used where a transfer of some single right by a solvent owner is meant, and "to make an assignment" oftenest means an assignment of all assets by an insolvent.

Make away with. To charge a man with having applied to defendant to "make away with" a bastard child, of which he is father, was held, after verdict for plaintiff, to be actionable, as meaning that he applied to defendant to murder the child. Demarest *v.* Haring, 6 *Cow.* 76.

Make a bill, deed, note, will, or any **written instrument.** Whenever the *factum* of a document, the signing and delivery of a writing, is the matter in question, "make" imports execution with the necessary formalities. It is otherwise when no writing is necessarily involved. Thus, "to make a note" implies that the person subscribed the paper; but "to make a contract" does not import execution of a writing, the phrase is satisfied by a verbal agreement. Again, "make," spoken of writings *inter partes*, usually implies delivery: ordinarily, the expression "made a note" imports that it was not only signed but delivered as an obligation; the instrument has no inception while

the subscriber retains it for future disposal. But the context may show that a narrower sense was intended; and, where this is indicated, the use of "make" and "made," to import execution without delivery, is not unusual or improper.

An averment in a declaration or complaint of the making of a promissory note, includes delivery to the payee. Chappell *v.* Bissell, 10 *How. Pr.* 274; Peets *v.* Bratt, 6 *Barb.* 662; and see 7 *Durnf. & E.* 596; 2 *Cow.* 536.

An averment that defendant made the note in suit is equivalent to saying that he signed it, and delivered it to the payee. Sawyer *v.* Warner, 15 *Barb.* 282.

Make a contract. To agree; or, if a written contract is contemplated, to execute the paper with the requisite formalities, and, usually, to deliver it as binding.

Make default. To fail to appear when summoned in a judicial proceeding. It is usually applied to the omission of a party to interpose an appearance in the technical sense. But it may be used of other like omissions, as of a witness to attend in obedience to a subpœna. There is some confusion in the use of the phrase with respect to a party served with process, as to whether it negatives appearance only, or both appearance and plea. Sometimes it appears to signify only omission to appear; one who appears by attorney, but puts in no plea, has not made default, in this strict sense. Often it signifies that one has not pleaded, or did not attend the trial.

Make one's faith. A Scotch phrase, equivalent to the old English phrase, to make one's law.

Make one's law. An old phrase, signifying to adduce proof to clear oneself of a charge; law (*q. v.*) seems here to be used in the sense of oath.

The formal words used by him that made his law were commonly these: Hear, O ye justices, that I do not owe this sum of money demanded, neither in all nor any part thereof, in manner and form declared. So help me God, and the contents of this book. *Jacob.*

Make over and grant, are words sufficient to pass lands by way of bargain and sale. Jackson *v.* Alexander, 3 *Johns.* 483.

Make up the issue. This is done, after issue has been joined in an action, by the plaintiff's solicitor drawing up a transcript on paper of the pleadings, and delivering it to the defendant's solicitor, that he may ascertain it to be a correct copy of the pleadings which have actually taken place. This transcript is called the issue. 3 *Steph. Com.* 515.

MALUS; MALA; MALUM. Latin adjectives, meaning bad, occurring in several phrases.

Mala fides. Bad faith. The opposite of *bona fides*, q. v.

Mala grammatica. Bad grammar. The same in meaning as *falsa grammatica*, and sometimes substituted in the maxim *falsa grammatica non vitiat chartam*, q. v.

Mala praxis. Bad practice; malpractice. Particularly, unskilful practice by a physician or surgeon, by which the health of his patient is injured.

Malum in se. Evil in itself. An act that is evil in its very nature, upon principles of natural or moral law.

Malum prohibitum. Evil that is prohibited. An act prohibited by law, but which is not *malum in se.* The distinction between the two classes of acts is of some importance in criminal law, a criminal intent being presumed in regard to offences *mala in se*, where it would not be in cases of offences merely *mala prohibita.* A like distinction was formerly made in regard to the validity of contracts, between those where the consideration or the promise was *malum in se*, and where either was only *malum prohibitum;* but this distinction is not now regarded.

An offence *malum in se* is one which is naturally evil, as murder, theft, and the like; offences at common law are generally *mala in se.* An offence *malum prohibitum,* on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden; as playing at games which, being innocent before, have become unlawful in consequence of being forbidden. *Bouvier.*

Things which are evil in themselves are termed *mala in se* in contradistinction to those things which are not evil in themselves, but are only forbidden by the laws, and which are therefore called *mala prohibita,* or forbidden evils; and sometimes *mala quia prohibita,* to indicate that they are evils by reason of the prohibition only.

MALEFICIUM. Wrong-doing; injury; a tort. This is a term of the civil law, nearly synonymous with *delictum.*

MALFEASANCE. The commission of some act which is positively unlawful; as opposed to nonfeasance, or the omission of an act which a man ought

to do; and to misfeasance, or the improper performance of some lawful act.

The term malfeasance is often used carelessly to describe a misfeasance. But a statute prescribing that a sheriff's bond shall cover defaults and misfeasances of deputies should not be construed as including a wilful or mistaken trespass by a deputy in taking property of one person under execution against another; but only for a deputy's neglects and defaults. Coite *v.* Lynes, 33 *Conn.* 109.

MALICE. Design to do what is contrary to law; intent prompting an unlawful act; purpose to do wrong.

The word may mean mere wilfulness, intention to act, in distinction from accidental, compulsory, or involuntary action; or it may signify a settled wish or purpose to injure another; a malignant design of evil. The latter is the idea attached to the word in popular use; but, to express it legally, some intensifying expression is needed, such as actual or express malice.

The former commissioners of the code in New York proposed the following definition: The terms "malice" and "maliciously," when applied to the intent with which an act is done or omitted, import a wish to vex, annoy, or injure another person, established either by proof or by presumption of law (*Rep. Penal Code*, § 766). And this, we believe, is the sense which the words are usually intended to convey, when they are used in a statute to denote one of the elements of a crime under definition.

Malice is often discriminated as being *express* or *implied;* but these adjectives are not well chosen. The distinction is better expressed by calling it *actual* or *constructive*. What is meant by express malice is not malice avowed, expressed, but malice which exists in fact, in the form of an actual, vengeful intention of the mind. And what is meant by implied malice is, rather, malice imputed; a holding the person liable as if for actual malice, upon a legal construction of his acts.

In its legal sense, "malice" does not mean ill-will against a person, but signifies that a wrongful act is done intentionally, without just cause or excuse. Thus, if I intentionally and without just cause or excuse gave a perfect stranger a blow likely to produce death, I should, in legal contemplation, do it of malice, because I did it intentionally, and without just cause or excuse. So, if I maim cattle, although without knowing whose they are, I should, in legal construction, do it of malice, because it would be a wrongful act, and be done intentionally, without cause or excuse. Malice is regarded under the following varieties of aspect:

Malice in law, being that species of it which is described above; and

Malice in fact, which again presents two sub-varieties; viz., personal malice, *i.e.* spite, against some particular individual; and malice against the world generally, without reference to any particular individual, *e.g.* where a person throws a bottle of vitriol over a wall into the public street or highway, not knowing or caring who is passing in the street or on the highway at the time. *Brown.*

Malice in its legal signification means ill-natured wilfulness; a wilful intention to do a wrongful act; a wrongful act done intentionally, without just cause or excuse. Dexter *v.* Spear, 4 *Mas.* 115; United States *v.* Harriman, 1 *Hugh.* 525; State *v.* Robbins, 66 *Me.* 324; Commonwealth *v.* York, 9 *Metc.* (*Mass.*), 93, 115; True *v.* Plumley, 36 *Me.* 466, 484; Etchberry *v.* Lerelle, 2 *Hilt.* 40.

Malice, in its common acceptation, means ill-will toward some person. In its legal sense, it applies to a wrongful act done intentionally, without legal justification or excuse. Dunn *v.* Hall, 1 *Ind.* 344.

There is an obvious distinction between the legal and the popular meaning of the term malice. In a legal sense, any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. That the perpetrator should be actuated by a feeling of hatred or ill-will towards the individual, or should entertain and pursue any general bad purpose or design, is not necessary. He may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if in pursuing that design he wilfully inflicts a wrong on another, which is not warranted by law, such act is malicious. Commonwealth *v.* Snelling, 15 *Pick.* 337. Compare, to the contrary, Viele *v.* Gray, 10 *Abb. Pr.* 1, 5.

Malice is a wilfully formed design to do another an unlawful injury, whether such design be prompted by deliberate hatred or revenge, or by hope of gain, or springs from the wantonness and depravity of a heart regardless of social duty, and fatally bent on mischief. State *v.* Summons, 9 *West. L. J.* 407.

Malice signifies the dictate of a wicked, depraved, and malignant heart; a corrupt motive. It does not necessarily imply ill-will toward the person injured. State *v.* Turner, *Wright*, 20; State *v.* Gardiner, *Id.* 392.

Malice is either express or implied. Express malice is where the act arises

from ill-will, from a malevolent design towards an individual, of doing him mischief. Implied malice is where the mischief is intentionally done, without just cause or excuse. Parke *v.* Blackiston, 3 *Harr.* (*Del.*) 373.

Express malice is that deliberate intention to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart. *Ga. Code*, cited 26 *Ga.* 156.

An averment that defendant maliciously set a building afire, means that he did so not by accident, or even carelessly, but with a wicked intent to injure. Tuttle *v.* Bishop, 30 *Conn.* 80.

The malice which must be shown to sustain a prosecution against a ship-master, under the act of congress for beating a seaman, is a wilful departure from known duty. The word is not used in the act in its popular sense. United States *v.* Taylor, 2 *Sumn.* 584; United States *v.* Cutler, 1 *Curt.* 501.

Malice is predicable of any wrongful act done intentionally, without legal justification; as a libel, printed without the publisher's knowledge, charging a woman with unchastity. Buckley *v.* Knapp, 48 *Mo.* 152; Barbee *v.* Hereford, *Id.* 323.

The malice which must be established against defendant in a prosecution for libel is not malice in its popular sense, viz., that of hatred and ill-will to the party libelled, but the doing an act wilfully, unlawfully, and in violation of the just rights of another. Commonwealth *v.* Bonner, 9 *Metc.* (*Mass.*) 410.

In newspaper publications, malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences that may result to him. Gott *v.* Pulsifer, 122 *Mass.* 235, 239.

In ordinary actions for slander, malice in law is sufficient ground, and is to be inferred from the publication of the slanderous matter, without such justification or excuse. In most, perhaps in all, instances where an injury is committed against the person or property of another, the actual intention of the author of the mischief is immaterial. The law considers every one whose neglect, carelessness, and want of due regard of the rights of others occasion injury to others culpable and bound to make reparation to the extent of such injury, as much as one who wilfully does mischief. It can make no difference to the party injured whether the injury was occasioned by a wilful act, or by negligence, or a careless disregard of his rights, and such a consideration ought not to affect his remedy. Dunn *v.* Hall, 1 *Ind.* 344.

In homicide, malice is a deliberate intention unlawfully to take away the life of a fellow-creature. Dozier *v.* State, 26 *Ga.* 156; *Exp.* Wray, 30 *Miss.* 673; State *v.* Schoenwald, 31 *Mo.* 147.

Any formed design of mischief may be called malice. Malice is a deliberate, wicked, vindictive temper, regardless of social duty, and bent on mischief. There may be malice, in a legal sense, in homicide, where there is no actual intention of any mischief, but the killing is the natural consequence of a careless action. Pennsylvania *v.* Bell, *Add.* 156.

Ill-will towards the deceased personally, is not necessary to constitute murder. Revel *v.* State, 26 *Ga.* 275; State *v.* Decklotts, 19 *Iowa*, 447.

Malice is an essential element in the crime of murder, either at common law or by statute. It is not necessarily confined to an intention to take the life of the deceased, but it includes an intention to do an unlawful act which may probably result in depriving the party of life. It may be express or implied. Warren *v.* State, 4 *Coldw.* 130.

Upon a murder trial, the court defined malice as including "anger, hatred, revenge, and every other unlawful and unjustifiable motive;" but this was held error, for every crime must be attended with an unlawful and unjustifiable motive. Malice includes those motives which are more wicked, but does not include all: there are many unlawful motives which have never been classified as malicious. Nye *v.* People, 35 *Mich.* 16.

Between express and implied malice there is a great difference: the former means a deliberate intention and design to commit the offence; the other springs from impulse. Anthony *v.* State, 21 *Miss.* 263. Compare Etchberry *v.* Lerelle, 2 *Hilt.* 40.

Express malice is a formed design (to kill another), evidenced by external circumstances discovering the inward intention. Malice is implied from any deliberate, cruel act, committed without considerable provocation. State *v.* Neal, 37 *Me.* 468; Commonwealth *v.* Green, 1 *Ashm.* 289.

Malice aforethought, or prepense. Design; intention. Used particularly in describing one of the elements of murder. Thus used, the term does not imply prolonged deliberation, or the lapse of considerable time between the intent to take life and the actual execution of that intent, but rather denotes purpose or design, in contradistinction to accident or mischance. And it does not imply a malignant hatred of the individual victim: a wicked disregard of the probability that one's act will result in destroying human life may be enough to satisfy the expression. It signifies, usually, that wilfulness or criminal recklessness of intention whereby any one

disregards the death of a person as a probable consequence of an act which he is about to do, without lawful justification or excuse.

The legal meaning of "malice aforethought," in cases of homicide, is not confined to homicide committed in cold blood with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are ordinary symptoms of a wicked, depraved, and malignant spirit. United States *v.* Cornell, 2 *Mas.* 91; Jones *v.* State, 29 *Ga.* 594; Green *v.* State, 13 *Mo.* 382; Commonwealth *v.* Drum, 58 *Pa. St.* 9.

The words malice aforethought long ago acquired in law a settled meaning, somewhat different from the popular one. In their legal sense they do not import an actual intention to kill the deceased. The idea is not spite or malevolence to the deceased in particular, but evil design in general, the dictate of a wicked, depraved, and malignant heart; not premeditated personal hatred or revenge towards the person killed, but that kind of unlawful purpose, which, if persevered in, must produce mischief. State *v.* Pike, 49 *N. H.* 399.

Malicious. Designed; intended; wilful. Maliciously: designedly; intentionally; wilfully. See MALICE.

Maliciously indicates intent. Commonwealth *v.* Boynton, 116 *Mass.* 343.

By maliciously, in section 10 of the U. S. crimes act of 1825, defining certain oppressive acts of shipmasters towards seamen, is not merely meant a wicked, malignant, and revengeful act, such as in cases of murder constitutes malice, and which flows from a heart regardless of social duty, and fatally bent on mischief. If the act be wantonly done, that is, with a wilful disregard of right or duty, it is, in the sense of the statute, malicious. There must be a wilful act, done contrary to a man's own convictions of duty. If, therefore, the defendant did the act from good motives, and under a mistaken sense of duty, and not from a spirit of hatred, or with an intention to oppress, then he ought to be acquitted, notwithstanding the want of justifiable cause. But if he did the act contrary to his own sense of duty, as a mere exercise of power, without any sense of its being right, then it was maliciously done, in the sense of the statutes. United States *v.* Ruggles, 5 *Mas.* 192.

Maliciously, in the U. S. crimes act of 1825, means wilfully; against a knowledge of duty. It is not limited to acts done from hatred, revenge, or passion; but includes all acts wantonly or wilfully done, that is, against what any man of reasonable knowledge and ability must know to be his duty. United States *v.* Coffin, 1 *Sumn.* 394, 398.

Maliciously, as used in Mass. Rev. Stat. ch. 126, § 39, — which prohibits the wilfully and maliciously destroying or injuring the personal property of another, — means more than "wilfully." To warrant a conviction under this statute, proof that the mischievous act complained of was done by design is not enough. The jury must also be satisfied it was done maliciously; that is, in a spirit of wicked revenge, or (where the injury is to an animal) of wanton cruelty. Commonwealth *v.* Walden, 3 *Cush.* 558.

To constitute the offence of maliciously killing the beast of another, the malice must be against the owner, not against the beast. State *v.* Pierce, 7 *Ala.* 728; United States *v.* Gideon, 1 *Minn.* 292; State *v.* Wilcox, 3 *Yerg.* 278.

To establish against an inspector of election the charge of maliciously refusing a vote, proof of personal ill-will to the voter is not necessary. Any improper motive is sufficient; and, in the absence of direct proof of the intention, it may be inferred from the circumstances attending the act. Bridge *v.* Oakey, 2 *La. Ann.* 968.

The refusal cannot be deemed malicious, where it appears that the inspector sincerely (though erroneously) believed, in a doubtful case, that the voter's residence was outside the election precinct. Patterson *v.* D'Autrive, 9 *La. Ann.* 35.

Malicious arrest. An arrest made from improper motives, and also without adequate legal grounds, and therefore subjecting the instigator to an action of damages at the suit of the person arrested. Compare MALICIOUS PROSECUTION.

Malicious mischief. In order to repress injuries to property perpetrated from a malignant, vengeful spirit, not from a desire to profit, statutes have been passed punishing various acts of malicious mischief. We understand the general course of decision under these enactments to be that they contemplate something more than a design to injure property without right; a spirit of cruelty, revenge, &c., must appear. See MALICIOUS.

Malicious mischief or damage is a species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss, but either out of a spirit of wanton cruelty, or wicked revenge. In this latter light it bears a near relation to the crime of arson, for as that affects the habitation, so does this the property, of individuals; and, therefore, any damage arising from this mischievous disposition, though only a trespass at the common law, is now, by several statutes, made severely penal. *Jacob.*

Malicious mischief consists in the wilful destruction of personal property, from actual ill-will or resentment towards its owner or possessor. State *v.* Robinson, 3 *Dev. & B. L.* 130.

Malicious prosecution. A judicial proceeding, instituted by one person against another from wrongful or improper motives, and without probable cause to sustain it, is usually called, speaking briefly, a malicious prosecution; and an action for damages for being subjected to such a suit is called an action of malicious prosecution. In strictness, the prosecution might be malicious, that is, brought from unlawful motive, although founded on good cause. But it is well established that unless want of probable cause and malice concur no damages are recoverable. However blameworthy was the prosecutor's motive, he cannot be cast in damages if there was probable cause for the complaint he made. Hence the term usually imports a causeless as well as ill-intended prosecution.

It commonly, but not necessarily, means a prosecution on some charges of crime.

Malice, in the rules relative to malicious prosecution, is not used in the sense of spite or hatred against an individual, but of *malus animus*, as denoting that the party is actuated by improper and indirect motives. Harpham *v.* Whitney, 77 *Ill.* 32.

MALITIA. Actual evil design; express malice. See MALICE.

Malitia supplet ætatem. Malice supplies (or makes up for) age; wickedness of design supplies the want of age. Between the ages of seven and fourteen years an infant is deemed, *prima facie*, to be *doli incapax*, — incapable of criminal intention; but this presumption may be rebutted by evidence that he is possessed of a mischievous discretion, or is *doli capax*, in which case he may be found guilty of felony, and punished capitally.

MALUM IN SE. Evil in itself.

MAN. 1. In jurisprudence, as in the vernacular, may include all human beings, as in the expression, offences against man; homicide is taking the life of man; manslaughter, &c. Or it may mean human beings of the male sex generally; that is, including boys, but excluding females. Or it may be restricted to adult males.

Man, as used in Gantt's Dig. § 7, regulating descent of property, "when any man shall die leaving minor children and no widow," includes a woman; and the statute applies, when a woman dies, leaving a minor child and no husband. Smith *v.* Allen, 31 *Ark.* 268.

2. In feudal law, man is used in the sense of vassal.

Man, Isle of. An island in the Irish Sea, off the coasts of Cumberland, Westmoreland, and Lancashire. It was formerly a distinct territory; but by 5 Geo. III. ch. 26, 39, the whole island and all its dependencies, except the landed property and some other rights belonging to the Athol family, were inalienably vested in the crown, and subjected to the regulations of the British excise and customs. *Wharton.*

MANAGE. To conduct, direct, or oversee a business or enterprise. In so far as the use of the word is drawn in question in adjudications, it is generally applied to affairs somewhat complex and extended, and requiring a degree of authority, discretion, and judgment, to ensure satisfactory conduct of them. Manager: one charged with the conduct, direction, or oversight of a business or enterprise. Management: direction; oversight.

An allegation that a railroad company carelessly managed a locomotive is sustained by proof that they carelessly managed the fire in the locomotive; for the management of an engine consists in part of the management of whatever generates its motive force. Smith *v.* Old Colony, &c. R. R. Co., 10 *R. I.* 22.

Management, in speaking of corporations, is sometimes used for the body of persons charged with the conduct of the corporate affairs, in the same way as the direction or the directory is sometimes used for the board having the management or direction. Such a use is popular rather than legal.

Manager, has a somewhat technical sense in different connections; varying so much under local usage, however, that no strict general definition can be given. Managers of an impeachment are members of the lower or impeaching house, selected to conduct the trial before the other house. Managers is the style or title assigned to the directors in some kinds of business corporations, particularly incorporated manufactories. See

DIRECTOR. Manager appears to be a usual title, in England particularly, for the chief executive officer of a branch bank, as distinguished from the president, who is at the head of the parent institution; also for the employe in general charge of a private bank or large mercantile house, in distinction from proprietors directing the details of the establishment themselves.

Managers of a conference. Members of the houses of parliament appointed to represent each house at a conference between the two houses. It is an ancient rule that the number of commons named for a conference should be double those of the lords. *May Parl. Pr.* ch. 16.

MAN-BOTE. See BOOT.

MANCIPATIO. 1. Every father, in the Roman law, had such an authority over his son, that, before the son could be released from his subjection and made free, he must be twice sold and bought, his natural father being in the first instance the vendor. The vendee was called *pater fiduciarius*. After this fictitious bargain, the *pater fiduciarius* sold him again to his natural father, who could then, but not till then, manumit or make him free. The imaginary sale was called *mancipatio;* and the act of giving liberty, or setting him free, was called *emancipatio*.

2. The selling or alienating of certain lands by the balance or money paid by weight, and in the presence of five witnesses, was also called *mancipatio*. This mode of alienation took place only among Roman citizens, and that only in respect to certain estates situated in Italy, which were called *mancipia*. It was abolished by Justinian. *Wharton*.

MANDAMUS. The name of a writ employed by courts of high jurisdiction, under common-law systems, for compelling subordinate courts or officers to perform their duties.

The name is derived from the emphatic word in the opening clause of the writ, in its old Latin form, *mandamus*, — we command you. So many changes have been introduced by statute in the various jurisdictions, relative to the employment of this remedy, that to give any single sketch of it which shall be everywhere accurate is impracticable. According to the king's bench practice prevailing during the times when the writ was introduced in this country, the writ of *mandamus* was defined to be a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified appertaining to their office and duty, and which the court of king's bench had previously determined, or, by issuing the writ, adjudged, to be consonant to right and justice. *Exp.* Crane, 5 *Pet.* 190. It issued to the judges of any inferior court, commanding them to do justice according to the powers of their office, wherever the same is delayed. But though called, from early views, a prerogative writ, — that is, one issuing only in the discretion of the sovereign, — it long ago came to be considered a writ of right, and might issue as freely as ordinary process, upon proper application to the court, in the various cases where it was the appropriate relief. These have been, in general, understood to be cases in which complainant can show that (1) he has a clear legal right to demand the performance of some act by defendant, which (2) is in the nature of a public or official duty, and which (3) defendant refuses to perform, and for which (4) complainant has no other complete and sufficient remedy. Restrictions upon the use of the writ have been such as the following: That the applicant's right to have the act in question done must be clear; if it is questionable, the court will leave it to be adjudged in the regular course of some action, rather than grant a *mandamus:* that the duty must be one which, in some aspects at least, is owed to the public; the writ does not lie to enforce merely private debts or obligations: that there must be a refusal of an act within defendant's power to do; for, if it has not been properly demanded, or has not been refused, or the omission is because performance is impossible, the extraordinary remedy is not appropriate: that, if there is another direct and complete remedy, as by action for damages, the complainant will not be allowed a *mandamus:* and, lastly, with reference particularly to judicial action, or official duties involving judgment or discretion, that the writ only lies to compel the tribunal or officer to exercise the judgment vested, and take such action as they see fit, but not to

direct it or them in what particular way they shall act.

In modern English practice, having regard to statutory changes introduced by the common-law procedure and the judicature acts, the writ of *mandamus* appears used in two modes or forms:

1. The prerogative writ, or substantially the former writ of *mandamus*, as above described. In this use of the writ, it still belongs to the king's or queen's bench, and is used principally for public purposes, and to enforce the performance of public rights or duties; it may, however, operate in affording specific relief, and in enforcing some private rights when they are withheld by a public officer. It is generally refused when the party applying for it has any other specific remedy.

2. There is a species of *mandamus* incidental to an action. By provisions of the common-law procedure act, a plaintiff in any action except replevin and ejectment might indorse upon the writ of summons a notice that he intended to claim a writ of *mandamus* commanding the defendant to perform some duty in which the plaintiff is interested. It was held that this did not enable a plaintiff to enforce by *mandamus* the specific performance of a contract; but that the act contemplated a public duty, in which the plaintiff, among others, was interested, and not a private obligation which the plaintiff alone was entitled to enforce. But, under the judicature acts, the court is authorized to grant a *mandamus* by an interlocutory order, in any cases in which it shall appear just and convenient that such order should be made. See *Brown; Mozley & W.*

Under the United States revised statutes, as under former acts of congress, the supreme court has an extended power to issue writs of *mandamus* in cases warranted by the principles and usages of law; and the circuit and district courts may employ them when necessary in the exercise of their respective jurisdictions. There is, therefore, in the federal judiciary an employment of the writ substantially as the old prerogative writ in the king's bench practice; also as a mode of exercising appellate jurisdiction; also as a proceeding ancillary to a judgment previously rendered, in exercise of original jurisdiction, as when a circuit court, having rendered a judgment against a county, issues a *mandamus* requiring its officers to levy a tax to provide for payment of the judgment. For a view of the different uses of the writ in the federal courts, and of the procedure, see Rev. Stat. §§ 688, 716, and the cases cited in the notes.

In the various States, *mandamus* is allowed and used as an important legal remedy, but under varying statutory regulations. In some of the States, mandate has been substituted, by statute, as the name of the proceeding.

Writs of *mandamus* are either *alternative* or *peremptory*. The practice is to issue, upon the first application for relief, a writ in the alternative; that is, commanding the defendant either to perform the act demanded, or to show cause why he does not, before the court, at a time and place named. If defendant attends, and shows sufficient cause, judgment passes in his favor, and the writ is dismissed. If the cause shown is insufficient, or if he makes default, a second writ is issued, containing an absolute, unqualified command that he shall do the act in question. These are respectively termed the alternative and the peremptory writs.

MANDANT; MANDATOR. The bailor, or party asking the service, in a contract of mandate.

MANDATARY. The bailee, or party promising the service, in a contract of mandate. Sometimes spelled mandatory; but see MANDATORY.

MANDATE. 1. The name of a class of contracts, generally considered a species of bailment, in which one party, called the mandatary, undertakes, without reward, to render some service affecting personal property placed in his charge for the purpose.

According to the extended and lucid account given by Justice Story (Bailm. ch. 3) of the contract of mandate, it is distinguishable from deposit chiefly by the consideration that in mandate the service to be rendered is the principal thing in contemplation, and the custody of the thing bailed is only accessory; in

deposit, the leading object of the parties is the custody of the thing. Three elements are necessary to create a mandate: that there should exist something which should be the subject of the contract, or some act or business to be done; that it should be to be done gratuitously; that the parties should voluntarily intend to enter into the contract.

A mandatary incurs three obligations: to do the act which is the object of the mandate, and with which he is charged; to bring to it all the care and diligence that it requires; to render an account of his doings to the mandator.

A mandator contracts to reimburse a mandatary for all expenses and charges reasonably incurred in the execution of the mandate, and also to indemnify him for his liability on all contracts which arise incidentally in the proper discharge of his duty.

The contract of mandate may be dissolved either by the renunciation of the mandatary at any time before he has entered upon its execution, or by his death; for, being founded in personal confidence, it is not presumed to pass to his representatives, unless there is some special stipulation to that effect. But, if the mandate be partly executed, there may in some cases arise a personal obligation on the part of the representatives to complete it.

Mandate is a contract by which one commits a lawful business to the management of another, who undertakes to perform the service gratuitously. Richardson *v.* Futrell, 42 *Miss.* 525.

Under La. Code, mandate need not be gratuitous. And the agent's right to compensation may be implied from the circumstances. Waterman *v.* Gibson, 5 *La. Ann.* 672; Succession of Fowler, 7 *Id.* 207.

2. A judicial command.

The rescript or precept promulgated upon the decision of an appeal or writ of error is, in the practice of the United States supreme court, called the mandate. It embodies, not the opinion of the supreme court upon the questions of law, but its decision; its direction as to what shall be done by or in the inferior court to make a final termination of the suit. The name of the writ of *mandamus* has been changed in some of the States to writ of mandate.

MANDATORY. The principal technical use of this word is in distinguishing statutes which must be obeyed according to the substantial import of their terms under sanction of having the act or proceeding adjudged void, from those which ought indeed to be obeyed, but, if disobeyed, do not invalidate what is done under them; which latter class of enactments are called directory. See STATUTES; also MAY; SHALL.

MANDAVI BALLIVO. I have commanded the bailiff. The name of a return made by a sheriff, in English practice, where he has committed the execution of a writ to a bailiff who has the right to execute it.

MANHOOD. To arrive at manhood means to arrive at twenty-one years of age. Hinton *v.* Hinton, 1 *Dev. & B. Eq.* 585.

MANIA. A form of insanity, consisting, according to the classification of Esquirol, as restated by Hammond, in perversion of the understanding, embracing all kinds of objects, and attended with mental excitement.

MANIFEST. One of the documents required to be carried by a merchant vessel, by the duty laws of most countries. It gives an account of the cargo carried by the vessel, specifying in what goods it consists, where it was laden on board, whither it is to be carried, and other particulars adapted to aid the officers of the customs in the discharge of their duties.

MANIFESTO. A public, solemn declaration, put forth by the authorities of one nation, explaining the reasons for its acts towards another.

MANNER, is a word of large signification, but cannot exceed the subject to which it belongs; the incident cannot be extended beyond its principal. Wells *v.* Bain, 75 *Pa. St.* 39, 54.

Manner does not necessarily include time. Thus a statutory requirement that a mining tax shall be "enforced in the same manner" as certain annual taxes, need not imply an annual collection. State *v.* Eureka Consolidated Mining Co., 8 *Nev.* 15, 29.

The Pa. act of 1868, p. 547, — providing for the extension of Fairmount Park, and assessment of damages "in like manner" as prescribed by the act of 1867, — has reference merely to the general method. The quarter sessions may appoint six, instead of twelve, viewers. Thirty-fourth Street, Philadelphia, 81 *Pa. St.* 27.

MANNER AND FORM; MODO ET FORMA. Formal words introduced at the conclusion of a traverse. Their object is to put the party whose pleading is traversed not only to the proof that the matter of fact denied is, in its general effect, true as alleged, but also that the manner and form in which the fact or facts are set forth are also capable of proof. Thus, in an action of assumpsit, conducted according to the former common-law system of pleading, where the plaintiff sets out an agreement in his declaration as the foundation of the defendant's promise, and the defendant pleads generally that he did not promise in manner and form as alleged, he may, under the issue so raised, take advantage of any material variance between the contract so set out and that which, upon the trial, is proved to have been the actual contract between the parties. When, however, the traverse is addressed to one only of several independent allegations, it simply puts in issue the substance of that allegation, notwithstanding the words *modo et forma* are employed. Thus, in the common action of debt for goods sold and delivered, when the defendant pleads that he never was indebted in manner and form as alleged, this traverse does not put in issue the formal accuracy of the plaintiff's statement, but the very substance of the plaintiff's declaration; viz., whether or not the defendant was ever indebted to the plaintiff in respect of the cause of action alleged.

It is said that in England this mode of pleading is abrogated by the orders made under the judicature acts.

MANOR. In the strict sense of the term, in English law, it signifies a tract of land held by ancient tenure, the distinguishing incident of which is that it was granted by the king to a lord, coupled with authority to hold within it a court-baron.

A manor usually comprises property appropriate for various uses. The lord or great personage to whom it was granted kept to himself, from the first, such parts as were necessary for his own use, which were called *terræ dominicales*, or demesne lands, and distributed the rest to freehold tenants. Of the demesne lands, again, part was retained in the actual occupation of the lord, and other portions were held in villenage; and there was also a portion which, being uncultivated, was called the lord's waste, and served for public roads and for common of pasture to the lord and his tenants. Thus, at the present day, a manor usually comprises a mansion-house, arable land, pasture, meadow, woodland, and these in the occupation of the lord, or under rent to tenants; also, it may be advowsons and other incorporeal rights. In most manors at the present day, that species of tenants called copyholders are found, whose lands, though substantially their own property, are nominally part of the lord's demesnes. But a manor, in its proper and perfect state, also comprises land occupied by freehold tenants holding of the manor in perpetuity; for, unless freeholds to the amount of at least two subsist, the power to hold a court-baron is lost, and the legal character of the manor is extinguished. Hence it is said that a manor cannot now be made; for a court-baron cannot, under existing laws, be created anew; and, without a court-baron, the estate, however extensive and varied, is not, in the technical sense of the law, a manor.

What is called a reputed manor seems to be an estate formerly a manor, but which has lost its strict legal right to that character, by cessation of its court-baron.

Under various decisions as to what will pass by a conveyance of a manor, it appears that, even without specifying "appurtenances," the word manor will pass: the demesnes, *i.e.* the lands of which the lord is seised within the manor; the freehold of all the lands held by copyhold or other customary tenants; the wastes; the fealty, suit of court, rents, and generally all the services; the court-baron, with fines and perquisites annexed thereto; the court-leet, with the like fines and perquisites; any franchises; and advowsons appendant.

In some older parts of the United States, the interior of New York particularly, manor has been used to designate a tract of land occupied by tenants

holding upon payment of a fee-farm rent, in money or in kind, to the proprietor, called the patroon.

Manor seems to be derived from the French *manoir*, or Latin *manendo*, because the lord did usually reside there. It is called *manerium* or *manurium*, because it is labored by handiwork. It is a noble sort of fee, granted partly to tenants for certain services to be performed, and partly reserved to the use of the lord's family, with jurisdiction over his tenants for their farms. Touching the origin of manors, it seems that in the beginning there was a circuit of ground, granted by the king to some baron or man of worth, for him and his heirs to dwell upon, and to exercise such jurisdiction, more or less, within that compass, as he thought good to grant; performing such services, and paying such yearly rent for the same as were by his grant required; and that, afterwards, this great man parcelled his land to other meaner men, enjoining such services and rents as he thought good, and so, as he became tenant to the king, the inferiors became tenants to him. But in these days manor signifies the jurisdiction and royalty incorporeal rather than the land or site.

Manors were formerly called baronies, as they still are lordships; and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor.

In early times, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons, to be holden of themselves, which do therefore now continue to be held under a superior lord, who is called, in such cases, the lord paramount over all these manors; and his seigniory is frequently termed an honor, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. In imitation of this, these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*; till the superior lords observed that by this method of subinfeudation they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the terre-tenant, or him who occupied the land; and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned the enactment of successive statutes, particularly the statute of *quia emptores*, 18 Edw. I. ch. 1, prohibiting further subinfeudations, since which no new manors can have been created, for it is essential to a manor that there be tenants who hold of the lord; and by the operation of these statutes no tenant *in capite* since the accession of king Edward I., and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself. *Blackstone; Jacob.*

MANSLAUGHTER. Unlawful homicide, without premeditation.

This is a general indication of the nature of the offence; but the discrimination of manslaughter from murder requires a careful attention to the kind and degree of premeditation or malice which may constitute murder, and this is the subject of many nice distinctions, not only those drawn by common-law authorities, but those introduced in various jurisdictions by recent statutes. The general idea of the early common law was to punish intentional, malicious, or premeditated killing (if unlawful) with death, under the name of murder; and unintended, accidental, unpremeditated killing, with lighter penalties, under the name of manslaughter. But when reckless indifference to the destruction of human life, irrespective of intent to take the life of an individual, also, an intent, formed on the instant and without deliberation, came to be recognized as sufficient malice aforethought to constitute murder, the application of the distinction between the two names became difficult. In the absence of a statutory definition, it is difficult to be more precise in defining manslaughter than to say that it includes all cases of felonious killing which are not characterized by such intent or malice as the decisions of the jurisdiction have held to be sufficient to constitute murder. See 2 Bish. Cr. L. (6th ed.) book x. ch. 23, for an extended discussion of the history and difficulties of the distinction.

Manslaughter is defined as the unlawful killing of another without malice, express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act. Manslaughter being defined as culpable homicide without malice, and malice being defined, in reference to homicide, as the wilfulness or criminal recklessness whereby a man contemplates the death of some person or persons as a probable consequence of his own unlawful act or omission, the absence of such wilfulness or criminal recklessness may be inferred, under the following circumstances:

1. Where there is not time for one to consider consequences; as when one, having a deadly weapon in his hand, throws it in the heat of passion at another who has provoked him.

2. Where there is time to consider the probable consequences of an unlawful act wilfully done, and yet the death of any person is by no means a natural or probable consequence of such unlawful act; as if two parties fight without deadly weapons; or as if a station-master, contrary to orders, starts a train before the proper time, having no reason to expect any obstacle, and yet a collision happens, whereby some person is killed.

Perhaps manslaughter may also be described as the causing the death of another through recklessness, including under that term negligence, heedlessness, and rashness; provided that the negligence, heedlessness, or rashness in question be not such as to indicate a wanton and palpable disregard of human life, in which case it will amount to murder. This definition would imply that the difference between murder and manslaughter is often one of degree, which is in fact the case. *Mozley & W.*

Manslaughter is defined as homicide felonious, but without premeditation; and it may be either *involuntary*, as where a man doing an unlawful act not amounting to felony, by accident kills another; or where, by culpable neglect of duty, he occasions another's death: or *voluntary*, as when, upon a sudden quarrel, two persons fight, and one of them kills the other, or where a man greatly provokes another by some personal violence, and the other immediately kills him. *Brown.*

The difference between manslaughter and murder principally consists in this: manslaughter (when voluntary) arises from the sudden heat of the passions; murder from the wickedness of the heart. Manslaughter is defined: The unlawful killing of another, without malice either express or implied, which may be voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. Hence, in manslaughter there can be no accessories before the fact, because it must be done without premeditation. As to the voluntary branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter; and so it is if they go out and fight in a field; for this is one continual act of passion, and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So, also, if a man be greatly provoked, as by having his nose pulled, and immediately kills the aggressor, though this is not excusable, *se defendendo*, since there is no absolute necessity for doing it, to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. But in this, and in every other case of homicide, upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this, being done deliberately, and not under the heat of passion, amounts to murder. Manslaughter, therefore, on sudden provocation differs from excusable homicide *se defendendo* in this: that there is no necessity for the killing; it being only a sudden act of revenge. As to the involuntary branch: this differs from homicide excusable by misadventure in this: that misadventure always happens in consequence of a lawful act, but this manslaughter, from an unlawful one. *Jacob.*

MANUFACTORY. The words starch manufactory, in a description in an insurance policy, will include fixtures, &c., necessary to the processes of the manufactory. Peoria, &c. Ins. Co. *v.* Lewis, 18 *Ill.* 553.

MANUFACTURE. Is used, with reference to the law of patents, to denote whatever is made by human labor, either directly or through the instrumentality of machinery; also, for the process by which a commodity is made. Thus, either merchandise which has been made by skill or machinery, or the process of skill or machinery by which it is made, is styled a manufacture.

The expression manufactures of metals, as used in an act regulating duties, means manufactured articles in which metals form a component part, and not articles in which they have lost their form entirely, and have become the chemical ingredients of new forms. Thus white lead, nitrate of lead, oxide of zinc, and dry and orange mineral, are not manufactures of metals within the meaning of the phrase. Meyer *v.* Arthur, 91 *U. S.* (1 *Otto*) 570.

Animal charcoal, or bone black, produced by burning bone, and bone dust, produced by grinding bone, are within the phrase "manufactures of bone." Various definitions of the noun manufacture, and examples of its use, stated. Schrieffer *v.* Wood, 5 *Blatchf.* 215.

MANUFACTURED. A statute giving a bounty for cloth manufactured in a family does not require that it should be fulled and dressed in the same family. Briggs *v.* Tillotson, 8 *Johns.* 304.

What may be considered a manufactured article, within a law imposing a duty upon such articles, see Lawrence *v.* Allen, 7 *How.* 785; United States *v.* Wilson, 1 *Hunt Mer. Mag.* 167.

MANUFACTURER. In the bankrupt act, has a technical meaning. It does not include every person who manufactures. A farmer is not a manufacturer because he makes butter and cheese for sale from the milk of his own cows; but, if the making butter and cheese becomes his principal business, on a scale requiring him to buy milk from others, he becomes a manufac-

turer. The publishers and conductors of a daily newspaper, and a job-printing office connected therewith, in which are made cards, bill-heads, show-bills, &c., are manufacturers, within the meaning of the bankrupt act. Matter of Kenyon, 1 *Utah T.* 47; 6 *Bankr. Reg.* 238.

One who prepares for market and sells lumber, the growth of his own land, is a "manufacturer," within the meaning of the bankrupt act. *Re* Chandler, 1 *Low.* 478.

MANUFACTURING. The term manufacturing company does not include an aqueduct company. Dudley *v.* Jamaica Pond Aqueduct Co., 100 *Mass.* 183.

The provision of 2 Rev. Stat. 415, § 33, — exempting from jury-duty persons in the actual employment of any "iron manufacturing company," — does not apply to companies engaged in making articles from iron manufactured. It includes only companies engaged in manufacturing iron. People *v.* Holdridge, 4 *Lans.* 511.

A covenant against erecting "any forge or furnace for the manufacturing of iron" does not forbid erecting a blacksmith's forge, *i.e.* an apparatus for manufacturing articles of merchandise out of iron, but only an apparatus whereby iron is manufactured from the ore. Rogers *v.* Danforth, 9 *N. J. Eq.* 289.

MANUMIT. To emancipate or set free; to give liberty to a bondman or slave. Manumitted: emancipated; set free from bondage or slavery. Manumission: the act of discharging or emancipating a bondman or slave.

The terms seem only applicable to a discharge from servitude; a relinquishment of some claim in the nature of an interest or ownership in the service of the subject. They were applied (in its Latin form) to emancipation of bondmen under the Roman law; also to the enfranchisement of a villein under the feudal law, and to the emancipation of a slave under the former law of slavery in the southern states. They are not appropriate to the discharge of a person from imprisonment.

Among the Romans it was performed in three several ways:

1. When with his master's consent a slave had his name entered in the census or public register of the citizens.

2. When the slave was led before the prætor and that magistrate laid his wand on his head.

3. When the master by his will gave his slave his freedom. (*Encyc. Lond.*) *Wharton.*

It was, in feudal times, *express* or *implied*. Manumission express was done by the lord granting to his villein a deed of enfranchisement. Manumission implied was done by the lord entering into an obligation with his villein to pay him money at a certain day, or granting him an annuity, or leasing lands to him by deed for a term of years, or doing any other similar act which would imply that he treated with his villein upon the footing of a freeman. *Termes de la Ley.*

MANUS. The hand.

Manu brevi. With short hand; briefly; directly.

Manu forti. With strong hand. Technical words of pleading in cases of trespass and forcible entry, in the Latin forms of writs and declarations.

The term implies greater force than is expressed by the words *vi et armis*. State *v.* Ray, 10 *Ired. L.* 39.

MARCHES. An old English term for boundaries or frontiers, particularly the boundaries and limits between England and Wales, or between England and Scotland, or the borders of the dominions of the crown, or the boundaries of properties in Scotland. *Mozley & W.*

Court of marches was the name of a tribunal of Wales, where pleas of debt or damages, not exceeding £50, were tried and determined. *Tomlins.*

MARGINS, as used in a deed executed by the governor and auditor of Indiana, and conveying to the purchaser all the right, title, and interest of the state to a certain canal, "including its banks, margins, tow-paths," &c, means something distinct from the other terms, such as "banks," "tow-paths," &c., employed in the deed; and includes any property owned by the state, adjacent to and on the margin of the canal, which had been set apart by the state for canal uses, or was reasonably necessary for such uses. Indiana Central Canal Co. *v.* State, 53 *Ind.* 575.

Margin, as used in brokers' contracts for the purchase and sale of stocks, means the security against loss on the part of the agent; and, instead of being paid in money, may be secured by a pledge of property. Markham *v.* Jaudon, 49 *Barb.* 462; 3 *Abb. Pr.* N. S. 286.

MARINE. 1. Pertaining to the sea; nearly equivalent to maritime.

2. A soldier of that class which are enlisted for employment on board of vessels of war.

Marine is a general name for the navy of a kingdom or state; as also for the whole economy of naval affairs, or whatever respects the building, rigging, arming, equipping, navigating, and fighting ships. It also means the government of naval armaments, and the state of all the persons employed therein, whether civil or military; also, a soldier in the sea-service. *Wharton.*

Marines, otherwise called royal marines, are a species of force sometimes quartered on shore, and sometimes sent to do duty on

board of transports or merchant ships, in which cases they are subject to the annual marine mutiny acts; sometimes on board her majesty's ships-of-war, in which case they are subject to the laws relating to the government of her majesty's forces by sea. *Mozley & W.*

Marine contract. A contract relating to business to be done at sea, or to matters particularly connected with commerce by vessels; better styled a maritime contract, *q. v.*

Marine corps. A body of soldiers enlisted and equipped for service on board vessels of war; the aggregate force of the marines; also, sometimes, the naval forces of the nation.

Marine court. A court in the city of New York, originally constituted chiefly for determination of controversies involving seamen arriving in that port; but now possessing much more general jurisdiction.

Marine insurance. Insurance of vessels or their cargoes against perils of navigation. See INSURANCE.

Marine interest. Extra interest allowed to be reserved where the lender of money towards the necessities of a voyage, secured to be paid by a bottomry bond, assumes the risk of the voyage.

Marine league. A measure of distance commonly employed at sea, being equal to one twentieth part of a degree of latitude

Marine risk. The perils necessarily incident to navigation constitute the marine risk. Thus, when a vessel is chartered, it may be an important question whether the charterer or the owner bears the marine risk; and when money is loaned on bottomry, a greater interest is allowed, because the lender assumes the marine risk.

MARINER. Includes cooks, stewards, carpenters, coopers, and firemen, as well as sailors; all on board the vessel employed in her equipment, her preservation, or the preservation of the crew, are denominated seamen. Wolverton *v.* Lacey, 8 *Monthly Law Rep.* N. S. 672.

Mariner, in the statute allowing nuncupative wills, applies to every person in the naval or mercantile service, from the common seaman to the captain or admiral. Gwin's Will, 1 *Tuck.* 44.

It applies to the cook or purser, as well as to the sailor. *Exp.* Thompson, 4 *Bradf.* 154.

Though mariners are not strictly seamen, yet they may be regarded as "persons enlisted for the navy," within the meaning of the act of 1837, which gives a premium for re-enlistment. Wilkes *v.* Dinsman, 7 *How.* 89.

Foreigners, while employed as seamen in the merchant ships of the United States, are deemed to be "mariners and seamen of the United States," within the language and policy of the act of congress of Feb. 28, 1803 (2 Stat. at L. 203), which provides for destitute seamen in foreign ports. Matthews *v.* Offley, 3 *Sumn.* 115.

MARITAGIUM. Dowry; a portion given with a daughter on her marriage; also, in feudal law, the right which the lord had to control the marriage of his vassals' daughters, or to exact a fee or tribute thereon. The right was formerly enjoyed by the lord of whom lands were held in knight-service, of disposing of his infant wards in matrimony, at their peril of forfeiting to him, in case of their refusing a suitable match, a sum of money equal to the value of the marriage; that is, what the suitor was willing to pay down to the lord as the price of marrying his ward; and double the market value was to be forfeited, if the ward presumed to marry without the lord's consent. *Cowel;* 2 *Bl. Com.* 70.

MARITAL. Bouvier defines it as meaning that which belongs to marriage; as marital rights, marital duties. But we think it is generally (not invariably) used of that which pertains to the husband in marriage. Marital rights would usually be understood to mean the rights accorded to the husband in view of the marriage relation; and marital duties, the duties of the husband, not those of the wife. Curtesy, for example, is a marital privilege, while dower is not. Webster and Worcester, both depending on Ayliffe as authority, give the word this restricted meaning only, and Wharton concurs.

MARITIME. Pertaining to navigation of the sea, or to marine commerce, with an extension in American usage to the navigation of the great lakes and rivers.

It is nearly equivalent to marine in many connections and uses; in others, the two words are used as quite distinct.

Maritime cause. A suit or judicial proceeding the subject-matter of which

arises out of navigation, and which is therefore cognizable in courts of admiralty or maritime jurisdiction.

Maritime contract. All those contracts which arise in, and are incidental to or required in, promoting navigation or commerce, upon public navigable waters are comprised within the class called maritime; and of these the United States district court in admiralty has jurisdiction. The phrase has received some expansion, in American usage, during the past twenty or thirty years, corresponding with the expansion of the admiralty jurisdiction. See ADMIRALTY. A contract for building a ship, or furnishing labor or materials therefor, has been held not to be a maritime contract (Roach *v.* Chapman, 22 *How.* 129; Edwards *v.* Elliott, 21 *Wall.* 532); and this doctrine is probably still unshaken (Tuttle *v.* Buck, 23 *Ohio St.* 565); but all the contracts pertaining to the use and employment of vessels upon waters open to public navigation are included, such as equipment, repairs, and supplies, seamen's wages, marine insurance, affreightments, charter-parties, wharfage, towage, salvage, and others of like connection with commerce by water. The jurisdiction now depends on the subject-matter alone: if that appertains to navigation, the contract belongs to the class maritime.

Maritime court. A general term for any of the various courts exercising admiralty jurisdiction, or charged with the administration of the maritime law. It is generally used in the plural, and to signify these courts as a class.

Maritime interest. Equivalent to marine interest, *q. v.*

Maritime law. A phrase for the body of principles and usages which have been, by common consent among commercial nations, adopted for the government of navigation and marine commerce, and for the determination of questions pertaining to sea-going affairs. There is no one distinct code or system of legislation which can be cited as being the maritime law. But principles extracted from ancient foreign codes, and usages which have received general adoption, and regulations, at first local, but which have won general assent, all enter into the maritime law, and are ascertained from a variety of sources, and expounded in a multitude of decisions in maritime courts throughout the world. Thus the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law, or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist as to some of the rules, or the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed, as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third: still, the commerce of the commercial world, bound together as it is by mutual relations of trade and intercourse, demands that in all essential things wherein those relations bring them in contact there should be a uniform law, founded on natural reason and justice.

Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries are not one and the same in every particular; but that whilst there is a general correspondence between them, arising from the fact that each adopts the essential principles and the great mass of the general maritime law as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common comes to be the common maritime law of the world.

That Americans have a maritime law, operative throughout the United States, cannot be doubted. The general system of maritime law, which was familiar to the lawyers and statesmen of the couutry when the constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion is one to ascertain the precise limits of the law thus adopted? The constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treaties, or only the limited and restricted system which was received in England, or, lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase admiralty and maritime jurisdiction is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood. One thing, however, is unquestionable: the constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the constitution arrived on all subjects of a commercial character affecting the intercourse of the states with each other, or with foreign states.

To ascertain, therefore, what the maritime law of this country is, one must read the French, German, Italian, and other foreign works on the subject, and the codes which they have framed, and must also have regard to the legal history, constitution, legislation, usages, and adjudications of this nation as well. The decisions of the supreme court illustrative of these sources, and giving construction to the laws and constitution, are especially to be considered; and, when these fail us, we must resort to the principles by which they have been governed. Per Bradley, J., in The Lottawanna, 21 *Wall.* 558, 571.

The maritime law comprises the law relating to harbors, ships, and seamen, and is divided into a variety of different departments, such as those with respect to harbors, the property of ships, the duties and rights of masters and seamen, contracts of affreightment, average, salvage, &c. No

system or code of maritime law has ever been issued by authority in Great Britain. The laws and practices that now obtain amongst us in reference to maritime affairs have been founded principally on the practices of merchants, the principles laid down in the civil law, the laws of Oleron and Wisby, the works of distinguished jurisconsults, the judicial decisions of our own and foreign countries, &c. A law so constructed has necessarily been in a progressive state of improvement, and, though still susceptible of amendment, it corresponds at this moment more nearly, perhaps, than any other system of maritime law with those universally recognized principles of justice and general convenience by which the transactions of merchants and navigators ought to be regulated. The decisions of Lord Mansfield did much to fix the principles and to improve and perfect the maritime law of England. It is also under great obligations to Lord Stowell. *Wharton.*

Maritime lien. Unlike the common law, which required possession to support a lien on chattel property, the general maritime law does not restrict one who has furnished labor or supplies, or money to pay for them, to a vessel out of her home port, on a lawful contract of the master, to a personal action against master or owners, but allows him to pursue the vessel in the admiralty, and, although he never acquired any possession or actual control over her, nor received any written mortgage or hypothecation, he may have a sale of the vessel for satisfaction of his demand. Similar liens exist for seamen's wages; for collision damages, &c. These are known as maritime liens, and in American books this expression is often used to distinguish a lien given by the general maritime law from one allowed by a state statute for advances to a vessel in her home port.

MARK, *n.*, or **MARC.** The name of an ancient coin; also, a weight used in some parts of Europe, more particularly for weighing the precious metals.

MARK, *n.* 1. Persons unable to write their names are allowed to subscribe written instruments by making their mark, commonly done by the subscriber making two lines across each other, on the paper, deemed to represent the sign of the cross, to which his name is affixed by some other person.

2. A label or ticket upon goods, known in the vernacular as their mark, is the foundation of the term trademark, *q. v.*

MARK, *v.* In a statute requiring designated courts "to mark and lay out the bounds and rules of the prisons in their several counties," "which marks and bounds shall be recorded by the clerk," is not used in a literal sense, requiring the court to fix visible marks. If the term is to be literally construed, the court should have perambulated the limits, and made their mark around the whole: nor would it suffice to have stones or monuments at convenient distances; for, as they are to mark the bounds, the mark must be everywhere, and consequently the stone or monument must surround the whole. Again, how mark? if it is to be done literally. Will a ditch around the limits suffice, or must a stone wall designate them? The word is not used in a literal sense. To mark is to point out, to settle, to define, to describe; and marking may be completed without fixing any visible marks or boundaries on the ground. Allen *v.* Smith, 12 *N. J. L.* 159, 165.

A statute requiring commissioners for the division of C county to "mark the boundary line," and make out drafts, &c., requires the commissioners to determine the line by marks on the ground. Keller *v.* Young, 78 *Pa. St.* 166.

MARKET, *n.* 1. Originally, an authorized place for the sale of commodities; a place designated by law for public traffic.

2. Hence, secondarily, in old English law, a franchise or liberty possessed by a municipal corporation of appointing a place within its territory for open sales of goods. This was an important power, both for the control it gave the city over local commerce, and as a means of revenue from license fees imposed. See *Jacob* or *Tomlins*, for an extended statement of the old English law of markets.

3. In the present and American law of municipal corporations, the power of establishing, licensing, and controlling markets is generally recognized as one of the corporate powers; but it is in practice limited to places for the sale of provisions, and is not attended by the incidents which distinguished the old English franchise.

4. Market is also used for buying and selling generally; for traffic, irrespective of any place appointed for it; as in the expressions market price or value.

Market overt. Open market. By peculiar rules of English law, a sale of

goods in certain designated public markets passes a good title to the purchaser, against the true owner (except the crown), even when a sale elsewhere might not; as where the goods sold have been stolen. In the country, the market-place or spot of ground set apart by custom for the sale of goods and wares, &c., is, in general, the only market overt. In London, however, a sale in an open shop, of goods in which the shop-keeper is accustomed to deal, is, by the custom, equivalent to a sale in market overt; for every day, except Sunday, is a market there. See case of market overt, *Tud. Lead. Cas. Mer. Law*, 713, and extended note.

The law of market overt is said not to exist in Scotland (*Patterson*); and it has not been adopted within the United States.

Market-place, does not necessarily or usually mean an uncovered space of ground dedicated as a market, but a market-house. Smith *v.* City of Newbern, 70 *N. C.* 14. Compare Mayor, &c. of Savannah *v.* Wilson, 49 *Ga.* 476.

Market price, means, when price at the place of exportation is in view, the price at which articles are sold and purchased, clear of every charge but such as is laid upon it at the time of sale. Goodwin *v.* United States, 2 *Wash. C. C.* 493.

Market value, signifies a price established by public sales, or sales in the way of ordinary business. Murray *v.* Stanton, 99 *Mass.* 345.

MARKETABLE. That which may lawfully and justly be sold. Thus, decayed and unwholesome provisions are not marketable.

Marketable title, to land, is such title as a purchaser may, in view of a court of equity, be compelled to accept as sufficient. This has been defined as being a title which is not merely good, but free from plausible or reasonable objection. It is, however, quite settled, that, so far as a purchaser's objection is one of pure law, the court, if the objection appears untenable, will not refrain from compelling him to complete his purchase by reason of any supposed doubtfulness in the state of the law on the subject.

MARKSMAN. A person who, because he cannot write, and instead of signing his name to a document, makes his mark, *q. v.*

MARQUE. See LETTERS OF MARQUE.

MARQUESS, or **MARQUIS.** A title of high grade in English nobility, being next in rank below that of duke.

MARRIAGE. 1. The civil condition of husband and wife; the status of a man and woman who have consummated espousals; the relation of persons who are joined in matrimony.

In this sense, marriage has, in the older American books, been defined as a contract, while definitions under European and ecclesiastical systems of law have presented it as a sacrament. The better definition, according to modern views, is that it is a status or condition which persons assume by mutual contract, or into which they are inducted by the church, according to the law of place; some jurisdictions allowing any qualified persons to take it upon themselves by simple agreement, others prescribing an ecclesiastical ceremony.

Marriage is not a contract in the strict common-law sense of the word contract, nor in its popular meaning; and it has been held not to be a contract within the constitutional prohibition upon laws impairing the obligation of contracts. It is a civil institution, established for great public objects. It has been defined to be a contract between a man and a woman, for the procreation and education of children. But it is wanting in many of the essential ingredients of a contract, and it is regulated more upon grounds of public policy than with reference to pecuniary rights of the parties as towards each other. Unlike other contracts at the common law, the parties may enter into it, the male at the age of fourteen, and the female at the age of twelve. It cannot, like ordinary contracts, be dissolved by mutual agreement, or cancelled upon a valuable consideration, neither can its obligations be modified by the parties. Public policy and the will of society supersedes the will of the parties; and, however unable one of the parties may subsequently become to perform the obligations of the relation, the other continues bound. And the very creation of the relation dissolves all previous contracts between the parties, and produces incapacity to enter into future ones. In

fact, the only important features of a contract which marriage possesses is that the assent of the parties is necessary to create the relation, and that some rights of property and service are acquired in virtue of this assent. See White *v.* White, 4 *How. Pr.* 107; also *Bish. Marr. & Div.* § 3.

So Ayliffe says: Marriage is a lawful coupling and joining together of a man and woman in one individual state or society of life, during the lifetime of one of the parties; and this society of life is contracted by the consent and mutual good-will of the parties toward each other. *Ayl. Parer.* 359. Bouvier, however, and Shelford substantially define marriage as a contract, made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife. So Wharton and Jacobs substantially define it as a solemn contract, dictated by nature and instituted by Providence, whereby a man is united to a woman for the lawful purposes of civilized society. And to like effect is the language of many of the earlier American decisions.

2. The act, ceremony, or formal proceeding by which persons take each other for husband and wife; an assumption of matrimony; a wedding.

Thus there is a distinction between marriage, which is the continuing relation, and *a* marriage, which often means only the ceremony.

Marriage is the union of one man and one woman, "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties cannot of their own volition and act dissolve, but which can be dissolved only by authority of the state. Roche *v.* Washington, 19 *Ind.* 53.

The term marriage contract is applied to the public ceremony of marriage, and also to the prior contract to marry which that ceremony implies. Develin *v.* Riggsbee, 4 *Ind.* 464.

Marriage is unquestionably a civil contract, founded in the social nature of man, and intended to regulate, chasten, and refine the intercourse between the sexes, and to multiply, preserve, and improve the species. It is an engagement by which a single man and a single woman, of sufficient discretion, take each other for husband and wife. From the nature of the contract, it exists during the lives of the two parties, unless dissolved for causes which defeat the object of marriage, or from relations imposing duties repugnant to matrimonial rights and obligations. Inhabitants of Milford *v.* Inhabitants of Worcester, 7 *Mass.* 48.

Nothing more is needed to constitute a marriage than that, in language which is mutually understood, or in any words declaratory of intention, the parties accept of each other as husband and wife; and, if the words do not of their natural meaning, or by common use, "conclude matrimony," yet, if the parties intend marriage, and their intent sufficiently appears, they are inseparably husband and wife. Consent may be either verbal or written; and, where there is no ceremony, but the parties live together as husband and wife for many years, they are deemed in law married. Dickerson *v.* Brown, 49 *Miss.* 357.

A contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is valid. Fenton *v.* Reed, 4 *Johns.* 52; Starr *v.* Peck, 1 *Hill*, 270; Clayton *v.* Wardell, 4 *N. Y.* 230; Canjolle *v.* Ferrie, 23 *N. Y.* 90; 26 *Barb.* 177; 4 *Bradf.* 28; Cheney *v.* Arnold, 15 *N. Y.* 345.

No peculiar form of words is necessary. Starr *v.* Peck, 1 *Hill*, 270.

Nothing more is necessary than a full, free, and mutual consent between the parties, though there be no consummation. Jackson *v.* Winne, 7 *Wend.* 47; 23 *N. Y.* 90; Canjolle *v.* Ferrie, 26 *Barb.* 177; 4 *Bradf.* 28.

Any mutual agreement between the parties to be husband and wife, *in præsenti*, especially where it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either. Rose *v.* Clark, 8 *Paige*, 574.

A contract to marry in future, though followed by cohabitation, does not amount to marriage in fact which will render issue legitimate. Such a contract, with cohabitation upon the faith of it, was ground for a decree enforcing performance by formal solemnization, in the ecclesiastical courts, and was for some purposes regarded as a valid marriage by the canon law, but it never constituted a valid marriage at common law. Cheney *v.* Arnold, 15 *N. Y.* 345.

The law of marriage depends partly on statute and partly on the common law. The most important statute upon the subject was the 26 Geo. II. ch. 33 (Lord Hardwicke's act), by which the publication of banns, and the solemnization in one of the churches where they had been published, were required; and that statute also enacted that two witnesses besides the minister should be present, and that the register should be signed by the minister, parties, and witnesses. This statute, referring only to the formalities of the marriage, was strictly territorial or local; hence Gretna Green marriages were valid (Brook *v.*

Brook, 9 *H. L. C.* 193). The Stat. 3 Geo. IV. ch. 75, declared marriages of infants by license, without consent, valid. The Stat. 6 Geo. IV. ch. 92, and other subsequent statutes, provide for the validity of marriages celebrated in churches and chapels in which banns have not been usually published; and, under other statutes, commencing with the Stat. 6 & 7 Wm. IV. ch. 85, marriages by or without licenses may be solemnized by virtue of the superintendent registrar's certificate.

By the common law of England, the requisites to the validity of marriage are the following:

The presence of a priest in holy orders, Catherwood *v.* Caslon, 13 *Mee. & W.* 261; Reg. *v.* Millis, 10 *Cl. & F.* 534; the presence of witnesses, Beamish *v.* Beamish, 9 *H. L. C.* 274, or at least of one witness, Wing *v.* Taylor, 2 *Swa. & T.* 278; the consent of the parties, Harrod *v.* Harrod, 1 *Kay & J.* 4; the formalities of marriage as defined by the *lex loci actus*, must be observed, Brook *v.* Brook, 9 *H. L. C.* 193; the essentials of marriage, as defined by the *lex domicilii*, including therein all questions of personal capacity or incapacity, must be observed, Brook *v.* Brook, *supra*; the parties must not be within the prohibited degrees of consanguinity or of affinity; and, for that purpose, illegitimate relationship counts; but the consent of the parents is not necessary, Rex *v.* Birmingham, 2 *Moo. & R.* 230. *Brown.*

3. In old English law, marriage is used in the sense of *maritagium* (q. v.), or the right of the lord to control the marriage of a vassal's daughter.

Marriage articles. A memorandum of what parties intending marriage have agreed upon in respect to settlement of property, drawn and signed as a guide in preparing a formal marriage settlement.

Marriage brokage, or brokerage. The endeavor of a third person to bring about a contract of marriage by conducting negotiations between the parties, for a compensation to be paid if a marriage results; also, the compensation contemplated or paid for such services.

Engagements having this purpose are understood to be sustained in some continental countries; but are strenuously discouraged by English and American law, and, indeed, have been seldom known.

Marriage-brokage contracts are agreements whereby a party engages to give another a remuneration if he will negotiate a marriage for him. Such agreements are void, as tending to introduce marriages not based on mutual affection, and therefore contrary to public policy. *Sm. Man. Eq.* tit. I. ch. 4.

Marriage ceremony. The form, religious or civil, for the solemnization of a marriage.

Marriage license. An official permit, which, under the statute law of many jurisdictions, must be obtained by persons desiring to intermarry, before the wedding can be lawfully solemnized.

In England, a marriage license is of one of the following kinds: A common license, granted by the ordinary or his surrogate; a special license from the archbishop of Canterbury; a license from the registrar of the district. A common or special license will enable the parties to marry without banns, according to the forms of the church of England; and a registrar's license obtained will enable the parties to marry in any other lawful manner. 2 *Steph. Com.* 246–257.

Marriage portion. Dowry; a sum of money or other property which a woman brings to her husband on their marriage.

Marriage promise. Betrothal; engagement to intermarry with another.

On a breach of a promise to marry, an action for damages may be maintained.

Marriage-notice book. A book kept, in England, by the registrar, in which applications for and issue of registrar's licenses to marry are recorded.

Marriage settlement. A formal instrument in the nature of a conveyance or trust-deed, executed by parties to a marriage, and in consideration of it, whereby lands or trust-funds are secured as a provision for the wife, or children, if any, or sometimes for the husband. Such settlement is usually made before the marriage, or in pursuance of articles signed before the marriage; a post-nuptial settlement may, however, be valid, if no prior rights of creditors intervene.

Such settlements have always been of high importance in Great Britain; in many of the United States they have lost consequence, under the operation of general laws continuing to women, notwithstanding marriage, the unrestricted ownership and enjoyment of their property.

MARRY. 1. To contract matri-

mony; to become joined to another person in the status known as marriage. Married, *adj.*: subject to matrimony; in the condition of marriage.

The passive voice, to be married to a person, is used in much the same sense as the active, to marry a person; if there is any shade of difference between the two, it is not drawn in question in jurisprudence, but belongs to the vernacular.

That a settler with an Indian woman for a wife is a "married" man, see Vandolf *v.* Otis, 1 *Oreg.* 153.

The terms "married," or "who shall be married," in the act of congress of Feb. 10, 1855, mean that whenever a woman who, under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes by that fact a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship on her. Kelly *v.* Owen, 7 *Wall.* 496.

2. To perform the ceremony by which two persons are joined in marriage; to solemnize, as a priest or officer, matrimony between other persons. Married is the past tense of the verb in this sense.

MARSHAL, *n.* 1. In old English law, the title applicable to several officers of different grades and powers; particularly the earl-marshal, or lord-marshal, who presided in the ancient court of chivalry; the knight-marshal, who formerly had a judicial authority within the king's palace; the marshal of the king's bench prison; the marshal of the exchequer, who had the custody of debtors to the revenue; marshal of judge of assise, whose duty it was to swear in the grand jury. *Brown; Burrill.*

2. In the United States courts, the marshal is the officer charged with the execution of process and various administrative duties.

The appointment of marshals for the various districts, their official oath and bond, and their powers and duties, are prescribed by the Rev. Stats., §§ 776–783. It is the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States. Each marshal appoints his own deputies; and the marshals and their deputies have, in each state, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof.

The service of all process in equity suits, and the sales of all property under decree in admiralty, must be by the marshal or deputy, unless some person is specially appointed by the court for the purpose. The duty and liability of the marshal or his deputy, in the execution of process, may be said, generally, to correspond with those of a sheriff. The sheriff cannot take from the marshal, under state process, property which the latter already holds in custody under United States process. The marshal is also charged with the custody of prisoners held under process of the United States courts, except so far as by state laws provision has been made for the delivery of the custody of such prisoners to the state jails. See Rev. Stat. §§ 943, 944.

MARSHAL, *v.* To arrange; to place in order. Marshalling: arranging; designating order or rank.

Marshalling assets. A doctrine of equitable jurisprudence intended to secure such an administration of the funds of an estate or debtor, which may be insufficient to pay all claims, as will discharge them as fully as possible. It has been long a general principle of equity, that, if a claimant has two or more funds to which he may resort, a person having an interest in one only of such funds has a right to compel the former to resort to the other or others of them, if that is necessary for the satisfaction of both; or, if a person having a claim upon two funds resorts to the only fund upon which another has a claim, that other person may claim to stand in his place for so much against the fund, to which otherwise he could not have access; the object being that every claimant shall be satisfied, as far as, by any arrangement consistent with the nature of the several claims, the property which they seek to affect can be applied in satisfaction of their respective claims. For it is considered that a creditor, having his choice of two funds, ought to exercise his right of election in such a manner as

not to injure other creditors who can resort to one only. Hence, though a creditor has a distinct lien on two funds, and might, as between himself and the debtor, enforce it upon either, at his election, yet he may be compelled, at the suit of a creditor who has a lien on one only, to resort to the other. But the administration of this principle is subject to the rule that no injustice is to be done to, or loss imposed on, the creditor who may be doubly secured.

MARSHALSEA. 1. The name of an English court, now abolished. It was originally held before the steward and marshal of the king's house; having been instituted to administer justice between the king's domestic servants, in order that they might not be drawn into other courts, and thus deprive the king of their services, but was afterwards merged in the palace court, erected by King Charles I., to be held before the steward of the household and knight-marshal, and the steward of the court or his deputy, with jurisdiction to hold plea of personal actions between any parties within twelve miles of the king's palace at Whitehall, outside of London.

2. The name of a prison. According to Mozley and Whiteley, there have been two prisons of the name. The prison of the marshalsea of the court of queen's bench, in Southwark, otherwise called the queen's bench prison, was a prison for debtors, and for persons confined under the sentence or charged with contempt of the court of queen's bench. The prison of the marshalsea of her majesty's household was a prison for debtors, and for persons charged with contempt of the courts of the marshalsea, the court of the queen's palace of Westminster, and the court of admiralty, and also for admiralty prisoners under sentence of court-martial. This prison was abolished in 1842, by Stat. 5 & 6 Vict. ch. 22, and the prisoners transferred to the queen's bench prison, which was thenceforth to be called the queen's prison, and was so called until its abolition, in 1862, by Stat. 25 & 26 Vict. ch. 104. This seems to be the prison mentioned by other books under the name of the prison of the marshalsea.

MARTIAL LAW. A discretionary government or sway over civil and personal affairs, which is exercised, in time of war, by the commanding general of a military force occupying a city or region of territory, and founded upon the necessities of the case, and the interruption of civil authority by the pending hostilities.

The operations of an army, in time of war, often require, even in their own country, that civil government should be suspended for the time being; and, when an army comes into belligerent occupation of enemy's territory, suspension of the local government is almost a necessary result. Under such circumstances, a necessity is considered to arise that the commanding general of the army should administer such rules as he thinks best to prescribe, both to promote the efficiency and success of the military operations and to secure such measure of good order throughout the territory subject to his occupation as may be practicable. This substitution of the discretion and will of the military authorities for civil law is what is properly known as martial law. It is founded on necessity, and can be justified only while the necessity continues. It must be distinguished from military law, *q. v.*

Martial law is the will of the general who commands the army of occupation. *Re* Egan, 5 *Blatchf.* 319.

For an extended discussion of the meaning of the term, and the extent to which martial law may be proclaimed by the president as commander-in-chief of the army, within the territory of the United States, see Griffin *v.* Wilcox, 21 *Ind.* 370.

MASTER. A designation bestowed on persons in several distinct relations or offices, authorized to control others.

Master and apprentice. In the relation of apprenticeship, the master is the party to whom the apprentice is indentured. He engages to maintain him for the term prescribed, and to teach him his trade, and to do other things enumerated in the indentures. He stands *in loco parentis* to the apprentice. See APPRENTICE.

Master in chancery. The title of an officer in courts of chancery whose functions are to assist the chancellor in his duties, or, in subordinate matters, to act in his place; as to inquire into mat-

ters referred to him by the chancery judges, to take accounts and compute damages; also to take oaths, affidavits, and acknowledgments of deeds and recognizances. The term is less used than formerly, the office, in that particular form, having been in many jurisdictions discontinued. Clerks, commissioners, and referees now perform many matters formerly entrusted to masters.

The masters in chancery were officers whose duty it was to make inquiries, when so required by the court, into matters which, from the constitution of the court, it could not conveniently, without the assistance of such officers, make for itself, and to report to the court their findings or conclusions with respect to such matters. The duties of these masters were of a mixed character, being partly judicial and partly ministerial, the powers which they possessed in both respects having been delegated to them by the court. Whenever a master had acted in obedience to the directions of the court, he used to inform the court, by a document in writing, of what he had done, or what conclusion he had come to; and, in most cases, this document was called the master's report. The masters in chancery, in addition to their ordinary functions, acted as messengers from the house of lords to the house of commons. There were also certain other officers of the court of chancery, called masters extraordinary in chancery. These were usually solicitors who were appointed by the court to act in the various counties of England in taking affidavits, acknowledgments of deeds, recognizances, &c., which otherwise would have had to be taken before the masters in London, and would thus have occasioned to the suitors loss of time and expense in coming to London for that purpose. The duties formerly discharged by the masters in ordinary in chancery are now discharged by the chief clerks attached to the offices of the various judges; those formerly discharged by the masters extraordinary are now discharged by solicitors qualified as commissioners for taking oaths throughout the kingdom. *Brown.*

Master at common law. The title of officers of the English superior courts of common law appointed to record the proceedings of the court to which they belong; to superintend the issue of writs and the formal proceedings in an action; to receive and account for the fees charged on legal proceedings, and moneys paid into court. There are five to each court. They are appointed under Stat. 7 Wm. IV. & 1 Vict. ch. 30, passed in 1837. *Mozley & W.*

Master of the crown office. The title of the queen's coroner and attorney in the criminal department of the court of queen's bench. He prosecutes at the relation of some private person or common informer, the crown being the nominal prosecutor. *Wharton.*

Master in lunacy. The masters in lunacy are judicial officers appointed by the lord chancellor for the purpose of conducting inquiries into the state of mind of persons alleged to be lunatics. Such inquiries usually take place before a jury. 2 *Steph. Com.* 511–513.

Master's report, in equity practice, signifies the formal statement made by a master of his decision on any question referred to him, or of any facts or action he has been directed to ascertain or take.

Master of the rolls. One of the judges of the English court of chancery, as it was formerly constituted, whose jurisdiction is now transferred to the supreme court of judicature. He was originally one of the masters in chancery; and his earliest judicial attendances seem to have been merely as assessor to the chancellor, with the other masters. He is called master of the rolls in Stat. 11 Hen. VII. ch. 18; and his character as an independent judge was fully established in the reign of George II. He has been ranked next after the lord chief justice of the queen's bench, and above the lord chief justice of the common pleas, the lord chief baron of the exchequer, and the lords justices of appeal in chancery, though the latter sat as judges to hear appeals from his decisions.

Master and servant. In former English law, this was a relation quite distinctly marked and regulated; but, throughout the United States at the present day, master in this connection means little else than employer.

Master of a ship. The title of the officer first in command of a vessel in the merchant service.

The master's authority over a merchant ship is similar to that of the captain on board a vessel of war; and the title captain is often applied to him.

For a mention of many other officers known to former English law under the title of master, see Jacob's, Tomlins', and Wharton's dictionaries.

MATE. The title of the officer of a merchant vessel second in rank, or next to the master.

If there are several mates, they are

styled first, second, third, &c., mate, ranking accordingly.

On the death or disability of the master, the mate succeeds, for the time being, to his authority.

MATERIAL, *adj.* Important. As applied to evidence offered in a cause, or facts drawn in question in a proceeding, it means much the same as relevant. Matters are pronounced material or immaterial to an issue, with the meaning that they are relevant or irrelevant.

MATERIAL-MAN. A person who has furnished lumber, iron, brick, or any other merchandise or stuff necessary and useful in the construction or repair of a building, structure, or vessel.

The term is of frequent occurrence in admiralty causes involving claims of material-men to liens on vessels for the price of what they have supplied to her; also in cases under mechanics' lien laws.

MATERIALS. In provisions of a slate company's charter, fixing the stockholders for debts to mechanics, &c., refers to that only which forms part of the products of the company. Moyer *v.* Pa. Slate Co., 71 *Pa. St.* 293.

The phrase "materials for building," in an ordinance prohibiting deposits in a street without permission, should not be deemed to include earth excavated from the site. Hundhausen *v.* Bond, 36 *Wis.* 29.

MATRICIDE. The crime of killing one's mother.

MATRIMONY. Marriage (*q. v.*), in the sense of the relation or status, not of the ceremony.

Matrimonial causes, is a term used in England more than in the United States to designate that class of suits which involve rights pertaining to marriage, other than claims to divorce.

Matrimonial causes are a branch of the ecclesiastical jurisdiction, and are either:

Suits of jactitation of marriage. These are brought when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their marriage may ensue. The party injured may petition the divorce court, which will enjoin a perpetual silence on that head.

Suits for restitution of conjugal rights. These are brought when a husband or wife is guilty of the injury of living apart from the other without any sufficient reason. The court will compel them to come together again.

Suits for judicial separation and dissolution. These have superseded the divorces *a mensa et thoro* and *a vinculo matrimonii*. *Wharton.*

MATRON. Seems to mean, originally, a woman who has been a mother. It is often used as the style of a female superintendent of an institution or establishment where the duties involve domestic care, the oversight of children, the nursing of the sick, &c.

Jury of matrons. A jury formed of women, which is impanelled to try the question whether a woman be with child or not.

MATTER. Occurs in some technical phrases.

Matter in controversy, or in dispute. Statutes conferring jurisdiction frequently limit it to causes in which the matter in controversy, or matter in dispute, exceeds a certain sum. The right of appeal is often limited in like manner. In general, the matter in controversy, or in dispute, in an original suit, is that which is demanded by the plaintiff, irrespective of admissions or denials in the answer; and under many statutes allowing appeal the same principle is applied. The claim put forward by the plaintiff at the outset is deemed the matter in dispute; and, if this is for a sum which gives jurisdiction, the courts may act throughout the suit, notwithstanding some portion is admitted or adjudicated upon, so that, in later stages of the cause, a less sum is all that is practically in controversy. But this rule is not invariable: the intent and construction of the particular statute must govern.

By "matter in dispute," in a statute predicating appellate jurisdiction on the value of the matter in dispute, is meant the subject of litigation, — the matter for which the suit is brought, and on which issue is joined, and in relation to which jurors are called and witnesses examined. In an action on a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining the question whether the court can take jurisdiction. Reference must be had both to the debt claimed and

the damages alleged or the prayer for judgment. Lee *v* Watson, 1 *Wall.* 337.

It is not the verdict or judgment which ascertains the value of the matter in dispute between the parties. To determine this, recurrence must be had to the original controversy, — to the matter in dispute when the action was instituted. The thing demanded, and not the thing found, constitutes the matter in dispute between the parties. Wilson *v.* Daniel, 3 *Dall.* 401.

The amount due at the institution of the suit constitutes the matter in dispute. Hence an appeal will not lie on an interest-bearing claim which was not sufficient in amount to give jurisdiction at the time the suit was instituted, although the interest which accrued after suit instituted, and before appeal taken, increased the amount of the claim so as to bring it within the jurisdictional limitation. Mason *v.* Oglesby, 2 *La. Ann.* 793; Frellsen *v.* Copley, *Id.* 911; Owen *v.* Boyd, 7 *Id.* 109; Cornell *v.* Geddes, 10 *Id.* 170; Klein *v.* Wild, 12 *Id.* 87.

An act which gives an appeal or error, where the matter in dispute shall exceed a value specified, does not give a review in a criminal case. The words "the matter in dispute" seem appropriate to civil causes, where the subject in contest is of a value beyond the sum mentioned in the act. In criminal cases, the question is the guilt or innocence of the accused; and, although he may be fined upwards of $100, yet that is, in the eye of the law, a punishment for the offence, and not the particular object of the suit. United States *v.* More, 3 *Cranch*, 159.

Matter in deed. That which may most properly be established by means of a sealed instrument; also, sometimes, matter of fact, in distinction to matter of law.

Matter in deed is some private matter or thing contained in a deed between two or more parties; as the covenants or recitals in a lease, or in a mortgage deed, for instance; and these, although enrolled, — that is, transcribed upon the records of one of the queen's courts at Westminster, or at a court of quarter sessions, as they often are, for safe custody, — do not thereby become matter of record, but are simple deeds recorded or enrolled; for there is a material difference between a matter of record and matter recorded for the purpose of being kept in memory: a record being an entry on parchment of judicial matters or proceedings which have taken place in a court of record, and of which the court takes judicial notice, as matter coming peculiarly under its own cognizance; whereas the enrolment of a deed is a private act of the parties concerned, of which the court takes no cognizance at the time when it is done. *Brown.*

Matter of fact. Whatever is to be ascertained by the senses, or by the testimony of witnesses to what they have perceived.

Matter of form. An important distinction, in determining the sufficiency of pleadings and proceedings, is taken between matters of form and matters of substance. No definite general rule can be given for discriminating between these. The general principle is that whatever pertains to the purpose of the instrument, to the objects to be accomplished by it, or to any right involved or affected, is matter of substance; while what relates merely to the language or expression, without affecting the issue presented, the evidence requisite, the rights of either party, or the steps necessary to be taken in furtherance of the proceedings, is matter of form. The importance of this distinction relates chiefly to the effect attributable to errors and defects, which, in matters of form, may be amended or disregarded much more readily than when in the substance. How the distinction will be applied varies in different jurisdictions and proceedings. Many things deemed matter of substance in criminal proceedings, where liberty or life is at stake, are closely analogous to things deemed matter of form only in civil causes. In actions under the reformed codes of procedure, and in suits in admiralty and equity, the rule is more liberal than under common-law rules, except as they have been modified by modern legislation.

Matter of law. Whatever is to be ascertained by reasoning from the principles of jurisprudence, or from the enactments of the legislature and adjudications of the courts.

Matter in pais. This expression usually signifies that which, being matter of fact, is not evidenced by writing, but must be established by oral testimony to what has been said or done by the person involved.

Matter *in pais* simply means matter of fact, — probably so called because matters of fact are triable by the country, *i.e.* by a jury. An example of an estoppel by matter *in pais* occurs when one man has accepted rent of another. In such case, he will be estopped from afterwards denying, in any action with such person, that the latter was at the time of such acceptance his tenant. *Brown.*

Matter of record. That which has been embodied in, and may properly be established by, the official documents authenticating judicial acts or proceedings.

Matter of record signifies some judicial matter or proceeding entered upon one of the records of the court, and of which the court takes peculiar cognizance. Thus the

pleadings in an action in the superior courts, and in the courts of record, being matter which is entered upon the records of the court, and filed with its officer as an authentic history of the suit, are thence termed a matter of record. *Brown.*

Matters of subsistence for man. This phrase comprehends all articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer, or are only consumed after undergoing a process of preparation, which is greater or less, according to the character of the article. Sledd *v.* Commonwealth, 19 *Gratt.* 813.

Matter of substance. The antithesis of matter of form, *q. v.*

MATURITY. Is not synonymous with legal majority. As used by a testator, it may well be held to import maturity of mind and character, the combined result of age and education. Condict *v.* King, 13 *N. J. Eq.* 375.

The word maturity was construed to mean puberty, in Lowry *v.* Mountjoy, 6 *Call,* 55.

Maturity, when used with reference to bonds and similar instruments, means the time fixed for payment of the principal. A condition to pay bonds at maturity does not refer to payment of annual instalments of interest, though such are promised by the bonds, and is not broken by default in payment of interest until the time named for paying the principal arrives. United States *v.* Union Pacific R. R. Co., 91 *U. S.* (1 *Otto*) 72.

The words "at maturity" refer to and include the whole day, unless specially and distinctly limited to a certain hour of the day. Leigh *v.* Knickerbocker Life Ins. Co., 26 *La. Ann.* 436.

MAY. Is often used in the sense of giving authority or permission. Its use in this sense in statutes declaring that officers or persons "may" do such and such acts has given rise to numerous decisions using the expression that "may" in such a connection means "must" or "shall."

Strictly, this is a principle of statutory construction, not a variation in the meaning of the word may. The decisions in question may be harmonized around one of two principles. One is, that, whenever in a statute the evident intention of the legislature is to impose a positive command, to create an absolute obligation, then, though the word may is used, it is to be read as "must" or "shall." This, however, is not varying the meaning of the word, but is only a particular application of a very broad and general rule, that the intent of the legislature, gathered from the whole enactment and attendant circumstances, must control the sense to be assigned to particular words employed. The other principle is, that, when an authority or power is conferred by a statute upon any one, not for his own advantage, but for public objects and the benefit of members of the community at large, he takes the power subject to a duty to execute it, whenever a proper application, supported by the requisite facts, is made to him. This, again, is a principle of statutory construction, not a variation in the meaning of "may." Etymologically, the word imports permission; but permission, viewed in connection with our scheme of government and the nature of an officer's relations to the public, raises a duty or obligation. The following are representative decisions illustrating the various distinctive expressions that have been given to the doctrine of construing "may" as imperative. The number might be multiplied almost indefinitely; but the increase would be mainly by repetitions.

The word shall may be substituted for "may" in the interpretation of a statute, when the good sense of the entire enactment requires the change. This rule applies when a statute establishes an improvement, and devolves upon any person or persons, or a corporation, the performance of such acts as may be requisite to insure its completion. People *v.* Common Council of Brooklyn, 22 *Barb.* 404.

In the construction of public statutes, the word may is to be construed "must," in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power; and in all cases the construction should be such as carries into effect the true intent and meaning of the legislature in the enactment. Minor *v.* Mechanics' Bank of Alexandria, 1 *Pet.* 46; Supervisors *v.* United States, 4 *Wall.* 435.

"May" is properly construed as equivalent to "must" or "shall," when used in giving power to a court or officer, if there is nothing to indicate an intent to leave the execution of the power to the officers' discretion. Matter of Ballentine, 45 *Cal.* 696.

"May" should be construed as "must," whenever this becomes necessary to carry out the intent of the legislature; but in all other cases this word, like any other, must have its ordinary meaning. Kelly *v.* Morse, 3 *Neb.* 224. And see Thompson *v.* Carroll, 22 *How.* 422.

The word may, in statutes, will be

construed to mean "shall," in those cases where public rights and interests are concerned, and where the public or third persons have a claim *de jure* that the power should be exercised. Nave *v.* Nave, 7 *Ind.* 122; Bansemer *v.* Mace, 18 *Id.* 27; Blake *v.* Portsmouth, &c. R. R. Co., 39 *N. H.* 435; Phelps *v.* Hawley, 3 *Lans.* 160; Low *v.* Dunham, 61 *Me.* 566.

"May," in a statute, should be construed to mean "shall," wherever the rights of third persons or the public interests require. Steines *v.* Franklin County, 48 *Mo.* 167; State *v.* Saline County Court, *Id.* 390.

Where a statute directs the doing of a thing for the sake of justice or the public good, the word may is the same as the word shall. People *v.* Supervisors, &c., 51 *N. Y.* 401; People *v.* Commissioners, 4 *Neb.* 150; Commonwealth *v.* Haynes, 107 *Mass.* 194, 197.

"May" means "must," in a statute, when a right is given or duty imposed. Adriance *v.* Supervisors of New York, 12 *How. Pr.* 224, 231; Darby *v.* Condit, 1 *Duer*, 599.

"May" is usually permissive only, and not exclusive. Commonwealth *v.* Haynes, 107 *Mass.* 194, 197.

The primary and most common use of "may" is for giving permission to perform the act referred to. Where it occurs in a statute, it should be read in that sense, and not in the sense of "must," unless there is something in the connection of the language, or in the sense and policy of the provision, to require an unusual interpretation. An act that stealing from the person "may" be punished as grand larceny, though the value of the property is less than $25, is not imperative, but enabling only. Williams *v.* People, 24 *N. Y.* 405.

Where the effect of the provisions of a statute is to impose a duty, the use of the word may is to be understood as imperative; but in other cases it is merely discretionary. Cooke *v.* State National Bank of Boston, 50 *Barb.* 339.

The word may, in a statute, will be construed to mean "must" or "shall," when the rights of the public or third persons depend upon the exercise of the power given, or the performance of the duty to which it refers. Such is its meaning in all cases in which the public alone have an interest, or a public duty is imposed upon a public officer. In other cases, it does not always mean "shall" or "must." Kane *v.* Footh, 70 *Ill.* 587; Lucas *v.* Ensign, 4 *N. Y. Leg. Obs.* 142.

The words "may" and "shall," when used in a statute, may be read interchangeably, as will best express the legislative intention. "May" will be construed to mean "shall" where the public interests and rights are concerned, and the public or third persons have a claim *de jure* that the power shall be exercised; and the same is true where the word shall is used; but, where no right or benefit to any one depends upon the imperative use of these words, they may be held directory merely. Fowler *v.* Pirkins, 77 *Ill.* 271.

The true rule of construction of statutes, providing that a certain thing may be done, is that the word may means "must" or "shall" in those cases only where the public interests and rights are concerned, and where the public or third persons have a claim *de jure* that the right shall be exercised. In other cases it confers a sound discretion only. Seiple *v.* Borough of Elizabeth, 27 *N. J. L.* 407; Cutler *v.* Howard, 9 *Wis.* 309; Newburgh, &c. Turnp. Road *v.* Miller, 5 *Johns. Ch.* 101; Buffalo & Batavia Plank-road Co. *v.* Commissioners of Lancaster, 10 *How. Pr.* 237.

The word may, when used in a statute, will be construed as mandatory and imperative for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right or determining its charac ter. A permissive word should be construed as peremptory, when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interests or the rights of third persons. *Exp.* Banks, 28 *Ala.* 28; *Exp.* Simonton, 9 *Port.* 390.

"May," in a statute, is construed as mandatory only for the purpose of sustaining or enforcing a right, never for creating one. State *v.* Holt County Court, 39 *Mo.* 521.

A bank charter provided that the capital stock "may consist" of a certain amount, divided into shares of a certain amount each, and "shall be paid" in the following manner, viz.: one dollar on each share in sixty, and one in ninety, days after subscription, "the remainder to be called for as the president and directors may deem proper," &c., and there was no clause expressly restricting the operation of the bank till a certain amount of stock was subscribed. It was held that "may" should be construed in its ordinary sense, and not by the common rule as synonymous with "must," and that a *bona fide* subscription of the capital stock prescribed by the charter was not a condition precedent to the corporate existence or legal operation of the bank. Minor *v.* Mechanics' Bank of Alexandria, 1 *Pet.* 46.

A statute providing that certain public officers, "if deemed advisable," or "if they believe the public good and the best interests of the city require it," "may" levy a certain tax, though permissive in form, is, in fact, peremptory, whenever the public interest or individual rights call for its exercise. Supervisors *v.* United States, 4 *Wall.* 435; Galena *v.* Amy, 5 *Wall.* 705.

In Illinois Rev. Stat. ch. 131, § 18, providing that "all actions, &c., against any county, may be commenced," &c., the word may is construed to mean "must." Randolph County *v.* Ralls, 18 *Ill.* 29.

"May," in the Illinois act of 1872, p. 345, providing that the court "may grant a continuance" for absence of the attorney as

member of the general assembly, means "must." St. Louis, &c. R. Co. *v.* Teters, 68 *Ill.* 144.

A statute which provides that appeals from judgments of the county courts against lands for taxes, &c., "may" be taken to the supreme court, is not imperative, and therefore does not repeal by implication the provision of a previous act, which gives an appeal in such case to the circuit court. Fowler *v.* Pirkins, 77 *Ill.* 271.

The word may, in section 34 of the justices' act, 2 Rev. Stat. 455, providing that matters of defence except, &c., may be given in evidence without plea, is not synonymous with "shall," nor should it be understood to operate imperatively; a party may plead, if he desires to do so, or may rely upon the statutory right to proceed without pleading. The provision of the statute is clearly for the benefit of the defendant. He may accept it or not. He will be presumed to have accepted it, unless the contrary is shown. Cross *v.* Pearson, 17 *Ind.* 612.

An enactment that an indictment for polygamy "may" be found and tried in the county where the offender resides, or where he is apprehended, is not in derogation of the common law, but only enlarges the jurisdiction, "may" being permissive and not mandatory. State *v.* Sweetsir, 53 *Me.* 438.

"May," in a statute that the probate court "may set apart" certain property of the deceased for his family, should be construed "shall." Walley's Estate, 11 *Nev.* 260.

Officers before whom oaths and affidavits may, by law, be taken, are bound to administer the same, when requested; the word may, in a statute conferring such power, being equivalent to "shall;" and a refusal to do so subjects them to indictment for a misdemeanor. People *v.* Brooks, 1 *Den.* 457.

"May" was held to mean "must," in a statute conferring power to declare certain marriages void. Appleton *v.* Warner, 51 *Barb.* 270.

And in statutes that courts of special sessions "may be held by any two police justices;" "may be held by any three police justices." Divine's Case, 11 *Abb. Pr.* 90.

An act declaring that commissioners of highways "may" allow the application of highway labor to plank-roads, was held permissive only. Buffalo & Batavia Plank-road Co. *v.* Commissioners of Lancaster, 10 *How. Pr.* 237.

In a statutory provision, that if election returns are found incomplete the board of canvassers "may despatch a messenger to the inspectors who made the returns, commanding them to complete," &c., "may" means "must." State *v.* Board of State Canvassers, 36 *Wis.* 498.

Where a charter declared that the mayor and jurats of an ancient town "might" hold a court of record for the holding of pleas, but this power had been long disused, a *mandamus* was granted to compel such court to be held, at the instance of an inhabitant of the town, though he was not a corporator. King *v.* Mayor, &c. of Hastings, 1 *Dowl. & R.* 148; 5 *Barn. & Ald.* 692, note.

May have. The expression "the possessions that I may have I will give," in a will, is not necessarily confined to possessions at a future time. Wilkinson *v.* Adam, 1 *Ves. & B.* 422.

The words "may have" and "may have been" are presumably retrospective. Heeney *v.* Brooklyn Benevolent Society, 33 *Barb.* 360.

May in any wise, is not always synonymous with may by any possibility, or, may under any circumstances. Gregory *v.* Kanouse, 11 *N. J. L.* 62.

May pay, in an agreement by one insurance company to reinsure another in all its term-risks, in several states, was held to mean liable to pay. Fame Ins. Co.'s Appeal, 83 *Pa. St.* 396.

May receive, in an agreement to credit on notes given for the use of a patent, any amount the payee "may receive" from a third party, "for the use of said patent to this date," was held to refer only to money thereafter received. Greene *v.* Robinson, 41 *Conn.* 470.

May saw. Defendants agreed to sell and deliver all the merchantable spruce plank "that they may saw" during the winter. It was held that they were not bound to saw any, but only to sell what they should choose to saw. Wemple *v.* Stewart, 22 *Barb.* 154.

MAYHEM. The offence of violently depriving a person of any limb, member, or organ useful in fighting, either offensive or defensive; also, the personal injury which may have this effect is called a mayhem, or a maim. See MAIM.

Cutting off a finger, putting out an eye, breaking out a fore-tooth, are commonly mentioned as examples of acts constituting mayhem. A mere disfigurement or a temporary disability is not enough.

Mayhem imports a permanent injury; a temporary disabling of a finger, an arm, or an eye is not sufficient to constitute the offence. State *v.* Briley, 8 *Port.* 472.

MAYOR. The usual title of the chief executive officer of a city.

See *Burrill* for an interesting paragraph on the derivation of the word.

MEANS. The phrase "or the attempt by any other means," in the statute punishing the setting fire to buildings or to any other materials, contemplates the employ-

ment of physical means. McDade *v.* People, 29 *Mich.* 50.

Means of support, in the Illinois civil damage law, embraces all those resources from which the necessaries and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. Meidel *v.* Anthis, 71 *Ill.* 241.

MEASURE OF DAMAGES. Aside from cases in which nominal damages only are allowed, and from cases in which exemplary (*q. v.*) or liquidated (*q. v.*) or statutory damages may be recovered, the general aim of the law in awarding damages is to secure a just compensation for the plaintiff's loss. But, as to many injuries and wrongs, positive rules exist for estimating what shall be deemed a compensatiou; and these are said to furnish the measure of damages in the cases to which they severally apply. Quite a nnmber of these rules have now become established, and they partially relieve courts and juries in the duty of making a general estimate of losses, by supplying a technical guide, which, being deemed generally just, is followed in all cases of the kind. See these rules presented in *Sedgwick on Damages.*

MECHANIC'S LIEN. A species of remedy allowed by the statute laws of most of the states to persons furnishing materials or labor towards the construction of a building, whereby, in proper cases, payment of their demands may be enforced out of the realty. See LIEN.

MEDICAL JURISPRUDENCE. Is that branch of jurisprudence which treats of controversies and questions requiring technical medical knowledge and skill, as well as knowledge of law; also called — less appropriately, we think — forensic medicine.

Judge Bouvier enumerates four distinct classes of these questions: those arising out of the relations of sex, as impotence and sterility, hermaphroditism, rape, pregnancy, legitimacy, delivery; those relating to injuries inflicted upon the living organization, as infanticide, wounds, poisons, persons found dead; those arising out of disqualifying diseases, as the different forms of mental alienation; and those arising out of deceptive practices, as feigned diseases. To these are added miscellaneous questions which will not fall into classes; such as those relating to age, identity, presumption of survivorship, life assurance, and others.

MEDIETATIS LINGUÆ. Of half-tongue; mixed in language. Another form of the phrase *de medietate linguæ*, q. v.

MEET. "Meet" and "pass." These terms, used in Rev. Stat. ch. 51, § 1, prescribing the law of the road, are used in their strict signification, and are intended to apply only where travellers are approaching each other from opposite directions, intending to pass on the same road. Travellers cannot with accuracy be said to meet and pass, when they come together in different directions from two roads or streets which intersect each other. Lovejoy *v.* Dolan, 10 *Cush.* 499.

MELIOR; MELIUS. Lat., better; preferable.

Melior est conditio possidentis. The condition of the person in possession is the better.

When the titles shown by a plaintiff seeking to recover property, and by a defendant having possession of it, may be deemed equally good, the defendant prevails in virtue of his possession. But it must be a possession peaceably and lawfully acquired.

Melius inquirendum. To be better inquired into. This was the name of a writ, in old English practice, commanding a further inquiry respecting a matter; as, after an imperfect inquisition in proceedings in outlawry, to have a new inquest as to the value of lands.

MEMBER. A son or daughter residing with a father does not cease to be a member of his family by the mere fact of arriving at twenty-one or eighteen years of age. Chicago, &c. R. Co. *v.* Chisholm, 79 *Ill.* 584.

A provision that "all the members" of a company shall be liable, extends to those who are members when the liability of the company is sought to be enforced. Curtis *v.* Harlow, 12 *Metc.* (*Mass.*) 3.

MEMORANDUM. Let it be remembered. When legal instruments were in Latin, a writing, for which no technical form was prescribed, but which was drawn up to embody and preserve some transaction, often commenced with the word memorandum, — let it be remembered, — and then proceeded to state the facts intended to be preserved. Hence this initial word

came to be the name of any informal writing. It has some technical uses.

It was applied in former practice in English common-law courts to two or three papers often used in suits. Thus, in proceedings by bill, there was a record of incidental proceedings which was called the memorandum. The note made of a party's appearance was called memorandum of appearance.

Memorandum of agreement. The statutes of frauds prohibit recovery upon agreements embraced within certain classes, unless a note or memorandum of the agreement is made and signed by the party sought to be charged. No particular form or requisites are, in general, required in these memoranda: if the essential elements of a valid contract can be gathered from the paper, this is sufficient. The word memorandum is doubtless employed to signify that the writing may be informal.

Memorandum articles. Articles as to which the liability of an insurer is usually limited by a special clause in or accompanying the policy, known as the memorandum clause.

Memorandum of association. A document to be subscribed by seven or more persons associated for a lawful purpose, by subscribing which, and otherwise complying with the requisitions of the companies acts in respect of registration, they may form themselves into an incorporated company, with or without limited liability. 3 *Steph. Com.* 20.

Memorandum check. It is very customary among merchants for a borrower to give his check instead of his note to the lender, for the amount of the loan; writing upon the check, however, the contraction *mem.*, for memorandum. This signifies that the check shall not be presented at bank, but the maker will redeem it at the agreed time.

What is known among merchants as a "memorandum check" is distinguishable, in view of the usage relative to such checks, and operates as an unconditional promise to pay the sum of money mentioned. The word memorandum is to be regarded not as something superadded to change the legal effect of a previously existing instrument, but as a part of the original paper. Turnbull *v.* Osborne, 12 *Abb. Pr.* N. S. 200.

Memorandum clause. A clause formerly appended or annexed to a policy of insurance, now usually incorporated in it, limiting the liability of insurers with respect to certain specified articles and risks.

Memorandum in error. A writing, signed by a party desirous to bring "error in fact" for the purpose of reversing a judgment, or by his attorney. This species of memorandum was entitled in the court and in the cause, and delivered to one of the masters of the court in which the judgment has been given, accompanied by an affidavit of the matter of fact wherein the alleged error consists. *Kerr Act. Law.* But proceedings in error have been abolished in civil cases by the judicature acts, and orders under them.

MEMORY. 1. Mental capacity. The phrase, sound and disposing mind and memory, means, not merely distinct recollection of the items of one's property and the persons among whom it may be given, but entire power of mind to dispose of property by will.

2. According to the ancient theory of the common law, customs, rights, possessions, &c., which had existed from a time ante-dating history, or from time immemorial, or before the memory of man, became obligatory and valid without proof of an original authority or grant by which they commenced. The time of this legal memory was originally indefinite. In 1276, by the statute of Westminster, the commencement of the reign of Richard I. was named as the date when legal memory should be deemed to commence. Under that enactment, a custom depending on length of existence only might be impeached and deprived of force as law, by proof that it had not existed uninterruptedly from that date. Of course, the lapse of centuries after that (or any other) fixed date gradually rendered it more and more difficult that any custom or right should be traced back to the beginning of legal memory; hence, in 1832, by Stat. 2 & 3 Wm. IV. ch. 71, the plan of dating legal memory from a fixed point of time was abandoned, and the principle introduced, that rights which had been enjoyed for full twenty years (against the crown, thirty) should not be liable to be impeached by mere

proof that they did not exist at some earlier date. This rule substantially prevails throughout the United States. The adoption of a term of years dating back from the date of controversy, in place of a date assumed as the commencement of legal history, has deprived the phrase, time of legal memory, of any special significance or importance. In older books it occurs, used with reference to the commencement of the reign of Richard I. More recently, the expression is found, referring to the change in the law introduced in Wm. IV., — the time of legal memory is twenty years.

MERCANTILE LAW. The body of general rules and customs prevailing among persons in trade, and by which, in addition to statutes and rules of the common law, in the strict sense of the latter term, controversies between them are determined. The expression means substantially the same as the commercial law, and as the law-merchant, *q. v.*

MERCHANDISE. A comprehensive general term for all those things which persons in trade usually keep for sale.

The word is not capable of exact definition, being collective. In most uses it signifies personal chattels, the product of artisanship or manufactures, as distinguished from land, live animals, agricultural produce in its original condition, and evidences of debt; but in special connections may have a more comprehensive meaning. The consideration that a thing is sometimes bought and sold does not render it merchandise: it should be a usual subject of trade.

In the earlier duty laws of the United States, the expression, goods, wares, and merchandise, was scrupulously used to comprehend all subjects of duty collectively. But in the revised statutes merchandise alone is used as the equivalent of goods, wares, and merchandise.

Merchandise, in a common count for goods sold and delivered, embraces animate as well as inanimate property. Weston *v.* McDowell, 20 *Mich.* 353.

Horses brought from a foreign country into the United States for the purpose of use or sale in this country, being objects of trade and commerce, may be considered as included in the term "merchandise," in the act of 1821 regarding imports. But when brought in as the mere instruments of prosecuting a temporary journey or visit, they are not within the purview of the act. United States *v.* One Sorrel Horse, 22 *Vt.* 655.

"Merchandise" seems not to have any fixed and technical legal signification, but comprehends whatever is usually bought and sold, what merchants commonly trade in. A policy of insurance taken out upon "grain and other merchandise" contained in certain warehouses ought not to be construed as embracing disused fixtures of the business, although the insurers would willingly have sold them had a purchaser appeared, but should be confined to grain and stuffs somewhat similar, in which the insurers ordinarily dealt. Kent *v.* Liverpool & London Ins. Co., 26 *Ind.* 294.

A policy on "merchandise" will cover a "curricle." Duplanty *v.* Com. Ins. Co., *Anth.* 114.

A policy upon merchandise such as is usually kept in country stores, is not void because hardware, china, and glass-ware, looking-glasses, &c., were not specifically mentioned; whether the articles were such as are usually kept in country stores is for the jury to determine. Franklin, &c. Ins. Co. *v.* Updegraff, 43 *Pa. St.* 350.

A charter power to run a steamboat for the "transportation of merchandise" does not authorize carrying bank-notes. Bank-notes are not merchandise. That term is usually, if not universally, limited to things that are ordinarily the subjects of commerce and traffic. The fact that a thing is sometimes bought and sold is no proof that it is merchandise. And the word properly signifies specific articles having a sensible intrinsic value, bulk, weight, or measure in themselves, and not things which are merely evidences of debt. Citizens' Bank *v.* Nantucket Steamboat Co., 2 *Story*, 16, 53.

The sale of shares in a joint-stock company is a transfer of "merchandise," within the statute of frauds. Pray *v.* Mitchell, 60 *Me.* 430.

The expression goods, wares, and merchandise, in the statute of frauds, includes shares of stock in a corporation. Fine *v.* Hornsby, 2 *Mo. App.* 61.

MERCHANT. Originally, one who carries on trade with foreign countries; also, one whose business it is to buy and sell, irrespective of whether he trades abroad or only at home.

Merchant is one who buys and trades in any thing; and, as merchandise includes all goods and wares exposed to sale in fairs or markets, so the word merchant formerly extended to all sorts of traders, buyers, and sellers. But every one who buys and sells is not at this day under the denomination of a merchant: only those who traffic in the way of commerce, by importation or exportation, or carry on business by way of

emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell, by a continued assiduity or frequent negotiation in the mystery of merchandising, are esteemed merchants. Those who buy goods to reduce them, by their own art or industry, into other forms, and then to sell them, are artificers, not merchants. Bankers, and such as deal by exchange, are properly called merchants. *Beawes Lex Merc.* 23.

As Coke saith: there are four sorts of merchants; that is, merchant adventurers, merchants dormant, merchants travelling, and merchants resident. Hammond *v.* Jethro, 2 *Brownl. & C.* 99 *note*.

Merchant includes all sorts of traders as well and as properly as merchant adventurers. Merchant tailor is a common term. Mayor, &c. of London *v.* Wilks, 2 *Salk.* 445.

It may be that, in the time of James I., when the English statute of limitations was passed, "merchant" was only applied to one who traded beyond sea. But, before the passage of the Pennsylvania act, it had come to be used in a more extended signification. Thomson *v.* Hopper, 1 *Watts & S.* 467.

A person who sells liquors, tobacco, and other articles, as an unrestricted business, in the house kept by him as a hotel, is a merchant, within the statute limiting actions between merchant and merchant. Campbell *v.* Finck, 2 *Duv.* 107.

Merchant, as used in the Kentucky statute imposing a fine on any merchant who shall sell liquors without a license, should not be construed to include an apothecary selling for medical uses. The word merchant, in its most general and comprehensive sense, will certainly embrace all who may be engaged in the purchase and sale of goods; and, as an apothecary, regarded in the strictest sense of that word, is "one who prepares and sells drugs for medicinal purposes," and must necessarily be a trafficker in drugs, it would seem that he is in a certain sense a merchant; and more obviously so is an ordinary druggist "whose occupation is merely to buy and sell goods." But the evident intent of the statute is only to restrict sales of liquor by common dealers in merchandise to be used as a beverage. Anderson *v.* Commonwealth, 9 *Bush*, 569.

Merchant and merchant; merchants' accounts. Most of the statutes of limitations contain an exception in favor of actions involving merchants' accounts, or of accounts between merchant and merchant; and the meaning of these phrases has been discussed in some decisions.

Merchants' accounts, to come within the exception in the statute, must be between merchants at the time the cause of action accrues, unsettled and mutual, and consisting of debts and credits for merchandise. Fox *v.* Fisk, 7 *Miss.* 328.

To constitute a merchant's account, within the exception in the statute of limitations, there must be reciprocal demands. Atwater *v.* Fowler, 1 *Edw. Ch.* 417; Chew *v.* Baker, 4 *Cranch C. Ct.* 696; Hussey *v.* Burgwyn, 6 *Jones L.* 385.

Where goods were purchased on joint account, and consigned to one of the parties to sell and account to the other for his share, it was held that the dealing was not a merchant's account, within the exception. Murray *v.* Coster, 20 *Johns.* 576; Coster *v.* Murray, 5 *Johns. Ch.* 522.

The exception, in the Virginia statute of limitations, in favor of merchants' accounts, extends to all accounts current which concern the trade of merchandise. Mandeville *v.* Wilson, 5 *Cranch.* 15; 1 *Cranch C. Ct.* 433, 452.

The exception, in the Maryland statute of limitations, in favor of "such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province," applies to dealings between a merchant creditor residing out of the state and a debtor residing within it. Bond *v.* Jay, 7 *Cranch*, 350.

The exception of "actions which concern the trade of merchandise between merchant and merchant," extends only to open and current accounts, and means no more than the words of the statute of Jac. I., excepting "accounts concerning the trade of merchandise," &c. Ramchander *v.* Hammond, 2 *Johns.* 200.

Merchant appraisers. Persons engaged in trade, selected pursuant to provisions of a law imposing duties on imported goods, to value the articles embraced in some invoice, the official appraisal of which is disputed by the importer.

Merchant appraisers formerly consisted of two merchants, one chosen by the importer and one by the collector; but, under existing provisions of law, the collector may select a government appraiser; so that, in the larger ports, the appraising board usually consists of a merchant selected by the importer, and a permanent appraiser selected by the collector. (9 *Stat. at L.* 630.) Belcher *v.* Linn, 24 *How.* 508, 521.

Merchantable. In a contract, means, generally, vendible in market. Merchandise is vendible, because of its fitness to serve its proper purpose. Applied to forage, merchantable means edible; therefore, prairie hay, if it be not edible, is not merchantable. Wood *v.* United States, 11 *Ct. of Cl.* 680.

A contract to deliver corn in a merchantable order means in quality, state, or condition fit for sale; and requires the corn to

be ripe. Hamilton *v.* Ganyard, 34 *Barb.* 204, 206.

MERE. Occurs, used substantially in the vernacular sense, in some technical phrases.

Mere motion. The free and voluntary act of a party himself, done without the suggestion or influence of another person, is said to be done of his mere motion, *ex mero motu*, q. v. The phrase is used in English letters-patent, whereby the king grants, "of his especial grace, certain knowledge, and mere motion" (*ex speciali gratia, certa scientia, et mero motu*), his license, power, and authority to the patentee to use and enjoy, exclusively, the new invention.

It is used of an interference of the courts of justice, when the judge voluntarily objects to an irregularity in the proceedings, though no objection has been taken to the informality by the plaintiff or defendant in the suit.

Mere right. The right of property which a person may have in any thing, without having either possession or even the right of possession, is sometimes spoken of under the name of the mere right.

MERGER. The absorption or extinguishment of a lesser estate, right, or liability by a greater one; the lesser becoming extinct, while the greater is not increased.

With regard to estates in lands, when a superior estate and an inferior one meet in the same person, without attendant circumstances recognized by law as operative to keep the latter existing, the inferior one is deemed to perish, and thereafter the rights of the party are only such as he possesses in virtue of the superior estate. In such cases, the inferior estate is said to merge, or to be merged, in the superior.

It is not the value, but the nature, of the two estates which governs in the application of this doctrine. This has been illustrated by the merger of an estate for one thousand years in an estate for life. An estate for one thousand years is obviously a more valuable thing to its owner than an estate for life; yet, in law, the estate for one thousand years, being a leasehold interest only, is less than an estate for life, which is an estate of freehold; and, if the owner of an estate for one thousand years acquire also a life-interest, his estate for years will merge in his estate for life.

With regard to crimes and wrongs there has also been a use of this term, signifying that, when one and the same act was both a private wrong and a public offence, the former aspect of it was extinguished by the latter. The result was, that, in larceny, for instance, the criminal character of the act embarrassed or delayed, or perhaps prevented, the owner of the stolen property from maintaining an action against the thief for his civil injury. This doctrine was, perhaps, never very clearly established, and has lost much of its importance under modern legislation and decisions.

Merger is an annihilation by act of law of a particular in an expectant estate, consequent upon their union in the same person, thus accelerating into possession the expectant, which swallows up the particular, estate. It is the drowning of one estate in another, and differs from suspension, which is but a partial extinguishment for a time; while extinguishment, properly so termed, is the destruction of a collateral thing in the subject itself out of which it is derived. The doctrine probably results from the maxim, *nemo potest esse dominus et tenens;* or perhaps from the inconsistency, but for it, of one person owning two estates in fact, whilst one of them, in law, includes the time or duration of both.

Merger is either absolute or qualified; for an estate, as against one person, may be extinguished, whilst, as against another, it may still have existence.

In order to effect a merger, the following circumstances must concur: 1. There must of necessity be two estates at least in the same property, or in the same part of the same property, which have vested in the same person; but merger will operate between three or more estates, as well as between two. 2. The several estates must be immediately expectant upon each other: the more remote estate must be without any intervening vested estate or contingent remainder created in the same instant of time and by the same means which originated the other estates; and the determination or acquisition of an intermediate estate may be the cause of merger, as between estates kept distinct by means of such intermediate estate. 3. The estate in reversion or remainder must be larger than the preceding estate: there cannot be a merger as between equal estates of freehold. *Wharton.*

Merger is the equivalent of *confusio* in the Roman law, and (when used with reference to demands) indicates that, where the qualities of debtor and creditor become united

in the same individual, there arises a confusion of rights which extinguishes both qualities; whence, also, merger is often called extinguishment. And as in the Roman law the prætor, in certain cases where merger would be inequitable, intercepted and prevented it, so in English law the chancellor interferes in like cases to prevent it. The rule is, that merger or extinguishment will or will not take place in equity according to the intention, actual or presumed, of the person in whom the two interests come to be united; and even at law merger is excluded in certain cases.

MERIT. Is used technically, in some connections, to signify not moral desert or worth, but legal sufficiency or validity.

Thus, in speaking of the merits of an action, or in the phrase, an affidavit of merits, the idea is simply that the action or defence is one which the law sustains.

Meritorious cause of action. A person is sometimes said to be the meritorious cause of action, when the cause of action, or the consideration on which the action is founded, originated with or was occasioned by such person. Thus, in an action by husband and wife for the breach of an express promise to the wife in consideration of her personal labor and skill in curing a wound, she would be termed the meritorious cause of action. So, in an action by husband and wife upon an agreement entered into with her before marriage, she would be the meritorious cause of action; for it originated or accrued out of a contract entered into with her.

Merits. The real or substantial grounds of the action are frequently termed the merits, in distinction from some technical or collateral matter which has been raised in the course of the suit. Thus where, when special demurrers were in use, a defendant demurred to the plaintiff's declaration, on the ground of some informality, and the plaintiff, instead of amending, joined in demurrer, with the view of having the point argued before the court, this was said not to involve the merits; for, although defendant might be beaten upon the demurrer, by the court deciding against the sufficiency of the declaration in point of form, yet the substantial grounds of the action still remained to be tried, and he might ultimately be successful upon these. So an affidavit of merits signifies an affidavit that, upon the substantial facts of the case, justice is with the party so making such affidavit. Such an affidavit is required in support of certain motions to the court; *e. g.*, in order to let in a defendant to defend after judgment signed upon a default.

Merits, in N. Y. Code Pro. § 349, means the strict legal rights of the parties, as distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court. St. John *v.* West, 4 *How. Pr.* 329; Megrath *v.* Van Wyck, 3 *Sandf.* 750; Tracy *v.* Steam Faucet Co., 1 *E. D. Smith*, 349; Bowman *v.* De Peyster, 2 *Daly*, 203.

MESNE. Between; intermediate; middle.

Mesne assignment. If A grant a lease of land to B, and B assign his interest to C, and C in his turn assign his interest therein to D, in this case the assignments so made by B and C would be termed mesne assignments; that is, they would be assignments intervening between A's original grant and the vesting of D's interest in the land under the last assignment. *Brown.*

Mesne incumbrance. An intermediate charge, burden, or liability; an incumbrance which has been created or has attached to property between two given periods. Thus, when a vendor of an estate covenants to convey land to a purchaser free from all mesne incumbrances, the meaning is free from all charges, burdens, or liabilities which might by possibility have attached to it between the period of his purchase and the time of the proposed conveyance to the intended vendee.

Mesne lord. In feudal law, one who, being lord as towards a subordinate tenant, held in his turn from a superior lord.

Mesne, or mean, signifies the middle between two extremes, and that either in time or dignity. In time, it is the interim betwixt one act and another, and is applied to denote profits of lands between a disseisin and recovery, &c. As to dignity, there is a lord mean, or mesne, that holds of another lord, and a mean tenant, &c. All the land in the kingdom is, by a fiction arising from the feudal origin of the English tenures, supposed to be holden mediately or immediately of the king, who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they

were still tenants with respect to the king, and, thus partaking of a middle nature, were called mesne or middle lords. *Jacob.*

Mesne process. Originally, any process between that employed for the commencement of the action and that for execution of the judgment. Thus process was styled original, mesne, or final. But the original writs formerly necessary are now disused, and actions are commenced and prosecuted by mesne process. The term includes the *capias* in common-law practice, the summons under codes of procedure and intermediate writs, but not execution.

Mesne process is generally used in contradistinction to final process, and signifies any writ or process issued between the commencement of the action and the suing out final process or execution in such action; and includes also the writ of summons, notwithstanding this is the process by which personal actions are commenced, and therefore cannot be regarded now as mesne or intermediate process, in the literal sense of the word. *Brown.*

Mesne profits. The rent or other pecuniary benefit which one who dispossesses the true owner receives between the disseisin and the restoration of possession, is termed mesne profits.

The action of ejectment, under some systems of practice, extends to the recovery of mesne profits, or, in some jurisdictions, a distinct action, known as an action for mesne profits, will lie.

Mesne profits, in the New York statute abolishing the action for mesne profits, means those which are received intermediate the original entry and the restoration of possession. The term does not include damages which accrued anterior to the ouster. Leland *v.* Tousey, 6 *Hill*, 328, 333.

Writ of mesne, was a writ in the nature of a writ of right, brought by a tenant paravail (or under-tenant) against the mesne lord (of whom the tenant paravail immediately held the land), when the mesne lord had allowed the tenant paravail to be distrained for rent or services due from the mesne lord to the superior lord. The process on this writ was regulated by the statute of Westminster 2, 13 Edw. I. st. 1, ch. 9, passed in 1285. But the writ itself, being a real action, was abolished in 1833 by Stat. 3 & 4 Wm. IV. ch. 27, § 36. *Mozley & W.*

MESSAGE. In congressional practice, a message is received, in writing, from the president of the United States, usually at the commencement of the session, when it embodies a general review of the situation of the country as it appears to the executive; and, at other times, when any particular information is to be communicated. Thus, a veto message is one returning a bill with the president's objections. That the president should communicate his view by writing is not prescribed by the constitution, and probably depends on custom only. It is said that the first two presidents, Washington and Adams, made oral addresses, and that Jefferson introduced the written message, which has ever since been employed.

Similar messages in writing often come from the crown to the English houses of parliament. Such messages are brought either by a member of the house, being a minister of the crown, or by one of the royal household. In the lords, when there is such a message, the bearer of it, having intimated that he has a message under the royal sign-manual, the lord chancellor proceeds first to read it, and then the clerk at the table reads it over again. In the commons, the member appears at the bar, and informs the speaker that he has a letter from her majesty. He then takes it to the table and presents it, upon which the speaker reads it, the members the meanwhile remaining uncovered. These forms having been gone through, the house proceed to deal with the message accordingly. *May Parl. Pr.* ch. 17.

MESSENGER. The officer whose duty it is to take charge of a bankrupt's estate on adjudication of bankruptcy, pending appointment and qualification of assignee, is technically styled messenger; his functions also involving service of the notices.

The messenger of the English court of chancery is an officer whose duty it is to attend on the great seal, either in person or by deputy, and to be ready to execute all such orders as he shall receive from time to time from the lord chancellor, lord keeper, or lords commissioners. There are also certain persons attached to the court of bankruptcy styled messengers, and whose duty consists, amongst other things, in seizing and taking possession of the bankrupt's estate during the proceedings in the bankruptcy. *Brown.*

MESSUAGE. A term used in deeds in describing the premises conveyed, and said to be, in general, substantially the equivalent of "dwelling-house."

It is, however, more technical than dwelling-house, and several decisions have given it a broader extent than that term has in its vernacular sense, as where it has been said to include a church. Moreover, as used in conveyances, it often is considered to include incidents of the house which is the principal subject of conveyance; but this is partly a rule of construction, or results from the addition of "appurtenances."

Messuage means a house, comprising the out-buildings, the orchard, and curtilage or court-yard, and, according to the better opinion, the garden also. *Mozley & W.*

Messuage is now synonymous with the word dwelling-house; but, as having once had a larger signification, it invariably precedes the word dwelling-house in a description of parcels. A grant of a messuage with the appurtenances will pass not only the dwelling-house, but also all buildings adjoining or attached to it, together with the curtilage, garden, and orchard, and the close in which the house is built, and any pleasure-grounds adjoining and belonging to it. *Brown.*

Messe or messuage seems to comprise somewhat more than place of habitation; for "house" and "messuage" differ in this: that "house" cannot be intended other than the matter of building; but "messuage" includes the curtilage. *Termes de la Ley.*

Although the word messuage may, there is no necessity that it must, import more than the word dwelling-house, with which word it is frequently put in apposition and used synonymously. Fenn *v.* Grafton, 2 *Bing. N. C.* 617.

To define with precision the signification of the legal term messuage is difficult. Authors have differed in their understanding of its import. The best writers, however, represent it as synonymous with house, and as embracing within its meaning an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling-house; but they limit the ground which may be appropriated to these purposes to a small quantity, not exceeding an acre or more. (1 *Thom. Coke.* 215, 216, note; 1 *Shep. Touch.* 94; 2 *Saund.* 410, note 2.) A statute, giving a widow a right to abide in the "mansion-house and messuage of her deceased husband," ought not to be construed to give to the latter term a meaning entirely new and inconsistent with its usual sense, or so as to make that term embrace a whole farm or plantation. Grimes *v.* Wilson, 4 *Blackf.* 331.

METALS. White lead, nitrate of lead, oxide of zinc, and dry and orange mineral, are not among the articles subject to a reduction of duty, under the act of June 6, 1872 (17 Stat. at L. 230), to reduce duties on imports, as being "metals" or "manufactures of metals." Meyer *v.* Arthur, 91 *U. S.* (1 *Otto*) 570.

METRE, or METER. A unit of measurement, of French contrivance, introduced about the commencement of the present century, as the basis of an improved system of weights and measures.

In theory, the metre is the ten-millionth part of a quadrant of a terrestrial meridian. The motive for the selection of such a unit was the desire to secure a standard which should be superior to all change; as unalterable as the dimensions of the earth; one which could never, by any complication of circumstances, be permanently lost. But the terrestrial meridians are not perfectly equal; for the determination of the standard to be employed a particular meridian had therefore to be selected, and from the most careful measurements of this which could be made, an actual standard unit of length was adopted. Practically, therefore, the metre is the length of a certain platinum bar, originally constructed to be closely equal to one ten-millionth part of the terrestrial meridional quadrant passing through Paris; this being the one selected for the purpose, and its length having been determined by an elaborate measurement of nearly one-ninth part (9° 40′) of that quadrant. The precision of its correspondence with any aliquot part of a great circle has been contested on the basis of improvements in the art of terrestrial measurement; but doubts of this kind have not led to any change in the unit. Its equivalent is 39.368 American, or 39.370 English, inches. From this unit, as a basis, all the denominations of weights and measures employed in the metric system are deduced. Linear measures are the multiples or aliquot parts of the metre. Measures of surface and of solid capacity are formed by employing linear measures in two or three directions, on the same principle as the superficial or solid foot is measured by the linear foot. For capacity, a cube of water, measuring one decimetre in each dimension, is taken as the unit, and is termed one litre, or when applied to weight, one kilogramme; and

multiples or aliquot parts of this give the various measures of weight. And specific gravities are deduced by calling that of water the unit.

Metric system. A system of measurement of length, capacity, surface, or weight, founded upon the metre (*q. v.*) as a unit, and recommended for general adoption and common use among civilized nations, on the grounds of its superior simplicity and accuracy, and of the advantage of employing a common system among different countries.

The employment of the metric system throughout the United States is authorized, not made obligatory, by the act of congress of 28th July, 1866, re-enacted in Rev. Stat. §§ 3569, 3570, where tables of equivalents are given. It was similarly authorized in Great Britain in 1864. The act of congress of 1866 provided that standards of weight and measure conformed to the metric system should be prepared at the bureau of weights and measures in Washington, and furnished to the executive authorities of all the states; and authorized employment of metric weights and balances in post-offices, for weighing letters.

METROPOLIS, when used with reference to the English metropolis, local management acts, and the decisions and practice under them, includes the city of London and the following parishes and places, arranged with reference to their representatives in the metropolitan board of works:

St. Marylebone; St. Pancras; Lambeth; St. George, Hanover Square; Islington; Shoreditch; Paddington; Bethnal Green; Newington, Surrey; Camberwell; St. James, Piccadilly; Clerkenwell; Chelsea; Kensington; St. Luke, Middlesex; St. George the Martyr, Southwark; Bermondsey; St. George-in-the-East; St. Martin-in-the-Fields; Mile End Old Town; Woolwich; Rotherhithe; Hampstead; Whitechapel District; Westminster District; Greenwich District; Wandsworth District, including Clapham, Tooting Graveney, Streatham, Battersea, Wandsworth, Putney, Roehampton; Hackney District, including Hackney parish and St. Mary, Stoke Newington; St. Giles' District, including St. Giles-in-the-Fields and St. George, Bloomsbury; Holborn District; Strand District; Fulham and Hammersmith; St. Saviour's District; Plumstead and Lewisham, including Penge; St. Olave District. Also the following places: Westminster Abbey and Close; the Charter House; Inner Temple; Middle Temple; Lincoln's Inn; Gray's Inn; Staple Inn; Furnival's Inn.

The metropolis, as thus defined, must not be confounded with the London postal district, which embraces a radius of twelve miles from the post-office, or with the metropolitan police district. *Mozley & W.*

METROPOLITAN. 1. In ecclesiastical law, is one of the titles of an archbishop.

The archbishop of Canterbury is styled "primate of all England and the metropolitan," because the province of Canterbury contains within it the metropolis or chief city. The metropolitans were so called because they presided over the churches of the principal cities of the province. It was their duty to ordain the bishops of their province, to convoke provincial councils, and exercise a general superintendence over the doctrine and discipline of the bishops and clergy within the provinces. The province of York anciently claimed and had a metropolitan jurisdiction over all the bishops of Scotland, until about the year 1466, shortly after which time Pope Sixtus the Fourth created the bishop of St. Andrews archbishop and metropolitan of all Scotland. 1 *Burn Ecc. Law*, by Phillimore, 194, 197, tit. Bishops; *Rog. Ecc. Law*, 105, 113.

2. In English legislation, metropolitan is frequently used to characterize statutes which relate particularly to the government of the metropolis of London and environs.

Thus, there are the metropolitan buildings acts, the metropolitan police acts, the metropolitan sewers acts, and many others.

Metropolitan police district. In the laws of New York, this phrase was used for a term of years to designate a region composed of New York city and some adjacent territory, which was, for police purposes, organized as one district, and provided with a police force common to the whole.

MEUBLES. A term of the French law, corresponding to "movables" in English law. Things are *meubles* from either their own nature as chattels; or by positive law, as evidences of debt; or from the determination of the law, *e.g.* obligations.

Meubles meublans. In French law, the utensils and articles of ornament usual in a dwelling-house.

MICHAELMAS TERM. One of the former terms of the English superior courts of law; understood to commence

on the 2d of November, and end on the 25th or 26th of the same month, according as the 25th is not or is Sunday.

Under the judicature act, 1875, the Michaelmas term is, so far as regards the sittings of the courts, to be superseded by the Michaelmas sittings. *Mozley & W.*

MICHE; or, **MICH.** To practise crimes requiring concealment or secrecy; to pilfer articles secretly. Micher: one who practises secret crime. *Webster.*

MIDDLEMAN. An intermediate agent; a broker between producer and consumers; between land-owner and occupant.

A middleman, in Ireland, is a person who takes land in large tracts from the proprietors, and then rents it out to the peasantry in small portions at a greatly enhanced price. *Wharton.*

MIDSHIPMAN. Corresponds in the navy to cadet in the army. A youth employed on board ship of war; whose duties are chiefly to transmit and second the orders of the officers; and to render any general service within his powers that may be required; but understood to be in training to receive a commission. A passed midshipman is one who has sustained an examination, and is qualified for appointment to a lieutenancy.

MILEAGE. A compensation for duties or services involving journeying, measured by the distance, *i.e.* number of miles, travelled.

MILITARY. Pertaining to war or to the army; concerned with war.

The word is quite generally used in antithesis to naval; yet in many of its applications the navy, so far as that branch is a means of war, may be deemed included.

Military-bounty land. In the United States, bounties have by several laws been granted to soldiers for services in the army, payable not in money, but in a certain quantity of the public land. Lands designated for the satisfaction of these grants, or taken up in discharge of these claims, are termed military-bounty lands; and the warrant issued to the soldier, by locating which he obtains his land, is called a military-bounty land-warrant, or, frequently, a bounty land-warrant.

Military cause. A cause or controversy arising out of the law governing the army, or out of the laws of war, and so cognizable within a class of courts charged with the administration of those laws.

In England, military causes are, by Stat. 13 Rich. II. ch. 2, passed in 1389, declared to be such causes as relate to contracts touching deeds of arms and of war, as well out of the realm as within it, which cannot be determined or discussed by the common law. *Mozley & W.*

Military court, or tribunal. One of the courts which have cognizance of controversies and offences arising under military law; in this country these are chiefly courts-martial.

The term military courts, in English usage, includes, 1. The court of chivalry, which was a court of honor, and is now practically obsolete; 2. Courts-martial, having jurisdiction to try and to punish offences committed against the articles of war and the mutiny acts; 3. The courts which, under the name of courts-martial, execute martial law upon offenders in time of war. *Mozley & W.*

The only military court known to, and established by, the permanent laws of the land is the court of chivalry, formerly held before the lord high constable and earl marshal of England jointly; but since the attainder of Stafford, Duke of Buckingham, under Henry VIII., and the consequent extinguishment of the office of lord high constable, it has usually, with respect to civil matters, been holden before the earl marshal only. *Jacob.*

A military tribunal exists under and according to the constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction and mode of procedure. Should congress fail to create such tribunals, then, under the constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war. In time of peace, neither congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the constitution which gives to congress the power "to make rules for the government of the land and naval forces." In time of war their power is more extensive. 11 *Op. Att.-Gen.* 297.

Military feud. In old English law, the original estates of a feudal nature, which were in the hands of military persons and held on a tenure of a

strictly military service, were distinguished as military fends.

Military forces. The regular standing army and the militia, taken together.

Military jurisdiction. There are, under the constitution, three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the president, with the express or implied sanction of congress; while the third may be denominated martial law proper, and is called into action by congress, or temporarily, when the action of congress cannot be invited, and in the case of justifying or excusing peril, by the president, in times of insurrection and invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights. Per four justices in *Exp.* Milligan, 4 *Wall.* 2, 141.

Military law. That system of statutes, regulations, and principles by which the army and its persons and affairs (also, to some extent, those of the navy) are governed; that branch of the laws which applies to military service and duties.

Military and martial law must be distinguished. Martial law is the temporary control and government exercised over all classes of persons by the military forces while they supersede civil administration. Military law is a permanent branch of the general laws of the land, limited in its application to persons and affairs connected with war.

Military offence. A crime under the laws or articles of war, or punishable violation of the laws regulating the army.

Military service. The employment of persons, by government, in matters connected with war or preparations for offence or defence.

The statutory exemption of property of "soldiers in actual military service" from attachment does not extend to persons in the naval service. Abrahams *v.* Bartlet, 18 *Iowa*, 513.

A contractor with the government to transport from port to port, remote from any seat of war, stores and supplies not forming any portion of the stores or supplies of an advancing or retreating army, is not a person "in the military service of the United States," within the act of March 3, 1849, "to provide for the payment of horses and other property lost" in that service. Stuart *v.* United States, 18 *Wall.* 84.

Military tenure. The tenures by knight-service, grand serjeanty, and cornage, were so styled in old English law. They were all abolished, in 1660, by Stat. 12 Car. II. ch. 24, except the honorary services of grand serjeanty. 2 *Bl. Com.* 59–77; 1 *Steph. Com.* 181–205.

Military testament. A term sometimes applied to a will allowed to be made by a soldier in service, without observance of forms ordinarily prescribed; a nuncupative will of a soldier.

MILITIA. The forces available for the defence of a state or of the nation, consisting of citizens called into military service for the time being.

The constitution of the United States provides, on this subject, that congress shall have power to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress.

The various states have their respective laws for the organization and government of their respective militia; and congress has legislated comprehensively on the subject in title 16 of the revised statutes.

MILL. Under the word mill in a devise, the land under the mill, and adjacent thereto, so far as necessary to its use, and commonly used with it, will pass. Whitney *v.* Olney, 3 *Mas.* 280.

A policy of insurance upon a "steam saw-mill" covers not only the building

itself, but all the machinery and fixtures therein necessary to make it a steam sawmill in all its parts. Bigler *v.* N. Y. Central Ins. Co., 20 *Barb.* 635.

Mill-dam. Does not include a dam built at the outlet of a lake to raise the waters for purposes of navigation, although used to propel mills. Arimond *v.* Green Bay, &c. Canal Co., 35 *Wis.* 41.

In a statute imposing taxes upon "mills and buildings used for manufacturing purposes," the word mills should be construed as including the machinery employed, and not as confined to the building alone; and the machinery should be included in the valuation. "Mill" may properly include machinery, and, indeed, is sometimes used of an engine or complicated machine considered by itself. Sprague *v.* Lisbon, 30 *Conn.* 18.

Mill privilege. The words "mill privilege," or "the privilege of a mill," in a grant, are to be understood as meaning the land on which the mill and its appendages stand, and the land and water then actually and commonly used with the mill and necessary to the enjoyment thereof. Moore *v.* Fletcher, 16 *Me.* 63.

Mill site. The grant of a "mill site" conveys a water-power, together with the right to maintain a dam, wherever such dam would be suitable for the convenient and beneficial appropriation of the water-power. Stackpole *v.* Curtis, 32 *Me.* 383.

MINERAL. The words "mines and minerals," in a deed, do not convey all the mineral kingdom, as distinguished from the animal or vegetable; nor are they restricted to any one of the subdivisions invented by chemists. A paint-stone, found below the earth, and distinct from the earth around it, and worked by the ordinary mining appliances, passes by these words. Hartwell *v.* Camman, 10 *N. J. Eq.* 128.

The term mineral products, in a revenue law, has been held to include coal-oil. Thompson *v.* Noble, 3 *Pittsb.* 201.

MINISTER. 1. An officer of high rank in the administration of civil government, associated with the sovereign, and having charge, as his representative, with the general administration of some one of the principal divisions of the public service; a head of a department of government; a member of the cabinet.

The more usual title of officers of this rank in the United States is secretary.

2. An officer or functionary of high rank charged with the duty of representing his government in negotiations and business at the court or seat of government of a foreign nation.

These are often termed public ministers. The term is a somewhat general one, and includes several ranks. Those distinctively known in European usages are: 1. Ambassadors, and papal legates or nuncios. 2. Envoys, and some other ministers. 3. Ministers resident, accredited to sovereigns. 4. *Chargés d'affaires;* these are accredited to the minister of foreign affairs.

The United States diplomatic service employs two classes of ministers, — ministers plenipotentiary and ministers resident.

3. A person ordained according to the usages of some denomination of Christians for the preaching of the gospel.

These persons are designated by law throughout the United States to perform some civil functions and duties, the chief of which is the solemnization of the marriage ceremony.

Who is to be deemed a "minister," within statutes providing for the support of ministers, exempting them from taxation, &c., see Washburn *v.* Fourth Parish of West Springfield, 1 *Mass.* 32; Kendall *v.* Kingston, 5 *Id.* 524; Barnes *v.* First Parish in Falmouth, 6 *Id.* 401; Turner *v.* Second Precinct in Brookfield, 7 *Id.* 60; Lovell *v.* Inhabitants of Byfield, *Id.* 230; Gridley *v.* Clark, 2 *Pick.* 403; Baldwin *v.* McClinch, 1 *Me.* 102.

4. In old books, "minister" characterizes subordinate officers attached to courts, and charged with execution of its process and orders.

The noun is no longer much used in this sense; but "ministerial," as a general designation of this class of officers and their duties, is frequently met.

Ministerial. As applied to officers, or to their acts, powers, or duties, "ministerial" indicates a function of simple obedience or service, as distinguished from one involving authority, discretion, or jurisdiction. Such officers as clerks of court, constables, sheriffs and their deputies, are termed ministerial officers; and ministerial duties are such as are to be performed by routine, or in obedience to a distinct command or definite rule.

A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment, upon the propriety of the act's being done. Acts done out of court, in bringing parties into court, are, as a general proposition, ministerial acts. Pennington *v.* Streight, 54 *Ind.* 376.

Acts of the secretary of state of a state, in issuing and revoking licenses to foreign insurance companies, under the statute, are ministerial, and not judicial, although he is required to ascertain the existence of the facts upon which his authority in each case is founded. State *v.* Doyle, 40 *Wis.* 175.

A county solicitor is a ministerial officer. Diggs *v.* State, 49 *Ala.* 311.

Ministerial powers. A phrase used in English conveyancing to denote powers given for the good, not of the donee himself exclusively, or of the donee himself necessarily at all, but for the good of several persons, including or not including the donee also. They are so called because the donee of them is as a minister or servant in his exercise of them. Brown says that the ministerial powers of a tenant for life are the following, viz.: A power of leasing; a power of borrowing money for the improvement of the estate, and charging the loan upon the inheritance; a power of selling the settled estates, and conveying the same to the purchaser for an estate in fee-simple.

They are subdivided, and the exercise of them regulated, by various statutes, which he cites. The ministerial powers of a tenant for life, in right of his wife, and of a tenant by the curtesy or in dower, depend, as to leasing, on the leases and sales of settled estates act, 1856, and are generally subject to the same or the like provisions as those regarding a tenant for life in his own right. The ministerial powers of a tenant in tail depend partly on the Stat. 3 & 4 Wm. IV. ch. 74 (as to leasing), and partly on the leases and sales of settled estates act, 1856; but, owing to the facility with which he may at the present day bar the entail and become absolute owner, the question of his ministerial powers is comparatively insignificant.

MINOR. One who has not attained the age at which full civil rights are accorded; a person less than twenty-one years old; an infant. Minority: the civil condition of a person under age.

In Scotch law, minor, when used in contradistinction to "pupil," signifies a person above the age of pupillarity (twelve in males and fourteen in females) and under that of majority (in both sexes, twenty-one years). *Bell.*

MIRROR. A law-book, the full name of which is the Mirror, or Mirrour, of the Justices, or of Justice. It dates in the reign of Edward II., and is attributed to one Andrew Horne. It is a general account of the body of the laws as then existing, with recommendations of reforms. There is an English translation, 1768.

MISADVENTURE. Is the killing a man, partly by negligence and partly by chance. Britton distinguishes between adventure and misadventure. The first he makes to be mere chance, as if a man, being upon or near the water, be taken with some sudden sickness, and so fall in, and is drowned; or into the fire, and is burnt. Misadventure, he says, is where a person comes to his death by some outward violence, as the fall of a tree, the running of a cart-wheel, stroke of a horse, or such like. Staundford construes misadventure more largely than Britton understands it, and says it is where one, thinking no harm, carelessly throws a stone, wherewith he kills another, &c. West defines misadventure to be when a man is slain by mere fortune, against the mind of the killer; and he calls it homicide by chance mixed when the killer's ignorance or negligence is joined with the chance. *Jacob.*

Misadventure is an unfortunate mischance arising out of a lawful act. It is a word generally used with reference to accidental homicide. (4 *Bl. Com.* 182, 183; 4 *Steph. Com.* 52.) A different definition is given in the *Termes de la Ley* and Cowel, whereby it would appear that misadventure is equivalent to homicide partly by negligence and partly by chance. This is equivalent to homicide by negligence simply; for negligence implies the absence of intention, and chance implies no more. *Mozley & W.*

MISCARRIAGE. 1. In its general sense, of erroneous doing or behavior, this word occurs in the original English statute of frauds, 29 Car. II. ch. 3, § 4, which enacts that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or "miscarriage" of another person, unless the agreement, &c., shall be in writing. Some other instances of its use, in this general sense, are found.

2. When used with reference to pregnancy, it signifies, in the strict medical sense, an expulsion of the fœtus from the womb within the first six weeks

after conception. In law-books, it often occurs as an equivalent of abortion, *q. v.*

Miscarriage, as used in an indictment for procuring a miscarriage, does not necessarily include the idea of destroying the life of the fœtus before delivery, nor exclude a case where the functions of life are exercised, briefly, after birth. Smith *v.* State, 33 *Me.* 48, 60.

MISCONDUCT. The expression misconduct in office, in a statute providing for the removal of a register of deeds, is not limited to wrongful performance of such acts as the law expressly authorizes him to perform. State *v.* Leach, 60 *Me.* 58.

The omission of an attorney to pay over money collected by him as attorney is a misconduct in a professional employment. Stage *v.* Stevens, 1 *Den.* 267.

The statute (2 Rev. Stat. 542, § 10) providing for annulling the award of arbitrators for misconduct and misbehavior contemplates, by these terms, acts evincing unfairness or injustice, and not mere errors of judgment. Turnbull *v.* Martin, 37 *How. Pr.* 20.

MISDEMEANOR. In a general sense, any punishable act; but the word is most used to designate the less aggravated crimes; offences punishable by indictment, but not amounting to felony.

Except within jurisdictions where a statutory definition of "misdemeanor" has been given, it cannot be said to be used with exactness or precision. The expressions high crimes and misdemeanors, felonies and misdemeanors, are in common use, as embracing all offences, and indicating a general division into such as are of graver enormity and such as are of lighter criminality; but the line of division must be sought in the statute of the jurisdiction. Otherwise, the use of the term is far from uniform. Blackstone says that crime and misdemeanor are properly synonymous terms, though, in common usage, the word crimes is commonly used to distinguish such as are of deeper dye. (4 *Bl. Com.* 5, note.) Chitty says that misdemeanor means every offence inferior to felony, but punishable by indictment, or by particular described proceedings. (1 *Chitt. Gen. Pr.* 14.) Jacob says that it is generally used in contradistinction to felony, and comprehends all indictable offences which do not amount to felony; and that it may be considered as a genus which embraces a great number of species. Chief Justice Savage, of New York, defined it as the antithesis of felony, and as including every offence below felony punished by indictment (Matter of Clark, 9 *Wend.* 212, 222; Son *v.* People, 12 *Wend.* 314); but this was said under statutory definitions of the state.

The revised statutes of New York (1828–30) divided crimes into felonies and misdemeanors; defined felony as any crime which is, or may be, punishable with death, or by imprisonment in a state prison; and declared every other crime to be a misdemeanor. This system enabled the legislature to use the term misdemeanor as distinguishing a division of offences; and it has been constantly so used in the legislation of the state. Substantially the same division has been adopted in several other states. In acts of congress, "misdemeanor" has been but seldom used, and to assign a precise meaning to it would be difficult. See FELONY.

As a technical term, the word is practically useless, for want of a precise signification, except within jurisdictions like New York, where the legislature has affixed a definition to it, and has prescribed, by some general enactment, a certain measure of punishment for all misdemeanors for which no special penalty is declared. Where this is done, subsequent legislatures may declare various acts or neglects to be misdemeanors, without restating the punishment in each enactment; and this becomes a convenient system for legislating upon lesser offences. Under such a system, the word becomes exceedingly useful and important.

Misdemeanor is a species of crime or offence comprehending all breaches of public law less than felony, as perjury, libels, conspiracies, assaults, &c., which are not so atrocious as murder, burglary, arson, &c., which are felonies. *Wharton.*

A misdemeanor is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition, however, comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word crimes is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the milder term of misdemeanors only. In the English law,

"misdemeanor" is generally used in contradistinction to felony; and misdemeanors comprehend all indictable offences which do not amount to felony, as libels, conspiracies, attempts and solicitations to commit felonies, &c. *Brown.*

The punishment of a misdemeanor at common law was by fine and imprisonment, at the discretion of the court; and this is the law at the present day, in cases to which no statutory enactment applies. But the misdemeanors most frequently committed are punishable with hard labor, under various statutes, and, in many cases, with penal servitude, for terms specified in the acts relating to them. The distinction between misdemeanor and felony is now in great measure unmeaning; but it is not yet entirely obsolete. Larceny, for instance, is a felony, and obtaining goods by false pretences is a misdemeanor, although the punishment attached to each is the same. *Mozley & W.*

The word misdemeanor, as used in the act of 1860, ch. 196, does not denote a criminal offence, but refers to a trespass done by a sheriff in his official capacity. State *v.* Mann, 21 *Wis.* 684.

MISE. The principal use of this word is, in the old law of pleading, to signify the issue joined in a real action, particularly in a writ of right. Other meanings are given.

Mise signifies a gift or customary present formerly made by the people of Wales to a new king or prince, on his entrance into that principality; a tax or tallage; costs and expenses; a writ of right so called; the issue in a writ of right; cast, or put upon; a messuage or tenement. *Mozley & W.*

Mise is a law term signifying expenses, and it is so commonly used in the entries of judgments, in personal actions; as, when the plaintiff recovers, the judgment is *quod recuperet damna sua* to such a value, and *pro misis et custagiis*, for costs and charges, so much, &c. It has another signification, as a word of art, appropriated to a writ of right, so called because both parties have put themselves upon the mere right, to be tried upon the grand assise; so that what in all other actions is called an issue in a writ of right is termed a *mise;* but if in the writ of right a collateral point be tried, there it is called an issue. To join the *mise* upon the mere right is as much as to say to join the *mise* upon the clear right; *i.e.*, to join upon this point, which hath the more right, the tenant or demandant. *Jacob.*

MISERABILE DEPOSITUM. A lamentable deposit. The term applied, in the civil law, to a deposit made involuntarily, or under pressing necessity; so called because made under circumstances of misfortune, as fire, shipwreck, &c.

MISERICORDIA. Mercy; an amercement; particularly, a discretionary amercement. To be in mercy is to be liable to such a fine as the judge in his discretion may impose. The word was commonly used in early English law to signify a discretionary mulct or amerciament imposed upon a person for an offence. Thus, when the plaintiff or defendant in an action was amerced, the entry was always *ideo in misericordia*, and it was so called because the fine was but small (and therefore merciful), in proportion to the offence; and, if a man was outrageously amerced in a court not of record (as in a court-baron, for instance), there was a writ called *moderata misericordia*, to be directed to the lord or his bailiff, commanding them that they take moderate amerciaments, in just proportion to the offence of the party to be amerced. When a fine was amerced on a whole county, instead of an individual, it was then termed *misericordia communis*. *Termes de la Ley.*

MISFEASANCE. The performance of a lawful act in an improper manner; a wrong done incidentally to the exercise of a right, or the performance of a duty.

The word is sometimes used in the general sense of any active wrong.

Misfeasance is the improper performance of some act which might lawfully be done. Wright *v.* Spencer, 1 *Stew.* 576.

Misfeasance, strictly, is not doing a lawful act in a proper manner, omitting to do it as it should be done; while malfeasance is the doing an act wholly wrongful; and nonfeasance is an omission to perform a duty, or a total neglect of duty. But "misfeasance" is often carelessly used in the sense of "malfeasance." Coite *v.* Lynes, 33 *Conn.* 109.

MISJOINDER. The uniting of things which ought not to be combined.

It contrasts with nonjoinder, which is the omission of something which ought to be united.

Important uses of the word are these: If persons are united as parties in an action, who ought not to be, this is termed a misjoinder of parties. If causes of action or counts, which ought to be the subject of separate suits, are combined in one action, complaint, or declaration, this is called a misjoinder of actions.

MISNOMER. Error in name; the defect of naming a person incorrectly in a pleading, deed, or other instrument.

MISPLEADING. The omission, in pleading, of any thing essential to the action or defence; as if a plaintiff does not merely set forth his title in a defective manner, but sets forth a title wholly defective in itself. The word was especially applied to such an error in pleading as could not be cured by verdict. *Mozley & W.*

Mispleading is pleading amiss, or pleading wrongly. The word comprehends misdeclaring, whether the error is in separate counts, or in the misjoining of counts. Lovett *v.* Pell, 22 *Wend.* 369, 375.

MISPRISION. Originally, a vague general term for a neglect, omission, or a contempt of authority. Hence it came to be sometimes used to signify any considerable offence which had no definite name. A more important and better defined use of the term was to denote the neglect or omission of one's duty to disclose an offence by another person of which he had become cognizant; the contempt of authority involved in concealing a crime. Thus, misprision of felony or misprision of treason is the offence of concealing the commission of either, known to have been perpetrated by another. As a designation of a distinctive offence the term has lost importance under the progress made in giving statutory definitions of the guilt and punishment of abettors and accessories.

Misprision is generally understood to be all such high offences as are under the degree of capital, but closely bordering thereon; and it is said that a misprision is contained in every treason and felony whatsoever. Misprisions are generally divided into two sorts, negative and positive, the former consisting in the concealment of something which ought to be revealed, the latter in the commission of something which ought not to be done. Of the first, or negative kind, is what is called misprision of treason, which consists in the bare knowledge and concealment of treason, without any degree of assent thereto. Of this negative kind is also misprision of felony, which is the concealment of a felony which a man knows but never assented to. The concealment of treasure-trove, which belongs to the king or his grantees by royal prerogative, is also a species of negative misprision. Positive misprisions are generally denominated contempts or high misdemeanors; such, for example, are the maladministration of such high officers as are in public trust and employment; the embezzling of the public money; contempts against the king's prerogative, his person and government, or his title, &c. See 1 *Hawk. P. C.* B. I. ch. 20.

Misprision has been applied to coining foreign coin, the reason given being that the offence was at one time visited with the same punishment as misprision; also, to the neglect of clerks in writing and keeping records. *Mozley & W.*

MISREPRESENTATION. An account or description of matters of fact given to another person falsely and to his injury.

The word is of frequent and important use in the law of contracts, in view of the principle that one who has been induced, by misrepresentations, to enter into a contract, can be relieved from liability upon it, on proper application and proof of the deceit or mistake; and particularly in the law of insurance, where misrepresentation is frequently a ground of defending actions on policies.

Misrepresentation is asserting what is not true in whole or in part. Though not bound to answer a question, yet, if the party does answer, he must do it fully, fairly, and in good faith, so as to give the other the benefit of the question and information sought. If a representation is voluntarily made, without being requested, it must be substantially true in every matter material to the contract. Blydenburgh *v.* Welsh, *Baldw.* 331, 337.

To constitute a representation, there must be language used equivalent to an averment of a particular fact. If it be untrue, its materiality to the risk must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it. Livingston *v.* Maryland Ins. Co., 7 *Cranch*, 506.

In order to avoid a policy for a misrepresentation, it must be a misrepresentation in which the matter disclosed or concealed is material to the risk of the voyage; one in which such matter affects the risk so as to render it different from the one understood at the time, and on which the premium was calculated. Hodgson *v.* Marine Ins. Co., 5 *Cranch*, 100.

If a person makes a representation on information derived from others, reporting it truly, and states it, not as being known to him positively, but as resting on information, the policy is not avoided because the information proves incorrect. Tidmarsh *v.* Washington Fire & Marine Ins. Co., 4 *Mas.* 439.

If a representation is made in good faith, and it is true at the time, this is enough;

the policy is not avoided by the representation being rendered incorrect through a subsequent change. Hubbard *v.* Coolidge, 2 *Gall.* 353.

MISSING SHIP. A ship which has been at sea and unheard from for so long a time as to give rise to the presumption that she has perished with all on board. *Bouvier; Wharton.*

A vessel is called a missing ship when, computed from her known day of sailing, the time that has elapsed exceeds the average duration of similar voyages at the same season of the year. The phrase is identical in meaning with the phrase "out of time," but is used by merchants and insurers in different senses. (2 *Duer Ins.* 469.) *Burrill.*

MISTAKE. There is a large body of decisions upon the extent and limits of the power of courts of equity to grant relief in cases of mistake; they, however, do not change the meaning of the word from its vernacular one of an error, an act done in ignorance, a misconception. The true bearing of the decisions mentioned is, not that the word mistake has any peculiar meaning in equity jurisprudence, but that only a limited class or kind of mistakes are subjects of equitable relief.

Likewise, in criminal law, proof that an act apparently a violation of law was done under influence of a mistake may excuse the perpetrator from punishment; for it disproves any criminal intent. The course of decisions on this subject do not, properly considered, assign any technical meaning to mistake, but limit the character of the mistake which will exempt from punishment.

Generally speaking, the mistake which entitles a person to relief in equity or to excuse from penalties is some mistake of fact; error as to the law is not regarded.

MITIORI SENSU. In the milder sense.

According to the former law governing actions for slander, the words complained of must always be construed *in mitiori sensu*, in the least injurious meaning admissible. Unless they were actionable, taken in the mildest sense, the action failed; or, if a verdict was recovered, the court would arrest judgment, if it appeared, on a motion for that purpose, that the words were susceptible of a construction which was not slanderous. This doctrine is now abandoned. The modern rule is that the words must be taken in their reasonable meaning, or in the sense in which they are shown to have been spoken and understood; and, after verdict, that sense which will support the verdict is favored.

MITTER LE DROIT; MITTER L'ESTATE. These phrases are employed in the old law of conveyancing to point out the mode in which releases of land operate. A release might be a conveyance of a right to a person in possession. Thus, where a person was disseised or put out of possession of lands, although the disseisor thereby acquired the possession, still the right of possession and property remained in the disseisee; but if the disseisee agreed to transfer his right to the disseisor, the proper mode of carrying such an agreement into execution was by a release, the disseisor already having the possession; and as in such cases nothing but the bare right passed, the release was said to inure by way of *mitter le droit*, *i.e.* transferring the right. A release was said to inure by way of *mitter l'estate*, *i.e.* of passing the estate; *e.g.*, when two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or coparceners, and one of them releases his right to the other, such release was said to inure by way of *mitter l'estate*, *i.e.* transferring the estate. 4 *Cru. Dig.* 84, 85.

MITTIMUS. We send.

1. In old English practice. The name of a writ for removing a suit for trial to a particular county.

2. In criminal practice. The name of a precept or warrant for committing to jail a person accused of crime in a case where bail is not allowed or is not given; a commitment.

Mittimus was a writ by which records were transferred from one court to another, sometimes immediately, as out of the king's bench into the exchequer, and sometimes by a *certiorari* into chancery, and from thence by a *mittimus* into another court. It is also used to signify a precept that is directed by a justice of the peace to a jailer for the receiving and safe-keeping of a felon or other offender committed by the said justice to the jail. *Termes de la Ley.*

MIXED. Occurs in some technical phrases.

Mixed action. Lawsuits which partake of the twofold nature of real and personal actions, having for their object the demand and restitution of real property, and also personal damages

for a wrong sustained, are termed mixed actions.

Mixed actions are those which are brought for the specific recovery of lands, like real actions, but comprise, joined with this claim, one for damages in respect of such property; such as the action of waste, where, in addition to the recovery of the place wasted, the demandant claims damages; writ of entry, in which, by statute, a demand of mesne profits; and dower, in which a claim for detention, may be included. Hall *v.* Decker, 48 *Me.* 255.

Mixed contract. In the civil law, denotes a transaction in which one of the parties confers a benefit on the other, and requires of the latter something of less value than what he has given; a legacy charged with something of less value than the legacy itself is an example.

Mixed government. A form of government combining some of the features of the monarchic, aristocratic, and democratic forms.

Mixed larceny. Compound larceny, or larceny combined with recognized circumstances of aggravation (see LARCENY), is sometimes styled mixed.

Mixed policy. A policy of marine insurance in which not only the time is specified for which the risk is limited, but the voyage also is described by its local termini; as opposed to policies of insurance for a particular voyage, without any limits as to time, and also to purely time policies, in which there is no designation of local termini at all. (*Arn. Mar. Ins.* 4th ed. p. 351; *Crump Mar. Ins.* § 371.) *Mozley & W.*

Mixed property. Such as is not entirely real, nor completely personal, but partakes of both characters.

Property which, though falling under the definition of things real, is attended with some of the legal qualities of things personal. Also property which, though falling under the definition of things personal, is attended with some of the legal qualities of things real. 2 *Steph. Com.* 214.

The phrase includes such subjects as fall within the definition of things real, but which are attended, nevertheless, with some of the legal qualities of things personal, as emblements, fixtures, and shares in public undertakings, connected with land. Besides these, there are others, which, though things personal in point of definition, are, in respect of some of their legal qualities, of the nature of things real; such are animals *ferœ naturœ*, charters and deeds, court-rolls and other evidences of the land, together with the chests in which they are contained, ancient family pictures, ornaments, tombstones, coats of armor, with pennons and other ensigns, and especially heirlooms. *Wharton.*

Mixed question. A question which partakes the natures of a question of law and one of fact; such as whether an asportation, a conversion, or an acceptance has been shown in a given case; what is reasonable time for performance of an act. Also, sometimes, a question arising from the conflict of different systems of laws.

Yet the terming any question a mixed question of law and fact is chargeable with some degree of indistinctness. Questions of law and fact are not in strictness ever mixed. It is always for the jury to decide the one, and the court the other, however complicated the case may be. In some cases, the main difficulty may consist in ascertaining the facts, where the application of the law to the ascertained facts admits of no doubt; in another, the facts may be clear and simple, and their legal effect doubtful; but still in each case the provinces of the court and jury are perfectly plain and distinct. It is true that, in some instances, the court could not, without the aid of a conclusion of fact drawn by a jury, apply the law; but this consideration does not properly occasion any intermixture of a confusion of the respective functions of the court and jury; for the latter, in drawing their conclusion, still confine themselves to mere matters of fact. *Wharton.*

Mixed tithes, were tithes taken from secondary, not immediate, produce of the land; as, one-tenth of the chickens or milk or eggs raised.

Mixed war. A mixed war is one which is made on one side by public authority, and on the other by mere private persons. (*Grotius*, b. 1, ch. 3, § 1; *Ruth.* b. 2, ch. 9, § 9.) People *v.* McLeod, 1 *Hill*, 377, 415.

MOB. An unorganized assemblage of many persons intent on unlawful violence; a riot involving a multitude.

Bouvier, citing Alison, says that in Scotch law "mob" and "riot," though often used together, have distinct meanings, and are sometimes used separately in legal language, — the word mobbing being peculiarly applicable to the unlawful assemblage and violence of a number of persons, and that of rioting to the outrageous behavior of a single individual. This is not so in English jurisprudence; in that, riot, only, is the technical term; three persons are required to compose one; and mob is not a term of the law, but a vernacular

word descriptive of a large and aggravated riot. See AFFRAY; RIOT.

The word mob is, however, drawn into the decisions somewhat, in consequence of statutes declaring cities or counties liable for injuries to property committed by mobs or riots, and which the municipal authorities fail to prevent; also, because insurance policies often except losses occasioned by mobs or riots.

A clause in a fire insurance policy excepting "loss by fire occasioned by mobs or riots," does not extend to a loss caused by the burning of an adjoining bridge by order of the military authorities, to prevent the advance of an armed force of rebels. Harris *v.* York, &c. Ins. Co., 50 *Pa. St.* 341.

Mobilia personam sequuntur, immobilia situm. Movable property follows the person of the owner, immovable property the locality. The mode of acquiring, enjoying, and transferring movable property is regulated by the law of the domicile of the owner; of immovable property, by the law of the place where the property is situated. Wills of chattels, executed according to the laws of the place of the testator's domicile, will pass personal property in all other countries, though not executed according to their laws. But wills concerning land must be executed according to the prescribed formalities of the country in which the land is situated. 4 *Kent Com.* 513; 2 *Id.* 67; 2 *Greenl. Evid.* § 668.

MODE. Manner in which any thing is done.

Modes of proceeding, in the process act of congress of 1792, includes proceedings on executions. United States *v.* Knight, 14 *Pet.* 301, 316; Duncan *v.* Darst, 1 *How.* 301, 306; s. c. 17 *Pet.* 204. And see Amis *v.* Smith, 16 *Pet.* 303, 313.

Modes of process, in the act of congress of 1789, to regulate processes in the courts of the United States, is equivalent to "modes or manner of proceeding." Wayman *v.* Southard, 10 *Wheat.* 1, 29; Beers *v.* Haughton, 9 *Pet.* 329, 356.

MODERATE. Moderately; temperately; within prudent bounds.

Moderate castigavit. He moderately chastised. The name of a plea in justification in trespass for assault and battery, alleging that the defendant moderately corrected the plaintiff, whom he had a right to correct. The emphatic words of the Latin form of the plea gave it a name.

MODIFY. To alter; to change in incidental or subordinate features. Compare ALTER. Modification: such change in a contract, judgment, &c., as leaves the original thing in operation as far as its general purpose and effect are concerned.

Modification of contracts differs from "novation," which imports a substitution of a substantially new engagement from the old one. Modification of decrees or judgments differs from "amendment," which imports an improvement in phraseology, to enable the precise decision to be enforced; while modification is some subordinate change in the substance of what is adjudged.

MODUS. Manner; mode; way.

The word was used in old English practice to denote the expression in a conveyance of the manner in which the estate conveyed should be held, or the nature of the estate which should pass by the conveyance: such as whether the estate should be held for years, for life, or in fee; whether by one or by several persons; if by several, whether jointly or in succession, and what estate to each. Hence it came to mean a qualification of the terms of an instrument, either by way of restriction or of enlargement; a departure or variance from the usual form of a conveyance, or from some other general rule or practice, according to the circumstances of a particular case, the will of a grantor, the agreement of parties, &c. This occurred most frequently, in old conveyancing, in relation to the prevailing mode of conveyance by *donatio;* the ordinary form of which was a gift of land to the donee and his heirs for certain homage and service, &c.; but the donor might depart from this form by a *modus* or qualification in the particular instance, enlarging the usual terms by including, with the heirs of the donee, his assignees or others, who were not in fact heirs, or restricting the descent of the land to one or more of his heirs, to the exclusion of others. This *modus* — the qualification of or variation from the ordinary terms of the instrument — was allowed in each case to control the rules of law

applicable to the usual form of the conveyance.

The modus of an indictment is that part of it which contains the narrative of the commission of the crime; the statement of the mode or manner in which the offence was committed. *Trayn. Max.*

When teinds, in Scotland, have been valued, they are said to be paid by a modus. *Bell.*

Modus is: 1. A payment in money in lieu of tithe in kind. 2. A song in rhythm. 3. A custom or rite. *Shipley.*

When a provision in a will was intended to impose a duty on a legatee or heir, and not to suspend the vesting of the legacy, it was called *modus*. *Hunt. Rom. L.* 743.

Modus de non decimando. A manner of withholding tithes. A claim, based on custom or prescription, to be discharged from paying tithes or any compensation in lieu of them.

The entire discharge from the payment of tithes, by a custom or prescription known as *de non decimando*, arises either from some personal privileges which the party enjoys who is so discharged, or by a real composition made in lieu of payment of tithes, or from some other like circumstance. Thus the king, by his prerogative, is discharged from all tithes; so a vicar is discharged from paying tithes to the rector, and the rector to the vicar. A real composition is made by an agreement between the owner of lands and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes in consideration of some land or other real recompense being given to the parson in lieu and satisfaction thereof. *Brown.*

Modus decimandi. A manner of tithing. Some peculiar manner of paying tithes, different from the payment of one-tenth the annual increase.

Modus decimandi is money, or other thing of value, given annually, in lieu of tithes. *Termes de la Ley.*

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing; sometimes a pecuniary compensation, as 2*d.* an acre for the tithe of land; sometimes a compensation in work and labor, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes, in lieu of a large quantity of crude or imperfect tithes, the parson is given a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe-eggs, and the like. Any means in short, whereby the law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing. *Jacob.*

To make a good and sufficient *modus:*

1. It must be certain and invariable; payment of different sums will prove it to be no *modus*, that is, no original, real composition.
2. The thing given in lieu of titbes must be beneficial to the parson, and not for the emolument of third persons only.
3. It must be something different from the thing compounded for.
4. One cannot be discharged from payment of one species of tithe by paying a *modus* for another.
5. The recompense must he in its nature as durable as the tithes discharged by it.
6. The *modus* must not be too large, which is called a rank *modus*. 2 *Bl. Com.* 30.

Modus et conventio vincunt legem. Manner and agreement overrule the law. The qualifications and restrictions imposed by the manner and terms of a conveyance, or the terms of an agreement between parties, control a general rule of law, or the usual practice as to a class of transactions, and become the law of the particular case, if such qualifications and terms are not themselves contrary to law.

Modus habilis. A valid manner.

Modus legem dat donationi. J. J. S. Wharton (*Dict.* tit. *Modus*) translates this maxim, Custom gives law to the gift; and G. F. Wharton (*Leg. Max.* 259) translates it, Agreement gives law to the gift. We much prefer Burrill's rendering, The manner gives law to the gift. The manner in which an estate is declared to be given by a feoffment (or gift) governs its operation, and the course of the estate under it. To much the same effect is Trayner's rendering, but the illustrations he gives are somewhat loose. He paraphrases it as meaning: a donor may attach to his gift such conditions as he pleases.

Modus tenendi. Manner of holding. Relates to the different species of tenures by which estates were held.

Modus transferrendi. The manner of transferring.

Modus vacandi. The manner of vacating. How and why an estate has been relinquished or surrendered by a vassal to his lord, might well be referred to by this phrase. See *Trayn. Max.*

Modo et forma. In manner and form. Technical words of pleading a denial of an allegation, not only in its general effect, but in manner and form as alleged. These words put in issue concomitants of the principal matters,

such as time, place, &c., and were therefore, in most cases, matter of form rather than of substance. They are literally translated in the English forms.

MOHATRA. In French law, a contract fraudulently contrived to cover a usurious loan of money. *Brown.*

MOIETY. One-half; but generally spoken of an undivided half.

Two joint tenants are said to take by moieties; that is, each is entitled to half. The duty laws of Congress have sometimes provided that, on a successful prosecution for smuggling, one-half the penalty or forfeiture should be divided among the informers and officers through whose efforts the whole was secured; and these perquisites have been called informer's moieties.

MOLENDUM. Corn (*i.e.* grain) sent to mill; also a grist. *Jacob.*

MOLITURA. The toll or multure paid for grinding corn at a mill. *Jacob.*

Molitura libera. Free grinding; a liberty to have a mill without paying tolls to the lord. *Jacob.*

Molliter manus imposuit. He gently laid hands upon. Technical words of pleading in justification in actions of trespass or assault, where the defendant justifies laying hands upon the plaintiff, as for the purpose of keeping the peace, or for the prevention of crime. When a person is sued for an assault he may, without denying it, set forth facts and plead *molliter manus imposuit.* From these words having been used in pleas, several of the justifications in trespass have come to be known by the phrase, as their name. *Brown.*

MONARCHY. Government organized under a king; that form of civil rule in which one personal sovereign is the source of authority and honor, and the chief (theoretically, at least) in executive power; a kingdom.

MONEY. A general, indefinite term for whatever is, by the lawful custom of the country, the common medium of sales and payments; cash; circulating medium; currency.

Compare CASH; CURRENCY; CURRENT; SPECIE; TENDER.

The question, what particular things are money, depends on the law for the time declaring what shall be legal tender. Thus an early decision, cited below, that treasury notes are not money, must be read in subordination to the recent acts and decisions making them legal tender.

Money is used in a specific and also in a general and more comprehensive sense. In its specific sense, it means what is coined or stamped by public authority, and has its determinate value fixed by governments. In its more comprehensive and general sense, it means wealth, — the representative of commodities of all kinds, of lands, and of every thing that can be transferred in commerce. Paul *v.* Ball, 31 *Tex.* 10.

In its strict technical sense, money means coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value. In its more popular sense, money means any currency, tokens, bank-notes, or other circulating medium, in general use as the representative of value. Kennedy *v.* Briere, 45 *Tex.* 305.

Money is a generic term, embracing, according to the subject-matter of the discourse or writing, every species of coin or currency, — guilders, guineas, napoleons, eagles, and bank-notes, as well as dollars. Hopson *v.* Fountain, 5 *Humph.* 140.

Money means the currency of the union; whatever is by law made a legal tender. Anderson *v.* Ewing, 3 *Litt.* 245.

For every purpose, in the ordinary transaction of business, bank-notes are considered as money. Morris *v.* Edwards, 1 *Ohio,* 189; Edwards *v.* Morris, *Id.* 524; Bradley *v.* Hunt, 5 *Gill & J.* 54; Morrill *v.* Brown, 15 *Pick.* 173.

Bank-notes in themselves are not money, for they are not legal tender. They subserve the purposes of money in ordinary business, by mutual consent of parties, not by binding force of any law or usage. They do not of themselves possess legal character as money, but have acquired that character to a certain extent, and so far as they are accepted as money. When, by consent, they have been received as equivalent to legal tender, and have worked payment or satisfaction, they may be considered as money. Corbit *v.* Bank of Smyrna, 2 *Harr.* 235, 252.

By the term money we generally understand that which is the lawful currency of the country, — that which may be tendered, and must be received, in discharge of a subsisting debt. In this sense, bank-notes are not money. No person is bound to receive them in discharge of a debt, unless in pursuance of a previous contract. But for every purpose in the ordinary transaction of business bank-notes have been, and still are, considered money. They do not come under the denomination of goods, wares, or merchandise. Evidence of the receipt of them will support an action for money had and received. The delivery and receipt of them in discharge of a debt will be considered as so much money, but not as an accord and satisfaction. By the universal

consent of mankind, when they pass from one to another, they pass as money. In the course of business, they are charged and credited as cash or money, and they have been estimated as such, not only by business men, but by courts of justice. They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. Hence a contract to pay a sum of money in current bank-notes of a city is a contract to pay money, if the bank-notes are not tendered on the day. Nor is such contract ambiguous, so that it may be explained by parol evidence. Morris *v.* Edwards, 1 *Ohio*, 189, 204.

Bank-notes are not money in such a sense that a promissory note, expressed to be payable in the "currency of this state," can be enforced by means of a proceeding (such as summons and petition in Kentucky) which is confined to obligations for the payment of money only. Otherwise of a note expressed to be payable in "the current money of" the state. Such a note cannot be deemed to intend bank-notes, but only gold or silver. The word current preceding the word money cannot change its meaning, because it is equally applicable to that kind of money made current by act of congress, which, in truth, is the only current money of a state. "Current money" does not mean the same thing as currency. McChord *v.* Ford, 3 *T. B. Mon.* 166.

An objection cannot be sustained, that a declaration avers the loss of money in bank-notes, and that bank-notes are not money. Towson *v.* Havre de Grace Bank, 6 *Har. & J.* 47.

Paper currency is not money. Lange *v.* Kohne, 1 *McCord*, 115.

Bank-notes are not deemed included in the term money, except when it appears to be used in the popular sense. Scott *v.* Conover, 6 *N. J. L.* 222, 226.

In an indictment, words are to be construed according to their strict legal meaning; consequently an indictment for winning money at cards will not be sustained by proof of winning bank-notes. United States *v.* Wells, 2 *Cranch C. Ct.* 43.

In criminal law, "money" means current metallic coins. Therefore, an indictment for embezzling money is not sustained by proof of embezzling greenbacks or national currency notes. Block *v.* State, 44 *Tex* 620.

In Maryland, tobacco was formerly considered as money, in judicial proceedings; and, in actions of debt, tobacco and money counts were joined. Crain *v.* Yates, 2 *Har. & G.* 332. See Skirvan *v.* Willis, 4 *Har. & M.* 483.

To bet checks at a gaming-table is to bet money. Walton *v.* State, 14 *Tex.* 381.

Treasury notes are neither money nor cash; and evidence of one will not support an allegation regarding the other. Foquet *v.* Hoadley, 3 *Conn.* 534.

A count for money loaned is not sustained by evidence of a loan of a United States bond. Waterman *v.* Waterman, 34 *Mich.* 490.

The word money, in a will, may be construed to mean cash, or may stand for the whole personal estate, and is to be received in the one or the other sense as will best effectuate the general intention of the testator, deduced from every part of the will. Where a testator bequeathed to his daughter household goods, a horse and cow, "and also one-third of the remainder or balance of money that may be left after paying all my just debts and funeral expenses," and his intention was manifestly to divide his personal estate equally between his two children, it was held that, the nature of his personal estate rendering such a construction necessary to effectuate his intention, the word money must be construed to mean "personalty." Smith *v.* Davis, 1 *Grant Cas.* 158.

The word money, used in a devise, may be construed to include the entire personal and real property of the testator, if it appears from the context, and on the face of the instrument, that such was the intention. It is a generally recognized rule that the word money may include personal property. (2 *Keen*, 14; 3 *Myl. & C.* 661; 4 *Russ.* 360; 20 *Beav.* 221; 26 *Id.* 452; 34 *Id.* 490; 1 *Metc.* (*Mass.*) 446; 4 *Kay & J.* 436; 2 *Redf. Wills*, 2d ed. 111; *Id.* 437, note; 2 *Wms. Exrs.* 1025; *Jarm. Wills*, ch. 24.) And, under the probate system and laws of descent and distribution of California, where both the real and personal estate are assets in the hands of the administrator for the payment of debts, with only this distinction between them, viz., that the personalty must be first exhausted before the realty can be so applied, and where the policy of the state is to disseminate real property, rather than to perpetuate it in families, the courts, in construing a devise of this character, should treat the real and personal estate on the same footing. Blood *v.* Fairbanks, 48 *Cal.* 171.

A bequest of "all my money and securities" does not include corporate stock owned by the testator. Shares in the capital stock of corporations are neither money nor securities: they are simply the title of a shareholder to his proportion of the corporate property and its income. Bonds, mortgages, notes, bills of exchange, and matters of like nature, are securities for money. Shares of capital stock are never called securities, unless when made so by being pledged as collateral. Graydon *v.* Graydon, 23 *N. J. Eq.* 229.

Moneys is not of more extensive signification than "money," and means only cash, and not things in action. Mann *v.* Mann, 14 *Johns.* 1; 1 *Johns. Ch.* 231.

A bequest of the moneys of which the testator should die possessed includes only cash, in the popular sense of the word,—the money of the testator in his possession,

or deposited in bank, — nothing else. Beck *v.* McGillis, 9 Barb. 35.

The word money, or moneys, used in a will, where the context favored such a construction, was held to include bank stock, notes, and bonds, in Fulkeron *v.* Chitty, 4 *Jones Eq.* 244.

Money of adieu. Earnest-money. For different explanations of the phrase, see *Burrill.*

Money of the United States. Money lawfully in the hands of an officer of the United States, and for which he is accountable, is money of the United States, and may be so charged in an indictment. United States *v.* Watkins, 3 *Cranch C. Ct.* 441, 458.

Money-bill. In English parliamentary practice, this term is used quite distinctively for a bill or measure introduced in parliament for raising and granting supplies for the crown. By established usage, the maturing such bills rests almost wholly with the commons.

The constitution of the United States prescribes that "all bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills;" which practically distinguishes that class of bills for the same reasons, and to much the same extent, as they are separately known in England; but the term money-bills has not been so much used in this country.

A money-bill is a bill for granting aids and supplies to the crown. Such bills commence in the house of commons, and are rarely attempted to be altered in the lords, except by verbal alterations which do not affect the sense. *May Parl. Pract.* ch. 22.

Originally, the lords and commons in parliament voted separate supplies, the last of such votes of which there is any trace having been in 18 Edw. III. For a brief period subsequently to that date, the lords and commons appear to have voted joint supplies; but from the reign of Richard II., probably, and from that of Henry IV., certainly, the practice was for the commons singly to vote the supplies, and for the lords merely to assent thereto. In early times, money-bills were entered in the statute book only when some relief of grievances was so interwoven with them as to render their entry unavoidable. It is not till the reign of Henry VII. that money-bills, being purely such, appear in the statute-book, and even then they appear occasionally only; however, by the reign of Henry VIII. they are entered regularly. They are, at this date, expressed to be enacted by the authority of parliament; but, by the reign of Charles I., the commons began the practice of omitting the names of the lords in the preamble, and of retaining it only in the enacting part; and this is the present practice.

About 1661, the commons began for the first time to object to the lords making any alterations in money-bills, the immediate occasion of their objection being certain alterations made by the lords in a bill of that year, introduced by the commons for providing for the paving of the streets of Westminster. Again, in 1671, the commons having introduced a bill imposing a tax on sugar, and the lords having proposed some modifications in it, the commons remonstrated, and a conference ensued between the two houses; and in this conference the commons laid claim to an exclusive privilege in the matter of money-bills. The conference ended in nothing definitive; but the exclusive right which was then claimed has since been acquiesced in, although it has never been expressly acknowledged by the lords. A like exclusive privilege, which was claimed shortly after 1688, in the matter of bills imposing pecuniary penalties, was similarly acquiesced in, not acknowledged. *Brown.*

Money claims. A term applied, in practice under the judicature act, 1875, to claims for the price of goods sold, for money lent, for arrears of rent, &c., and other claims where money is directly payable on a contract, express or implied, as opposed to the cases in which money is claimed by way of damages for some independent wrong, whether by breach of contract or otherwise. These "money claims" correspond very nearly to the "money counts" hitherto in use. *Mozley & W.*

Money counts. Short, simple, technical statements, employed in the modern common-law action of assumpsit for setting forth the causes of action most frequently prosecuted, are called the money counts. They were so called because they were appropriate to transactions in which the defendant's engagement, express or implied, on which the plaintiff sued, was for payment of money.

The money counts, or the "common counts," are the counts for money lent; for money paid by the plaintiff for the defendant, at his request; for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff, upon an account stated between them. (3 *Steph. Com.* 432; *Lush Pr.* 905, 906; *Kerr Act. Law.*) *Mozley & W.*

Money demand on contract. This phrase includes the right of action upon an undertaking in the nature of a replevin bail, to return a chattel in controversy, if such return should be adjudged, pay costs, &c. Roberts *v.* Nodwift, 8 *Ind.* 339.

It includes an action for a breach of the obligations contained in articles of apprenticeship. Brock *v.* Parker, 5 *Ind.* 538.

Money-land. In equity, land articled or devised to be sold, and turned into money, is reputed as money; and money articled or bequeathed to be invested in land has, in equity, many of the qualities of real estate, and is descendible and devisable, as such, according to the rules of inheritance in other cases; and this upon the ground that equity regards substance, and not form, and will further the intention of parties. *Wharton.*

Money-order. A certificate or direction in writing, which postmasters are by law authorized to draw, on application of a person depositing money at one post-office, directing the payment of a like sum to a payee named in the order, at some other post-office. These orders form a convenient and safe mode of transmitting small sums.

Money-order office. One of the post-offices authorized to draw or pay money-orders.

Moneyed corporation, as used in the New York statutes and decisions respecting corporations, includes all corporations having banking powers, or power to make loans on pledges, &c., or to make insurances. 1 *Rev. Stat.* 599, § 53. A mutual insurance company has been held to be within this definition. Hill *v.* Reed, 16 *Barb.* 280.

These corporations are subject to important restrictions in their dealings with assets imposed, in terms, upon the directors, but held (Bank Commissioners *v.* Bank of Buffalo, 6 *Paige*, 497) to operate upon and bind the corporation itself. The word directors in the prohibition is used for the corporation.

Lawful money. A bond, payable in "lawful current money of Pennsylvania," was held to relate to the money issued by congress. Wharton *v.* Morris, 1 *Dall.* 124.

"Current lawful money," by the Pennsylvania act of assembly, means such money as is current at the time of entering into the contract. Lee *v.* Biddis, 1 *Dall.* 175.

Lawful money of the United States is lawful money of any state or territory. Cocke *v.* Kendall, *Hempst.* 236.

MONITION. The name of the process, in the nature of summons, corresponding to the writ at common law, and subpœna in equity, which issues from courts proceeding according to the civil law, particularly the admiralty and the ecclesiastical courts.

The monition, in American admiralty practice, is, in effect, a summons, citation, or notice; though in form a command to the marshal to cite and admonish the defendant to appear and answer, and not a summons addressed to the party. 2 *Conkl. Adm.* 2d ed. 147.

The monition is the common admiralty citation or summons, and is either general, special, or mixed.

The *general* monition is a citation or summons to all persons interested, or, as is commonly said, to the whole world, to appear and show cause why the libel should not be sustained, and the prayer of relief granted. This is adopted in prize causes, admiralty suits for forfeitures, and other suits *in rem*, where no particular individuals are summoned to answer. In such cases the taking possession of the property libelled, and this general citation or monition, served in the manner directed by the rules of the court, are considered constructive notice to the world of the pendency of the suit. The monition is a warrant of the court, directed in the United States to the marshal or his deputy, commanding him, in the name of the president, to give public notice, by advertisements in such newspapers as the court may select, and by notifications to be posted in public places, that a libel has been filed in a certain admiralty cause pending, and of the time and place appointed for the trial. A brief statement of the allegations in the libel is usually contained in the monition. The monition is served in the manner directed in the warrant.

A *special* monition is a similar warrant, directed to the marshal or his deputy, requiring him to give special notice to certain persons, named in the warrant, of the pendency of the suit, the grounds of it, and the time and place of trial. This is served by a delivery of a copy of the warrant, attested by the officer, to each one of the adverse parties, or by leaving the same at his usual place of residence; but personal service should be made if possible.

Sometimes the monition is of a *mixed* character, and contains directions for a general monition to all persons interested, and a special summons to particular persons named in the warrant. This is usually served by newspaper advertisements, by notifications posted in public places, and by the delivery of a copy, attested by the officer, to each person specially named, or by leaving it at his usual place of residence. *Dunlap, Adm. Prac.* 132.

MONITORY LETTERS. Communications of warning and admonition sent from an ecclesiastical judge, upon information of scandals and abuses within the cognizance of his court. *Wharton.*

MONOPOLY. An exclusive right; a privilege conferred on one person

only, particularly a sole authority to manufacture or deal in some commodity.

From historic reasons, "monopoly" has come to be used in a reproachful sense, to imply a privilege which is unreasonable or oppressive to the public. Some seem to consider this element a part of the meaning of the word.

In early times, in England, exclusive rights to manufacture or trade were freely granted by the crown as a mere means of raising a revenue from the license fees exacted. The exercise of this power was at first believed to be beneficial, because ingenious foreign workmen were from time to time drawn to England by the expectation of substantial commercial advantages being secured to them by royal letters-patent (these being, really, grants of monopoly); and enterprising Englishmen were also induced by the like expectation to travel abroad, and acquire a practical knowledge of trades and arts. But the crown experiencing in those days the evils of no regular taxation, — the chief of which was a perpetually recurring want of money to conduct the affairs of government, — the prerogative was exposed to, and its exercise soon became affected with, many abuses, principally of this nature, that the monopoly was sold at a ruinous price, usually to the highest bidder, whether or not he was the true and first inventor of the process of manufacture, and latterly without any regard at all to his capacity or ability as an inventor or manufacturer, and frequently, indeed, to courtiers, who made it a means of gain exclusively, and did not assist the national industry at all.

This prerogative was, however, freely exercised down to the accession of the Stuarts, and was carried to a very oppressive and injurious extent during the reign of Elizabeth. The validity of the grants was at length contested in the courts, which adjudged them to be illegal, for three reasons mentioned. "A monopoly, it is said, hath three incidents mischievous to the public: 1. The raising of the price; 2. The commodity will not be so good; 3. The impoverishing of poor artificers." Darcy *v.* Allen, 11 *Coke*, 84. This was in the 44th year of Elizabeth; about 1601. The abrogation of the practice of making these grants was, from about the same time, agitated in parliament; and at length, in 1624, the statute 21 Jac. I. ch. 3, was enacted. This act declares that all monopolies, grants, letters-patent for sole buying, selling, and making of goods and manufactures, shall be null and void. It excepts patents for fourteen years, for the sole working or making of any new manufactures within the realm, to the true and first inventors of such manufactures, not contrary to law nor mischievous to the state; also grants by act of parliament to any corporation, company, or society, for the enlargement of trade; and letters-patent concerning the making of gunpowder.

Substantially this principle obtains in American constitutional law. Thus the constitution of Tennessee declares that "perpetuities and monopolies" are "contrary to the genius of a free state;" but it is held that this provision does not apply to an exclusive privilege to a city to erect waterworks, nor to such privilege to a private company for a term of thirty years. City of Memphis *v.* Memphis Water Co., 5 *Heisk.* 495.

So, also, it has been held that a patent for a useful invention is not, under the laws of the United States, a monopoly, in the old sense of the common law. It more nearly resembles a contract, which, under the authority conferred by the constitution, congress authorizes to be entered into between the government and the inventor, securing to him, for a limited time, the exclusive enjoyment of the practice of his invention, in consideration of the disclosure of his secret to the public, and of his relinquishment of his invention to the public at the end of the term. Attorney-General *v.* Rumford Chemical Works, 9 *Off. Gaz. Pat.* 1062.

MONSTRANS DE DROIT. A manifestation or showing of title.

This was the name of a common-law proceeding or remedy available for enforcing a claim against the crown, when the crown was in possession of the property in question, and all the facts as to

the title were matter of record. The proceeding was formerly allowable only when the right of the claimant as well as the right of the crown appeared upon the record; and it consisted in putting in a claim of right, grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject had the right. This proceeding was extended by statutes of Edward III. and Edward VI. to almost all cases where a subject claims against the right of the crown founded on an inquisition of office. 3 *Bl. Com.* 256, 257; 3 *Steph. Com.* 656, 657.

The judgment in a *monstrans de droit*, or other proceeding against the crown, is called *amoveas manus* or *ouster-le-main*.

Monstrans de droit may now be preferred or prosecuted either in the chancery or in any of the common-law courts, although originally in the chancery and exchequer only. (See petitions of right act, 1860, 23 & 24 Vict. ch. 34.) *Brown.*

MONTH. Whether the word month, occurring in a written instrument, as a contract, deed, or statute, means a calendar or a lunar month, is a question of intention. Where the intent is not clear from the nature of the instrument or the context in which the word is found, some positive rule of construction must be applied; and this rule has varied in different jurisdictions. It is not possible to reconcile the decisions; but, upon a general view of them, the clue to the conflict seems to be this: The common law preferred to construe month as meaning lunar month. The general commercial law, common to England and continental Europe, together with the ecclesiastical courts, preferred to understand it as calendar month; both, very probably, being under some influence from the church, by which the system of calendar months was imposed. The common-law courts soon came to yield to the rule of the mercantile law in construing commercial instruments, while they adhered to the common-law rule in common-law papers. The distinction was not always strictly pursued; our colonial courts, therefore, found the question embarrassed by a conflict of authorities which they could not well reconcile, and they decided some one way and some another; and at last, in many of the states, statutes have been passed prescribing a positive rule, under which decisions apparently conflicting with earlier ones in the same court have been necessarily rendered. See Redmond *v.* Glover, *Dudl.* 107. Thus now in England, by Stat. 13 Vict. ch. 21, passed in 1850, the word month, in an act of parliament, is declared to mean a calendar month.

"Month," in a statute, should generally be construed to mean a calendar month. Brudenell *v.* Vaux, 2 *Dall.* 302; Hunt *v.* Holden, 2 *Mass.* 170; Avery *v.* Pixley, 4 *Id.* 460; Alston *v.* Alston, *Tredw. Const.* 606; Williamson *v.* Farrow, 1 *Bailey*, 611; Commonwealth *v.* Chambre, 4 *Dall.* 143; Pyle *v.* Maulding, 7 *J. J. Marsh.* 202; Parsons *v.* Chamberlain, 4 *Wend.* 512; Kimball *v* Lamson, 2 *Vt.* 138; Commonwealth *v.* Shortridge, 3 *J. J. Marsh.* 638; Mitchell *v.* Woodson, 37 *Miss.* 567; Strong *v.* Birchard, 5 *Conn.* 357; Sprague *v.* Norway, 31 *Cal.* 173; Brewer *v.* Harris, 5 *Gratt.* 285.

"Month," at common law, when used alone, means a lunar month. But it may be construed calendar month, when required by its context in a statute. What context will have this effect, in a penal law, see State *v.* Jacobs, 2 *Harr.* (*Del.*) 548.

In commercial instruments, bills of exchange, promissory notes, &c., "month" means, presumably, a calendar, not a lunar, month. Leffingwell *v.* White, 1 *Johns. Cas.* 99; Thomas *v.* Shoemaker, 6 *Watts & S.* 179.

In matters other than commercial instruments, "month" was construed (prior to the statute prescribing a different rule) as meaning lunar month. Leffingwell *v.* White, 1 *Johns. Cas.* 99; Loring *v.* Halling, 15 *Johns.* 119; Jackson *v.* Van Valkenburgh, 8 *Cow.* 260; Parsons *v.* Chamberlin, 4 *Wend.* 512; People *v.* Mayor, &c. of N. Y., 10 *Id.* 393; Stackhouse *v.* Halsey, 3 *Johns. Ch.* 74.

"Month," when used in contracts or deeds, must be construed, where the parties have not themselves given to it a definition, and there is no legislative provision on the subject, to mean calendar and not lunar months. The term is thus construed in a lease by the state of Indiana. Sheets *v.* Selden, 2 *Wall.* 177.

"Months," in an obligation, should be construed to mean calendar months. Hardin *v.* Major, 4 *Bibb*, 104; Shapley *v.* Garey, 6 *Serg. & R.* 539.

"Month," in the former New York statute relating to the notices to be given in cases of sales under powers in mortgages, means a lunar and not a calendar month. Loring *v.* Halling, 15 *Johns.* 119.

In Massachusetts, "month" is now, by statute, deemed to mean a calendar month. *Rev. Stat.* ch. 2, § 6; Churchill *v.* Merchants' Bank, 19 *Pick.* 532.

Such was the construction given to it by the decisions of the supreme court, with reference to its use in mercantile contracts and legal proceedings. Hunt *v.* Holden, 2 *Mass.* 170, note; Avery *v.* Pixley, 4 *Id.* 460.

Now, by statute, in New York, "month," in any statute, contract, or other instrument, means calendar month, unless otherwise expressed. 1 *Rev. Stat.* 606, § 4.

The term month, as used in the Alabama act of 1843, regulating the proceedings on the settlement of insolvent estates, means a calendar month. Bartol *v.* Calvert, 21 *Ala.* 42.

The months allowed by statute for the redemption of land sold under a decree of foreclosure, or on execution, are calendar, not lunar, months. Gross *v.* Fowler, 21 *Cal.* 392.

The term months, in the Delaware statute limiting indictments for "horse-racing, cock-fighting," &c., is to be construed lunar months. State *v.* Jacobs, 2 *Harr.* 548.

When parties contract for the performance of an act during the first half of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day. Grosvenor *v.* Magill, 37 *Ill.* 239.

"Month," in section 8 of the Indiana general railroad law, means thirty days. Heaston *v.* Cincinnati, &c. R. R. Co., 16 *Ind.* 275.

The months referred to in the act of 1790, ch. 101, concerning the publication of notices, &c., are calendar months. Glenn *v.* Smith, 17 *Md.* 260.

"Six months," in a bank charter, was held to mean calendar months, in Union Bank of Georgetown *v.* Forrest, 3 *Cranch C. Ct.* 218.

A notice of thirty days, given during a calendar month which contains but thirty days, is a "month's notice." People *v.* Ulrich, 2 *Abb. Pr.* 28.

An agreement to forbear the collection of money for "twelve months" means twelve calendar months. Satterwhite *v.* Burwell, 6 *Jones L.* 92.

"One month," as used in N. C. Const. art. 4, § 15, relating to the term of imprisonment, defining jurisdiction, &c., is not synonymous with "thirty days," as used in the N. C. act of 1873, ch. 133, § 19, prescribing the penalty for one's not returning his tax-list. State *v.* Upchurch, 72 *N. C.* 146.

"For the space of one month after the return-day," and "within one month from the return-day," are equivalent expressions. Gore *v.* Hedges, 7 *T. B. Mon.* 520.

Where a month is referred to, in legal proceedings, it will be understood to be of the current year, unless, from the connection, it is apparent that another is intended. Tillson *v.* Bowley, 8 *Me.* 163; Kelley *v.* Gilman, 29 *N. H.* 385.

MOOT, *v.* To argue by way of exercise; to discuss without expecting an authoritative decision. Moot, *n.*, or, more frequently, moot court: an assembly held for the discussion of law questions or fictitious cases. Moot, *adj.*, or mooted: proposed for discussion; also, undecided, doubtful.

MORAL. Occurs in somewhat different senses, in three phrases:

Moral certainty. Assurance less than absolute, but sufficient to warrant the gravest action.

Strictly, a moral certainty should be a complete, unquestioned assurance (this is the force of "certainty"), derived through the intuitive, affective feelings, instead of through the intellect or the senses; an assurance founded on consciousness, or on the moral sense or nature, and not upon observation, including testimony, or reasoning. In this sense of the phrase, "moral" would be the antithesis of intellectual and of physical. The phrase regards man as having a triple nature, gifted with threefold powers of ascertaining truth and attaining knowledge: by the senses, which is physical; by reasons, which is intellectual; and by ethical perception, which is moral certainty.

But the term is not faithfully used with this discrimination. Moral is often prefixed to certainty where the thought is that the assurance is not absolute or perfect, yet is sufficient in degree to warrant human action. In this aspect, a moral certainty is one which lacks the support of actual evidence of the senses, yet is sustained by considerations and persuasions sufficiently strong to control our assent, even in the most important matters.

A purchaser cannot be compelled to take a doubtful title; but on this subject the court acts on a moral certainty; and a purchaser will not be permitted to object to a title on account of a bare possibility. Laurens *v.* Lucas, 6 *Rich. Eq.* 217, 222.

In criminal cases depending on circumstantial evidence, the rule is, that the circumstances, taken together, should be of a conclusive nature and tendency, producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offence. It is not sufficient that they create a probability, though a strong one: it is essential that, taking them as a whole, and giving them their reasonable and just weight, they should to a moral certainty exclude every other hy-

pothesis; should prove the offence beyond a reasonable doubt. Reasonable doubt is not mere possible doubt (because every thing depending on moral evidence is open to some possible or imaginary doubt), but is that state of the case in which jurors cannot say that they feel any abiding conviction to a moral certainty of the truth of the charge. The evidence must establish guilt to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the judgment of those who are called upon to act on it. If the law should go further than this, and require absolute certainty, as it mostly depends on considerations of a moral nature, this would exclude circumstantial evidence altogether. *Webster's Trial, by Bemis*, 469.

Moral certainty, as used by publicists and metaphysicians, signifies only a very high degree of probability, and is synonymous with "proof beyond a reasonable doubt." Commonwealth *v.* Costley, 118 *Mass.* 1.

Moral duty, or **obligation**. Such a duty or obligation as is ascertained by ethical considerations only, not by the customs or positive rules of human society; one which is not imposed or enforced by law.

In this phrase, moral is the antithesis of legal, taking that word in its broadest sense as referring to the whole of jurisprudence, and not in its meaning of opposed to equitable. A large division of legal duties and obligations are moral also. To pay one's just debt is a moral obligation, as well as a legal one; but the most frequent need for the term in jurisprudence is to designate the duties which are not of legal sanction. The law recognizes many such, while it will not compel obedience. Thus the duty of charity is not compellable, yet gifts in charity are favored and sustained by the courts; and payment of an outlawed debt will not be enforced, but the moral duty is deemed a good consideration for a promise to pay.

Moral insanity. Incapacity, from disease, to control one's conduct according to one's knowledge; uncontrollable morbid impulse; disability of the will to refrain from what one knows is wrong and punishable; a morbid perversion of the affections, inclinations, and temper, independent of any disease or delusion operating directly on the intellect.

The existence of insanity of this type is recognized in some jurisdictions as a ground of exemption from criminal responsibility and punishment, while in others it is repudiated. The question has been widely and earnestly discussed; it is frequently presented in the criminal courts; it has been the subject of several elaborate adjudications: but remains, if the progress of thought throughout the whole country, not within a single state, is in view, a grave and perplexing topic.

To indicate, first, how this question has arisen: At about the commencement of this century, medical jurisprudence had advanced so far as to prescribe one rule for determining insanity in cases of crime, which is still respected; viz., if the individual is incapable, from mental imbecility or disease, of knowing the criminality of an act which he commits, he is not amenable to punishment for it. The adjudications propounding this rule at so early a date are, of course, chiefly English; but the American states inherited or adopted the doctrine. It prevails throughout the Union. See INSANITY.

By the middle of the century, under the influence of the labors of physicians and experts in mental disease, who have been steadily calling attention to types of insanity previously undistinguished, and urging the rightfulness of medical treatment rather than criminal punishment in new classes of cases, an important qualification of the legal test of insanity became established throughout England and America. It was testified by medical men that many instances were observed in which an individual, though capable of judging sanely of right and wrong, if the facts were truly before his mind, yet had his judgment fatally perverted and his consequent action uncontrollably vitiated by delusions which were the product of disease. A man might well understand, said the doctors, that it was wrong to kill in general, and right to kill in self-defence; yet if he were possessed by a diseased hallucination that So-and-so was going about to kill him, he would shoot So-and-so on sight, under the very influence of his sound judgment as to his rights. After many discussions, the courts conceded that this class of persons are proper subjects for the asylum, rather than for the jail or gallows.

The review in the house of lords, in 1843, of the trial of Daniel Macnaghten, for the murder of Edward Drummond (private secretary of Sir Robert Peel), by shooting (10 *Cl. & F.* 200), together with the decision of the Massachusetts supreme court, in 1844, in the case of Abner Rogers, a convict in state prison, tried for murder of the warden, were the leading cases; and these, aided by auxiliary decisions of less note but powerful aggregate influence, established the rule that a person overwhelmed by diseased delusions as to facts, such that, if his imaginations had been true, his action according to them would have been innocent, should be exempt from amenability to criminal punishment. Delusions are thus an important cause or branch of intellectual insanity, but not a kind distinct from it; for they operate to pervert one's knowledge as to the punishability of his conduct.

This brings us to the question of moral insanity, which (if it is conceded) is a distinct kind. Within the present half-century, medical men, constantly studying diseased mental action in all its forms, declare that organizations exist in which they find no loss of the power to judge of right and wrong, nor any disturbance from hallucination as to facts, but find the mind powerless to control conduct in view of its knowledge. The subject of such disease knows what is right, but cannot choose it; what is wrong, but cannot shun it. What is called kleptomania is a familiar instance. The subject may know the articles belong to another, and understand that stealing is punished; but it is said that he cannot help taking what he sees exposed.

Are there such organizations? If there are, is their incapacity a rightful ground of exemption from penalties of law? If it seems to be intrinsically a right ground of excuse, can the excuse be allowed with safety to the community, while our modes of ascertaining human motives and purposes are so uncertain? These are the questions which constitute the problem of "moral insanity."

We gather from Mr. Stephen's recent Digest of the English Criminal Law that this question of moral insanity is, at the present day, an unsettled question in England. It is true that decisions rendered many years ago prescribe only the familiar test, that, to establish a defence on the ground of insanity, it must be clearly proved that the accused was laboring under such a defect of reason as not to know the quality of the act he was doing (*i.e.* was a subject of delusions which, if true, would have excused his act); or, if he did know it, that he did not know that he was doing wrong (*i.e.* was intellectually incapable of knowing his act was punishable). And this test excludes moral insanity. But decisions rendered before the time when the phenomena supposed to constitute moral insanity had been studied by the medical profession, and brought to the notice of the courts, are not considered by advocates of the progressive view at all decisive against the defence: they show that it was not admitted when they were rendered; but if this was because it had not then been presented, they do not show that it ought not to be admitted now, when the psychological facts are better understood Reviewing in a very general way, without mentioning distinctions and details which are of importance, yet cannot be noticed here, the course of recent decisions in the American courts, one may say that in eight of the states, Connecticut, Illinois, Indiana, Iowa, Kentucky, Michigan, Ohio, and Pennsylvania, the courts of last resort, deferring to the general testimony of physicians of the present generation that moral insanity is a disease of known existence, have recognized it as a sound defence in law.

The case of Bradley, in Indiana, illustrates the general position of these states adopting the progressive view. Bradley and Evans were neighbors and good friends. There was no quarrel between them. Bradley one day was angered by the annoyance of stray hogs in his door-yard. Trying to drive them out excited him to a violent fit of passion. Meantime, Evans was starting from his own doorstep, near by, and walking towards Bradley's house. He was not owner of the hogs, and had done nothing to give Bradley offence; but Bradley, excited by his trouble with

the swine beyond all reason or self-control, suddenly declared he would shoot Evans, rushed into his house for his pistol, returned, and shot and killed Evans as he was approaching. There was a trial for murder. No provocation for the shooting was suggested, nor any delusion or hallucination. There was evidence of long-continued drinking habits, which had impaired a mind naturally feeble beyond even their usual ill effects; of conduct manifesting insanity in Bradley himself; and of several cases of undoubted insanity among his immediate relatives. The supreme court adjudged, in effect, that insanity is a disease which may impair or totally destroy the understanding or the will, or both. If it has destroyed either, the person is not a subject of punishment. Bradley *v.* State, 31 *Ind.* 492.

There have been two representative cases in Iowa, in their circumstances one upon each side of the line which divides an act caused by an uncontrollable, insane, or diseased impulse, from one prompted by extreme but natural passion. State *v.* Felter, 25 *Iowa*, 67; State *v.* Strickley, 41 *Iowa*, 232. The supreme court has decided that, since medical science shows there is a diseased condition of the mind in which, although the subject abstractly knows that a contemplated act is wrong and punishable, he is yet, by an insane impulse, irresistibly driven to commit it, this should be recognized as a defence. A want of power to govern one's conduct, which springs from a diseased or insane condition of the mind, is a ground of exemption from punishment; but not so a want of power which springs from unrestrained indulgence of natural passions.

The United States circuit court for the first circuit (in United States *v.* Holmes, 1 *Cliff.* 98, 118), has decided, as lately as 1858, emphatically against the defence. The same may be said as to the courts of five of the states, — Georgia, Nebraska, New Jersey, New York, and North Carolina.

In New York the question has been often presented. Salient cases among the earlier ones were the trials of Freeman for murder, 1846, which can scarcely be said to have done more than raise the question (see 4 *Den.* 28; also, *Trial of Freeman*, in pamphlet); that of Kleim, for murder, 1847, in which the judge recognized and allowed the defence in his charge, and the jury acquitted, on the ground of insanity (*Edm. Sel. Cas.* 13); that of Huntington, for forgery, 1856, in which the defence was very earnestly presented, but was disallowed by the judge in his charge, and the jury convicted the prisoner (*Trial of Huntington*); and that of McFarland, for murder, 1870 (McFarland's Case, 7 *Abb. Pr.* N. S. 348). On this latter trial the recorder charged, that, to constitute a crime, the man must have memory and intelligence to know that the act he is about to commit is wrong, and will expose him to punishment; also, reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it; and the jury acquitted the prisoner, as was generally understood at the time, under the latter branch of this instruction. Neither of these cases led to any authoritative decision. But in Flanagan's case, 1873, the question was directly brought before the court of appeals, and decided in the negative. The court declare it to be the settled law of New York, that the test of responsibility for criminal acts where unsoundness of mind is interposed as a defence is the capacity of the defendant to distinguish between right and wrong, at the time of and in respect to the act which is the subject of the inquiry. It is not the rule that the power of choosing right from wrong, as distinguished from the capacity of choosing between them, is essential to legal responsibility; or that there is a form of insanity accepted as a defence in criminal courts, in which the faculties are so disordered that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts the consequences of which he anticipates, but from which he cannot refrain. The doctrine that a criminal act may be

excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. Flanagan *v.* People, 52 *N. Y.* 467.

It is observable that the general view of courts which admit the defence of moral insanity seems to be that the question of mental capacity sufficient to constitute responsibility is a question of fact, on which courts should take the testimony and follow the opinions of experts in mental disease, and, when they unite in declaring that a form of incapacity previously unnoticed exists, courts should recognize it; while the adverse cases rest not so much on any denial of the fact, as upon the view that the processes and means of inquiry at the command of courts of justice are not adequate to ascertain so vague and easily pretended a defence as that of uncontrollable morbid impulse, and they can only protect the community against a certain abuse of any such defence by disallowing it altogether.

MORE OR LESS. The insertion of the phrase more or less in a conveyance of land, following the statement of the quantity supposed to be correct, is understood to operate as a qualification of the representation of quantity. It renders the mention of the supposed number of acres matter of general description only; and, if good faith has been observed, neither party can complain of a surplus or deficiency disclosed by actual measurement, and which is of a character to be deemed natural and reasonable under the circumstances. Thus, if a deed conveyed land described by metes and bounds, adding "containing one hundred acres, more or less," and the tract, as bounded, should afterwards be shown to contain only ninety-eight acres, the purchaser could not complain that he had not received as much as he bought; or, if the boundaries proved to embrace one hundred and two acres, the vendor could not sue for an additional payment.

The phrase does not preclude proof of actual mistake or fraud, or prevent relief for either of these; nor is it understood as covering all possible variations from the quantity stated, but only such as it is reasonable to believe may have naturally occurred, under the circumstances. In the application of the principle much depends on the circumstances of the individual case; the size of the tract; the opportunity of the parties to know its dimensions, its character as a city lot, a cultivated country farm, or wild unsurveyed land; whether the consideration is a gross sum, or carefully rated by the acre or foot; whether the antecedent description is by a general name or usual designation of the land in gross, as in a conveyance of "my farm known as Lea Meadows in W.;" or by landmarks, courses, and distances, and the like. In short, it is a rule of construction, founded on the idea of ascertaining the probable intent.

Where, in a deed, the lands sold are said to contain "about so many acres, more or less," both the grantor and the grantee will be deemed to consider those words as a representation of the quantity which the grantee expects to purchase, and the grantor expects to sell; and the phrase more or less is understood as intended to cover some reasonable excess or deficit. Thomas *v.* Perry, *Pet. C. Ct.* 49.

A vendor of land described it by section, locality, and as the farm on which he resided, and as containing "one hundred and eighty acres more or less." It was held that these words were only descriptive of the farm, not a covenant that it contained one hundred and eighty acres. Harrell *v.* Hill, 19 *Ark.* 102.

A sold to B a tract of land "containing eighty acres, be the same more or less," including a mill-seat. It appeared that the tract contained but sixty acres. It was held that the mill-seat being the chief object of the purchaser, the sale being in gross, and no fraud shown, the contract should not be rescinded on account of the deficiency in the quantity. Pollock *v.* Wilson, 3 *Dana*, 25.

Parties modified a contract for the sale of land by the acre, and agreed to abide by an old survey, and the deed was made in accordance therewith, describing the land sold as "containing ninety-eight acres, be there more or less," and giving the boundary. Under these circumstances, it was held that the expression more or less showed that the parties risked the quantity, and that, the survey proving erroneous, equity would not relieve. Williford *v.* Bentley, 5 *J. J. Marsh.* 181.

The words more or less, in the description of land in a deed, intend such deviation from the supposed quantity as would be reasonable under the circumstances; and such deviation ought not to exceed ten or

fifteen per cent. Fannin *v.* Bellomy, 5 *Bush*, 663.

They were held not to extend to a deficiency of one-fifth of the quantity stated; and the purchaser was allowed a deduction from the price. Gentry *v.* Hamilton, 3 *Ired. Eq.* 376.

These words in a contract which rests *in fieri*, will only excuse a very small deficiency in the quantity of an estate; for, if there be a considerable deficiency, the purchaser will be entitled to an abatement. Hill *v.* Buckley, 17 *Ves.* 394.

Incorporating the phrase "more or less" in a conveyance will not preclude the court from rectifying an actual mistake or relieving against fraud. Shipp *v.* Swan, 2 *Bibb*, 82.

Nor will these words operate to enlarge the premises beyond the boundaries given. Poague *v.* Allen, 3 *J. J. Marsh.* 421.

When, in a contract for the sale of land for a gross sum, the representation of quantity is qualified by "more or less," the effect is to render the statement of the number of acres descriptive merely, and not of the essence of the contract; and, in the absence of fraud, a deficiency or surplus in the quantity will not affect the contract. But, if the deficiency is of such magnitude as to raise a presumption of fraud or mistake, the phrase will be inoperative, and relief will be granted. Hunt *v.* Stull, 3 *Md. Ch.* 24.

Where a deed conveys land, for a consideration in gross, described as "containing one hundred acres, be the same more or less," neither party can claim relief on account of any deficiency or surplus, unless it is of such a character as to induce belief of fraud or mistake. Smallwood *v.* Hatton, 4 *Md. Ch.* 95.

"More or less," in a deed, should be restricted to an allowance for a slight variation of instruments and small errors in surveys. Hoffman *v.* Johnson, 1 *Bland*, 103.

The phrase more or less, incorporated in the description of the quantity of land sold, imports that quantity does not enter into the essence of the contract of sale, and a purchaser under a contract so expressed cannot, in the absence of fraud, claim to be relieved for a deficiency, by an abatement of the price. Tyson *v.* Hardesty, 29 *Md.* 305.

Where a boundary line is described as measuring a certain number of feet, more or less, and there is nothing in the deed itself, or in the subject to which it applies, to explain the description, the number of feet mentioned is the length of the boundary line. Blaney *v.* Rice, 20 *Pick.* 62.

A deed for a tract "containing one thousand acres, more or less," is fulfilled although there turn out to be but nine hundred and twenty acres. The words more or less create a mutual risk: the vendor risked as to the sum of money, the vendee as to the quantity of land. Phipps *v.* Tarpley, 24 *Miss.* 597.

When land is sold at a given price per acre, for the aggregate quantity contained in the tract, specified as a certain number of acres, more or less, and no provision is made for a survey to ascertain the precise quantity, the price and the number of acres mentioned are to govern in fixing the amount of money to be paid, and the words more or less are not to unsettle this amount, and leave the matter open to survey. Sullivan *v.* Ferguson, 40 *Mo.* 79.

When the phrase more or less is used in a deed, in connection with a description of land by the sectional subdivisions, or by metes and bounds, it is understood to designate approximately the quantity of land in such subdivision or defined boundaries, and not to refer to the state of the title. Williamson *v.* Hall, 62 *Mo.* 405.

Where the vendor agreed to convey a farm "said to contain one hundred and thirty-five acres," and the deed made in pursuance of the agreement described the farm as "containing one hundred and thirty-five acres, more or less," and there was a deficiency of twenty acres, it was held that the vendee was entitled to a deduction from the purchase-money for the deficiency. Couse *v.* Boyles, 4 *N. J. Eq.* 212.

Upon a sale of land for a gross sum, and described by known boundaries, the length of which boundaries is given, concluding with the words more or less, the purchaser is not entitled to any deduction on account of a deficiency in the quantity of land. Morris Canal Co. *v.* Emmett, 9 *Paige*, 168.

In an executory contract for the sale of lands, the qualifying words, more or less, import only that there is not a great deficiency or excess. Belknap *v.* Sealey, 14 *N. Y.* 143.

The words more or less, in the boundary in a deed of land, are merely words of description, to prevent the parties from being prejudiced by inaccuracies; and do not extend the grantee's boundary. Brady *v.* Hennion, 8 *Bosw.* 528.

In trespass, to try title, where the land in dispute is described in the deed of conveyance, under which a party claims, as containing a certain number of acres, more or less, if the description is otherwise certain, the party must recover or fail according to the description, and a parol agreement to make up the quantity can have no effect. Baynard *v.* Eddings, 2 *Strobh.* 374.

Where a lot of land sold, the boundaries of which are well known to the purchaser, is described in the contract as containing a certain quantity, more or less, any deficiency in the quantity, in the absence of any misrepresentation, is no ground for an abatement in the price. Peden *v.* Owens, *Rice Eq.* 55.

The phrase more or less, in a deed, cannot be allowed to cover a mistake of one-quarter. Smith *v.* Fly, 24 *Tex.* 345.

In contracts for the sale of land by a specific number of acres, the parties are entitled to compensation for a deficiency or excess in that quantity, beyond what may

be reasonably imputed to small errors from variations of instruments or otherwise; the insertion of the phrase more or less in the deed does not preclude a court of equity from an inquiry into what was the real contract. Joliffe *v.* Hite, 1 *Call*, 301.

If a vendor of a lot of land knows the quantity of it from his own title-deeds, and conveys it as containing a certain number of acres, more or less, he will be liable for any deficiency in the quantity. Duvals *v.* Ross, 2 *Munf.* 290. S. P. Bedford *v.* Hickman, 5 *Call*, 236.

Where land is sold for a certain number of acres, more or less, at a price for the tract, the purchaser will not be relieved, in case there is a deficiency. Pendleton *v.* Stewart, 5 *Call*, 1.

The words more or less have a plain, ordinary, and popular signification, and are often used in contracts relating both to real and personal estate. As applied to quantity, they are to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus, occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically named as the subject of the contract. In sales of merchandise, especially in large quantities, where it is impossible to ascertain with precise accuracy the number or weight of the articles before concluding the contract for their purchase, it is necessary and usual to insert the words more or less, or about, in connection with the specific amount which forms the subject of the contract, in order to cover any variation from the estimate which is likely to arise from differences in weight, errors in counting, diminution by shrinking, or other similar causes. But, in such cases, parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified; and the effect of the words more or less is only to permit the vendor to fulfil his contract, by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for an excess or short delivery, arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold, or, as it is sometimes briefly expressed, it is "an absolute contract for a specific quantity within a reasonable limit." What is a reasonable limit and a substantial compliance with such contract, if the facts are not in dispute between the parties, is a question for the determination of the court. Cabot *v.* Winsor, 1 *Allen*, 546.

The qualifying words more or less, used in a contract, are words of intention, and must be understood in their ordinary and popular sense. They have, by usage, no technical meaning, and must be understood to effectuate the immediate intention of the contracting parties. Where they are used in a contract for army transportation, they give the government no more right to withhold a portion of the freight contracted for than the contractor would have to refuse to transport the same quantity were it offered to him. Hardy *v.* United States, 9 *Ct. of Cl.* 244.

Where a contract is to deliver a specified quantity of lumber to the government, and the words more or less are added, with no reference to any other method of determining more exactly the quantity intended, or removing the uncertainty, the parties will be held to a quantity approximate to that named, allowing only a variation reasonable under the circumstances. But when the words more or less have a reference to something by which the exact quantity intended can be ascertained, and the uncertainty removed, then the words will limit or extend the quantity named to that which may be ascertained and determined by the reference. Brawley *v.* United States, 11 *Ct. of Cl.* 522.

MORT. Death.

Mort d'ancestor. Death of ancestor. See ASSIZE OF MORT.

Mort civile. The term of French law corresponding to our "civil death," and denoting the status impressed on the subject of a conviction for felony. It was nominally abolished by a law of the 31st of May, 1854; but something very similar to it, in effect at least, still remains. Thus the property of the condemned, possessed by him at the date of his conviction, goes and belongs to his successors (*héritiers*), as in case of an intestacy; and his future-acquired property goes to the state, by right of its prerogative (*par droit de désherence*); but the state may, as a matter of grace, make it over, in whole or in part, to the widow and children. See *Brown*.

MORTGAGE, *v.* To convey as security, and on condition of reconveyance after payment or performance. Mortgage, *n.*: a conveyance made as security, and defeasible after the duty secured has been done. Mortgaged: conveyed as security. Mortgagee: the grantee in a mortgage; one to whom property has been conveyed as security. Mortgagor, mortgager, or mortgageor: the grantor in a mortgage; one who has conveyed property as security.

With respect to the orthography of the last-mentioned word, it is observable

that the best vernacular dictionaries recommend mortgag*eor*, allow mortgag*er*, and altogether repudiate mortgag*or*. Webster, who was generally willing to omit superfluous letters, says that "mortgag*or* is an orthography which should have no countenance;" and Worcester quotes and approves this view, citing Smart as an additional authority. Upon the other hand, we do not remember to have ever seen the spelling mortgag*eor* in any acknowledged law-book. Mortgag*er* is sometimes noticed, chiefly, so far as our observation extends, in reports published in recent years in the western states. Mortgag*or* is altogether the most common. It is found in Dart on Vendors and Purchasers, Davidson's Precedents and Forms, Deane's Principles of Conveyancing, Kent's Commentaries, Stephen's Commentaries, Story on Equity Pleading, Washburn on Real Property, the old and the new editions of the United States Digest, Abbott's various Digests, and in the law dictionaries of Bouvier and Burrill, Brown, Jacob, Mozley and Whiteley, Tomlins, and Wharton.

The term is traced to the French words *mort*, dead, and *gage*, pledge; they signifying that the property was a dead or unproductive pledge, in that the creditor had no right to the use of it, or to apply its rents and profits to the debt; whereas, in what was anciently called *vif* pledge, — now-a-days pledge simply, — the rents and profits went towards discharging the debt; or, according to another explanation, dead pledge was applied to the transaction, because, in case of non-payment of the debt at the time limited, the land was for ever *dead*, and gone from the mortgagor; and, in case of payment, it became *dead* as to the mortgagee. Under modern views of the nature of mortgage and pledge, and of the rights of the parties, this verbal distinction has lost much of its force and value.

We do not find any explanation as to the term mortgage which so lucidly reviews the history of, and changes in, its use, and so clearly exhibits the meaning attached to it upon modern views, as the discussion given by Professor Washburn (1 *Real Prop.* 478), the leading thoughts of which are these: Mortgages are one form of lien upon real estate to secure the performance of some obligation, more commonly the payment of money. A mortgage, at common law, may be defined to be an estate created by a conveyance, absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. It is, therefore, an estate defeasible by the performance of a condition subsequent. The act which is to defeat the estate must, in order to constitute a mortgage, be one to be done by the grantor or his assigns. It does not, therefore, relate to the quantity of estate, but to its quality, or to circumstances which qualify the ownership and enjoyment. Though conditional in its character, it differs essentially from an estate upon condition at common law. Estates upon condition vest in the grantee, subject to be defeated; but until defeated by act of the grantor, the estate, with the possession and the ordinary incidents of ownership, are in the grantee; whereas, a mortgage only becomes effectually an estate in the grantee, called the mortgagee, by the grantor or mortgagor failing to perform the condition. The possession may be in either grantor or grantee, according to the terms of the deed, though ordinarily it is retained by the grantor. If there is no provision inserted in the deed as to possession, the mortgagee may enter and hold the estate until the condition is performed; but, if the condition is performed according to its terms, the estate of the mortgagee is *ipso facto* defeated and at an end. On the other hand, if the mortgagor failed to perform the required condition, his estate was, by the common law, wholly defeated and gone; equity, however, assured to him a privilege of redeeming. This right to redeem a mortgaged estate after it had, in view of the common law, been forfeited by a failure to perform the condition of the mortgage, gave to mortgages a double aspect and a double nature, the one created by and known

to the common law, the other created by and known only to equity; this right of redeeming, after breach of the condition, being what is called a right in equity of redemption, or, in shorter terms, an equity of redemption. In law, the mortgagee, as holding the freehold, may sue by action of ejectment, and recover possession of the land against the mortgagor. He may devise his interest as real estate by will, or it will descend at common law to his heir. In equity, the land is a pledge. The mortgagee holds this only as a security for a debt; and, like the debt, it is an interest of a personal nature; and, if he dies, the debt goes to his executor, who may receive the same, and oblige the heir to release to the mortgagor, without being paid a farthing.

Other general definitions.

Mortgage is the conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it. 4 *Kent Com.* 136.

The term mortgage is applied indifferently: to the mortgage transaction; to the mortgage deed; and to the rights conferred thereby on the mortgagee. *Mozley & W.*

A mortgage may be described to be a conveyance of lands by a debtor to his creditor, as a pledge or security for the repayment of a sum of money borrowed. The debtor who so makes a conveyance of his lands, or so puts them in pledge, is termed the mortgagor, and the creditor to whom the lands are so conveyed as a security for the money lent, is termed the mortgagee. The mortgagee, with respect to the tenure which he acquires in the lands so conveyed to him, is also termed a tenant in mortgage.

Mortgages of freehold lands are of two sorts: either the lands are conveyed to the mortgagee and his heirs in fee-simple, with a proviso that, if the mortgagor pays the money borrowed on a certain day, the mortgagee will reconvey the lands; or else the lands are conveyed to the mortgagee, his executors, administrators, and assigns, for a long term of years, with a proviso that, if the money borrowed is repaid on a certain day, the term shall cease and become void. There is also another kind of mortgage, where the proviso for redemption does not oblige the mortgagor to pay the money on a particular day, but allows him to do it at any indefinite time; and this is called a Welsh mortgage.

Mortgages of leasehold lands are likewise of two sorts, being either by assignment, in which case the mortgagee coming into legal privity with the lessor, becomes liable to the latter on the rents and covenants; or by underlease, in which case the mortgagee, by reason simply of the absence of that privity with the lessor, does not become liable to the latter on the rents and covenants. In either case, there is the usual proviso for the reassignment or surrender of the premises upon repayment of the principal money lent, and interest and costs.

Mortgages of copyhold lands, where they constitute the principal or entire security, are usually made by surrender without admittance, subject to a proviso making void the surrender upon repayment of the principal, interest, and costs; but, where they are only a subordinate part of the security, the mortgagee is frequently satisfied with a covenant to surrender, which he takes from the mortgagor, subject to the usual proviso that the covenant shall be discharged and become void upon repayment of the mortgage debt, and interest and costs. *Brown.*

A mortgage is a creation of an interest in property, defeasible, *i.e.* annullable, upon performing the condition of paying a given sum of money, with interest thereon, at a certain time. Mortgages are either legal, which are enforceable at common law, or equitable, which can only be realized through chancery.

A mortgage is employed when a debt has been incurred or a loan of money or credit effected, in order to secure either the repayment of the one or the liquidation of the other. The debtor or borrower is then the mortgagor, who has charged or transferred his property in favor of or to the creditor or lender, who thus becomes the mortgagee. If the mortgagor pays the debt or loan and interest within the time mentioned in a clause technically called the proviso for redemption, he will be entitled to have his property again free from the mortgagee's claim; but, should he not so comply with such proviso, the legal estate becomes perfected in the mortgagee, *i.e.* indefeasible, and so lost at the common law to the mortgagor, though redeemable in equity. It is because the mortgagor seldom observes the condition in the proviso for redemption, that these instruments have been denominated mortgages, as the pledge is then dead or lost to the mortgagor, at law. A mortgage thus differs from a vifgage, so called because neither loan nor property is lost; for in that the creditor enters into possession of the estate, and receives its proceeds in satisfaction of his debt with interest, after which the debtor becomes entitled to a return of the subject-matter. *Wharton.*

Special significations of the word.

The term mortgage has a technical signification in law, and when used in legal proceedings, as descriptive of a written instrument, it must be taken and construed according to its technical and legal import; which includes a defeasance and an equity of redemption. Walton *v.* Cody, 1 *Wis.* 420.

The verb mortgage imports a transfer of

the title; thus, a valid mortgage of personal property may be created by a writing which uses the word mortgage only, without any other words of conveyance; nor is it necessary that it should contain a power of sale, or authorize the mortgagee to take possession, on default being made in the payment of the secured debt. Mervine *v.* White, 50 *Ala.* 388.

The words mortgage, assign, and transfer, in a deed, will pass the legal estate. Gambril *v.* Doe, 8 *Blackf.* 140.

The noun mortgage may include pledge; thus, as used in Cal. Pr. Act, § 120, "mortgage" includes any security involving a lien of a fixed determinate character, capable of being enforced with certainty, and not dependent on conditions. Payne *v.* Bensley, 8 *Cal.* 260.

"Mortgage," as used in S. C. act of 1789, § 26, prescribing the order in which debts of a decedent are to be paid, embraces a mortgage of chattels, as well as a mortgage of real estate. Edwards *v.* Sanders, 6 S. C. 316.

An agreement for "a mortgage" on property does not authorize the party claiming it to demand a mortgage containing a power of sale. Capron *v.* Attleborough Bank, 11 *Gray*, 492.

Indebtedness essential.

In general, the idea of a debt or sum due is essential to characterize a contract as a mortgage. Almy *v.* Wilbur, 2 *Woodb. & M.* 371.

Where A borrows money of B, executing his note to him, and by deed conveys certain land to him, taking from B a bond to reconvey on payment of the note, the transaction amounts, *prima facie*, to a mortgage. Crassen *v.* Sworeland, 22 *Ind.* 427.

A sale of property by A to B, and an obligation by B to reconvey the same property on certain conditions, where the transaction does not create the relation of debtor and creditor between the parties, is not a mortgage, and B will only be held to a compliance with the terms of his bond. Galt *v.* Jackson, 9 *Ga.* 151.

A deed upon condition is not a mortgage, unless it is a security for a debt, or a demand in the nature of a debt. If the demand on breach of the condition would be for unliquidated damages, it is not a mortgage. Bethlehem *v.* Annis, 40 *N. H.* 34.

An instrument conveying absolutely lands, not as security for money, nor to be held in trust for its repayment, but in lieu of it, is a deed, and no subsequent event can convert it into a mortgage. Kearney *v.* Macombe, 16 *N. J. Eq.* 189.

To constitute a mortgage, it is not necessary that there should be any collateral or personal security for the debt secured by the mortgage. Smith *v.* People's Bank, 24 *Me.* 185; Mitchell *v.* Burnham, 44 *Me.* 286.

A covenant to pay the debt, or repay the money lent, is not an indispensable ingredient to a mortgage. If a security for the money is intended, that security is a mortgage, though not bearing on its face the form of a mortgage; and where the relation of mortgagor and mortgagee is once fairly established, though the equity of redemption may be sold or disposed of to the mortgagee, yet, unless the transaction appears to be fair and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation. Dougherty *v.* McColgan, 6 *Gill & J.* 275.

Nature of mortgage; as a conveyance or a lien only.

A mortgage is a transfer of property, as security for a debt. Conard *v.* Atlantic Ins. Co., 1 *Pet.* 386, 441.

In England, a mortgage is regarded in law as a conveyance, vesting in the mortgagee, upon its execution, a conditional estate, which becomes absolute upon breach of its condition, and of course carrying with it all the rights and incidents belonging to the ownership of property. Thus the mortgagee, unless restrained by stipulations in the mortgage, is there entitled to immediate possession of the land, and may enter peaceably, or bring ejectment; and his right to possession cannot be defeated, except by payment at the period fixed by the terms of the mortgage. Payment subsequent to that period only gives an equity of redemption, and a reconveyance is necessary to vest the title in the mortgagor. The same doctrine prevails in several of the states. But in equity, both in England and the United States, a mortgage is regarded in a very different light. The settled doctrine of equity is that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or incumbrance, and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor, in any of the ordinary modes of assurance, subject only to the lien of the mortgage. This equitable doctrine, established to prevent the hardships springing by the rules of law from a failure in the strict performance of the conditions attached to the conveyance, and to give effect to the just intent of the parties in contracts of this description, has been, in most of the states, gradually adopted by the courts of law, although, in some instances, to a limited extent only. The cases indicate a fluctuation between equitable and common-law views of the subject, and a hesitation by the courts of law to carry the equitable doctrine to its legitimate results. McMillan *v.* Richards, 9 *Cal.* 365, 407.

In California, a mortgage is not treated as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for a debt, and default in the pay-

ment does not change its character. Neither can possession under the mortgage affect the nature of the mortgagee's interest. Nagle *v.* Macy, 9 *Cal.* 426.

A mortgage is not an assignment; for that passes the whole interest in the thing assigned, whereas a mortgage creates a lien only, in favor of the mortgagee. Nor is it a conveyance, within the meaning of that term as it has been understood by jurists in New York, Massachusetts, Maine, and Connecticut, for the last thirty years, and by English judges for the last half century. (Citing many cases.) The result of the cases is, that a mortgage is not a conveyance of the land, but a charge or lien upon it; and that the mortgagee's interest is a chattel, and that he is vested with the right to maintain ejectment to obtain and appropriate the pledge. Bates *v.* Coe, 10 *Conn.* 280, 294.

A mortgage, as between the mortgagor and mortgagee, so long as the former continues in possession of the mortgaged premises, is merely a security for the payment of money, and does not absolutely convey the legal title to the premises; but it is a lien on the property of so high a nature that it is not divested by a sale on judgments subsequently obtained against the mortgagor. One claiming his title by virtue of a sale on a judgment cannot recover the possession in ejectment. His only right is to redeem. Doe *v.* Hall, 1 *Houst.* 320.

A mortgage is but a security for the debt. The mortgagor continues the owner of the land, and payment is an absolute discharge of the property from the claim of the mortgagee. Francis *v.* Porter, 7 *Ind.* 213. S. P. Reasoner *v.* Edmundson, 5 *Ind.* 393; Grable *v.* McCulloh, 27 *Ind.* 472.

A mortgage is a conveyance subject to a condition. Engell *v.* Hart, 9 *N. Y.* 213; Smith *v.* Acher, 23 *Wend.* 653, 668.

Although a mortgage has been held, with good reason, not to be a sale, within a condition in a policy restricting any sale or alienation of the thing insured, yet in respect to questions arising under the law of fraudulent conveyances, or whenever to distinguish between a mortgage and a pledge is necessary, a mortgage is held to be a sale, and the mortgagee a purchaser. Hay *v.* Parker, 55 *Me.* 355.

A mortgage is a sale upon a condition that, if the mortgagor pays the debt secured, it shall be void. Lewis *v.* Graham, 4 *Abb. Pr.* 106.

A deed conditioned to become void, unless a certain amount is paid by a day certain, is in effect a deed of mortgage from the debtor to the creditor. Austin *v.* Downer, 25 *Vt.* 558.

What have been held mortgages.

Bonds of a corporation, which pledge the real and personal property of the corporation for the payment of the debt and interest, will be treated and enforced by a court of equity as a mortgage. White Water Valley Canal Co. *v.* Vallette, 21 *How.* 414.

A decree that D is entitled to certain lands, and that he be let into the possession, charged with the payment to C of a sum of money, does not make C a mortgagee of the lands. Davenport *v.* Bartlett, 9 *Ala.* 179.

A bond for title is, in legal effect, a mortgage, which the vendor may foreclose. Merritt *v.* Judd, 14 *Cal.* 59.

An agreement to make a mortgage does not amount to a mortgage, as against subsequent judgment creditors. Price *v.* Cutts, 29 *Ga.* 142.

An agreement to purchase land does not constitute a mortgage. Greene *v.* Cook, 29 *Ill.* 186.

A railroad corporation's deed of trust, to secure its bonds or coupons, operates as a mortgage. Coe *v.* Johnson, 18 *Ind.* 218.

Where the conditions announced at a sale and in the *procès-verbal* show clearly that the sale-notes are to be secured by mortgage, the adjudication on those conditions will at once convey title and create a mortgage. Brooks *v.* Walker, 3 *La. Ann.* 150.

A written instrument under seal, not acknowledged, in which the signer agrees to maintain his father and mother during their natural lives, and as security for the fulfilment of the agreement conveys and grants to them, "each and severally, a life lien or dower or lien of maintenance for life" in real estate, is a mortgage. Gilson *v.* Gilson, 2 *Allen*, 115.

A French *hypothéqué* of land, in which the conveying words are *obligé, engagé, aliené, affecté, et hypothéqué*, is equivalent to a mortgage under the law of Missouri, and is embraced in the provisions of the territorial act of Oct. 20, 1807, concerning mortgages. McNair *v.* Lott, 25 *Mo.* 182.

A conveyance in trust to sell, and pay debts, and, after the debts are paid, in trust for one of the grantors, is not a mortgage. M'Menomy *v.* Murray, 3 *Johns. Ch.* 435.

Equitable mortgages and conditional sales.

A court of equity will often pronounce that to be an equitable mortgage which, at law, would be considered as a conditional sale; and, whenever a conveyance resolves itself into a security for the performance or non-performance of any act, it is a mortgage, whatever be its form. Flagg *v.* Mann, 2 *Sumn.* 486; Pearson *v.* Seay, 38 *Ala.* 643; Dougherty *v.* McColgan, 6 *Gill & J.* 275.

Courts of equity incline against conditional sales; and where it is doubtful, from all the circumstances attendant on a transaction, whether a conditional sale or a mortgage was intended, equity will treat it as a security merely. Turnipseed *v.* Cunningham, 16 *Ala.* 501; McNeill *v.* Norsworthy, 39 *Id.* 156; Davis *v.* Stonestreet, 4 *Ind.* 101; Trucks *v.* Lindsey, 18 *Iowa*, 504; Robinson *v.* Cropsey, 6 *Paige*, 480; Wilson *v.* Weston, 4 *Jones Eq.* 349.

Conditional sales are not favored in law; and in all cases of doubt the court inclines in favor of mortgages. The general tests in doubtful cases are the adequacy of the consideration and the continuance or extinguishment of the debt. Parish *v.* Gates, 29 *Ala.* 254; Todd *v.* Hardie, 5 *Id.* 698; Locke *v.* Palmer, 26 *Id.* 312; Watson *v.* James, 15 *La. Ann.* 386; Scott *v.* Britton, 2 *Yerg.* 215.

Where a deed of conveyance, absolute on its face, is executed, and the grantee agrees to reconvey on payment, by the grantor, of a certain sum in a given time, whether the transaction constitutes a mortgage or a conditional sale is a question of intention; and, if that is doubtful, equity will consider the transaction a mortgage; and this is so whether the defeasance be in writing or by verbal agreement. Crane *v.* Bonnell, 2 *N. J. Eq.* 264; Robertson *v.* Campbell, 2 *Call*, 421; Ketchum *v.* Johnson, 3 *Green*, 370; King *v.* Newman, 2 *Munf.* 40.

The test to determine whether a transaction is a mortgage or a conditional sale is this: if the relation of debtor and creditor remains, and a debt still subsists between the parties, it is a mortgage; if there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases, within a given time, and thereby entitling himself to a reconveyance, it is a conditional sale. Slowey *v.* McMurray, 27 *Mo.* 113; Hoopes *v.* Bailey, 28 *Miss.* 328; Saxton *v.* Hitchcock, 47 *Barb.* 220.

In determining whether a transaction is to be regarded as a mortgage or a conditional sale, adequacy of price paid, and want of obligation to repay the purchase-money, are important facts, though not conclusive. Brown *v.* Dewey, 2 *Barb.* 28.

Where, from the language of an instrument, it is difficult to determine whether a conditional sale or mortgage of lands was intended by the parties, if the price is grossly inadequate, the transaction will be construed to be a mortgage. Davis *v.* Stonestreet, 4 *Ind.* 101.

A deed of conveyance taken upon a loan of money, with an accompanying agreement that the land shall be reconveyed upon payment being made, operates as a mortgage. Cross *v.* Hepner, 7 *Ind.* 359.

A deed absolute on its face, if accompanied by a contemporaneous covenant implying a qualification, may be construed a mortgage. Cooper *v.* Whitney, 3 *Hill*, 95; Johnson *v.* Gray, 16 *Serg. & R.* 361.

A conveyance upon a grantee's parol promise to obtain thereby from a building association a loan, pay the grantor's liabilities, and reconvey to him when the loan should be repaid from the rents, held to be a mortgage. Danzeisen's Appeal, 73 *Pa. St.* 65.

Mortgage of chattels and pledge or assignment.

The general difference between a mortgage of chattels and a pledge is that, in pledge, only the possession is transferred, the title remaining in the pledgor until default; in mortgage, the title is transferred, and the possession need not be. See cases cited *U. S. Dig.* tit. Bailment, II. 2, Mortgage, XII. 1.

By the common law, a pledge is a bailment of personal property as a security for some debt or engagement. It is usually confined to chattels. Where real or personal property is transferred by a conveyance of the title, as a security, it is commonly denominated a mortgage. Campbell *v.* Parker, 9 *Bosw.* 322.

Perhaps the definition of "mortgage" in 2 *Ves. Jr.* 378, — "a mortgage is a pledge, and more; for it is an absolute pledge to become an absolute interest if not redeemed at a certain time," — is not, at this day, precisely accurate. A pledge is a species of bailment; a mortgage is a sale upon condition; and, if the condition is not performed, the title becomes absolute at law. Chamberlain *v.* Martin, 43 *Barb.* 607.

The leading difference between pledge and mortgage is, that the former is security for the payment of a debt; and the latter is a conditional sale, which becomes absolute by non-performance of the condition, of payment of a specified sum at a fixed day. Haskins *v.* Kelly, 1 *Abb. Pr.* N. S. 63.

A chattel mortgage is an instrument of sale, conveying the title of the property to the mortgagee, with terms of defeasance; and, if the terms of redemption are not complied with, then, at common law, the title becomes absolute in the mortgagee. The nature of the agreement must be such that, by the mere non-performance of the condition by the mortgagor, the title will be transferred to the mortgagee by the force of the agreement. This test is decisive. Parshall *v.* Eggart, 52 *Barb.* 367.

Where it appears, from the transactions of the parties, that the intention of the one was to lend money, and of the other to secure the same by delivering property to the lender, the transaction will be held to be a mortgage. Reed *v.* Lansdale, *Hard.* 6.

An instrument of sale of chattels, given as security for the payment of loaned money, is a chattel mortgage. Scott *v.* Henry, 13 *Ark.* 112; Plummer *v.* Shirley, 16 *Ind.* 380; Ing *v.* Brown, 3 *Md. Ch.* 521; Carpenter *v.* Snelling, 97 *Mass.* 452; Taber *v.* Hamlin, *Id.* 489.

An agreement which contains a stipulation that one of the parties to it is to have a lien upon certain property of the other as security for the payment of a debt, operates as a mortgage. Whiting *v.* Eichelberger, 16 *Iowa*, 422.

A bill of sale with a condition for redemption is a mortgage. Kent *v.* Albritain, 5 *Miss.* 317; Perkins *v.* Drye, 3 *Dana*, 170; McFadden *v.* Turner, 3 *Jones L.* 481.

A bill of sale of chattels, declaring that it is to secure a debt, and that, on payment of the debt by the proceeds of some of the articles, the residue shall be released to the

vendor, is a mortgage. Bissell *v.* Hopkins, 3 *Cow.* 166.

A bill of sale, absolute upon its face, transferring property to be held as security for the payment of a debt due the vendee, is a mortgage. Smith *v.* Beattie, 31 *N. Y.* 542.

A contract purporting to be a sale, by the terms of which the purchaser is to sell the property, and out of the proceeds pay an antecedent debt of the seller, with interest and expenses, any excess to be returned to the seller, and any deficiency to be made good by him, is, in effect, a mortgage. Cannon *v.* McNab, 48 *Ala.* 99.

An instrument, under seal, setting forth on its face the sale, transfer, and delivery of certain personal property to a creditor to secure a debt, and authorizing a sale by the creditor at a certain time to pay the debt, unless previously paid by the obligor, is a mortgage. Smith *v.* Quartz, &c. Co., 14 *Cal.* 242; Barfield *v.* Cole, 4 *Sneed*, 465.

An assignment by a debtor of his property to a creditor, to sell and pay his own debt, and return the surplus to the debtor, is a mortgage: it is different from an assignment to trustees for a payment of specific debts, with reversion to the debtor. McClelland *v.* Remsen, 36 *Barb.* 622.

A mortgage of personal property may be by absolute bill of sale and a separate writing of defeasance. Hopkins *v.* Thompson, 2 *Port.* 433; Winslow *v.* Tarbox, 18 *Me.* 132.

Where an absolute bill of sale is made, and at the same time the vendee gives back an instrument of defeasance, the transaction will be construed a mortgage. Barnes *v.* Holcomb, 20 *Miss.* 306; Davis *v.* Hubbard, 38 *Ala.* 185; Knox *v.* Black, 1 *A. K. Marsh.* 298; Brown *v.* Bement, 8 *Johns.* 96.

Power to mortgage.

A special provision in a charter, authorizing the corporation to mortgage its effects, &c., for a particular purpose, does not exclude their general implied power to execute a mortgage for the security of creditors. Allen *v.* Montgomery R. R. Co., 11 *Ala.* 437; Mobile, &c. R. R. Co. *v.* Talman, 15 *Id.* 472.

An authority conferred upon a plank-road company to "mortgage the road or other property" permits a mortgage of the franchise of receiving tolls; but not the mortgage of any franchise essentially corporate in its nature, and not enjoyable by a natural person. Authority to mortgage a part only of the road is likewise implied, provided the road is divisible, so that separate tolls may be taken on the separate parts. Joy *v.* Jackson, &c. Plank Road Co., 11 *Mich.* 155.

Trustees of a public turnpike, with power by statute to erect houses and mortgage the tolls, are not thereby authorized to mortgage the toll-houses or gates. Fairtitle *v.* Gilbert, 2 *Durnf. & E.* 169.

Power to mortgage the property of a corporation for a particular purpose — *e.g.* to raise funds to complete specified improvements — will not authorize it to mortgage for different purposes, or to apply the funds raised by the mortgage to other purposes. Trevilian *v.* Mayor of Exeter, 27 *Eng. L. & Eq.* 578.

A power to mortgage the land of the society, for the purpose of building thereon, authorizes making a mortgage to secure demands for materials and labor in erecting a building. Miller *v.* Chance, 3 *Edw.* 399.

A statute which forbids corporations to mortgage their real estate, or to give any lien thereon, does not preclude a vendor's lien. Dubois *v.* Hull, 43 *Barb.* 26.

MORTMAIN. Dead hand.

Lands which have been conveyed to corporations having perpetual succession, so that the lands may remain for ever inalienable, are said to be held in mortmain. Conveyances to religious houses were, in the early legal history of England, found to be contrary to public policy, because, as the corporations did not sell again, the lands of the kingdom were gradually becoming tied up in their ownership and control. This led to statutes restricting conveyances to corporations, known as the mortmain acts.

An alienation of lands in mortmain is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. The name is thought to have been derived from the fact that the religious houses, to whom principally in former days alienations in mortmain were made, were composed of persons dead in law. *Mozley & W.*

Mortmain acts. The statutes whereby the rights of corporations to take lands by grant or devise is abridged. The principal act on the subject now in operation is the Stat. 9 Geo. II. ch. 36, passed in 1735. At the time of the passing of that act no devise of lands to a corporation was good, except for charitable uses. By that statute, no lands or hereditaments or money to be laid out therein may be given or conveyed, charged or incumbered, for any charitable use whatever, unless by deed executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in chancery within six calendar months of its execution, nor unless such gift be made to take effect immediately, and be without power of revocation. Gifts to the universities of Oxford and Cambridge, and their colleges, or in trust for the scholars on the foundations of Eton, Winchester, and Westminster, are excepted from the operation of the act; so are *bona fide* purchases for valuable consideration paid down. Various other exceptions have been introduced by subsequent statutes. *Mozley & W.*

MORTUARY. 1. A gift left by a man at his death to his parish church, for the recompense of his personal tithes and offerings not duly paid in his lifetime.

2. A kind of ecclesiastical heriot, being a customary gift claimed by and due to the minister in very many parishes, on the death of his parishioners. Like lay heriots, they were originally but voluntary bequests to the church. It was usual, in ancient times, to bring the mortuary to church along with the corpse when it was brought to be buried, and thence it is sometimes called a corpse-present. *Wharton.*

MORTUUM VADIUM. A dead pledge; a mortgage (*q. v.*); a pledge where the profits or rents of the thing pledged are not applied to the payment of the indebtedness secured, thereby differing from a *vivum vadium*, q. v.

MOTE. Sometimes signifies *gemote* (*q. v.*), an assembly; sometimes *moat*, a trench of water protecting a residence from intrusion.

MOTION. 1. In the practice of the courts, a motion is usually a public application to the court that it will make some order, pass judgment or sentence, or take other judicial action.

According to the definition of the New York code of procedure, § 401, "an application for an order" is a motion; and, when the word is used of proceedings in civil actions, it generally has this restricted meaning. But to speak of "making a motion for judgment," or making a motion for sentence in a criminal cause, is not improper.

And in expressions relating to action taken by the court "of its own motion," any idea of an application to it, to act, is negatived.

Motions are termed motions *of course*, when the thing sought is grantable on mere request, and without question or hearing; *special* motions, which invoke the discretion or judgment of the court, and must be heard and considered; *ex parte* motions, which must be heard and considered, but may be heard on application of one party only; and motions *on notice*, in which the applicant must apprise the other party of what he wishes, and when he will apply, and give him an opportunity to oppose.

2. In the business of deliberative assemblies, motion is the formal mode in which a member submits a proposed measure or resolve for the action of the meeting.

Motion is an application made to a court or judge *viva voce* in open court. Its object is to obtain an order or rule, directing some act to be done in favor of the applicant. *Mozley & W.*

Motion signifies an application to the court by the plaintiff or defendant in an action, or by the counsel for either, in order to obtain some rule or order of court which may become necessary in the course of the proceedings; and the act of making such an application is termed moving the court. The word also signifies instance, desire, will, &c. Thus a person is said to do a thing of his own motion, *i.e.* voluntarily, without being required to do it. *Brown.*

Motion for decree. This has been (since its introduction in 1852 by Stat. 15 & 16 Vict. ch. 86, § 15) the mode most frequently adopted by a plaintiff in English chancery for obtaining the decree to which he claims to be entitled. It must be distinguished from interlocutory motions. *Mozley & W.*

Motion for judgment. A proceeding which a party to an action may adopt for obtaining the judgment of the court in his favor, under various circumstances enumerated in order 40 of the orders under the judicature act, 1875. *Mozley & W.*

MOVABLE. That which can be changed in place, as movable property; or in time, as movable feasts or terms of court.

Movable property, or movables. Property which can be carried from place to place.

In the French law and law of Louisiana, "movables" is used more technically than under common-law systems.

Movable and immovable is one of the commonest, because the most apparent and natural, of the modern divisions of things, as the subjects of property. It is not coincident, however, with the historical divisions which have obtained most extensively in ancient or in modern times; for it does not agree with the Roman law division into *res mancipi* and *res nec mancipi* (agricultural and non-agricultural), on the one hand, nor with the English law division into lands and chattels, or real and personal property, on the other. For example, a leasehold house is an immovable, and yet is personal property; and a dignity or title of honor is a movable, and yet is real property. Nevertheless, just as the division into *res mancipi* and *res nec mancipi* gradually gave way before the industrial development of Roman greatness, so also the division into real and personal property is more and more giving way before the advancing diversities of English wealth. For example, a leasehold house is now for many purposes looked upon as land, and is even declared

to be such in the interpretation clause of most modern statutes. But the division into movable and immovable, finding its basis in nature, promises to be permanent; and it may grow to be as fertile in consequences as the older divisions have been. *Brown.*

The law attaches no artificial or technical meaning to "movable property" in a legacy. It must be construed according to its popular signification and the testator's probable intent. Movable, applied to property, ordinarily signifies capable of being put out of one place into another; it implies that the property is susceptible of locomotion or change of place. Hence "movable property" includes only such as is corporeal and tangible; and a bequest of testator's movable property will not pass a judgment due to him. There is no rule that movable, in such connection, is equivalent to "personal." Personal property includes movables; but movables are only one kind of personalty. Strong *v.* White, 19 *Conn.* 238, 245.

A bequest of all the testator's "in-door movables" does not pass a promissory note. The word movables, standing alone, comprehends personal property generally, and would include rights in action; but, when qualified by the adjective "in-door" (and particularly when contrasted with another bequest of testator's "out-door movables"), it cannot embrace rights in action, for these have no locality, but follow the person of the owner. Penniman *v.* French, 17 *Pick.* 404.

A devise of "wearing-apparel, household furniture, plate, linen, books, and every movable," will not include debts due to the testatrix. Jackson *v.* Vanderspreigle, 2 *Dall.* 142.

A will giving "all my movable goods and chattels" will not pass bond-debts due to testator. Sparke *v.* Denne, 1 *Wm. Jones*, 225.

A bequest of all the testator's "movable property" will include slaves, unless a different intent is expressed by the will. Whitehurst *v.* Harker, 2 *Ired. Eq.* 292.

MOVE. To apply to the court for its action; to propose a measure in a deliberative body. See MOTION.

MULATTO. A mulatto is defined to be "a person that is the offspring of a negress by a white man, or of a white woman by a negro." Thurman *v.* State, 18 *Ala.* 276.

A person begotten between a white and a black. The issue of such person and a white is not a mulatto. Inhabitants of Medway *v.* Inhabitants of Natick, 7 *Mass.* 88.

The offspring of a white woman and a negro father is a mulatto, within the meaning of the act of South Carolina of 1740, who can be tried and punished for a criminal offence only by a court of magistrates and freeholders. State *v.* Scott, 1 *Bailey*, 270; State *v.* Hayes, *Id.* 275.

MULIER PUISNE. The lawful issue preferred before an elder brother born out of matrimony. See EIGN.

Mulier, as used in our law, seems to be a word corrupted from *melior*, or the French *meilleur*; and signifies the lawful issue, born in wedlock, preferred before an elder brother born out of matrimony. But by Glanvil lawful issue are said to be *mulier*, not from *melior*, but because begotten *e muliere*, and not *ex concubina*; for he calls such issue *filios mulieratos*, opposing them to bastards. *Glanv.* lib. 7, ch. 1. It appears to be thus used in Scotland, also; Skene saying, *mulieratus filius* is a lawful son, begotten of a lawful wife. *Jacob.*

MULTIFARIOUSNESS. A defect in equity pleading, consisting in the uniting in one bill of several claims of a distinct and independent nature, and which ought to be the subject of distinct suits. A bill obnoxious to this objection is said to be "multifarious."

Multifariousness, in equity pleading, is improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In strictness, to use "misjoinder," where different and distinct claims are mixed in the same bill against the same defendant, would be more correct. What is more familiarly understood by the term multifariousness, as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever. But to lay down any rule, applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible. *Wharton.*

MULTIPLE POINDING. In Scotch law, means double distress.

An action of multiple poinding is an action brought by a person threatened by rival claimants, calling upon them to dispute their preferences *inter se.* (*Bell.*) It corresponds substantially to proceedings by way of interpleader in the English law. *Mozley & W.*

MULTIPLICITY OF ACTIONS. This arises where several different suits or actions are brought upon the same issue; which is always considered objectionable. It is obviated in equity by resort to what is called a bill of peace; in courts of law, by a rule of court for the consolidation of different actions.

MULTITUDE. The meaning of this word is not very certain. By some it is said that to make a multitude there must be ten persons at least, while others contend that the law has not fixed any number. (*Coke Litt.* 257.) *Bouvier.*

In a legal sense, merely two riotous persons cannot constitute a multitude. Pike *v.* Witt, 104 *Mass.* 595.

MULTURE. In Scotch law, a miller's tolls.

Multure is a quantity of grain payable to the proprietor of the mill by every person who comes to the mill to have his corn ground. The tenants and proprietors of some lands are bound by their tenure to use a particular mill; and these lands, so bound or restricted to the mill, are termed the thirl or the sucken, and the tenants or proprietors the insucken multurers; while those who use the mill without being bound to use it are called the out-town or outsucken multurers. And the payments of the former are called insucken multures, and those of the latter outsucken multures. *Bell.*

MUNICIPAL. Originally, pertaining to or governing a city or other distinct local community or body within a state, but having large rights of self-government.

The *municipium* of Roman times was an independent city as respected local affairs, united by voluntary political ties to the republic as regarded general interests and sovereignty. From this origin we have derived "municipal," applying it, in an earlier history, to cities and incorporated towns, and, more recently, in somewhat more extended uses, varying or growing with the gradual progress of modern institutions of government. It is used with different shades of meaning, in different connections.

Municipal signifies that which belongs to a corporation or a city. The term includes the rules or laws by which a particular district, community, or nation is governed. It may also mean local, particular, independent. Horton *v.* Mobile School Commissioners, 43 *Ala.* 598.

Municipal claims. In the Pa. Stat. 1866, repealing the laws requiring advertisement of "municipal claims," does not apply to registered taxes. Philadelphia *v.* Scott, 72 *Pa. St.* 92.

Municipal corporation. A term embracing that class of corporations which are created to administer local government, subordinate to the general sovereignty of the state or kingdom; it includes boroughs, cities, incorporated towns, and villages, and some other forms of public corporations.

Municipal corporations act. A general statute, the 5 & 6 Wm. IV. ch. 76, passed in 1835, prescribing general regulations for the incorporation and government of boroughs.

By this act, the corporate towns or boroughs enumerated in the schedules annexed (comprising, with the exception of London and a few other places, all those in England and Wales) were placed under one uniform plan of government.

The act defined what householders within a borough shall be considered burgesses. It further provided, that in every borough there shall be elected, annually, a mayor, and, periodically, a certain number of aldermen, and of councillors, who together shall constitute the council of the borough; that they shall be respectively chosen from among persons on, or entitled to be on, the burgess list, and otherwise qualified as in the act described; that the councillors shall be elected by the burgesses, and the mayor and aldermen by the council; that the council shall meet once a quarter (and oftener, if due notice be given), for transaction of the general business of the borough, and make their decisions according to the majority of the members present (if those present amount to one-third of the whole), and that the mayor, or other member presiding in his absence, shall have a casting vote; that at any meeting at which two-thirds at least of the whole shall attend the council may make by-laws for the good rule and government of the borough, for the prevention and suppression of nuisances, and for the imposition of fines on persons in that behalf offending; that the burgesses shall annually elect from among those qualified to be councillors two auditors and two assessors, the former to audit the accounts of the borough, the latter to assist in revising the burgess list; and that the council also may appoint a town clerk and a treasurer (neither of whom is to be a member of the council), and such other officers as have been usual, or shall be necessary, and shall be empowered to fix their salaries; and, if the borough have a separate court of quarter-

sessions, shall also appoint a coroner and a clerk of the peace.

It also provided, subject, however, to certain exceptions, that the council shall not sell or mortgage the land or public stock of the borough, or demise them for more than a certain term; and that the rents, profits, and interest of all corporate property shall be paid to the treasurer, and carried to the account of the borough fund, which, after discharging debts, shall be applied to the payment of salaries, the expenses connected with the corporate elections, prosecutions, jails, and maintenance of offenders, and other public purposes; that the surplus, if any, shall be expended for the public benefit of the inhabitants, and the deficiency, if any, made up by a rate; and that the accounts shall be at all times open to inspection, and regularly audited and printed for the use of the ratepayers, and submitted to the secretary of state, and laid before both houses of parliament.

The act distinguished between the rights newly conferred by it, and the former rights of the corporators, with regard to the corporate property, and to voting at parliamentary elections; both which former rights are expressly reserved; it being provided that every inhabitant, and every person admitted a freeman or burgess, and the wife or widow or son or daughter of any freeman or burgess, and every apprentice, shall enjoy the same share and benefit of the lands and public stock of the borough as he might have enjoyed in case the act had not been passed; subject to the limitation, however, that the total amount to be divided among such persons shall not exceed the surplus which shall remain after payment of the expenses, by the act charged upon the borough fund; also, that every person who, if the act had not been passed, would have enjoyed as a burgess or freeman, or might thereafter have acquired in respect of birth or servitude, the right of voting in the election of members of parliament, shall be entitled to enjoy or acquire such right of voting as fully as he might in that case have done.

The act abolished the customs and by-laws of various boroughs, that no person not being free of the borough, or of certain guilds, mysteries, or trading companies therein, should keep a shop for merchandise, or use certain trades or occupations for gain within the same; and enacted that every person may in future keep any shop, and use every lawful trade and occupation therein, any such custom or by-law notwithstanding.

The municipal corporations act of 1859 is the Stat. 22 Vict. ch. 35, which introduced extensive amendments in the mode of conducting borough elections under the act above condensed. *Wharton.*

Municipal court. A name sometimes applied to an inferior court whose territorial jurisdiction is limited by the boundaries of a particular city or other municipality. Such are the municipal criminal court of San Francisco and the municipal courts in Maine and Massachusetts.

Municipal law. In this phrase the word municipal is used somewhat more broadly than the preceding. The term may, indeed, mean the local law of a particular place, but more generally means the law of the state or community united under a single government, in distinction from international or constitutional law.

Municipal officer; municipal ordinance. In these phrases "municipal" is used in its stricter sense of a local corporation; the meaning is, an officer of a borough, city, incorporated town or village, or the like.

MUNIMENT. Any deed, document, or instrument of evidence whereby title appears.

Muniments of title is a general expression for all the means of evidence by which an owner, corporate or individual, may defend title to real property; and the room set apart in old English corporate buildings and offices for preserving such papers was called the muniment room. The word has been also spelled miniment, but this is a corruption.

MURDER. Intentional and unlawful homicide; the offence of killing a human being with malice aforethought; the unlawful premeditated destruction

of human life; the wilful felonious killing of man, with malice prepense.

When the development of early English law reached the point at which manslaughter was no longer a subject for a pecuniary composition, but was recognized as a public offence, to be rigorously punished unless a justification or excuse could be affirmatively shown, unlawful homicides were divided by a simple line into murder and manslaughter (*q. v.*), according as they were deliberate, intentional, malicious, or were accidental, involuntary, unintended. Refinements were early introduced, however, with regard to the element of intention in murder; and the offence came to include cases of killing springing from a depraved condition of mind involving a disregard of human life generally, and cases in which the killing was perpetrated incidentally to the commission of some other felony, as well as those exhibiting, as the main purpose of the act, an actual design to take the life of the individual victim. See Bishop on Crimes, book x. ch 23, III., for a full discussion of the comparison between murder and manslaughter. He presents the following definition: Murder is that species of felonious killing, technically known by the phrase wilful and of malice aforethought, which proceeds from an intent to take life without excuse, or the intended commission of some other felony, or the inexcusable use of a dangerous weapon, or some other purpose equal in malignity.

In our view, a precise, exhaustive definition of murder is not practicable, for the reason that what are really distinct kinds of killing are now recognized as included. Hence the attempt to frame a logical expression of the meaning runs into a catalogue of the several sorts of homicide embraced.

In the legislation of several of the leading states, during recent years, murder has been divided into two degrees, the general object being to class the more aggravated, deliberate, and long-intended forms of homicide, such as those perpetrated by poisoning, by lying in wait, or marked by other circumstances of heinous criminality, as murder in the first degree, and to make them punishable with death; while those exhibiting an instantaneous intent only, or marked by circumstances somewhat extenuating the guilt, shall be placed in the second degree, to which imprisonment for life shall be affixed. But upon this division into degrees the statute of the jurisdiction must be consulted. The subject is so extensive, that we forbear to collect the earlier decisions on what has been held murder under common-law definitions, in various cases; they are reviewed in many treatises easily accessible. We present decisions of recent years, particularly such as exhibit the general course of legislation creating degrees. The Pennsylvania statute, passed in 1794, is said to be the earliest of these enactments; and so many of the other states have followed it in substance, that the Pennsylvania cases are placed below, at the head of the extracts given.

General definitions.

The word murder, used as a verb, implies, of necessity, the idea of malice aforethought. State *v.* Phelps, 24 *La. Ann.* 493.

The word murdered, *ex vi termini*, imports death. Cordell *v.* State, 22 *Ind.* 1.

When an act of congress declares murder, by that name, punishable, without prescribing a definition, the courts construe the provision as intending those acts which are punishable by the common law. Thus construed, it includes the unlawful killing of another, with malice. United States *v.* Magill, 1 *Wash. C. Ct.* 463.

To constitute murder, it is not necessary that any animosity should exist towards the deceased: a corrupt and wicked motive and intention to do evil is sufficient. Nor is it necessary that the intention to kill should have been formed for any length of time: that it existed at the instant of the killing is enough. A predetermined intention to kill, fixed in the mind after mature reflection, is not required. McAdams *v.* State, 25 *Ark.* 405.

It is not the intention to use a deadly weapon, but the intention to kill, of which the deadly weapon is evidence, that constitutes murder; and this distinction should be made clear to the jury in the instruction on this point. Palmore *v.* State, 29 *Ark.* 248.

An intention to kill sufficient to constitute murder may be inferred from the fact of killing by the deliberate use of a deadly weapon. Alford *v.* State, 33 *Ga.* 303.

But the presumption is not conclusive. Bradley *v.* State, 31 *Ind.* 492.

The killing of a human being, even in the heat of passion, is murder, if the slayer

have no just cause for his anger, and is a sane person. Smith *v.* State, 49 *Ga.* 482.

A person sober enough to intend to shoot at another, and actually to shoot at and hit him, without any provocation or justification, is sober enough to form the specific intent to murder; and mere drunkenness, whatever its degree, will not negative such intent. Unless the evidence suggests some other motive for the shooting, the offence has necessarily the same grade with as without drunkenness, and consequently, in such a case, no grading is to be done; and any charge to the jury in reference to drunkenness, as a separate element in grading the offence, is inapplicable, and need not be given. Estes *v.* State, 55 *Ga.* 31.

If an act is cruel, that is, unnecessary and wanton, it does not matter how recently the determination to do it may have been formed before it is done. It is the cruelty and the wantonness of the act, the animus of the actor, and not the length of time that the purpose to do the act may have existed, which determines its quality; hence it is proper to say that an unlawful homicide committed deliberately, *i.e.* intentionally and maliciously, is murder. Nichols *v.* Commonwealth, 11 *Bush*, 575.

To constitute murder, the intent need not be to take the life of the person killed, or even to inflict a personal injury upon him; but it must be equivalent, in legal character, to a criminal purpose aimed against life; and, generally, there must be an intent to commit either a specific felony, or at least an act involving all the wickedness of a felony; and, if the effect be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either perilling life or leading to great bodily harm. Weller *v.* People, 30 *Mich.* 16.

In general, where the assault is not committed with a deadly weapon, the intent must be clearly felonious to make the killing constitute murder; and, though the presumption arising from the character of the instrument of violence is not conclusive, yet, where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. *Ib.*

If one beats another in a cruel and unusual manner, so that he dies, it may be murder with express malice, although, in fact, the accused did not intend to kill. *Ib.*; State *v.* Jones, 64 *Mo.* 391.

Every wilful and intentional taking of life of a human being, without a justifiable cause, is murder at common law, if done with deliberation, and not in the heat of passion; and legal malice is always implied in such cases. People *v.* Kirby, 2 *Park. Cr.* 28.

Murder is the voluntary killing of any person of malice aforethought, either express or implied by law. Manslaughter differs from murder in that the malice, which is the very essence of murder, is presumed to be wanting. *Exp.* Tayloe, 5 *Cow.* 39, 51; People *v.* Enoch, 13 *Wend.* 159, 167.

It is not necessary to constitute the premeditated design to effect death, which is made by 2 Rev. Stat. 657, § 5, subd. 1, an essential element in murder, that any particular space of time should elapse between the forming the design and the act of violence by which it is put in execution. It is enough that a deliberate intent to kill precedes the act, although that follows instantly. The introduction of the word premeditated makes no change in the law in this respect. People *v.* Clark, 7 *N. Y.* 385.

Criminal homicide consists in the unlawful taking by one human being of the life of another in such a manner that he dies within a year and a day from the time of the giving of the mortal wound. If committed with malice, express or implied by law, it is murder; if without malice, it is manslaughter. No personal injury, however grave, which does not destroy life, will constitute either of these crimes. The injury must continue to affect the body of the victim until his death. If it ceases to operate, and death ensues from another cause, no murder or manslaughter has been committed; but, if the bullet remains in the body so as to press upon or disturb the vital organs, and ultimately produces death, or the wound or the poison causes gradual decline of health, ending in death, the injury and death are as much the continuous operation and effect of the unlawful act as if the shot, the stab, or the poison proves instantly fatal. The unlawful intent with which the wound is made or the poison administered attends and qualifies the act until its final result. Commonwealth *v.* Macloon, 101 *Mass.* 1.

If death ensues from a wound given in malice, but not in its nature mortal, but from which, being neglected or mismanaged, the party dies, this will not excuse the prisoner who gave it; but he will be held guilty of the murder, unless he can make it clearly appear that the maltreatment of the wound, or the medicine administered to the patient, or the patient's misconduct, and not the wound itself, was the sole cause of his death. State *v.* Morphy, 33 *Iowa*, 270.

Statutes creating degrees.

In Pennsylvania, the statute declares that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree." Any "wilful, deliberate, or premeditated killing" constitutes the offence of murder of the first degree; and also a killing committed in the attempt or the actual perpetration of the crime of rape, arson, &c. All homicides are not felonious.

An officer of justice who kills a man in the discharge of the duties of his office (as when the sheriff executes a criminal) perpetrates a homicide; but he commits no crime, for it is a justifiable act. The man who, in self-defence, and under circumstances clearly warranting it, slays another, is not a criminal, for the act is a necessary one, and the homicide is excusable. Where a life is taken under circumstances clearly indicating malice, the offence, at common law, was a felony of the highest grade, — was murder. The statute, however, modifies the rigor of the common law, and establishes two grades of murder; to wit, murder of the first and murder of the second degree. To establish murder of the first degree, something more than malice must be present: it must, in ordinary cases, be coupled with an intent to take life; and the killing must have taken place in consequence of the "wilful, deliberate, and premeditated" act of the prisoner. If the intent to take life does not exist, and it is not clearly established by the prosecution, and if the act was not "wilful, deliberate, and premeditated," the offence is not murder of the first degree. If the killing occurred from the malicious intent of the prisoner to do great bodily harm, the offence would be murder in the second degree. Commonwealth *v.* Hanlon, 8 *Phila.* 401.

"Deliberately and premeditatedly," in the Pennsylvania law distinguishing murder in the first degree, means the intent to take life with a full and conscious knowledge of the purpose to do so. Where intoxication deprives the intellect of power to think and weigh the nature of the act, it may prevent a conviction of murder in the first degree; the criterion of such degree being the words "deliberately and premeditatedly." Jones *v.* Commonwealth, 75 *Pa. St.* 403.

Unless the commonwealth shows the ingredients of murder in the first degree, no presumption arises from the killing that the offence is higher than murder in the second degree. McCue *v.* Commonwealth, 78 *Pa. St.* 185.

In Alabama, a definition of murder in the second degree as "the unlawful killing of a reasonable person with malice aforethought, either express or implied," is not erroneous. Fields *v.* State, 52 *Ala.* 348.

In Arkansas, a malicious killing is not necessarily murder in the first degree: it must also be wilful, deliberate, and premeditated, or committed in the attempt to perpetrate some one of the felonies described in the statute. Palmore *v.* State, 29 *Ark.* 248; State *v.* Garrand, 5 *Oreg.* 216; State *v.* Foster, 61 *Mo.* 549.

In California, murder is the unlawful killing of a human being with malice, either express or implied. The act of 1856, dividing it into two degrees, did not define murder anew, but simply directed the nature of the punishment to be accorded to the aggravated character of the crime. People *v.* Haunn, 44 *Cal.* 96.

Under the California statute dividing murder into the first and second degree, the distinction is, that, in murder of the first degree, unless committed in perpetrating, or attempting to perpetrate, arson, rape, robbery, or burglary, the killing must be deliberate and premeditated; while, in murder of the second degree, the killing is not deliberate or premeditated, though there need not be an absence of all intention to take life. People *v.* Long, 39 *Cal.* 694.

To constitute murder in the first degree, it is not necessary that there should be any appreciable space of time between the formation of the intention to kill on the part of the slayer and the act of killing. People *v.* Cotta, 49 *Cal.* 167.

A homicide which is unlawful, and accompanied with malice, but not deliberate and premeditated, is murder in the second degree. People *v.* Doyell, 48 *Cal.* 85.

In Connecticut, all murder perpetrated by "any kind of wilful, deliberate, and premeditated killing," is made murder in the first degree; a deliberate intent to take life must be proved; and a state of intoxication, or any other fact tending to prove that the prisoner was incapable of deliberation, may be shown in defence, and be considered by the jury, not as excusing the act, nor in mitigation of punishment, but as tending to show that a less offence than murder in the first degree was committed. State *v.* Johnson, 40 *Conn.* 136.

In Florida, under the statutes dividing murder into degrees, proof of the fact of killing, merely, does not raise a presumption of premeditation such as makes the offence murder in the first degree, and casts upon the prisoner the burden of showing that it was not. Dukes *v.* State, 14 *Fla.* 499; Stokes *v.* People, 53 *N. Y.* 164.

In Indiana, under the statute dividing murder into two degrees, malice, a purpose to kill, is a necessary ingredient to render the killing murder in either degree. To constitute murder in the first degree, it is requisite that there should exist, not only malice and the purpose to kill, but such purpose must be premeditated, or, in the language of the statute, it must be done "purposely and with premeditated malice." When defining murder in the second degree, the statute uses the words "purposely and maliciously." "Purposely" here means intentionally, designedly; therefore, to make the act murder in the second degree, the intention, design, or purpose to perpetrate it must be formed before the act is committed. To render it murder in the first degree, something more than purpose or intention to commit it is requisite: the purpose must be premeditated. In other words, the principle of the distinction is this: In the first degree, premeditated malice requires that there should be time and opportunity for deliberate thought; and that, after the mind has conceived the thought of taking the life, the conception should

be meditated upon, and a deliberate determination formed to do the act. When that is done, then, no matter how soon afterwards the fatal resolve is carried into execution, it is murder in the first degree; in the second degree, the purpose or intention to kill is followed immediately by the act; it is not premeditated; the time and circumstances are not such as to allow of deliberate thought. Yet, to constitute murder, even in the second degree, there must be a formed design and purpose to kill. Fahnestock *v.* State, 23 *Ind* 231.

Under the Indiana statute, murder in the second degree consists in the act of killing a human being; and in purpose (intention) and malice in the killing. These two facts must exist to constitute the crime. Polk *v.* State, 19 *Ind.* 170.

The words malice aforethought, in the description of murder, do not necessarily imply that the act was committed with deliberation and premeditation; and therefore, where an indictment for murder charged the prisoner with having committed the act "feloniously, wilfully, and of his malice aforethought," held, that, under the statute, the indictment only contained a charge of murder in the second degree. Finn *v.* State, 5 *Ind.* 400.

An intent to kill is necessary to constitute killing by poison murder in the first degree. To administer cantharides to a woman with intent to excite her passions so as to induce consent to sexual intercourse, and without intending to kill, is not murder in the first degree, although she dies from its effects. Bechtelheimer *v.* State, 54 *Ind.* 128.

In Iowa, one who, without any necessity, either real or apparent, kills another, is guilty of murder in the second degree, notwithstanding he entered the combat without any intent to kill. Especially is this true if the slayer takes an undue advantage, or uses a deadly weapon. State *v.* Morphy, 33 *Iowa*, 270.

In Michigan, the statutory division of murder into degrees does not materially change its common-law elements; the line of division is, in general, between cases where the malice aforethought is deliberate, and those where it is not. Nye *v.* People, 35 *Mich.* 16.

In Minnesota, the statute dividing murder into degrees has created no new offence, but merely divided the common-law offence into different degrees, based upon circumstances mitigating the crime, and has reduced the penalty to be inflicted on the criminal when convicted of such offence as so modified. The crime, whatever its degree, remains the same in its nature and name. Minnesota *v.* Lessing, 16 *Minn.* 75.

In Missouri, in order to constitute murder in the first degree, under the statutory division, the homicide must be not only wilful and with malice, but with deliberation or premeditation, which is to be shown by direct proof, or by circumstances from which it may be inferred by the jury. State *v.* Mitchell, 64 *Mo.* 191. And see State *v.* Lane, *Id.* 319.

If, however, the accused had time to think, and intended to kill, for a moment, the killing is deemed a deliberate, wilful, and premeditated killing, constituting murder in the first degree, just as much as if he intended it for an hour or a day previously. State *v.* Holme, 54 *Mo.* 153.

In New Hampshire, the statute which enacts that all murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary, is murder in the first degree; and murder not of the first degree is of the second degree, does not mean that killing in perpetrating one of the crimes specially named is murder of the first degree, only when accompanied by a deliberate premeditated design to kill; for if such a design had been a necessary ingredient to constitute murder of the first degree, the latter part of the section would have been omitted. The meaning of the section is, all kinds of that unlawful killing which constitutes murder at common law, if committed by poison, starving, torture, or other deliberate and premeditated killing, or if committed in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary, constitute, under this statute, murder in the first degree; and all other kinds of unlawful killing which constituted murder at common law, constitute, under this statute, murder of the second degree. The statute creates no new offence; murder of the first and murder of the second degree are not two distinct crimes, the statute merely divides murder into two degrees; the punishment for the higher grade of the crime is not changed; all that the statute does is to provide the milder punishment of imprisonment for murder of the second degree, all murder having before been punishable by death. The statute only specifies certain things, which, if found by the jury, shall require them to bring in a verdict subjecting the prisoner to death; while, if they are not so found, the verdict shall be one authorizing imprisonment merely. State *v.* Pike, 49 *N. H.* 399.

Mere proof that one has been deprived of life by the act of another fails utterly to show the class to which the homicide belongs. It does not raise any presumption of such premeditation as constitutes murder in the first degree. Stokes *v.* People, 53 *N. Y.* 164.

In Ohio, murder in the first degree is the unlawful and intentional killing, by one reasonable being, of another, in the peace of the state, with deliberate and premeditated malice. And murder in the second degree is the unlawful, intentional, and malicious killing, by one reasonable being, of another, in the peace of the state, without deliberate and premeditated malice. Deliberate and premeditated malice exists

where the wrong act is thought of and determined upon before it was done; though this need not be for any considerable time. State *v.* Turner, *Wright*, 20.

In Texas, murder committed in the perpetration, or the attempt to perpetrate, arson, rape, robbery, or burglary, is, under the penal code, murder in the first degree; the malice in such cases being evidenced by the act of killing for such purposes. Singleton *v.* State, 1 *Tex. App.* 501.

If homicide is committed not in the heat of passion or with lawful provocation, and the prisoner deliberately and with malice aforethought intended the killing for any length of time beforehand, no matter how short, he is guilty of murder in the first degree. State *v.* Jones, 64 *Mo.* 391. S. P. Duebbe *v.* State, 1 *Tex. App.* 159.

That the deliberate, premeditated intention to kill another should be formed and matured prior to the occasion at which the act is done, is not necessary, in order to constitute the killing murder in the first degree. If the intent is executed the moment it has been formed in the mind, the offence is the same as if the intention had existed for a much longer time. Herrin *v.* State, 33 *Tex.* 638.

Proof of the fact of killing raises a presumption of malice, but not of premeditation; and therefore warrants a verdict of murder in the second degree, but not of the first. Hamby *v.* State, 36 *Tex.* 523.

MURDRUM. In early English criminal law, the killing of a person in a secret manner was distinguished from other homicides by this name. It also signified the fine or amercement imposed in cases of homicide.

MUSTER, *v.* To convene, drill, enrol, or organize soldiers; thus, a militia regiment, formally accepted for the service of the United States, is said to be "mustered into" the federal service, or, when formally discharged as a body, to be mustered out. Muster, *n.*: a gathering of soldiers for drill, enrolment, or the like.

Although the word muster, by itself, may doubtless be applied to a parade of soldiers already enrolled, armed, and trained, yet, when the preposition is added, this modifies the meaning, and "mustering into the service," or "mustering in," clearly implies that the persons mustered are not already in the service. Tyler *v.* Pomeroy, 8 *Allen*, 480.

Muster roll. The formal list of a body of soldiers, or of a ship's company.

MUTATION. Change. In the law of France, it is applied to a change of title to property when transferred from one person to another. In the practice of ecclesiastical courts it is spoken of amendment of the libel. *Bouvier.*

MUTE. A prisoner is said to stand mute when, being arraigned for trial or felony, he either makes no answer at all, or answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise; or when, having pleaded not guilty, he refuses to put himself upon the country. *Brown.*

MUTINY. The offence of rebellion against discipline, or resistance of officers, committed by sailors, soldiers, or marines.

Mutiny is now, by military men, generally understood to imply collective insubordination, or rising against or resisting military authority in combination or simultaneously, with or without actual violence. A distinction has been drawn between mutinous conduct and mutiny; mutinous conduct being behavior tending to mutiny, which may, nevertheless, be clear of the completion or commission of that offence. Formerly, however, individual acts were frequently charged as mutiny, as the opposing by force any act ordered to be done; or any act of violence done to the person of any officer in the execution of his duty. *Simmons Ct. Mar.* §§ 170, 171; *Hickman Nav. Ct. Mar.* ch. 21. Similarly, a collective insubordination of the crew of a ship, whether a ship of war or a merchant vessel, is spoken of as mutiny.

Mutiny act. An act of parliament to punish mutiny and desertion, and for the better regulation of the army and their quarters; also, appropriating their pay. The mutiny act, properly so called, relates to the army only; the marine mutiny act relates to the navy. Each act is passed annually, the jealousy of the constitution for the individual's liberties being such as not to tolerate that such acts, or the jurisdictions which they establish, should become perpetual or permanent. This necessity for their annual re-enactment secures the annual reassembling of parliament.

MUTUAL. Interchangeable; reciprocal; spoken of an engagement or relation in which like duties and obligations are exchanged.

Mutual should be distinguished from common, which (in one of its senses) signifies that two or more persons have the same or similar interests or rights in the subject-matter: thus, a field may be common to several persons, when all may enjoy it alike; but cannot be mutual. Insurance is mutual, when

several persons unite in insuring each other, so that the engagements are reciprocal.

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

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

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

An account where there are no credits except payments is not mutual, open, and current, within the statute. Buntin *v.* Lagow, 1 *Blackf.* 373; Knipe *v.* Knipe, 2 *Id.* 340; Prenatt *v.* Runyon, 12 *Ind.* 174; Weatherwax *v.* Cosumnes, &c. Co., 17 *Cal.* 344; Adams *v.* Patterson, 35 *Id.* 122; Dyer *v.* Walker, 51 *Me.* 104; Peck *v.* N. Y., &c. S. S. Co., 5 *Bosw.* 226.

A mutual or open account-current exists where there is an express or implied understanding that mutual debts shall be a satisfaction or set-off *pro tanto* between the parties. McNeil *v.* Garland, 27 *Ark.* 343.

Mutual combat. Does not necessarily imply reciprocal blows. If a mutual intent to fight exists, there is a mutual combat, though the first blow kills one of the parties. Tate *v.* State, 46 *Ga.* 148.

Mutual credits. By this phrase, in the rule under which courts of equity allow set-off in cases of mutual credit, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt, as a means of discharging it. King *v.* King, 9 *N. J. Eq.* 44.

A premium note given for a policy of insurance, and a loss incurred under the policy, are mutual credits, within the meaning of 2 N. Y. Rev. Stat. 47, § 36, and the insured is entitled to offset the loss against the note, although, by the terms of the policy, the loss was not payable until some time after proof of loss, and no proof was furnished until after the insolvency of the insurers. Pardo *v.* Osgood, 5 *Robt.* 348.

"Mutual credit" is not confined to pecuniary demands, but may include goods belonging to a debtor. *Exp.* Deeze, 1 *Atk.* 228.

Where there is a trust between both parties there is a mutual credit. Atkinson *v.* Elliott, 7 *Durn. & E.* 378.

Mutual debts. The expressions "mutual debts," "dealing together," and "indebted to each other," in the statutes of set-off, are of the same import. Pate *v.* Gray, 1 *Hempst.* 155.

Mutual insurance. That form of insurance in which various persons unite in an engagement to indemnify each other against losses; so that the contracts are reciprocal, — each member insures the others, and is in turn insured by them. Companies formed on this principle are known as mutual insurance companies.

Mutual mistake. Some confusion and misconception has crept into the cases on equitable relief from mistake, from the inexact use of the word mutual, as defining or classifying the kind of mistakes which the courts will reform. According to the real signification of the word, it would mean a mistake reciprocal, shared by both parties. The inaccurate use of the word in cases on mistake has led to the idea that mistakes in contracts will not be corrected where the error was confined to one of the parties. Such is not the rule. Botsford *v.* McLean, 45 *Barb.* 478.

Mutual obligations, or promises. Such as are reciprocally exchanged, at the same time.

In a declaration in special assumpsit the plaintiff usually alleges that, in consideration that he, at the request of the defendant, had then promised the defendant to observe, perform, and fulfil all things in the agreement on his (the plaintiff's) part, the defendant promised the plaintiff that he would perform and fulfil all things in the said agreement on his (the defendant's) part, to be observed and performed, which is thence termed the allegation or statement of mutual promises. *Mozley & W.*

MUTUALITY of a contract means an obligation on each to do, or permit to be done, something in consideration of the act or promise of the other. Spear *v.* Orendorf, 26 *Md.* 37.

MUTUANT; MUTUARY. The lender and the borrower, respectively, in the contract of *mutuum.*

MUTUUM. A loan for consumption. A loan of consumable goods, for consumption by the borrower, lent on condition of a return in kind. The property in the subject-matter of such a loan is transferred to the borrower, the lender being entitled only to the return of its value in kind.

MYSTERY. The art, occupation, or trade by which a person may be described.

In old English conveyancing practice, the designation of a person's avocation,

in addition to his residence, in a deed, was termed his mystery.

Mystery means the defendant's trade, art, or occupation; such as merchant, mercer, tailor, painter, clerk, schoolmaster, husbandman, laborer, or the like. 2 *Hawk.* ch. 23, § 111.

N.

NAKED. See NUDE.

NAM. For. The frequent use of this word to introduce a Latin maxim has sometimes caused such maxims to be quoted as if commencing with "*nam.*" As it is not strictly the initial word of any maxim included in this work, the definition of any maxim so quoted should be sought in its alphabetical place. Thus *nam quisque scire debet cum quo contrahit* — for one ought to know with whom he contracts — is treated in this work under *quisque scire*, &c.

NAME. The designation by which a person or corporation is usually known.

Many decisions have said that the law recognizes only one Christian name; and the insertion or omission of a middle name, or any error in it, or the giving an initial only, is not a material variance; and, for civil purposes, it has been held that a single letter may be taken as an entire Christian name. Whether this is allowable in an indictment has been differently decided. Such affixes as junior or senior form no part of the name. If several persons bear the same name, it is a question of fact which one is intended, in any particular case, when it is used.

By a familiar principle, known as the rule of *idem sonans*, trivial differences in spelling of names, not materially affecting the sound, are disregarded; the name is deemed the same if the pronunciation is substantially preserved, notwithstanding variations of orthography. See *U. S. Dig.* tit. Persons.

Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously, and according to common usage, to be the same, though differing in sound, the use of one for the other is not a material misnomer. Gordon *v.* Holiday, 1 *Wash.* 285; Wilkerson *v.* State, 13 *Mo.* 91.

If a father and son have the same name, it will be presumed, nothing appearing to show the contrary, where the name is used, that the father is intended. Brown *v.* Benight, 3 *Blackf.* 39.

It is merely a custom for males to assume the name of their parents, but it is not obligatory, nor is it punishable to adopt another name. Any contract or obligation, grant or devise, entered into or made by or with reference to a man by a name which he has voluntarily assumed, is as valid and effectual as if the original name were employed. Petition of Snook, 2 *Hilt.* 566.

Engraving upon the collar of a dog the initials of the owner's name is not engraving on the collar the "name of the owner" of the dog, within the meaning of a statute requiring this. Morey *v.* Brown, 42 *N. H.* 373.

Where a defendant is known as well by one name as another, he may be sued and arrested by either, and it is immaterial by what name he was known to the plaintiffs in the action. Eagleston *v.* Son, 5 *Robt.* 640.

When a person affected by a crime is known by two names, and the pleader, for greater certainty, deems it necessary to aver both names in an indictment, it is immaterial which of the two names is first stated, and which was the real name. It is sufficient if the pleading designates with certainty the names by which the person intended may be known, and the priority of the names in the statement is unimportant. Kennedy *v.* People, 39 *N. Y.* 245; 5 *Abb. Pr* N. S. 147.

The corporate name of a township is not "the congressional township, numbered," &c., but "the inhabitants of congressional township, numbered," &c. State *v.* Anderson, 7 *Blackf.* 222.

NANTISSEMENT. In French law, is the contract of pledge: if of a movable, it is called *gage*; and if of an immovable, it is called *antichrèse*. *Brown.*

NARRATIO. A narrative. In common-law practice, the term is applied to the plaintiff's count or declaration, as being a narrative of the facts of the case constituting his ground of action. The abbreviation *narr.* is in common use.

NASCITURUS. Yet to be born; an unborn child. Used in designating the

children as yet unborn of a particular marriage, in whose favor dispositions of real property are made by marriage settlements, wills, &c. See NATUS.

NATION. A community or people permanently occupying a distinct territory, maintaining a government of their own, and recognized as independent of, and capable of dealing with, other sovereignties. National: affecting, or belonging, or pertaining to a nation. Nationality: character of a person, vessel, &c., as belonging to some sovereignty; membership of a nation.

National bank; national banking association. The names of a class of institutions for banking purposes, created by laws of the United States, as distinguished from those organized under state laws.

The statutes of the United States regulating the organization, conduct, and dissolution of national banking associations are contained in title LXII. of the revised statutes, §§ 5133–5243, and in various enactments since the revised statutes. For a history of the legislation of congress establishing a national currency, and authorizing as a means the creation of the national banking associations, see Veazie Bank *v.* Fenno, 8 *Wall.* 533.

A general outline of the system is, that such banks may be formed either anew, or by reorganization of a state bank. New associations for carrying on the business of banking may be formed by any number of natural persons not less than five. Articles of association must be signed by them (*U. S. Rev. Stat.* § 5133); and they must also make and acknowledge an "organization certificate," which must state the name assumed by the association; the place where its operations of discount and deposit are to be carried on, designating the state, territory, or district, and the particular county and city, town or village; the amount of capital stock and the number of shares; the names and places of residence of the shareholders, and the number of shares held by each (*Id.* § 5134). Upon executing and filing in the office of the comptroller of the currency these documents, the association becomes, as from the date of the execution of its organization certificate, a body corporate, clothed with power to adopt and use a corporate seal; to have succession for the period of twenty years from its organization, unless it is sooner dissolved, &c.; to make contracts; to sue and be sued; to elect directors and appoint other officers; to prescribe, by the board of directors, by-laws not inconsistent with law, regulating the manner in which its general business shall be conducted, and the privileges granted to it by law exercised; and particularly "to exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes." *Id.* § 5136.

The name to be adopted by a banking association is subject to approval of the comptroller (*Id.* § 5134, subd. 1); and all banks not organized and transacting business under the national currency laws, or under this title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by congress to use the word national as a part of their corporate name, are prohibited from using the word national as a portion of their name or title (*Id.* § 5243); which enactment gives to the term national bank a peculiar and distinctive meaning.

Upon the other hand, "any bank incorporated by special law, or any banking institution organized under a general law of any state, may become a national association under this title, by the name prescribed in its organization certificate; and, in such case, the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or bank-

ing institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association." The shares of such bank may continue to be for same amount; and the same directors may be continued in office until others are elected. *U. S. Rev. Stat.* §§ 5154, 5155. No assent or permission from the state is necessary; nor is any authority other than that conferred by congress required to enable a bank existing under a special or a general state law to become a national banking association. And the certificate of the comptroller is conclusive as to the completeness of the organization under the act of congress, in a suit against a stockholder to enforce his liability, or a party upon his contract with the bank. Casey *v.* Galli, 94 *U. S.* (4 *Otto*) 674. And the reorganization of a state bank, under the United States national bank laws, does not relieve it from any former liabilities to individuals with whom it has had dealings. The bank passes from one jurisdiction to another; but its identity is not thereby necessarily destroyed. It remains substantially the same institution, under another name. The transition does not disturb the relation of either the stockholders or officers of the corporation, nor enlarge or diminish the assets of the institution. These all remain the same under the national as they were under the state organization. Coffee *v.* National Bank, 46 *Mo.* 140.

National banking associations are private corporations, organized for private gain, and managed by officers of their own selection. They constitute no part of the government. The fact that the comptroller of the currency has supervisory powers over them does not involve the United States government in any liability for their acts. They may be designated by the secretary of the treasury to be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the secretary; and they may also be employed as financial agents of the government; and they must perform all such reasonable duties, as depositaries of public moneys and financial agents of the government, as may be required of them. But the designating a national bank as a national depository of public moneys, under the general banking law, does not change the character of its organization, or convert its managers into public officers, or render the government liable for its acts. *U. S. Rev. Stat.* § 5133; Branch *v.* United States, 12 *Ct. of Cl.* 281.

A national banking association may exist with or without the power to issue circulation. Banks without the right to issue circulation may be necessary agents in providing a national currency. They prevent banks of issue becoming monopolies, and thereby keep them from the untrammelled and wild course of business into which monopolists too easily fall. And the provisions in the national bank act indicate that congress intended not only to create banks of discount, deposit, and circulation, but also to permit the creation of banks of deposit and discount, without the right to issue circulation. National Currency Acts, 11 *Op. Att.-Gen.* 334. To obtain circulating notes, the association desiring to issue them must make a deposit with the comptroller of the currency of United States bonds, to be held as a security for the redemption of such notes as it may issue; and thereupon, within limits of aggregate amount prescribed by the law, circulating notes of various denominations may be furnished it by the comptroller. Extended provisions are made for the custody of these bonds by the currency bureau, and for a receivership and liquidation, under supervision of the comptroller, of any association failing to redeem its notes, and for a sale of the bonds, and application of the proceeds to the payment of the bill-holders.

Moreover, associations may be organized, under the national banking laws, for the purpose of issuing notes payable in gold; and, upon the deposit of United States bonds, the comptroller of the currency issues to the association making the deposit circulating notes, for not more than eighty per

centum of the par value of the bonds deposited, "which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable." *U. S. Rev. Stat.* § 5185.

National currency. That circulating medium which consists of the notes issued by the national banks, under authority of the laws of congress; not the United States notes or greenbacks. These are a national currency in their nature, more properly than the banking-association notes; but "national currency" is generally used to signify the notes authorized by the acts to provide a national currency, and issued on the immediate responsibility of the associations; while greenbacks or treasury notes is the more common designation of the notes issued immediately by the government. In other words, national, as usually applied in America during recent years to currency, distinguishes the currency of banks authorized by the nation from that authorized by state laws, not that issued by the nation from that issued by corporations.

An indictment for the larceny of divers notes of the "national currency of the United States" is equivalent to the phrase in the statute of "United States currency," and the indictment is sufficient. Dull *v.* Commonwealth, 25 *Gratt.* 965.

National debt. The debt due by a nation to individual creditors, whether our own people or foreigners. *Toml.* In England, this national debt is in part funded, and in part unfunded; the former being that which is secured to the national creditor upon the public funds; the latter, that which is not so provided for. The unfunded debt is comparatively but of small amount, and is generally secured by exchequer bills and bonds. 2 *Steph. Com.* 574.

NATIVO HABENDO. A writ which lay for a lord when his villein had run away from him. It was directed to the sheriff, and commanded him to apprehend the villein, and to restore him, together with his goods, to the lord. But if a villein had tarried in a town or ancient demesne lands for the period of a year and a day, without having been claimed by his lord, then the lord could not seize him in either of such places. *Termes de la Ley.*

NATURA. Nature. Occurs in some maxims.

Natura appetit perfectum; ita et lex. Nature desires that which is perfect; and so does the law. The law seeks perfection.

Natura non facit saltum; ita nec lex. Nature makes no leap; neither does the law. Proceedings at law should be in a natural and regular order, omitting no step. Applied particularly to the course of proceeding in the old English practice upon writs of entry.

NATURAL. This adjective occurs, without much deviation from its vernacular meaning, in several somewhat technical phrases.

Natural affection, or love. That love or sentiment of regard which usually accompanies physiological relationship. The phrase is used in deeds, where a conveyance, made by way of gift from a parent to a child, for instance, is said to be upon the consideration of natural affection.

Natural allegiance. That allegiance (*q. v.*) which is due from a person in view of his birth within a country, as distinguished from local allegiance, *q. v.*

Natural-born subject. This term is used, in English law-books, for a person born within the dominions of the crown; that is, within the allegiance of the king. It does not seem to mean any thing different from "native subject," which is a preferable expression.

Natural child. In a proper use, natural should, in this connection, signify the opposite of adopted; and the phrase should mean a child begotten and born by procreation, in distinction from one taken into filial relations by agreement. And this was a use of the phrase in Roman and early English law. See *Burrill.* But the phrase has had a wide popular use as a euphuism for bastard, and in that sense is often employed in modern law-books.

A natural or illegitimate child is one who comes under any of the five following categories: A child born of a woman not actually married at the time of its birth; or, of a wife under such circumstances that prove her husband cannot be its father; or, of a husband and wife, whose marriage has since been judicially dissolved, which illegitimatizes their previously lawful issue; or, of a widow so long after her husband's decease as to render it absolutely impossible for it to be a child begotten by him; or, of a husband or wife who has married during the life of his or her former wife or

husband, for the second marriage is utterly void. *Wharton.*

Natural day. The time between sunrise and sunset; the solar day. *Burrill.*

Natural duty, or obligation. A duty or obligation is natural when it springs from the common conscience and needs of man, and is not imposed upon him by enactment or rule of positive origin; and if it thus originates, it is natural, equally whether the law recognizes and enforces it, or does not. But the want of some phrases to designate duties and obligations which rest in conscience merely, and are not enforceable in law, has led to these phrases being used in that sense. Who uses them generally means that the duty or obligation is *only* natural.

Natural equity. That which appears equal, just, and right to the common native conscience of mankind, as distinguished from that system of jurisprudence technically known as equity, which, though founded in justice, is largely composed of and directed by established precedents and rules.

Natural fool, or, simply, a natural. An idiot.

Natural fruits. Produce of the earth, derived by the powers of nature. It does not seem to be used to signify what grows spontaneously, as opposed to what is cultivated, but to discriminate the product of the forces of nature from theoretic or artificial increase, such as interest of money. See *Bouvier.*

Natural heir. In the Indiana act of 1855, authorizing adoption of children, and providing that an adopted child shall be entitled to all the rights in the estate of the adopted parent that it would have "if the natural heir" of such parent, the word natural is used in the sense of legitimate (procreated); it contrasts the natural mode of producing heirs with the artificial. Barns *v.* Allen, 9 *Am. Law Reg.* 747.

Natural infancy. A period of non-responsible life, which ends with the seventh year of a person's age. *Wharton.*

Natural law. That rule of conduct which may be deduced from the common reason and conscience of mankind, as opposed, on the one hand, to a system of divine law revealed to man, and, on the other, to enacted or formulated human law.

Natural life. Actual vitality; that life which terminates by natural death, as opposed to civil death.

Natural person. A man, woman, or child, as opposed to a corporation, which has a certain personality impressed upon it by law, and is called an artificial person.

Natural presumption. A probable presumption; an inclination of the mind towards belief, caused by a probability discerned in the fact; as distinguished from a rule for deciding doubtful cases, which has grown up in the courts from a basis of convenience, otherwise called a legal presumption.

Natural right. Those rights which are plainly assured by what is termed the law of nature are called natural rights; such as the right to life, to personal liberty, &c.

NATURALE. Natural. Many Latin maxims which are based upon common reason are sometimes quoted with the phrase *naturale est* — it is natural — prefixed; which may be, however, considered as not forming a part of the maxim. Thus the definition of the maxim, *eodem modo quo quid constituitur, eodem modo dissolvitur*, will be found in this work under *eodem modo*, &c., although common forms of quoting it are, *naturale est eodem modo*, &c., and *naturale est quidlibet dissolvi eo modo quo ligatur.*

NATURALIZE. To impart, by a proceeding, the privileges and rights in the nation usually founded on nativity; to make one a citizen. Naturalization: a proceeding by which an alien may be constituted a citizen. Naturalized: made a citizen by adoption.

Naturalized citizen. One who, being alien by birth, has received citizenship by law.

Naturalization is the making a foreigner a lawful subject of the state, or, as it is sometimes termed, the king's natural subject. Formerly, an act of parliament was required in each particular case to naturalize an alien; the king, by his letters-patent, might denizenize, but not naturalize. However, by the Stat. 7 & 8 Vict. ch. 66, which was a general act, it was enacted that aliens of friendly states might become naturalized British subjects upon complying with the requisites of the act. And now, by the naturalization act of 1870 (33 & 34 Vict. ch. 14), further facilities of naturalization

are afforded, and the important privilege of expatriation is conferred; also, the evil or inconvenience of a "double allegiance" is remedied.

NATUS. Born. Used in connection with, or by way of distinction from, *nasciturus* (q. v.), to designate a child or children of a particular marriage already born, as distinguished from those who may hereafter be born. Thus, real estate given to all the children, born and to be born, is said to be given *natis et nascituris*. Used of descendants, generally, without restriction as to degree, the phrase *nati et nascituri* includes all heirs, however remote.

NAVAL. See NAVY.

NAVIGABLE. Adapted to bear vessels in use; capable of being navigated; useful for commercial communication by water.

The term navigable waters, in the act of Feb. 26, 1845, is not to be understood in the same sense as natural streams. It must be held to include an artificial communication, such as a canal. Scott *v.* The Young America, 1 *Newb.* 101, 106.

The navigableness of a river does not cease at a point where navigation is interrupted by falls; where a stream is navigable for one hundred and twenty miles above the falls, it is a navigable stream. Spooner *v.* McConnell, 1 *McLean*, 337.

A river above the ebb and flow of the tide may be navigable, when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers; and this has been extended to its capacity to float rafts of lumber. To go beyond this, and declare a stream navigable which can float a log, would be to turn a rule, intended for the benefit of the public, into an instrument of serious detriment to individuals, if not of actual private oppression. The only other instance in which a stream is navigable is when it is so declared by statute; and when so declared navigable to a certain point, it is, by implication, declared non-navigable above that point. American River Water Co. *v.* Amsden, 6 *Cal.* 443.

A cove cannot be said to be navigable merely because, at times, a fish-boat or skiff or canoe may be pushed through its waters, or because, in the winter months, a small sea-boat is laid up in it to avoid the ice of the river. This is not navigation. That only is navigation, and those waters only are navigable, where the public pass and repass with vessels or boats in the prosecution of useful occupations. There must be some commerce which is of value. A hunter or fisherman, by drawing his boat through the waters of a brook or shallow creek, does not create navigation, or constitute the waters navigable. Wethersfield *v.* Humphrey, 20 *Conn.* 217.

There are two classes of streams within and bordering upon Indiana which are called navigable streams and public highways. One class is only navigable for certain kinds of craft, and is not visited by vessels from the navigable waters of other states; but the other class is navigable for such vessels. The state has exclusive jurisdiction over the first class, and may authorize the streams of which it is composed to be obstructed for the public good; and no action can be sustained therefor, except private property be taken or injured. Over the streams of the second class, in the absence of congressional interference, the state has a like jurisdiction, so far as these streams are within her territorial limits; but the national legislature may interfere, and deprive the state of this jurisdiction. Depew *v.* Board of Trustees, 5 *Ind.* 8.

A stream cannot be said to be navigable in the legal sense of that term, unless it be of such a character as to be useful to the public as a channel of trade or commerce. Neaderhouser *v.* State, 28 *Ind.* 257, 270.

Rivers are navigable as far as the tide ebbs and flows. Commonwealth *v.* Chapin, 5 *Pick.* 199; Cobb *v.* Davenport, 32 *N. J. L.* 369; People *v.* Tibbetts, 19 *N. Y.* 523.

The ebb and flow of the tide is not the only test of navigability. McManus *v.* Carmichael, 3 *Iowa*, 1.

Not every ditch in which the salt-water ebbs and flows, through the extensive salt-marshes along the coast, and which serve to admit and drain off the salt-water from the marshes, can be considered a navigable stream. Nor is every small creek in which a fishing skiff or gunning canoe can be made to float, at high water, to be deemed navigable. To have this character, a stream must be navigable to some purpose useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give the character of a navigable stream, but the waters must be generally and commonly useful. Rowe *v.* Granite Bridge Corporation, 21 *Pick.* 344.

Where the legislature authorized the building of a bridge over a navigable stream, "either solid or on piles, leaving sufficient passages for the water," as certain commissioners might deem necessary, and a bridge was built by direction of those commissioners, two-thirds of the length of which was solid, and the other third, over the channel and deeper parts of the stream, was on piles; and scows, gondolas, and boats and vessels without masts, or with movable masts, empty or loaded, could and did advantageously pass and repass under the bridge, it was held that the stream had not ceased to be navigable, and the county commissioners had no authority to lay a highway over it. Charlestown *v.* Middlesex, 3 *Metc.* (*Mass.*) 202.

The expression navigable water includes tide-water navigable for pleasure, although the craft thereon have never been used for purposes of trade or agriculture. Attorney-General *v.* Woods, 108 *Mass.* 436.

There is a distinction at common law between navigable rivers, technically so called, and rivers which have the capacity to float boats, rafts, and logs, and are subject to the servitude of the public, and which are therefore denominated public highways. All rivers where the tide ebbs and flows are, by the common law, termed navigable rivers. In the technical sense of the term, a river is deemed navigable as high from the mouth as the tide ebbs and flows. In Maine, all streams of sufficient capacity, in their natural condition, to float boats, rafts, or logs, are denominated public highways, and as such are subject to the use of the public. In many of the states which are intersected or bounded by the great rivers of the continent, the common-law distinction between navigable rivers and those which are simply recognized as highways does not exist. In Maine, the common-law definition has been fully recognized. Veazie *v.* Dwinel, 50 *Me.* 479.

The true test in determining the right of public use in fresh-water streams, as public highways, is, whether a stream is inherently and in its nature capable of being used for the purposes of commerce; for the floating of vessels, boats, rafts, or logs. Where a stream possesses such a character, the easement exists. Moore *v.* Sanborne, 2 *Mich.* 519; Spring *v.* Russell, 7 *Me.* 273; Browne *v.* Scofield, 8 *Barb.* 239.

The term navigable waters, as used in Mich. Compiled Laws, § 5944, has the same meaning as in the ordinance of 1787, and is not limited to waters where the tide ebbs and flows. Tyler *v.* People, 8 *Mich.* 320.

Not every ditch navigable for small boats at certain tides is a navigable water; but the legislature is the judge in regard to the use of any stream as a highway for boats and vessels, and when it shall be so considered and protected as such, or when it may be obstructed. Glover *v.* Powell, 10 *N. J. Eq.* 211.

A stream in which the tide does not ebb and flow, and which is not navigable for boats or vessels or rafts, and has not been declared a public highway by statute, is not a navigable stream, within the meaning of the authorities, so as to subject it to the use of the public, but is private property. Munson *v.* Hungerford, 6 *Barb.* 265.

A stream eight feet deep and sixty yards wide, with an unobstructed navigation for sea vessels from its mouth to the ocean, is a navigable stream, and its edge at low-water mark is the boundary of the adjacent land. Wilson *v.* Forbes, 2 *Dev. L.* 30.

In North Carolina, the ebb and flow of the tide is no rule for determining whether a river is navigable or not. Wilson *v.* Forbes, 2 *Dev. L.* 30; Ingram *v.* Threadgill, 3 *Id.* 59.

The common-law criterion of a navigable stream is the flow and reflow of the tide; the civil-law criterion is the capability and suitableness of the stream to the purposes of navigation, in the ordinary state of the water. In the state of Tennessee, the civil-law criterion has been adopted; but in all other respects the principles of the common law regulating and defining the rights of the public and the riparian owners remain unchanged. If a watercourse is navigable in a legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. If it is navigable only in the ordinary sense, the ownership of the bed of the stream is in the riparian proprietors, and the public have an easement therein for the purposes of transportation and commercial intercourse. If the stream is so shallow as to be unfit for such purposes of transportation and commerce, the rights both of property and use are wholly and absolutely in the owners of the adjoining land. Stuart *v.* Clark, 2 *Swan*, 9.

In Pennsylvania, all rivers and streams of water that are subject to tides, or capable of being navigated in the common sense of the term, are treated as navigable; and grants of the adjoining soil are not *usque ad filum medium aquæ*, but only to low-water mark; the soil and water found between the lines that describe low water being retained as eminent domain for the use of all citizens. Flanagan *v.* Philadelphia, 42 *Pa. St.* 219.

There being no tidal waters in Ohio, "navigable" is not there used in the technical sense of the common law. Hickok *v.* Hine, 23 *Ohio St.* 523.

NAVIGATE. To conduct vessels through public waters; to use the waters as a means of communication; also, spoken of a vessel, to conduct or employ it actively.

NAVIGATION. The art, or business, or science of conducting vessels through waters, in the usual employment of them.

Navigation laws. Acts of parliament regulating the trading intercourse of foreign countries with the United Kingdom and the British possessions in general. The original navigation law, passed in 1650, under the commonwealth, prohibited all ships of foreign nations from trading with any English "plantation" (or colony), without license from the council of state. In 1651, the prohibition was extended to the mother country. At the restoration, this provision was continued by Stat. 12 Car. II. ch. 18, passed in 1660, which required also that the master and the mariners should be British subjects; the object of this act being to encourage, by the exclusion of foreign competitors, the ships, seamen, and commerce of Great Britain. But now, by various acts of parliament passed since 1849, and especially by the customs consolidation act,

1853 (16 & 17 Vict. ch. 107), foreign vessels are generally allowed a free commercial intercourse with this country and its dependencies. But upon ships belonging to any nation which refuses to concede a similar freedom to British trade, and on the goods exported therein, her majesty may, by order in council, impose such duties as may appear justly to countervail the disadvantage to which British trade or navigation is so subjected. (3 *Steph. Com.* 143–147.) *Mozley & W.*

Rules of navigation. These are systematic rules and regulations by which the movements of vessels, when approaching each other under such circumstances that a collision may possibly ensue, must be governed. Such rules have long prevailed under the general maritime law, in the absence of statutory enactments; but these have more recently been superseded by express enactment, in most of the commercial countries of the world. A leading system is that promulgated by the corporation of the Trinity House on the 30th of October, 1840, and which may be found in full in 1 *W. Rob. Adm.* 488. The United States revised statutes prescribe important regulations of like purpose.

NAVY. The organized public vessels of a country; the system for the defence of the nation by sea. Naval: pertaining to the navy; connected with the maritime protection of a people.

Navy, as used in the treaty between the United States and Texas (5 *Stat. at L.* 797), is construed to relate exclusively to the ships-of-war and their armaments belonging to the naval establishments of Texas. Brashear *v.* Mason, 6 *How.* 92, 100.

Naval court-martial. A tribunal for the trial of offences arising in the management of the public vessels.

Naval law. The system of principles and regulations which particularly pertains to the government of vessels-of-war and of persons connected with them, and to the administration of their affairs.

Naval officer. 1. A person in command in the management of ships-of-war.

2. The style of an officer in the larger custom-houses of the United States. His duties relate to estimating duties, countersigning permits, clearances, &c., certifying collectors' returns, and similar subjects.

Navy department. That one of the chief public offices, or divisions of the public business, which superintends the defence of the nation by means of its ships-of-war.

Navy pension. A pecuniary allowance made in consideration of past services of some one in the navy.

Navy-yard. Includes the waters contiguous to and necessary to the operations of the navy-yard. The waters necessary to float the vessels stationed at the yard are, like the yard itself, within the exclusive jurisdiction of the United States. *Exp.* Tatem, 1 *Hugh.* 588.

NE. This Latin negative occurs in several maxims and phrases.

Ne admittas. That you do not admit. The emphatic words in the Latin form of a writ issued on behalf of the plaintiff in an action of *quare impedit*, to forbid the bishop to admit to a benefice a clerk of the defendant, or any other person, pending the suit. These words were used also as the name of the writ.

It ought to be issued within six calendar months after the avoidance, before the bishop may present by lapse; for it is in vain to sue out this writ when the title to present has devolved upon the bishop. *Fitz. Nat. Brev.* 37.

Ne baila pas. He did not deliver. The name of a plea in an action of detinue, denying the delivery to the defendant of the thing for which suit is brought.

Ne disturba pas. He did not disturb. The name of the plea forming the general issue in an action of *quare impedit*.

Where a person claims the presentation to a living, as patron, and brings an action of the nature of *quare impedit*, alleging that the bishop has instituted the clerk of a rival patron, either the bishop or such clerk may plead *ne disturba pas*, which is a plea of the general issue, to the effect that the party so pleading has done nothing to obstruct the right of presentation claimed by the plaintiff. 3 *Steph. Com.* 610.

Ne dona pas. He did not give. The name of the plea forming the general issue in an action of formedon; also termed *non dedit*, from the emphatic words of the Latin form.

Ne exeat. That he do not depart. The name of a writ in equity practice, issued to prevent a defendant from going out of the jurisdiction of the court. It was used in England under the name *ne exeat regno*, — that he depart not from

the kingdom, — originally for state purposes, but afterwards as a process between private parties in an equity suit, to prevent a party from withdrawing his person or property from the jurisdiction. The operation of the writ was ordinarily that of a mere process to hold to bail, or compel the party to give security to abide the decree to be made in the case. The writ has been generally adopted in American practice; but in many of the states has been abolished, and superseded by other remedies for the same end. Thus, in the New York code of civil procedure, taking effect Sept. 1, 1877, by which the writ of *ne exeat* is expressly abolished, an order of arrest against the defendant is authorized in an action wherein "the judgment demanded requires the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt;" where it appears "that the defendant is not a resident of the state, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure there is danger that a judgment, or an order requiring the performance of the act, will be rendered ineffectual." This provision is believed to include all the cases in which a *ne exeat* was allowed in ordinary equity practice.

The writ *ne exeat regno* is not now used for state purposes, but has become a mere process in an equity suit, and is used to prevent one of the parties from withdrawing his person or property from the jurisdiction of the court, by going abroad, unless he shall first give security for the satisfaction of such claim as the other party shall establish. 2 *Steph. Com.* (6th ed.) 538, note.

Ne exeat regno is a writ which issues to restrain a person from leaving the kingdom. It is frequently resorted to in equity when one party has an equitable demand against another, and that other is about to leave the kingdom; and it is only in cases where the intention of the party to leave can be shown that the writ is granted. *Fitz. Nat. Brev.; Gray Ch. Pr.* 16.

The writ is directed to the sheriff of the county in which any defendant in chancery is resident, commanding him to take bail from the defendant not to quit England without leave of the court. It is granted on motion, supported by affidavit showing that a sum of money is due from the defendant to the plaintiff, or will be due on taking accounts between them, and that the defendant intends to abscond. The writ was formerly applied to great political purposes; but it is now applied in civil matters only. *Mozley & W.*

Ne injuste vexes. That you do not unjustly vex. The name of a prohibitory writ in old English practice, issued on behalf of a tenant upon whom his lord had distrained for more services than he was bound to perform, commanding the lord not to vex his tenant unjustly; the emphatic words being taken as the name of the writ.

Ne recipiatur. That it be not received. The name of a proceeding by a party to an action at law, in the nature of a *caveat* or warning to an officer, not to receive some record or proceeding of an adverse party, required to be filed with such officer; *e.g.*, where the defendant seeks to prevent the plaintiff from filing the trial record after the proper time for so doing has passed.

Ne unques accouple en loiall matrimonie. Never joined in lawful matrimony. The name of a plea by which the tenant in an action of dower might defend, by denying the validity of the marriage of the demandant with the person of whose lands she claimed to be endowed. The words *ne unques accouple* are sometimes used as an abbreviated name for the plea.

Ne unques executor. Never executor. The name of a plea by which the defendant denies that he is an executor, as he is alleged to be; or that the plaintiff is an executor, as he claims to be. The name is derived from the emphatic words of the plea, in the law-French form of pleading.

Ne unques receivour. Never receiver. The name of a plea by which the defendant in an action of account render denies that he ever was receiver, as alleged by the plaintiff; derived from the emphatic words of the plea. The phrase *ne unques son receiver* is sometimes used in a like sense.

Ne unques seise que dower. Never seised of that of which dower might be had. The name of a plea in an action of dower, by which the tenant denies that the husband of the demandant was ever seised of an estate of which dower could be had; derived from the emphatic words of the plea.

Ne varietur. That it be not changed. This phrase is sometimes written by a notary upon a bill or note, for the purpose of identification. The negotiability of the instrument is not thereby affected. 8 *Wheat.* 338.

The negotiability of a promissory note, made in Louisiana, and payable to order, is not restrained by an indorsement on its face, in the handwriting of the notary by whom it was drawn, of the words *ne varietur*, without proof of some local law or usage to that effect. Fleckner *v.* Bank of the United States, 8 *Wheat.* 338; Brabston *v.* Gibson, 9 *How.* 263, 278.

NEAR. As applied to space, can have no positive or precise meaning. It is a relative term, depending for its signification on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects. A town may be properly said to be near to another town or city, if it is within a distance of a few miles; but if a house is spoken of as near to another, it signifies that it is within a few feet or rods if within the limits of a city or thickly settled village, or within a fraction of a mile if in the country, where the population is more sparse; while an article of furniture is said to be near to a person or object in the same room, if distant therefrom only a few inches. When used to designate and describe the location of a line of railroad, it cannot be interpreted as having any narrow or restricted meaning. Hence a charter-power to construct a branch railroad from a point "at or near" a previously existing road was held duly executed by a location commencing about 2,500 feet from the road. 1863, Fall River Iron Works *v.* Old Colony & Fall River R. R. Co., 5 *Allen*, 221.

"Near" is a relative term, and its precise import can only be determined by surrounding facts and circumstances. Barrett *v.* County Court, 44 *Mo.* 197.

A prohibition upon liquor-selling on election days, "near an election ground," includes a locality a mile and a quarter off. Morris *v.* State, 3 *Heisk.* (*Tenn.*) 315.

NEAT. See NET.

The phrase neat cattle, in its popular meaning, as well as in the sense in which it is used in the Texas criminal code, means a species of animals having an essential identity in qualities, to be taken and considered either collectively or individually. Hubotter *v.* State, 32 *Tex.* 479.

An indictment under a statute punishing the stealing of cattle, which charged a theft of "three head of neat stock or beeves," was held uncertain. All neat stock are not beeves. Castello *v.* State, 36 *Tex.* 324.

NECESSARY. As used in jurisprudence, usually imports not that the thing spoken of is absolutely unavoidable, cannot be omitted or waived, must be accorded, but only that it is required for the attainment of some object, the supply of some want, the execution of some purpose; is the reasonable and convenient means, more so than others, of accomplishing or performing something allowed. It does not generally mean an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other; but frequently imports no more than that one thing is convenient, or useful, or essential to another. Necessaries: is used as the plural of a supposed noun, to signify the various supplies without which an infant, a wife, &c., cannot enjoy a reasonable and proper life, education, and maintenance, according to the condition and circumstances of the individual. It is not limited to what is indispensable to support life. Necessaries vary with the social status and the pecuniary means of the person under consideration.

"Necessary" is not limited to actual physical necessity. An instruction that a deed confers a right of way, if necessary to the enjoyment of the premises described, does not mean that the right of way does not pass, if another way could by any possibility be made, but only requires proof that the way claimed was reasonably necessary. Pettengill *v.* Porter, 8 *Allen*, 1.

Thus a cause is necessarily on the calendar when it is regularly or properly there. Sipperly *v.* Warner, 9 *How. Pr.* 332.

Thus "necessary," as used in the Pennsylvania lateral railroad act of 1832, § 1, in the clause "necessary and useful for public or private purposes," refers not to an absolute, but to a reasonable necessity. Hays *v.* Briggs, 3 *Pittsb.* 504.

"Necessary" frequently imports no more than convenient, essential, or useful to some end in view. To employ means necessary to an end is generally understood as meaning to employ means calculated to produce the end, not as being confined to some single means without which the end would be unattainable. Necessary admits of degrees: a thing may be necessary, very necessary, or absolutely necessary. It is in the looser sense that the word is employed in that clause of the federal constitution which empowers congress to pass laws necessary and proper for carrying its express powers into effect. When the framers of the constitution intended an indispensable necessity (as in art. 10, § 1), they coupled the word "absolutely" with it. McCullogh *v.* Maryland, 4 *Wheat.* 318, 413.

"Necessary," in the provision of the

federal constitution giving congress general power to make all laws "necessary and proper to carry into effect" the powers previously conferred, includes all such means as are appropriate, plainly conducive to the end authorized to be attained, and not prohibited or inconsistent with the letter and the spirit of the instrument. To restrict the word to a signification which would deny to congress the choice of means, and confine it to such only as are indispensably necessary, would be absurd; for there are many substantive powers expressly granted by name, which would thus be utterly denied. To illustrate, there is the authority to borrow money; but the issue of legal tender notes, for that purpose, is not the only means by which money may be borrowed: therefore, it is not absolutely necessary; and if, for that reason, it is unconstitutional, then the same argument would deny the power to resort to any and every other measure to obtain a loan; for it could be truly said of any means which might be suggested for the execution of either of the express powers, that some other might be employed, and therefore that the one suggested was not a necessary one. Thayer *v.* Hedges, 23 *Ind.* 141.

A statute provision that certain officers may "administer oaths necessary in the performance of their duties" relates to matters filed with, or business transacted before, the officer, in which an oath is required, and in reference to which some duty is enjoined upon him. Wheat *v.* Ragsdale, 27 *Ind.* 191.

An authority to towns to raise money for necessary charges does not include expenses of a committee directed by a vote of the town to petition the legislature for the annexation of the town to another town. Minot *v.* West Roxbury, 112 *Mass.* 1.

The legislature gave the canal commissioners, by themselves or their agents, leave "to enter upon and use all lands necessary for the prosecution of the improvements, and to make canals, feeders, locks, dams, &c., doing, nevertheless, no unnecessary damage." Held, that the commissioners were entitled to enter upon the lands adjacent to a lock, and break up and remove stone for the construction of the lock, and that the commissioners were not trespassers in so doing; and that "necessary," in the act, was used in the popular sense, and was not equivalent to indispensable. Jerome *v.* Ross, 7 *Johns. Ch.* 315.

"Necessary," when used in reference to taking private property, is constantly understood and acted upon in the sense of expedient, or what is necessary for the public good; or, as contradistinguished to what is unnecessary or inexpedient. Stuyvesant *v.* Mayor, &c. of N. Y., 7 *Cow.* 588, 606.

In a decree of a board of aldermen, laying out a highway, their judgment therein expressed, that "public convenience requires" the laying out of the highway, is equivalent to finding that the highway is necessary. Hunter *v.* Newport, 5 *R. I.* 325.

Inasmuch as a statute which exempts from warrant or execution "bedding and household furniture necessary for supporting life" is to be deemed a remedial one, passed for a humane purpose, and which ought to be liberally expounded, the term necessary in such act, while it excludes superfluities and articles of luxury, will not be limited to articles which are indispensable to the bare subsistence of the debtor and his family, but will embrace those things which are necessary to enable them to live in a convenient and comfortable manner. Montague *v.* Richardson, 24 *Conn.* 338.

A statute exempting from execution necessary household furniture includes more than what is absolutely indispensable: it includes articles which, to the common understanding, are required for comfort and convenience. But it is not to be understood in the liberal sense in which it is used in the rules as to "necessaries" furnished to wives or minors, where the habits and station in life of the individual are permitted to enlarge its meaning. This is not allowable in determining what is exempt from process for debt, as being "necessary." Hitchcock *v.* Holmes, 43 *Conn.* 528.

The articles exempted from execution by Rev. Stat. ch. 97, § 22, cl. 2, as "other household furniture necessary for the debtor and his family, not exceeding fifty dollars in value," are not merely things so absolutely indispensable that the debtor cannot live without them, but things so essential as to be regarded among the necessaries rather than the luxuries of life. A sofa and two carpets, of a plain and cheap character, which, together with the other household furniture of the debtor, were of less value than fifty dollars, were held exempted from execution under such a clause. Davlin *v.* Stone, 4 *Cush.* 359.

An exemption of necessary provisions from attachment includes corn, potatoes, and cabbages planted and raised by the debtor for the use of his family, and ripe for harvest, though not severed from the soil. Mulligan *v.* Newton, 16 *Gray*, 211.

An exemption of a debtor's "necessary team" will not be limited to the team of teamsters or laborers. The only horse of a country physician, or any other professional man, which is necessary for the successful or convenient prosecution of his professional business, is exempt; and it is immaterial whether the debtor has or has not other ample means to pay the debt. Wheeler *v.* Cropsey, 5 *How. Pr.* 288. To nearly same effect, Eastman *v.* Croswell, 8 *Id.* 75.

A statute exempting from taxation "property necessarily used in operating a railroad" includes an inn used exclusively by persons arriving and departing on the rail-

road. Milwaukee, &c. R. R. Co. *v.* Board, &c. of Crawford County, 29 *Wis.* 116.

The expression necessary disbursements, in a statute for taxation of costs, is limited to actual expenses. Wolf *v.* McGavock, 24 *Wis.* 54.

It includes officers' fees. De Witt *v.* Swift, 3 *How. Pr.* 280. And as to guardian's fees, see Carter *v.* Montgomery, 2 *Tenn. Ch.* 455.

Necessaries. Is a term of relative signification, and should not generally be restricted in its application to such things merely as are proper and requisite for sustenance, but often includes much more, depending on the circumstances, situation, and social position of the parties. Harris *v.* Dale, 5 *Bush*, 61.

An exception of "necessaries furnished him or his family" does not apply to groceries furnished an unmarried person, and used in the family in which he is boarding, and by them taken in payment for his board. McAuley *v.* Tracy, 61 *Me.* 523.

"Necessaries," in the rule as to supplying wife or an infant, and recovering from a husband or guardian, is not used in its strictest sense, nor limited to that which is required to sustain life. Things proper and suitable to each individual, according to his circumstances and condition in life, are necessaries, if not supplied from some other source. But when suitable provision is made by a parent or guardian, or where, from any source, the wants of a minor are supplied, articles furnished by a trader to the minor, on his own credit, are not necessaries, and of this the trader must take notice and inform himself. Davis *v.* Caldwell, 12 *Cush.* 512.

No general rule, as to what may be and what may not be considered necessaries, can be laid down. It is a flexible, not an absolute, term, having relation to the infant's condition in life, the habits and pursuits of the place in which and the people among whom he lives, and to the changes in those habits and pursuits which occur in the progress of society. So held where the articles claimed to be necessaries consisted of an outfit to enable the infant (a boy of fourteen years) to go to California to engage in mining, the outfit consisting in mining tools, &c. Breed *v.* Judd, 1 *Gray*, 455, 458.

A pew in church is not included among the necessaries which may be supplied to a wife or infant, and recovered for from the husband or guardian. St. John's Parish *v.* Bronson, 40 *Conn.* 75.

"Necessaries" may include dentistry. Strong *v.* Foote, 42 *Conn.* 203.

Expenses incurred by the wife in defending her good name, as in the husband's suit for divorce on the ground of adultery, are necessaries. Porter *v.* Briggs, 38 *Iowa*, 166.

"Necessaries" includes food, raiment, shelter, or other comfort for the family, but not debts unconnected with family sustentation. Ford *v.* Teal, 7 *Bush*, 156.

A claim for medical attendance and medicines furnished is for necessaries. Darling *v.* Andrews, 9 *Allen*, 106.

Services of an attorney, rendered to an infant in defending him in a bastardy proceeding, are necessaries, for which, if it was reasonable for him to make a defence, he is liable on an implied promise. Barker *v.* Hibbard, 54 *N. H.* 539.

The word may include not merely articles absolutely necessary to support life, but also those suitable to the station of life of the person to whom they are furnished. A bridal outfit, including a chamber set, may be allowed. Jordan *v.* Coffield, 70 *N. C.* 110.

Provisions of bankrupt laws allowing the assignee to set apart certain articles and necessaries for the debtor may be construed to include money, but does not include a fowling-piece, pistol, fishing-tackle, and paintings, nor the watch and breast-pin of the bankrupt. Matter of Ludlow, 1 *N. Y. Leg. Obs.* 322.

A pew in church cannot be set apart by the assignee for the bankrupt as necessary. Matter of Comstock, 1 *N. Y. Leg. Obs.* 326.

Money is included in "necessaries," in the bankrupt law. When an allowance in money is appropriate and necessary, it may be made. *Re* Hay, 2 *Low.* 180.

Money cannot be set apart to the bankrupt as necessaries, unless such money is the proceeds of specific things which ought to be set apart to him under that head. Matter of Welch, 5 *Ben.* 230.

As applied to a vessel, "necessaries" means articles which form part of the natural and reasonable outfit of a vessel for the business in which she is engaged. The Plymouth Rock, 7 *Ben.* 448.

Where A, by bill of sale, sold to B one-half of a vessel, "together with one-half of the masts, bowsprit, sails, boats, anchors, cables, and all other necessaries thereto appertaining," it was held that ballast on board did not pass. Burchard *v.* Tapscott, 3 *Duer*, 363.

NECESSITAS. Necessity; the force or influence which causes a man to act against his will; that influence causing an act which makes any different action impossible.

Several Latin phrases and maxims relating to the legal nature or effect of such necesity are in use, among which are the following:

Necessitas culpabilis. Culpable necessity; a necessity compelling an act which may be the subject of blame; unfortunate necessity. Used to distinguish the necessity which compels homicide in self-defence from the necessity of killing a malefactor. 4 *Bl. Com.* 187.

Necessitas est lex temporis et loci. Necessity is the law of time and place.

Where the necessity which compels an act also excuses it, that necessity may be said to be the law for that occasion, — the law of that particular time and place. See *Necessitas inducit privilegium*, &c.

Necessitas facit licitum quod alias non est licitum. Necessity makes lawful that which otherwise is not lawful. A form of the maxim, *necessitas inducit privilegium*, &c., *q. v.*

Necessitas inducit privilegium quoad jura privata. Necessity carries with it a privilege, as to private rights. So far as private rights are concerned, a person acting under necessity may be relieved from their obligation. As expressed by Lord Bacon, the principle is, "The law chargeth no man with default where the act is compulsory, and not voluntary, and where there is not consent and election; and therefore, if either there be an impossibility for a man to do otherwise or so great a perturbation of the judgment and reason as, in presumption of law, man's nature cannot overcome, such necessity carrieth a privilege in itself." *Bacon Max.* An act done through necessity, under compulsion, is regarded as involuntary, and without intention; and the person so acting is, therefore, not responsible for such acts in any manner where his intent is an element essential to his responsibility. Familiar examples arise out of the necessity for self-preservation, which is deemed to justify homicide in self-defence. Such homicide is privileged by absolute necessity, and by that necessity only; for, if it be possible to escape the assailant's attack otherwise than by killing him, the homicide is not justifiable. The privilege extends to the protection of property, as well as life, as the defence of one's property against thieves. So to cut away the masts and rigging of a ship, or to throw goods overboard, may be quite lawful, when necessary for the safety of the crew and vessel, in a storm at sea, though such acts would be criminal if no necessity for them existed. The maxim extends to the necessity for obedience to the laws, as where an officer, civil or military, or one lawfully under his authority, in the execution of a lawful command, causes death. *Broom Max.* 14; *Wharton Max.* 49. And so of the necessity of obedience where a person is subject to the power of another; as if a wife should commit a larceny with her husband, she is presumed to have acted under coercion of him, and is excused by the necessity of obedience to him. And the acts of an idiot, lunatic, or person under some bodily or mental incompetency, may be deemed to come within the same principle, as actions compelled by a necessity which the particular person cannot overcome, though one *compos mentis et corporis* might not be excused. *Wharton Max.* 49. And losses or injuries caused by the act of God, by inevitable accident, by public enemies, &c., are regarded as arising from such a necessity, or *vis major*, as relieves from liability common carriers and others who are held absolutely responsible under other circumstances. The privilege termed a way of necessity, which one may have whose lands are surrounded by the lands of others, so that he cannot enjoy his own without passing over the land of another, is an example of privilege given by a necessity which is not absolute; as the owner of such lands is not compelled, whether he will or not, to do the act which is injurious to another; but he is compelled either to do such act or lose the use of his own property.

But, by the very terms of the maxim, necessity confers such privileges only *quoad jura privata*, — as regards private rights. Necessity does not excuse an act which is contrary to the public good. Though a man may defend his life, his property, or even protect his rights and interests by acts done under stress of necessity, which under other circumstances would be criminal, yet, in a question with the state, he is bound rather to suffer injury himself than to do violence to the interests of the public. This principle is expressed in the maxim, *necessitas publica major est quam privata*, q. v.

Many other maxims expressing the principle that necessity may excuse acts or omissions otherwise deemed unlawful are commonly cited. Such are *necessitas non habet lege; necessitas sub lege*

non continetur; necessitas vincit legem; necessitas est lex temporis et loci; necessitas, quod cogit, defendit; necessitas facit licitum quod alias non est licitum. Most of these state the rule in broader and stronger terms than the form given at the head of this article, which, though perhaps less familiar, is a more precise expression of the principle, with its proper restrictions.

Necessitas non habet legem. Necessity has no law. A maxim corresponding to the common proverb, "necessity knows no law." See *Necessitas inducit privilegium*, &c.

Necessitas publica major est quam privata. Public necessity is greater than private. Private necessities must yield to the public good. The rights of eminent domain and of taxation possessed and exercised by every sovereign state illustrate the application of this principle to private rights of property. If the public necessity requires, the rights of the individual owner of property, and even his necessities, must yield to it. The principle extends farther than to rights of property. The state may, if necessary, command the services, and even the lives, of its subjects or citizens. "Death," says Lord Bacon, in illustrating this maxim, "is the last and farthest point of particular necessity; and the law imposeth it upon every subject that he prefer the urgent service of his prince and country before the safety of his life." *Bacon Max.*

That public interests must control individual necessities is further illustrated by the limitation expressed in the maxim, *necessitas inducit privilegium quoad jura privata*, q. v. The private necessity which will excuse acts otherwise unlawful, as contrary to private rights, will not avail to excuse such acts if directed against the public welfare. "In all cases, if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuses not." *Bacon Max.*

Necessitas, quod cogit, defendit. Necessity justifies what it compels. Another form of the maxim, *necessitas inducit privilegium*, &c., *q. v.* In this form, it is quoted as applicable to the acts of a sheriff or other ministerial officer, a person called as part of the *posse comitatus*, &c., upon the theory that the necessity of obedience to the law justifies such acts, even though, if done voluntarily, and in an individual capacity, they would be unlawful.

Necessitas sub lege non continetur. Necessity is not restrained by law. See *Necessitas inducit privilegium*, &c.

Necessitas vincit legem. Necessity overcomes the law. See *Necessitas inducit privilegium*, &c.

NECESSITY. Compulsion; constraint of the will; that which makes an act or event unavoidable.

Necessity is of three sorts: necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. *Jacob.*

Necessity is a constraint upon the will, whereby a man is urged to do that which his judgment disapproves, and is thereby excused from responsibility which might be otherwise incurred. It includes: The obligation of civil subjection; in certain cases, the coercion of a wife by her husband; in certain cases, also, *duress per minas*, which impels a man to act in a given way from fear of death or personal injury; where a man is constrained to choose the least of two evils. *Mozley & W.*

"Necessity," in a statute excepting "works of necessity" from a prohibition of labor on Sunday, is not confined to acts of absolute physical necessity. Boiling down maple sap may be a work of necessity within the exception, when the sap is flowing freely, the party's troughs are full, and he has no way to save the increase but by gathering in and boiling down what has been collected. Morris *v.* State, 31 *Ind.* 189.

By a "work of necessity," in the exception to the prohibition of labor, business, or work on the Lord's day, is not meant a physical and absolute necessity; any labor, business, or work, which is morally fit and proper to be done on that day, under the circumstances of the particular case, is a work of necessity. Flagg *v.* Millbury, 4 *Cush.* 243.

Running street railroad cars on Sunday, in cities and the vicinity thereof, is a work of necessity, and it is not unlawful to run them on such day. Augusta & S. R. R. Co. *v.* Renz, 55 *Ga.* 126.

NEFAS. Wrong; that which is contrary to divine law. The opposite of *fas.*

NEFASTUS. Inauspicious. Applied, in the Roman law, to a day on which it was unlawful to administer justice. See DIES FASTI; DIES NEFASTI.

Negatio conclusionis est error in lege. Denial of a conclusion is error in law. To deny a conclusion of law is bad pleading. Denials must be of facts; not merely of legal conclusions drawn as inferences from facts alleged and not denied.

NEGATIVE PREGNANT. In pleading, signifies the statement of a negative proposition in such a form as may imply or carry with it the admission of an affirmative. Thus, in an action of trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so, and that he entered by that license; to which the plaintiff replied, that he did not enter by her license. This replication was held to be a negative pregnant, inasmuch as it might imply or carry with it the admission that a license was given, although the defendant did not enter by that license; and the proposition would therefore, in the language of pleading, be said to be pregnant with that admission; viz., that a license was given. A negative pregnant is one of those faults in pleading which fall within the rule that pleadings must not be ambiguous or doubtful in meaning. In the above instance, the plaintiff should have denied either the entry by itself, or the license by itself; for the effect of denying both together was to leave it doubtful whether he meant to deny the license, or the fact of the defendant's entry by virtue of that license. *Steph. on Pl.* 408, 409, 4th ed.

NEGLECT. Means to omit, as to neglect business or payment or duty or work, and is generally used in this sense. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. Rosenplaenter *v.* Roessle, 54 *N. Y.* 262.

As used in respect to the payment of money, refusal is the failure to pay money when demanded; neglect is the failure to pay money which the party is bound to pay without demand. Kimball *v.* Rowland, 6 *Gray*, 224.

The neglect of an attorney to pay over money collected for his client is a "neglect" in a "professional employment," within the exception of the act of July 12, 1842, abolishing imprisonment, &c. Wills *v.* Kane, 2 *Grant Cas.* 60.

NEGLIGENCE. Lack of diligence; omission of due care; failure to use the efforts or take the precautions which an ordinarily prudent person would employ in like circumstances.

Upon the distinction between *gross*, *ordinary*, and *slight* negligence, see those expressions. See also CONTRIBUTIVE.

The cases upon negligence, and the questions which arise upon what constitutes negligence, relate in great part not to the meaning of the word, but to the question, what are the proper and prudent rules for conducting a business or performing an act in question. Thus, a decision that a constructor of street improvements, who leaves an excavation open all night, unguarded, is chargeable with negligence, does not in truth turn upon the meaning of the word, but shows what is the proper duty of a person engaged in such works. A decision that it is negligence for a railway engineer to omit the whistle at a crossing means that a duty rests on an engineer to blow the whistle; it has no proper bearing on the meaning of the word negligence. We give such representative cases only as discuss the general meaning of the word.

Negligence is where a person neglects or omits to do a thing which he is by law obliged to. *Jacob.*

Negligence is any culpable omission of a positive duty. It differs from heedlessness, in that heedlessness is the doing of an act in violation of a negative duty, without adverting to its possible consequences. In both cases there is inadvertence, and there is breach of duty. *Aust. Jur. Lects.* 19, 20, 24.

Negligence, in reference to the keeping of property, is divided by Sir W. Jones into three kinds: Gross negligence, which is the want of that care which every man of common sense takes of his own property; ordinary negligence, which is the omission of that care which men of prudence take of their concerns; and slight negligence, which is the omission of that diligence which very circumspect and careful persons employ. 2 *Steph. Com.* 81, 82, and note (*c*).

The question what shall be considered negligence, for which a person injured by it may recover damages, is a question for the jury, subject to certain rules of law, or of common sense, according to which the measure of culpable negligence varies according as the circumstances of the cases differ. In all cases, the first point to settle is the amount or degree of diligence exigible from the defendant, for by means of that positive criterion it is possible to ascertain in the next place the amount or degree of negligence on the defendant's part which will involve him in liability for the damage which has arisen. The rule is, that the negligence is inversely in proportion to the diligence. For example, if but slight diligence (*levis diligentia*) is exigible, then only gross negligence (*crassa negligentia*), amounting also to wilfulness or intentionality (*dolus*), will render the defendant liable, as is the case with gratuitous bailees, whether

depositaries or mandatories. And, on the other hand, if extreme diligence (*exacta diligentia*) is exigible, then the slightest negligence (*levis negligentia* or *levis culpa*) will in like manner render the defendant liable, as is the case with inn-keepers, carriers, and generally with paid bailees. Subject to these rules, the question is one of fact. *Brown.*

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Nitroglycerine Case, 15 *Wall.* 524; Blythe *v.* Birmingham Water Works, 36 *Eng. L. & Eq.* 506.

Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in like employments. Bizzell *v.* Booker, 16 *Ark.* 308; O'Brien *v.* R. R. Co., 3 *Phila.* 76.

Where there is no obligation of care or caution, there can be no negligence. Thus, in so far as one is not under obligation to be cautious in behalf of a wrong-doer, the latter cannot charge him for negligence. Needham *v.* San Francisco, &c. R. R. Co., 37 *Cal.* 409, 423.

Gross negligence, in a condition in a policy of insurance exempting from loss on that account, means the want of that diligence which even careless men are accustomed to exercise. Lycoming Ins. Co. *v.* Barringer, 73 *Ill.* 230.

That a mistake is not negligence, see Flournoy *v.* Jeffersonville, 17 *Ind.* 169.

Negligence is the want of that care which a prudent man ordinarily exercises under the given circumstances. Shehan *v.* Cornwall, 29 *Iowa*, 99.

The reasonable belief of a party that he will not sustain an injury in doing acts which, but for such belief, would be negligent, does not exonerate him from the charge of contributive negligence. Muldowney *v.* Illinois Central R. R. Co., 36 *Iowa*, 462.

Negligence or carelessness signifies want of care, caution, attention, diligence, or discretion in one having no positive intention to injure the person complaining thereof. The words "reckless," "indifferent," "careless," and "wanton" are never understood to signify positive will or intention, unless when joined with other words which show that they are to receive an artificial or unusual, if not an unnatural, interpretation. Lexington *v.* Lewis, 10 *Bush*, 677.

Negligence is a violation of the obligation which enjoins care and caution in what we do. Even when gross, it is but an omission of duty. Tonawanda R. R. Co. *v.* Munger, 5 *Den.* 255, 266; 4 *N. Y.* 349; Carroll *v.* N. Y. & New Haven R. R. Co., 1 *Duer*, 571, 583.

Negligence means simply the want of care, proper care. McGrath, &c. *v.* Hudson River R. R. Co., 32 *Barb.* 144.

Negligence consists in omitting to do what a person ought to do. It is of the essence of negligence that the party charged should have knowledge that there was a duty for him to perform; or he must have omitted to inform himself as to what his duty was, in a given case. Knowledge is presumed, in a great number of cases, and the party will not be permitted to prove that he had not knowledge of his duty. Every man is presumed to know the law; and hence, when the law imposes a duty on a man, it presumes that he knew of it; and it will not permit him to prove that he did not. When the specified duty is not imposed, by either the statute or the common law, the party alleging negligence must show that the accused was cognizant of the duty he is charged with having neglected. Sherman *v.* Western Transp. Co., 62 *Barb.* 150.

The law will not hold it imprudent in one to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both, even though such other has once conducted himself in a contrary manner. Newson *v.* New York, &c. R. R. Co., 29 *N. Y.* 383.

To support an action for negligence, there must be proof of carelessness at the time of the accident: general recklessness will not suffice. King *v.* McDermott, 2 *Phila.* 175.

To constitute negligence, there must be a disregard of some duty or rule of conduct prescribed beforehand, or arising so manifestly from the facts as to leave no doubt of its existence. Warner *v.* R. R. Co., 6 *Phila.* 537.

Where the law imposes a duty on a party, and he is disabled to perform it by the act of God, the performance is excused. Mosely *v.* Baker, 2 *Sneed*, 362.

One may act in good faith, and still be guilty of gross negligence. Lincoln *v.* Buckmaster, 32 *Vt.* 652.

The term negligence embraces acts of omission, as well as of commission, in its legal signification, and diligence implies action as well as forbearance to act; hence the result of a mere accident may constitute a good cause of action. Grant *v.* Moseley, 29 *Ala.* 302.

Accident is an event from an unknown cause, or an unusual and unexpected event from a known cause; a chance or casualty. A usual and expected event from omission of proper precautions is not accident, but it is negligence. Crutchfield *v.* Richmond, &c. R. R. Co., 70 *N. C.* 380.

The law gives no redress for inevitable accidents, or for losses resulting from mutual negligence. But when the injury comes from the exclusive negligence of one party, he cannot shield himself from liability by calling it an accident. McGrew *v.* Stone, 53 *Pa. St.* 436.

To constitute wilful negligence, the act done or omitted to be done must be intended. Mere neglect cannot ordinarily be

alleged to be wilful. Peoria Bridge Association *v.* Loomis, 20 *Ill.* 235.

The word negligence ordinarily excludes design. Gove *v.* Farmers', &c. Ins. Co., 48 *N. H.* 41.

Negligent escape. See ESCAPE.

NEGOTIATE. 1. To conduct business; and particularly to discuss terms of a bargain; to endeavor to effect a contract.

2. To transfer, under rules of the commercial law, an evidence of debt or instrument for payment of money, so that the holder's title is independent of any equities existing against the transferrer; to transfer by indorsement.

Negotiated is used as the adjective or past participle in both the above senses of the word; a piece of business or a note may be said to have been negotiated. Negotiable and negotiability involve the second meaning only; they signify that an instrument is capable of being transferred so as to be free from any questions between original parties; the quality of being vendible by commercial indorsement. Negotiation is used in both the senses; it may mean either promoting a bargain or contract involving discussion and effort to bring about meeting of minds, or the act or contract of transferring mercantile paper by indorsement, as distinguished from assignment.

To negotiate means to conclude by bargain, treaty, or agreement. Inhabitants of Palmer *v.* Ferry, 6 *Gray*, 420.

To negotiate a bill of exchange can only mean to transfer it for value. It is a solecism to say that a bill has been negotiated by a payee who has never parted with its ownership and possession. Blakiston *v.* Dudley, 5 *Duer*, 373.

"Negotiable" describes that which is capable of being transferred by assignment; a thing which may be transferred by a sale and indorsement, or delivery. This negotiable quality transfers the debt from the party to whom it was originally owing to the holder, when the instrument is properly indorsed, so as to enable the latter to sue in his own name either the maker of a promissory note, or the acceptor of a bill of exchange, and the other parties to such instruments, such as the drawer of a bill or the indorser of a bill or note, unless the holder has been guilty of laches in giving the required notice. It must, however, be payable to order or bearer, and, at all events, in money only, and not out of any particular fund. Walker *v.* Ocean Bank, 19 *Ind.* 247.

"Negotiable at the bank of Washington" is not a note payable at that bank; "negotiable" does not mean "payable." Beeding *v.* Thornton, 3 *Cranch C. Ct.* 698.

Negotiation, as used by writers upon mercantile law, means the act by which a bill of exchange or promissory note is put into circulation, by being passed by one of the original parties to another person. Walker *v.* Ocean Bank, 19 *Ind.* 247.

NEGOTIORUM GESTIO. A transacting of business. Used in the civil law to denote an intervention in the affairs of another, during his absence, and without authority from him. The person so interfering with the business or property of another is termed *negotiorum gestor*. As there is no contract, such person is entitled to no benefits to himself from his interference, not even compensation or recompense of any kind, except to have expenses reimbursed; but the civil law implies a *quasi* mandate in many cases, for the benefit of the other party, and holds the *negotiorum gestor* to a degree of care and diligence corresponding to that of a mandate in like circumstances.

NEGRO. A negro is a person having in his veins one-sixteenth or more of African blood. State *v.* Chavers, 5 *Jones*, 11.

The word negro means a black man, one descended from the African race, and does not commonly include a mulatto. Felix *v.* State, 18 *Ala.* 720.

NEIGHBORHOOD. Under Iowa Rev., § 3362, requiring for an appraisement of land at judicial sale two householders "of the neighborhood," one residing thirty-five miles from the land is not *prima facie* "of the neighborhood;" the sparsely settled condition of the county in the vicinity must be shown affirmatively to establish his competency to serve. Woods *v.* Cochrane, 38 *Iowa*, 484.

NEMO. No one; no man. The initial word of many Latin phrases and maxims, among which are the following:

Nemo admittendus est inhabilitare seipsum. No one is allowed to incapacitate himself. The law does not permit a man to plead his own incapacity, — to stultify himself. This principle was applied in the common law to prevent a man's availing himself of his own lunacy to avoid his contract; but, at least in the United States, is not now regarded as a rule of general application.

Nemo agit in seipsum. No one acts

against himself. This maxim expresses the principle that a man cannot act against himself, even in a different capacity. Thus, one cannot bring an action against himself; and cannot be judge in a cause to which he is a party. A different translation sometimes given is, no one acts to himself; a man cannot contract with himself.

Nemo allegans suam turpitudinem est audiendus. No one alleging his own infamy is to be heard. A man is not permitted to allege his own discreditable conduct, for his own advantage. This maxim of the civil law, although to some extent adopted into the common law, is, at least in its literal sense, of very limited application. As applied to a party in an action, the principle probably goes no further than the familiar rule that a party shall not be allowed to take any advantage from his own wrong. As applied to testimony, the objection that a witness testifies to his own guilt does not prevent his being heard, though the fact may affect his credit; it is an objection to his credibility only, not to his competency. A common form of the maxim is, *allegans suam turpitudinem non est audiendus*, q. v.

The maxim in question was cited by Lord Mansfield as a maxim of the civil law, in Walton *v.* Shelley, 1 *T. R.* 296, 300, in 1786, which case was afterwards overruled. It has likewise been referred to in some other cases; but the decisions in such of them as can be supported would stand very well without it, — most, if not all, proceeding on the unimpeachable principle that a man shall not be allowed to take advantage of his own guilt, wrong, or fraud. The modern authorities completely negative the existence of any such rule, so far as witnesses are concerned. It is now undoubted law that a witness, although not always bound to answer them, may be asked questions tending to criminate, injure, or degrade him. So, it is the constant practice in criminal cases to receive the evidence of accomplices, who depose to their own guilt as well as to that of the accused; and it is not even indispensable, although customary and advisable, that some material part of the story told by the accomplice should be corroborated by untainted evidence. The cases of Titus Oates and Elizabeth Canning, the chief authorities in favor of the maxim, were expressly overruled by the court of king's bench, in Rex *v.* Teal, 11 *East*, 307. In the subsequent case, also, of Rands *v.* Thomas, 5 *M. & S.* 244, the court held that the objection went only to the credit of the witness. So it is competent for a defendant, who is sued on a contract, to plead and prove that, as between him and the plaintiff, such contract was illegal or immoral, but not that it was merely fraudulent. For although a man may, in a court of justice, acknowledge his own wrong or fraud, it is a principle of law that he shall not be allowed to take advantage of it. *Best Evid.* §§ 545, 546.

The maxim of the Roman law, *allegans suam turpitudinem non est audiendus*, seems to have been transferred into our law, at least to the extent of taking from such testimony, standing alone, all its intrinsic force and efficiency. Gould *v.* Gould, 3 *Story*, 516, 541.

The rule of the civil law which says, *nemo allegans suam turpitudinem est audiendus*, is adopted both in England and in New York; so also in Pennsylvania. Baker *v.* Arnold, 1 *Cai.* 258, 270.

The maxim of the civil law, *nemo allegans suam turpitudinem est audiendus*, however it may be there applied, is not adopted into our law, to the extent of the exclusion of a witness. There are many cases in which witnesses are admitted, although they are not compelled to prove facts which show their own turpitude. Such is the common case of a *particeps criminis*, and many others, where such witnesses are received, and their credit is to be weighed by a jury. Winton *v.* Saidler, 3 *Johns. Cas.* 185, 189.

The maxim is applicable to parties rather than witnesses; and it goes no more to the exclusion of witnesses in civil than in criminal cases. *Ib.* 192. And see Powell *v.* Waters, 17 *Johns.* 176; Bank of Utica *v.* Hillard, 5 *Cow.* 153.

Nemo bis punitur pro eodem delicto. No one is twice punished for the same offence. A principle more broadly stated in the maxim, *nemo debet bis vexari pro una et eadem causa*, q. v.

Nemo cogitur rem suam vendere, etiam justo pretio. No one is bound to sell his own property, even for a just price. A maxim applied to articles offered for sale in markets; the principle being that the owner is not by such offer bound to sell upon tender of a fair price. The maxim has no application as against the sovereign right of eminent domain.

Nemo contra factum suum venire potest. No one can contradict his own deed. This is the principle of estoppel by deed.

This rule, however, must be understood to apply only where an action is brought to enforce rights arising out of the deed, and not collateral to it; and it does not include the case of a mere general recital

in a deed, for such general recital has not the effect of an estoppel. This is on the principle *generale nihil certum implicat*, it being a rule that an estoppel must be certain to every intent, and is not to be taken by argument or inference; and therefore it is only a special recital of a particular fact in a deed which will estop. When a recital is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the instrument. 2 *Best Evid.* § 542.

Nemo dat qui non habet. No one gives who has not. This maxim expresses the principle that one who has no title cannot confer a title; or that no one can convey a better title than he himself has. Another form is, *nemo dat quod non habet*, — no one gives what he has not. See also *Nemo plus juris ad alium transferre potest quam ipse habet.*

Nemo de domo sua extrahi debet. No one should be dragged from his own house. A man should not be taken by force from his own house by the officers of the law. A maxim of the Roman law analogous in its meaning and practical application to the common-law maxim, "every man's house is his castle."

Nemo debet bis vexari pro una et eadem causa. No one should be twice prosecuted for one and the same cause. The principle of this maxim forbids the bringing of a second action for a cause once adjudicated, even though the form of action is different; forbids enforcing a second arrest and holding to bail where the party is already held to bail; and applies to criminal as well as civil prosecutions. When the rule is cited with reference to its application to criminal proceedings, it is frequently quoted in the form, *nemo debet bis puniri pro uno delicto*, — no one should be twice punished for one offence. But the rule is much wider than this form of expression indicates. Not only more than one punishment for the same offence, but more than one indictment is prohibited. *Autrefois acquit* is a defence, as well as *autrefois convict*. Where a person has once been indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted upon it by proof of the facts contained in the second indictment. *Broom Max.* 347. It does not, however, follow, if, from any particular circumstances, a trial has proved abortive, that then the case shall not be again submitted to the consideration of a jury, and determined as right and justice may require.

The form in which the prohibition is expressed in the constitution of the United States is that no person shall be twice "put in jeopardy." See JEOPARDY.

An offence may, however, furnish ground for both a criminal and a civil prosecution. Thus, an assault may be the subject of an indictment for the offence, as against the public peace, and of an action for damages, as compensation for the injury to the individual assaulted.

The maxim is sometimes quoted as *nemo debet bis vexari si constet curiæ quod sit pro una et eadem causa*, — no one ought to be twice prosecuted, if it appear to the court that it is for one and the same cause; but the additional words do not appear to change the meaning.

Nemo debet esse judex in propria causa. No one should be a judge in his own cause. No one can be at once judge and party. Not only one who is technically a party to the suit is disqualified, but every one interested in the result. It has been held that the presence of one interested magistrate will render the court improperly constituted, and vitiate the proceedings, it being no answer to the objection that there was a majority in favor of the decision, without reckoning the vote of the interested party. Reg. *v.* Justices, 6 *Q. B.* 753. See *Re* Underwood, 11 *Com. B.* N. S. 442.

The mere presence on the bench, however, of an interested magistrate during part of the hearing of an appeal, was held not sufficient ground for setting aside an order of sessions made on such hearing, it being expressly shown that he took no part in the hearing, came into court for a different purpose, and did not in any way influence the decision. Regina *v.* Justices, 18 *Q. B.* 421.

It has been laid down that "even an act of parliament made against natural equity, as to make a man a judge in his

own case, is void in itself; for the laws of nature are immutable, and they are the laws of laws." Day *v.* Savadge, *Hobart*, 85, 87.

Other forms of this maxim are: *Nemo potest esse judex in propria causa*, — no one can be a judge in his own cause; *nemo potest esse simul actor et judex*, — no one can be at the same time suitor and judge; *aliquis non debet esse judex in propria causa, quia non potest esse judex et pars*, — one should not be judge in his own cause, because he cannot be judge and party.

Nemo debet esse testis in propria causa. No one should be a witness in his own cause. A person cannot testify in a cause to which he is a party. This rule of the common law has been so greatly modified and impaired by statutory provisions, in both England and the United States, that it can no longer be regarded as a maxim of the law. In most of the United States, one may be a witness in all civil actions to which he is a party, except where the legal representatives of a deceased person are the other party to the action; and in criminal actions, while he cannot be called as a witness against himself, may be a witness for himself.

Nemo est hæres viventis. No one is the heir of the living. A person cannot be the actual heir of another until the death of such other. One may be the heir apparent or heir presumptive of another during the life of the latter; but his expectation of the inheritance is liable to be defeated at any time before the death of the ancestor. Hence (and this is the practical bearing of the maxim) the heir, so long as his ancestor is living, has no estate in the inheritance.

Nemo ex consilio obligatur. No one is bound by his advice. No obligation arises from the mere giving of advice. Thus, in the law of bailments, mere advice does not constitute a mandate. *Story Bailm.* § 155.

Nemo ex proprio dolo consequitur actionem. No one acquires a right of action from his own wrong. A form of the more general maxim, *nullus commodum capere potest de injuria sua propria*, q. v. Another form, less frequently found, is, *nemo ex suo delicto meliorem suam conditionem facere potest*, — no one can improve his condition by his own wrong.

Nemo in propria causa testis esse pebet. No one should be a witness in his own cause. See *Nemo debet esse testis in propria causa.*

Nemo patriam in qua natus est exuere, nec ligeantiæ debitum ejurare possit. No one can renounce the country in which he was born, nor abjure the obligation of allegiance. This maxim of the common law was based on the feudal system. The allegiance of the subject was inseparably incident upon his birth within the dominions of the sovereign, and he could not by any act of his own free himself from his natural allegiance. A like principle is expressed in the English maxim, "once a subject, always a subject." But the right of expatriation has been so much enlarged in recent times by modifications of the principles of international law and by treaties between particular nations, that the application of this maxim has been greatly restricted.

Nemo plus juris ad alium transferre potest quam ipse habet. No one can transfer more right to another than he himself has. A grantor cannot convey to another any greater right, title, or estate than what was vested in him. This general rule applies to transfers of both real and personal property. There are, however, exceptions to it. By a sale in market overt, one wrongfully in possession of a chattel may convey a good title to a *bona fide* purchaser; and, in like manner, the holder of a negotiable instrument who could not himself recover upon it as against the rightful owner may, by transferring it in good faith for value before it is due, make it available in the hands of the assignee, notwithstanding fraud which would have rendered it unavailable in his own hands. Another exception to the rule occurs in connection with the subject of stoppage *in transitu:* the consignor, by indorsing and delivering the bill of lading to the consignee, puts it into the power of the latter to transfer the property in the goods to a *bona fide* purchaser for a valuable consideration, and thus to deprive himself of any right of stoppage

in transitu which he might have had as against the assignee prior to such transfer. *Broom Max.*

Nemo potest contra recordum verificare per patriam. No one can verify by the country against a record. An old rule of common-law practice, signifying that an issue upon matter of record should not be to the country; *i.e.*, was not an issue to be tried by jury.

Nemo potest facere per alium, quod per se non potest. No one can do through another what he cannot do himself. A principle sometimes expressed in the form, *nemo potest facere per obliquum quod non potest facere per directum*, — no one can do indirectly what he cannot directly.

Nemo potest mutare consilium suum, in alterius injuriam. No one can change his purpose to another's injury. This doctrine forbids a party to a contract to refuse to perform it; but, in the usual applications of the maxim, it has reference to public enactments rather than to acts of private individuals. The principle is that laws once determined and acted on should not be changed to the detriment of vested rights, acquired on the faith of existing law. *Trayn. Max.*

Nemo præsumitur alienam posteritatem suæ prætulisse. No one is presumed to have preferred another's offspring to his own. This is a legal presumption which holds with regard to testamentary writings. A will executed by a person who at its date had no issue is held to be revoked by the birth of his posthumous child, or by the birth of a child shortly before his death, the presumption being against the idea of intentional disinheritance. In the language of the maxim, he is not presumed to have preferred others' to his own offspring. *Trayn. Max.*

Nemo præsumitur donare. No one is presumed to give.

Nemo præsumitur esse immemor suæ æternæ salutis, et maxime in articulo mortis. No one is presumed to be forgetful of his own eternal welfare, and especially at the point of death. An act done in contemplation of death is presumed to be done under a sense of the solemnity of the situation, and with sincerity. Even declarations by one dying may have the weight of testimony under oath. Another form of the maxim is, *nemo præsumitur ludere in extremis*, — no one is presumed to trifle at the point of death.

Nemo prohibetur pluribus defensionibus uti. No one is restrained from using several defences.

Nemo prudens punit ut præterita revocentur, sed ut futura præveniantur. No wise man punishes that things done may be revoked, but that future wrongs may be prevented. A maxim expressing the theory upon which the law proceeds in inflicting punishment; not with a view of undoing the offence, or for the sake of avenging it or retaliating upon the offender, but solely for the purpose of preventing future offences.

Nemo punitur pro alieno delicto. No one is punished for the crime of another.

Nemo punitur sine injuria, facto, seu defalto. No one is punished unless for some wrong, act, or default.

Nemo tenetur ad impossibile. No one is bound to do an impossibility. This is another form of stating the principle embodied in the maxim, *lex non cogit ad impossibilia*, q. v. In this form, it has been relied upon as justifying disobedience by judges to a royal command to do some act contrary to law.

Nemo tenetur armare adversarium contra se. No one is bound to arm his adversary against himself. A party to an action cannot be compelled to furnish his adversary with evidence or other means of establishing his cause of action or defence. But this rule of the old common-law practice has been much relaxed by statutory provisions and remedies afforded by courts of equity for compelling a discovery, inspection of documents, or even examination of parties themselves.

Nemo tenetur divinare. No one is bound to divine or to have foreknowledge of a future event. The foresight of an ordinarily prudent man is all that is, in general, required by the law.

Nemo tenetur edere instrumenta contra se. No one is bound to produce writings against himself. A rule of the

Roman law, adhered to in criminal prosecutions, but departed from in civil questions. *Burrill.*

Nemo tenetur informare qui nescit, sed quisquis scire quod informat. No one is bound to give information on a subject as to which he is ignorant; but every one is bound to know that which he gives information about. If one assumes to make statements as to matters about which he has no knowledge, he may be liable for any injury resulting from such statements proving to be false, even though he was under no obligation to furnish the information.

Nemo tenetur jurare in suam turpitudinem. No one is bound to testify to his own baseness. The modern rule is less broad: no one is bound to criminate himself. See *Nemo tenetur seipsum accusare;* also, *Allegans suam turpitudinem non est audiendus.*

Nemo tenetur seipsum accusare. No one is bound to accuse himself. Or, *Nemo tenetur seipsum prodere,* — no one is bound to betray himself. A witness is privileged from answering, where his answer will criminate him, or even tend to criminate him; but the danger to be apprehended must be real and not imaginary. Where, however, the reason for the privilege ceases, the privilege does also; as if the prosecution to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time, or the offence has been pardoned or penalty waived.

It has been, for ages, a principle of jurisprudence in this country, that no man shall be compelled to answer upon oath to a matter by which he may accuse himself of any crime; and, strictly speaking, the rule holds good to the present day. The rule has, however, in modern times been somewhat relaxed, and a difference has been made between private crimes, or those arising out of commerce or the private relations of society, and public crimes, or those relating strictly to the general welfare of the state. *Wharton Max.* 23.

Nemo tenetur seipsum infortuniis et periculis exponere. No one is bound to expose himself to misfortunes and dangers. On this principle, duress by force or even threats of bodily harm may avoid a contract or excuse the performance of a duty or obligation.

Neminem oportet esse sapientiorem legibus. No one ought to be wiser than the laws. Considering the law as the perfection of reason, no one, out of his own private reason, need be wiser than the law. Where a course of action, or mode of discharging a duty or obligation, is prescribed by law, there is no need of going beyond its requirements. He who does so assumes to be wiser than the laws, and must not rely upon them to sustain the validity of his act.

Nemine contradicente. No one opposing. A phrase used of a unanimous vote in a legislative body. Often abbreviated to *nem. con.* The phrase *nemine dissentiente* (abbreviated, *nem. dis.*), signifying no one dissenting, is sometimes used in the same manner; and is the term properly applicable to votes of the English house of lords, as *nemine contradicente* is in the house of commons.

NEPHEW. Nephew and niece. These words mean the immediate descendants, male and female, of the brothers and sisters of the person named; and will ordinarily include grand-nephews and grand-nieces. They may be shown, by circumstances, to include grand-nephews and grand-nieces, and even a great-grand-niece. Cromer *v.* Pinckney, 3 *Barb. Ch.* 466.

Nephew, in a will, may be construed, when consistent with other provisions of the will, as including grand-nephews. Brower *v.* Bowers, 1 *Abb. App. Dec.* 214.

Where a testatrix by will made a residuary bequest to "all my nephews and nieces," the court held that only her own nephews and nieces were included, and not those of her husband. Green's Appeal, 42 *Pa. St.* 25.

NET, NEAT, or NETT. After deductions made; clear of charges; free from expenses.

Net balance. The proceeds of sale, after deducting expenses. Evans *v.* Waln, 71 *Pa. St.* 69.

Net earnings, in a contract giving preferred stockholders in a railroad company a priority in payment out of the net earnings of the road, means what remained of the earnings of the road after deducting expenses incurred by the company in conducting its operations in good faith free from dictation by the preferred stockholders. St. John *v.* Erie R. R. Co., 22 *Wall.* 146.

Net earnings, or income, as used in Pa. Law of 1864, § 2, taxing corporations, does not include dividends. Jones, &c. Manuf'g Co. *v.* Commonwealth, 69 *Pa. St.*

137. And see St. John *v.* Erie Railw. Co., 10 *Blatchf.* 271.

Net income. There is no fair distinction between "income" and "net income." Net is a term used among merchants to designate the quantity, amount, or value of an article or commodity, after all tare and charges are deducted. The income of an estate means nothing more than the profit it will yield after deducting the charges of management, or the rent which may be obtained for the use of it. The rents and profits of an estate, the income, or the net income of it, are all equivalent expressions. Andrews *v.* Boyd, 5 *Me.* 199.

Net profits. This term does not mean what is made over the losses, expenses, and interest on the amount invested. It includes the gain that accrues on the investment, after deducting simply the losses and expenses of the business. If but two or three per cent is realized on the amount put in, the business may be a poor one, but still there would be net profits, even if the legal rate of interest were ten per cent, or greater. Hence a partner, who is by the copartnership articles to receive a certain share of the net profits, has no claim to interest on his contribution of capital. Tutt *v.* Land, 50 *Ga.* 339, 350.

"Net profits," in articles of copartnership, varies in meaning according to the peculiar circumstances of the case. Fuller *v.* Miller, 105 *Mass.* 103.

Net proceeds. Under an agreement, by a manufacturer, to allow another a "third of the net proceeds of what might be made therefrom," it was held, that before dividing the profits the value of the labor and materials was to be deducted. Danlap *v.* O'Dena, 1 *Rich. Eq.* 272.

Net weight. The weight of the contents, the merchandise, &c., within a box or parcel, excluding that of the bag, box, cask, or keg; the weight of an animal taken after it is dressed for market, and excluding that of hide, offal, &c.

NEUTRAL, *adj.* Taking no part in a war; on neither side; impartial or indifferent in a contest. Neutral, *n.*: a third nation, which has no concern with, and should take no part in, a war. Neutrality: the condition of a nation which refrains from taking part in a war between two other powers; the obligation to avoid assisting one belligerent against the other.

NEW. Occurs in some technical phrases.

New assets, in the Mass. administration laws, does not include proceeds of sales of a patent right which was an item in the original inventory. Robinson *v.* Hodge, 117 *Mass.* 222.

New assignment. In many actions the plaintiff, who hath alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances, in such a manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a new or novel assignment. *Jacob.*

New assignment is a form of pleading which sometimes arises from the generality of the declaration, when, the complaint not having been set out with sufficient precision, it becomes necessary, from the evasiveness of the plea, to reassign the cause of action with fresh particulars. It is used when a defendant has pleaded to a different matter from that which constitutes the real subject of complaint, and should be framed so as to distinguish the true ground of action from that which is covered by the plea. As the object of a new assignment is to correct a mistake occasioned by the generality of a declaration, it always occurs in answer to a plea, and is, therefore, in the nature of a replication. *Wharton.*

From the very general terms in which declarations have been allowed to be framed, the defendant is sometimes not sufficiently guided to the real cause of complaint, and is in consequence led to apply his plea to a different matter from that which the plaintiff had in view. In such cases, a plaintiff is obliged to resort, in his replication, to a mode of pleading termed a new assignment, for the purpose of setting the defendant right. A new assignment, as the phrase imports, is an instrument in which the plaintiff assigns afresh his ground of complaint with more certainty and particularity than he had previously done in the declaration, and distinguishes the true ground of complaint from that which the defendant in his plea had assumed it to be. *Brown.*

In former common-law pleading, new assignment signified a species of reply by the plaintiff to a defendant's plea, by which the plaintiff alleged that he brought his action not for the cause supposed by the defendant, but for some other cause to which the plea pleaded was irrelevant.

This might arise in two ways: Where the plaintiff complained of one of several trespasses in a form so general that the declaration was applicable to any of them, and a trespass in respect of which the action was not brought was (by mistake or design) justified by the defendant; or where the defendant pleaded a justification of the trespass complained of, and the plaintiff maintained that there had been an excess beyond what the circumstances justified, or that the trespass was not, in fact, justifiable in the way set up by the defendant. (*Lush Pr.* 483; *Kerr Act. Law.*)

Under the judicature act, 1875 (38 & 39 Vict. ch. 77), by order 19, rule 14, no new

assignment shall hereafter be necessary or used. But every thing which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the "statement of claim." *Mozley & W.*

New trial. A second or other trial, granted because of some objection established to the course or results of the trial first had of a cause. This is often obtained as the result of a reversal on appeal or writ of error. The phrase is more frequently used in reference to the practice of the courts, particularly those holding jury trials, to revise the proceedings and verdict, upon a motion before a single judge, and to grant a new trial upon good ground shown therefor, without putting the aggrieved party to the delay and expense of appeal or error. This forms an important head in procedure.

The grounds for which new trials are chiefly granted, upon these motions, are such as the following: That the judge misdirected the jury on a point of law; that he admitted or rejected evidence improperly; that he improperly discharged the jury; that he refused to amend the record when an amendment ought to have been made; that the defendant did not receive due notice of trial; that the successful party misbehaved to the prejudice of the defeated one; that the jury, or any of them, have misbehaved, as by drawing lots for the verdict; that the damages are excessive; that the damages are too slight; that the verdict was obtained by a surprise; that the witnesses for the prevailing side are manifestly shown to have committed perjury; that the verdict was against the weight of evidence; that new and material evidence has come to light since the trial. And in some jurisdictions a second trial of certain issues may be demanded of right, without impeachment of the first.

There is a jurisdiction of equity to decree a new trial of an action at law, but it is, in modern practice, very sparingly exercised.

A new trial is not quite the same thing as a *venire de novo*, which is a much more ancient procceding. (3 *Bl. Com.* 387, 388; see also 393, note by Coleridge; 3 *Steph. Com.* 558; *Kerr Act. Law.*) *Mozley & W.*

NEWSPAPER. According to the usage of the commercial world, a newspaper is defined to be a publication in numbers, consisting commonly of single sheets, and published at short and stated intervals, conveying intelligence of passing events. 4 *Op. Att.-Gen.* 10.

The "Chicago Legal News," published in Chicago, although devoted principally to legal intelligence, is a newspaper in which notices required by statute or the order of courts may be published, and comes within the Illinois statutory definition of a newspaper, for the publication of legal notices. Kerr *v.* Hitt, 75 *Ill.* 51.

NEXT. When a day or month is mentioned as antecedent or subsequent to a contract, and the precise day or month is not specified, it means the time nearest to the date of the contract. Whitney *v.* Crosby, 3 *Cai.* 89.

Where it was necessary, in order to give a reasonable effect to a statute, the words "1st day of August next" were held to mean next after an event referred to, not next after the date of the act. Couch *v.* Ulster & Orange Branch Turnpike Co., 4 *Johns. Ch.* 26.

Next court. In the act of 1799 of Georgia, means the next court after that to which a bill in equity is returned; and defendant in equity is not obliged to answer at the term to which the bill is returned. Green *v.* McLaren, 7 *Ga.* 107.

A statute providing that the report of referees shall be made to the next court of common pleas to be holden in the county, means the next term of that court held after the making of the award. Durell *v.* Merrill, 1 *Mass.* 411.

Next friend. One who represents a party to a suit who is not *sui juris;* a guardian *ad litem;* a *prochein ami.*

Next of kin. The words next of kin, in a will, mean nearest of kin. Simmons *v.* Gooding, 5 *Ired. Eq.* 382; Redmond *v.* Burroughs, 63 *N. C.* 242.

The words next of kin, used *simpliciter* in a deed or will, mean, not nearest of kindred, but those relatives who share in the estate, according to the statute of distributions, including those claiming *per stirpes* or by representation. Slosson *v.* Lynch, 28 *How. Pr.* 417; 43 *Barb.* 147.

That next of kin cannot be construed so as to include representatives of next of kin, see Clayton *v.* Drake, 17 *Ohio St.* 367.

The rule of the ecclesiastical law determines who are the next of kin. The degrees of kindred are reckoned by the rule of the civil law, where the question is as to the succession to personal estate. Sweezey *v.* Willis, 1 *Bradf.* 495.

In determining who is intended by next of kin, in a statute regulating descents or distribution, the rules of the common law should be followed. Legitimate kindred only are presumed to be intended, unless the context clearly shows illegitimate to be included. McCool *v.* Smith, 1 *Black*, 459.

As used in the Illinois statute of wills, the phrase next of kin to the mother includes illegitimate as well as legitimate children. Rogers *v.* Weller, 5 *Biss.* 166.

The words next of kin are limited in the legal meaning, as in common use, to blood relations, and do not include a husband or a wife, unless accompanied by other words clearly manifesting a purpose to extend their signification. Mere addition of a reference to the statute of distributions is not sufficient therefor. Haraden *v.* Larrabee, 113 *Mass.* 430.

The phrase next of kin, as used in the statutes authorizing action for causing death, does not include husband or wife; but is used to signify relatives of a person who has died intestate. Green *v.* Hudson River R. R. Co., 32 *Barb.* 25, 28.

"Next of kin," in 2 Rev. Stat. 451, § 23, authorizing actions against the next of kin to recover back the assets, means those to whom, under the statute of distributions, the personal estate of the deceased would pass. It embraces all relatives entitled to share in the assets of an intestate estate, and it therefore includes the widow of the deceased. Merchants' Ins. Co. *v.* Hinman, 34 *Barb.* 410.

Where a bequest is left to a man's next of kin, relations, or descendants, to be divided among them, as if he had died intestate, his widow is not included. Hamlin *v.* Osgood, 5 *N. Y. Surr.* 409.

A husband is not of the next of kin of his wife, within the meaning of the statute of distributions. The words next of kin embrace blood relatives only. Peterson *v.* Webb, 4 *Ired. Eq.* 56.

"Next of kin" is a comprehensive term for the relatives of a person dying intestate. It should be understood as comprehending these persons, and no others, who stand named, in order, in the statute of distributions, to take the personalty, — the children, husband or wife, brothers and sisters, &c. In Ohio, read in connection with the statutes of descent and distribution, the phrase includes the husband. Steel *v.* Kurtz, 28 *Ohio St.* 192.

First cousins of the whole and half blood are next of kin in equal degree, and equally entitled to distribution. Edwards *v.* Bucksdale, 2 *Hill Ch.* 416.

Next regular session. This phrase in the Ill. Const. of 1870, art. 4, § 18, prescribing that "each general assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session," means the end of the first fiscal quarter after the adjournment of the second regular session of the general assembly held after the adoption of the constitution. People *v.* Lippincott, 64 *Ill.* 256.

Next term. In Iowa, where, by attachment, the defendant is required to appear and answer at the "next term," the next general term will be intended, unless a special term had been appointed at the time of the issuing of the writ. Wilkie *v.* Jones, 1 *Morr.* 97.

Under a statute requiring an action to be entered at the term of court holden next after its removal to the court, an action was removed by an order passed March 2, which also was the first day of a term. Held, that the next subsequent term, and not the term commencing March 2, was the next term within the meaning of the law. French *v.* Barnard, 9 *Cush.* 403.

The phrase next term, in the act of 1799, meant the term holden after the termination of the circuit court. Moodie *v.* Vandyke, 4 *Yeates*, 512.

NICKNAME. A short name; one *nicked* or cut off for the sake of brevity, without conveying any idea of opprobrium, and frequently evincing the strongest affection or the most perfect familiarity; *e.g.* "the Little Corporal," "Old Hickory," "Rough and Ready." When the question of identity arises, as where a nickname occurs in a will, deed, or bond, it is competent to show that the individual or corporation whose true name was not used was nevertheless meant to be indicated by the nickname or sobriquet. President, &c. *v.* Norwood, *Busb. Eq.* 65.

NIECE. See NEPHEW.

NIENT. A law-French negative.

Nient culpable. Not guilty. The name in law French of the plea of not guilty, either in a criminal prosecution or an action for tort.

Nient dedire. To say nothing; to deny nothing; to suffer judgment by default. The phrase is also used as the name of a clause in a suggestion which states that the fact suggested to the court is not denied.

Nient le fait. Not the deed. The name of a plea denying the having made a deed, or of the general issue formed by such a plea; equivalent in law French to the Latin *non est factum*, q. v.

Nigrum nunquam excedere debet rubrum. The black should never go beyond the red. The text of a statute should never be read in a sense more comprehensive than the rubric, or title. This rule (given by Sir George Mackenzie in his works, vol. ii. p. 139) does not hold in modern law. The rubric is not a part of a statute: it is a mere index, and may be right or wrong. The rubric can never be read as modifying or explaining the text of the statute. But where a clause in a statute is ambiguous and open to construction, the

title and preamble of the act (which in themselves, although parts of the statute, have no practical or operative effect) may be read as throwing light upon the intention of the legislature, and so serve to clear away the ambiguity, and lead to a reasonable and proper construction of that clause which is doubtful. *Trayn. Max.*

NIHIL. Nothing. This word is often contracted to *nil*, particularly in some of the phrases and maxims given below, such as *nil debet*, *nil dicit*.

Various returns made by a sheriff are termed returns of *nihil*. Such are the returns to a writ of *scire facias*, that the bail or the defendants have nothing by which he can make known to them, two such returns being considered equal to a service of the writ; and, in some of the United States, a form of return to a garnishee process, where nothing is found subject to garnishment.

Nihil capiat. That he take nothing. The form of judgment for the defendant in an action at law. If the action was commenced by original writ, in the old practice the form was, *nil capiat per breve*, — that he take nothing by his writ; if commenced by bill, *nil capiat per billam*, — that he take nothing by his bill.

Nihil debet. He owes nothing. The name of the plea of the general issue in an action of debt on simple contract, derived from the emphatic words of the plea in the Latin form.

Nihil dicit. He says nothing. The name of a judgment at common law rendered against a defendant for default of a plea or answer to the plaintiff's declaration.

Nihil facit error nominis, quum de corpore constat. An error of name is of no consequence when the subject intended clearly appears. This is a maxim of the civil law, applicable to persons as well as things. In other forms of citing it, the words *persona* or *re* are used instead of *corpore*. As adopted in the common law, the term *corpore* is held also to include a corporate body. Thus, a misnomer in a grant to a corporation will not avoid the grant, though the right name of the corporation is not used, if the corporation really intended is made apparent. 2 *Kent Com.* 292. See *Falsa demonstratio non nocet*.

Nihil habet. The name of a return by a sheriff upon certain writs, which he has been unable to serve, usually termed, more briefly, a return of *nihil*, q. v.

Nihil in lege intolerabilius est eandem rem diverso jure censeri. Nothing in law is more intolerable than that the same matter should be determined by different rulings of law. Cases similar in their facts should be decided upon the same principles of law.

Nihil perfectum est dum aliquid restat agendum. Nothing is completed while any part remains to be done. A maxim applicable to acts which must be done completely before they can be considered as done at all, as in the performance of an entire contract, which must be complete before the party can avail himself of it.

Nihil præscribitur nisi quod possidetur. Nothing is prescribed except that which is possessed. A prescriptive right acquired by possession or use is limited strictly to that which has been used or possessed. Thus, use and possession of a certain way, as a path or road for foot-passengers only, would not confer a right to use that road for carriages, carts, or driving cattle. There had been no use or possession of that road for such purposes, and therefore no prescriptive right to such use. *Trayn. Max.*

Nihil quod est inconveniens est licitum. Nothing which is inconvenient is lawful. Taken literally, this maxim is erroneous. A thing is not illegal simply because it is inconvenient. This maxim, "which is frequently advanced by Sir E. Coke, must certainly be received with some qualification, and must be understood to mean that, against the introduction or establishing of a particular rule or precedent, inconvenience is a forcible argument." *Trayn. Max.* This principle is better expressed by the maxim, *argumentum ab inconvenienti plurimum valet in lege*, q. v.

Nihil tam naturale est quam unumquod que eodem modo dissolvi quo colligatur. Nothing is so natural, in other words, so consonant to nature's

equity as that each thing should be dissolved by the same means by which it was bound. This maxim originated in the civil law, and is found in the Digest in the form, *nihil tam naturale est, quam eo genere quidque dissolvere quo colligatum est*, — nothing is so natural as to dissolve any thing by the same sort of means by which it was bound. As first adopted in the common law, it was applied to the dissolution of the relation of homage by mutual consent, as it was created by consent. In modern law, the maxim is relied upon to sustain the principle that a contract or obligation can be released or dissolved only by matter of as high nature as the original contract or the act which created the obligation. This rule, however, is subject to exceptions, such as the dissolution of the contract of partnership. See, as to this principle, under a correlative form of stating it, the maxim, *eodem modo quo quid constituitur, eodem modo dissolvitur*. The maxim is also cited as sustaining the rule which excludes parol evidence offered to contradict or vary the terms of written instruments. *Best Evid.* §§ 225, 226.

Other forms of this maxim are: *Nihil est tam naturale quam quidlibet dissolvi eo modo quo ligatur*, — nothing is so natural as that a thing should be dissolved in the same way in which it was bound; *quomodo quid constituitur, eodem modo dissolvetur*, — in whatever manner a thing is constituted, in the same manner it is dissolved.

Nil facit error nominis cum de corpore vel persona constat. An error in name does no harm while it is clear as to the subject or person meant. *Trayn. Max.* This is the same principle as is embodied in the maxim *falsa demonstratio*, &c.

NIL. Nothing. A contracted form of the word *nihil* (q. v.), for phrases and maxims of which *nil* is the initial word.

Nil ligatum. Nothing bound; that is, no obligation has been incurred. *Trayn. Max.*

Nimia subtilitas in jure reprobatur. Too great subtlety in law is disapproved. To this maxim is sometimes added, as a reason, *talis certitudo certitudinem confundit*, — such certainty confounds certainty; the meaning of the whole being that the law discountenances subtle and nice objections tending to obstruct or delay justice; for such nice pretence of certainty only confounds real certainty. See, as to the limits of the principle, the maxim, *apices juris non sunt jura*.

NISI. Unless.

A rule or order of court, which is to become absolute after service, "unless" good cause to the contrary is shown, is termed in common-law practice a rule *nisi*. Such rules or orders are called, in systems of practice under a code or practice act, orders to show cause.

Nisi prius. Unless before. Emphatic words formerly contained in the *venire* for summoning jurors for the trial of causes in the superior courts of law in England, adopted to designate courts or terms of court held for the trial of issues of fact, in civil causes, before a jury, as distinguished from the argument of issues and questions of law before the court in bench.

The origin of the phrase is traced to the provisions of Magna Charta, that the common pleas should be held in one place, and no longer follow the person of the king; but that assises of novel disseisin and assises of *mort d'ancestor*, then the commonest remedies for the recovery of land, should, instead of being tried at Westminster, in the common pleas, be taken into their proper counties before the justices in eyre, who were to be sent into every county once in each year for that purpose. For the convenience of parties, a practice soon grew up of continuing causes in the superior courts, by an entry on the record giving the parties in the cause a day in the higher court, "unless before" that day the justices in eyre should come into the county where the cause of action arose, in which event they had jurisdiction to try the cause. This entry in the record was called the *nisi prius* clause. The practice, having been found very convenient, was confirmed by the statute 13 Edw. I. ch. 30, often called the statute of *nisi prius*, but more generally known as the statute of Westminster 2. This statute, in prescribing the form of the *venire* for summoning jurors, introduced into that writ a condition similar

to the *nisi prius* clause previously entered of record, the sheriff being directed to cause the jurors to come before the justices at Westminster on a day specified, "unless" the justices of assize should, at a certain day and place, come to those parts, &c. The *venire* was later framed in the alternative, directing the jurors to be summoned to come before the justices at Westminster, &c., or before the justices of assize, if they should sooner come to the place of trial, on the day designated. Such a *venire* was termed a *nisi prius* writ; and, the *nisi prius* clause being thus inserted in the *venire*, was thenceforward omitted from the entry of record of the continuance. In modern English practice, under the provisions of the statute 42 Edw. III. ch. 11, this clause was altogether omitted from the *venire*, and inserted in the *distringas*. But, from the continued use of the phrase in this connection, it gradually came to be used, not only as the name of the writ by which a trial by jury of an issue of fact was authorized, of the court in which the trial was had, and of the record used for the trial, but also of the whole system of proceeding, and of the several steps in the proceedings, at such a trial.

Nisi prius court. The *nisi prius* courts are such as are held for the trial of issues of fact before a jury and one presiding judge. It is in these courts that the various disputes and differences which daily arise between man and man, and which form the subject-matter of civil actions, are heard and determined. The circumstance of the *nisi prius* courts taking cognizance of questions of fact only arising between man and man in his civil capacity occasions them to be frequently mentioned in contradistinction to the criminal courts, and to the courts sitting *in banc* or *banco* for the hearing and determining questions of law. Thus, a judge may be said to be sitting *in banc* or at *nisi prius*. In the one case, he would, in company with three other learned judges, be hearing and determining questions of law which have been raised for the opinion of the court; in the other, he would be presiding at the trial of some question of fact which was to be submitted to the consideration of a jury. So, at the assizes, a judge is said to be sitting in the *nisi prius* court as distinguished from the crown court, wherein the trial of prisoners takes place. The same distinction prevails when speaking of the peculiar qualifications of an advocate. Thus, an advocate is frequently said to be a good *nisi prius* lawyer, — meaning thereby that he possesses in an eminent degree that peculiar learning and those mental qualifications more particularly required to attain success in the conduct and management of trials at *nisi prius*. The origin of the phrase, in this application of it, is in the old form of *præcipe* to the sheriff, commanding him to have the persons of the jury at Westminster on such and such a day, "unless sooner" (*nisi prius*) the judge should go down himself to the country to try the case there. *Brown.*

Nisi prius record, or roll. These terms were applied to the record of the cause made up for the use of the court upon a trial at *nisi prius*, containing entries of the pleadings and the issue, so as to constitute a summary of the proceedings in the cause. After the verdict, or other termination of the trial, the *postea* (q. v.) was entered on the back of the *nisi prius* record, and formed the ground for the final entry of judgment.

NOBILE OFFICIUM. Noble privilege; noble duty. In Scotch law, a peculiar jurisdiction of privilege of the court of session, equitable in its nature.

The *nobile officium* of the court of session does not admit of a precise definition. Generally speaking, it may be said to be the equitable power vested in that court, whereby it interposes to modify or abate the rigor of the law, and, to a certain extent, to give aid where no remedy could be had in a court confined to strict law. *Bell Dict.*

NOLLE PROSEQUI. Will not prosecute. The name of an entry on the record, by which the plaintiff or prosecutor declares he will proceed no further in the action or prosecution. In civil cases, a *nolle prosequi* was entered by the plaintiff where he wished to discontinue his action, either wholly or as to one or more of several counts of his declaration, or as to one or more of several defendants. It did not operate as a release, and constituted, of itself, no bar to another action for the same cause. In criminal prosecutions, a *nolle prosequi* is an entry by the prosecuting officer by which he agrees to prosecute no further, either as to the whole indictment, or some particular part of it, or as to one or more of several defendants indicted. The *nolle prosequi* is still in general use in American practice in criminal cases. In most of the states, it may be entered without the consent of the defendant, at least before a jury has been im-

panelled; in some of them, the proceeding is in the discretion of the prosecuting officer, without leave of the court; but, in others, leave of court must first be obtained. It operates as a discharge of the accused, but not as an acquittal, and does not prevent his being again indicted or tried upon the same charge.

A *nolle prosequi* is in the nature of an acknowledgment or undertaking by the plaintiff in an action to forbear to proceed any further either in the action altogether, or as to some part of it, or as to some of the defendants; and is different from a *non pros.*, by which the plaintiff is put out of court with respect to all the defendants. *Brown.*

Nolle prosequi is a formal averment by the plaintiff in an action, that he will not further prosecute his suit as to one or more of the defendants, or as to part of the claim or cause of action. Its effect is to withdraw the cause of action, in respect of which it is entered, from the record. *Mozley & W.*

NOMEN. A name. In general, the name of a person or thing. In a more limited sense, used in Roman law, the name which declared the *gens* to which the person belonged; usually preceded by the *prænomen* and followed by the *cognomen;* to which the *agnomen* was sometimes added. In English law, *nomen* often designates the Christian name, as distinguished from the family name.

Nomen collectivum. A collective name. A name in the singular number, but sometimes to be understood in a plural sense, either as expressing a class or several things of the same kind. Thus, misdemeanor, a word of the singular number, includes several offences, and may be taken as *nomen collectivum.* So heir, in the singular, may include all the heirs of a person.

Nomen generalissimum. A general name. A term of the most comprehensive kind. Thus land is *nomen generalissimum;* and every thing terrestrial, it is said, will pass under that name. 2 *Bl. Com.* 19; 3 *Id.* 172.

Nomen juris. A name of the law; a technical legal term; any term employed in legal phraseology, which has a recognized technical signification, is *nomen juris.*

Nomine pœnæ. In the nature of a penalty.

1. In the civil law. A condition annexed to a legacy or devise, for the purpose of coercing the person to comply with the condition, was said to be *nomine pœnæ.*

2. In the common law. The term is applied to the penalty fixed by a covenant in a lease for non-performance of its conditions; generally, a forfeiture of a certain sum of money.

NOMINAL. Apparent; formal; verbal; the antithesis of real or substantial.

Nominal damages. When plaintiff in an action of tort proves the technical commission of the wrong alleged, but does not appear to have suffered any substantial injury, some damages must be awarded him because he has proved a cause of action; but they can be only trivial, because no loss has been sustained. Such an award is called giving nominal damages. An example is where plaintiff sues for a slander, which he proves, but defendant shows that plaintiff was a person of no reputation. In such a case, the jury will often award only six and a quarter cents damages.

Nominal partner. An apparent partner; one who is held out as being a member of a firm when he has no ownership of the capital nor any interest in the business or profits.

Nominal party, plaintiff, or defendant. One who is joined as party to a suit, in obedience to some technical rule of law, but who has no real interest in the controversy, no substantial right upon which the court is called to pass.

NOMINATE. To propose for an appointment; to designate for an office, a privilege, a living, &c. Nomination: the act of designating or proposing persons for appointment to offices, livings in the church, &c. Also, sometimes, and particularly in the plural, the names or persons designated; as in the expression, the president sent in nominations; the nominations were confirmed.

The rights of nominating and of presenting to a living are distinct, and may reside in different persons. Presentation is the offering a clerk to the bishop. Nomination is the offering a clerk to the person who has the right of presentation. Thus, one seised of an advowson may grant to A and his

heirs that, whenever the church becomes vacant, he will present such a person as A or his heirs shall nominate. He who has the right of nomination is, to most purposes, considered as the patron of the church. *Brown.*

NON. Not; no. The ordinary particle of negation in Latin. Many Latin phrases and maxims, of which *non* is the initial word, used by legal writers, are given below. In English, compound words of negative signification are formed by prefixing *non* to an affirmative word; definitions of some, which have a recognized legal use and meaning, are also given here.

Non acceptavit. He did not accept. The name of a plea in an action of assumpsit against the drawee of a bill of exchange, brought upon an alleged acceptance by him, by which he denies the acceptance.

Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram. Words ought not to be taken to import a false description, which may have effect by way of true limitation. A general rule of construction, importing that the law will not presume error or falsehood in description, where the words may be otherwise applied. See *Falsa demonstratio non nocet.*

Non accrevit infra sex annos. It did not accrue within six years. The name of the plea of the statute of limitations, in actions, the commencement of which is limited to six years, setting up that the cause of action did not accrue within six years. The name is derived from the emphatic words of the plea in the Latin form.

Non aliter a significatione verborum recedi oportet quam quum manifestum est aliud sensisse testatorem. The ordinary meaning of the words ought not to be departed from, except where it appears manifest that the testator understood them in another sense. A rule observed in the construction of wills; which can only, however, be safely applied where it appears manifest from the deed itself that the testator did not use the words employed in their ordinary sense.

Non assumpsit. He did not undertake. The name of the general denial in actions of assumpsit; derived from the emphatic words of the Latin form of the plea.

Non assumpsit infra sex annos. He did not undertake within six years. The name of the plea of the statute of limitations, in the action of assumpsit, setting up that the obligation alleged was not undertaken within six years, the period limited for the commencement of suit.

Non auditur perire volens. He is not heard who is desirous of destroying himself. A person who confesses that he is guilty of a crime, for which he may suffer death, should not be heard. This is a maxim of the civil law.

Non bis in idem. Not twice in the same. This phrase is used in the civil law to signify that no one shall be twice tried for the same offence; a rule similar to that expressed in the constitution of the United States by the prohibition against twice putting in jeopardy any person for the same offence. And see *Nemo bis debet vexari pro una et eadem causa.*

Non cepit. He did not take. The name of the plea of the general issue in an action of replevin, for the wrongful taking of property; which puts in issue both the taking and the detaining them in the place alleged in the declaration, both of which are material. Compare CEPIT ET DETINET. The name is derived from the emphatic words in the Latin form of the plea.

Non compos mentis. Not sound of mind. The opposite of *compos mentis*, q. v. This phrase has obtained a very general meaning, often embracing all kinds of mental derangement, whether arising from lunacy, idiocy, sickness, or alcoholism, old age, &c., as distinguished from the rational condition.

According to the New York authorities, unsoundness of mind, such as constitutes a person *non compos mentis*, is a total incapacity, *quoad hoc*, from whatever cause produced, exhibiting itself in a person previously in the enjoyment of full mental power. The term corresponds with lunatic or insane. It does not include idiots, or the deaf and dumb. *Ordron. Jud. Ins.* 216.

Non compos mentis includes one who has lost memory and understanding by sickness, grief, or other accident. Matter of Baker, 2 *Johns. Ch.* 232.

It imports a total deprivation of sense. Jackson *v.* King, 4 *Cow.* 207.

Non concessit. He did not grant. The name of a plea by a stranger to a grant, in denial of the grant; a stranger to an instrument not being estopped to deny it. Thus, in a suit for infringement of a patent, a denial by the defendant that the plaintiff's letters-patent granted to him the right alleged and claimed by him is a plea of this nature.

Non consentit qui errat. He does not consent who mistakes. A form of the maxim, *non videntur qui errant consentire.*

Non constat. It does not appear; it is not clear; it does not follow. A phrase frequently used in argument, to express dissent from the conclusions of an adverse party; either because an essential fact does not appear, or because an inference drawn does not follow as a necessary conclusion from the premises.

Non culpabilis. Not guilty. The name of the plea of the general issue in actions of trespass, being the emphatic words in the Latin form of the plea. Often abbreviated in the reports to *non cul.* or *non culp.*

Non damnificatus. Not injured; not damnified. The name of the plea in an action of debt on a bond of indemnity, by which the defendant alleges that the plaintiff has received no damage. It is, therefore, a plea of performance.

Non debet cui plus licet, quod minus est non licere. He to whom the greater is lawful should not be debarred from the less as unlawful. This maxim is more frequently quoted in the form, *cui licet quod magnus, non debet quod minus est non licere*, q. v.

Non demisit. He did not demise. The name of a plea in an action of debt for rent on a parol lease, by which the defendant denies the demise alleged in the declaration.

Non detinet. He does not detain. The name of the plea of the general issue in an action of detinue. Also, the name of the plea of the general issue in an action of replevin, brought for the detention only. Compare DETINET. The plea is also proper in actions of debt on a simple contract against executors or administrators. The emphatic words of the Latin forms of each of these pleas are *non detinet.*

Non est factum. Is not his deed. The name of the plea of the general issue in an action of debt on a bond or other specialty; derived from the emphatic words of the Latin form of the plea.

This plea denies that the deed mentioned in the declaration is the defendant's deed; under this the defendant may contend at the trial that the deed was never executed in point of fact. But he cannot, under this plea, deny its validity in point of law; for this should form the subject of a special allegation, showing the circumstance out of which the illegality is supposed to arise. None but the party, his heirs, executors, &c., can plead *non est factum*, for a stranger to a deed cannot; he must say that nothing passed by the deed. *Wharton.*

Non est inventus. Is not found. The name of the return made by a sheriff to a writ commanding him to arrest a party, where the person named is not found within his bailiwick. These were the emphatic words of the Latin form of the return, and have been held sufficient, where there were more persons than one named in the writ, and intended to be included in the return, although the singular form of the phrase was used when good grammar required the plural. 2 *Hill* (*N. Y.*), 598. The initial letters N. E. I. were often used; and, in English, the expression "not found" is the usual form of the return. The return, in whatever form, is indorsed upon the writ, and signed by the sheriff.

Non exemplis sed legibus judicandum. Things are to be judged, not by examples, but by laws. Disputed questions are to be determined according to the principles of law which are applicable, not according to previous decision or precedent. A previous decision or precedent is of no weight or authority, if it can be shown to be erroneous, and therefore, in that event, ought not to be followed. A series of consistent decisions upon one question, however, decide the law upon that question, and therefore, to follow them in any subse-

quent case involving the same matter, would be applying the law itself, not merely following a precedent.

Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur a qua constituuntur. A derogatory clause does not prevent an act from being dissolved by the power which constituted it. By "derogatory clause," here, is meant words in an instrument which purport to deprive the author of his power to change or discharge the act embodied in the instrument; so called because it derogates from his lawful power. *Trayn. Max.* And the principle is, that one's mere declaration that he shall not change his act cannot devest his power. If a testator, in a will, professes to renounce his right to revoke it; or, if a legislature declares in an act that it shall not be repealed, these derogatory clauses are nugatory; they will not prevent the person or authority from afterwards doing what they forbid. A competent contract may well restrict the power, for the future; but not a mere declaration or disavowal of future action.

Non impedivit. He did not disturb; he did not hinder. The name of the plea of the general issue in the action of *quare impedit.*

Non infregit conventionem. He did not break the covenant. The name of a plea in an action of covenant, denying the breach. It is not a plea of the general issue, which is not allowed in that form of action; and, being negative in form, this plea is not good where a breach in the negative form is alleged in the declaration.

Non juridicus. Not juridical. A term applied most frequently to days, the phrase *dies non juridicus* signifying a day on which legal proceedings cannot be had; not a judicial day. See DIES NON JURIDICUS.

The expression *dies non juridicus* means only a day on which process cannot ordinarily issue or be executed or returned, and on which courts do not usually sit. It does not imply that no judicial action can be had on the day thus designated, or that the verdict of a jury may not be received on such a day. State *v.* Ricketts, 74 *N. C.* 187, 193.

Non jus, sed seisina facit stipitem. Not right, but seisin makes a stock. To make a person the root or stock from which inheritance must be derived, a mere right to enter on lands is not enough: actual seisin is necessary. In England, this ancient maxim of the common law was abrogated by statute 3 & 4 Wm. IV., with respect to descent of lands upon deaths after 1833; and it is not regarded as in force in the United States.

Non liquet. It is not clear. Words used in the civil law by *judices* (corresponding to jurors in the common law) who were at a loss how to decide a doubtful cause, and who were thereupon discharged from further consideration of it. The phrase was represented upon the ballots or tablets used in voting by the initial letters N. L.

Non observata forma, infertur adnullatio actus. Where form is not observed, the annulling of the act follows. If a form prescribed by law for the doing of a particular act is not observed, the act is a mere nullity. This is a principle of the law of evidence, applied particularly to the forms provided for preappointed evidence. *Best Evid.* § 61.

Non obstante. Notwithstanding. These words were formerly much used, in both public and private instruments, to preclude in advance any construction contrary to certain declared purposes, especially of the power exercised by the English crown of dispensing with the execution of a particular statute. In such a case, the full expression was *non obstante aliquo statuto in contrarium,* — notwithstanding any statute to the contrary. The dispensation imported a license from the crown to do a thing forbidden by act of parliament, and was termed a *non-obstante.* This dispensing power was abolished by the English bill of rights.

Non obstante veredicto. Notwithstanding the verdict. A judgment for the plaintiff, entered by order of the court in an action at law, where there has been a verdict for the defendant, is termed a judgment *non obstante veredicto.*

For although defendant has obtained a verdict before the jury, yet if the defence put upon the record is very clearly not a legal defence to the action in point of substance, the court, upon motion, will

give the plaintiff leave to sign judgment notwithstanding the verdict. If, however, the plea contains no confession of the cause of action, the proper course is said to be a repleader, and not to give judgment *non obstante*. And a defendant cannot obtain this judgment as of course; he must arrest the judgment. The judgment is interlocutory; after which a writ of inquiry must be executed, and final judgment signed as usual. See *Com. Law Proc. Act*, 1852, § 145; 2 *Chit. Arch. Prac. by Pren.* 1483.

Non omittas. That you do not omit. The name of a writ in old English practice, commanding the sheriff *non omittas propter libertatem*, — that you do not omit on account of any liberty, — that he himself enter into some liberty or franchise, and execute the writ. The necessity for this arose from the practice, when a defendant resided within a liberty which had the execution and return of writs, that the sheriff, on a writ being issued to him, made his mandate to the bailiff of the liberty, directing the latter to execute the writ. If the bailiff did not serve the writ, upon a proper return by the sheriff, the writ of *non omittas* issued, under which the sheriff executed the process. After the statute 2 Wm. IV. ch. 39, a *non omittas* clause was inserted in every process issued to sheriffs, and the necessity for the separate writ no longer existed.

Non omne quod licet honestum. Not every thing which is permitted is honorable. There are some things permitted, or rather not prohibited, by the law, which are not honorable or moral in themselves. The distinction is between those things which a man is not prevented by the law from doing, and those things which cannot be regarded, in ordinary dealing, as fair or just.

Non plevin. A term applied, in old English practice, to a neglect or default of a defendant, within due time, to replevin land taken into the hands of the king, upon a default. By this neglect seisin was lost, until after the statute 9 Edw. III. ch. 2; which enacted that no man should lose his land by *non plevin*.

Non potest adduci exceptio ejusdem rei cujus petitur dissolutio. A plea of the same matter, the dissolution of which is sought, cannot be adduced. In an action brought to defeat, undo, or annul any matter or proceeding, a plea of the same matter, the validity of which is at issue, cannot be set up as a bar.

Non potest quis sine brevi agere. One cannot sue without a writ. It was a fundamental rule of the old common-law practice that every suit must be commenced by a writ.

Non prosequitur. He does not prosecute. The name of an entry and judgment on the part of the defendant in an action at law, where the plaintiff fails to prosecute his action, or any part of it, in due time. Such an entry and judgment terminates the action, with costs to the defendant. The judgment is termed, by abbreviation, judgment of *non pros.*; and the plaintiff is said to be *non pros'd*.

Non quieta movere. Not to disturb what is settled. A rule of policy and conduct, rather than a maxim of the law. It is applied, however, to sustain the legal principle of adhering to precedents, and not unsettling rules already carefully considered and adjudicated; more usually expressed by the phrase *stare decisis*, q. v.

Non quod dictum est, sed quod factum est inspicitur. Not what is said, but what is done, is regarded. A maxim applied to the execution and delivery of deeds and wills.

It is to be observed, however, that, if words are used in the statement or expression of a contract or other deed which have a well-recognized meaning, and which is not modified or altered by usage of trade or universal practice in some particular district, the words used will be read in their ordinary meaning, and neither of the contracting parties will be heard to maintain that he intended to express something else than the meaning which the words usually bear. *Trayn. Max.*

Non refert quid ex æquipollentibus fiat. It matters not what is done with equivalent expressions. Equivalent words may be treated as redundant.

Non refert quid notum sit judici, si notum non sit in forma judicii. It matters not what is known to a judge, if it is not known judicially. *Trayn.*

Questions of fact must be decided upon the evidence, without reference to matters within the personal knowledge of the judge or the jurymen. This is a fundamental principle of the common law.

With the exception of a few matters, which either the law notices judicially, or which are deemed too notorious to require proof, the judge and jury must not decide facts on their personal knowledge; and they should be in a state of legal ignorance of every thing relating to the questions in dispute before them, until established by legal evidence, or legitimate inference from it. It is obvious that if they were allowed to decide on impressions, or on information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public, to know on what grounds the decision proceeded, but it might be founded on common rumor, or other forms of evidence, the very worst, instead of the best. *Best Evid.*

Non sui juris. The opposite of *sui juris* (q. v.); and compare ALIENI JURIS.

Non sum informatus. I am not informed; I have not been instructed. The name of a judgment in a species of default, founded on an averment by the defendant's attorney that he has not been instructed to answer the plaintiff; usually entered in pursuance of a previous agreement between the parties.

Non tenent insimul. They do not hold together. The name of a plea in a suit for partition, by which the defendant denies that the plaintiff or complainant and himself hold the property which is the subject of the suit, as tenants in common.

Non videntur qui errant consentire. They who mistake are not deemed to consent. Assent to an agreement given under a mistake as to material facts does not make a valid contract. Such a contract is not considered as made by consent, and is therefore not a binding contract.

Non-acceptance. Applied to bills of exchange, signifies that acceptance by the drawee was not procured, or given. See ACCEPT.

Non-access. Is used in a technical sense to signify privation of an opportunity of sexual intercourse between husband and wife; denial of cohabitation. See ACCESS.

Non-appearance. The omission of timely and proper appearance; a failure to come into court as a party; default.

Non-feasance. Not doing; the omission of some act, generally of one which ought to have been done. See MALFEASANCE; MISFEASANCE.

Non-conformist. A dissenter from the church of England; a word used more especially of the Protestant bodies who have seceded from the church. 4 *Bl. Com.* 51-59; 2 *Steph. Com.* 706.

Non-joinder. The failure to make some one a party to a suit who should be; omission to unite a proper plaintiff or defendant; also, less frequently, omission of some cause of action from a writ.

Non-juror. A person who, after the abdication of James II., refused to take the oaths to William III. and his successors in the government. *Mozley & W.*

Non-resident. Not a dweller within some jurisdiction mentioned; not an inhabitant of the state in question.

Non-sane. As "sane," when applied to the mind, means whole, sound, in a healthful state, "non-sane" must mean not whole, not sound, not in a healthful state; that is, broken, impaired, shattered, infirm, weak, diseased, unable, either from nature or accident, to perform the rational functions common to man upon the objects presented to it. Den *v.* Vancleve, 5 *N. J. L.* 589, 661.

Non-sane memory means generally unsoundness of mind; and especially an exception to an action, on the ground that the act upon which the action was brought was done by a person who was mad at the time. *Cowel.*

Non sum informatus. A formal answer made by an attorney, who is commanded by the court to say something in defence of his client; by which he is deemed to leave his client undefended, and so judgment passes. *Termes de la Ley.*

Non-user. Omission to assert some privilege, exercise some franchise, exert some right.

NONSUIT. A renunciation or giving up the suit by the plaintiff. This is usually done on his discovering some error or defect, or when he finds that his evidence is not sufficient to maintain his case. The stage of the proceedings at which a plaintiff is nonsuited is usually just before the judge has summed up, but it may be done at any time before the jury have delivered their verdict. It is, however, entirely optional with the plaintiff whether he will submit to a nonsuit or not; he cannot be compelled to do so, but may insist on the case going to the jury, and take his chance of the verdict. In cases, however, where it is doubtful whether the verdict will be a favorable one, it is usual for the plaintiff to elect to

be nonsuited; because, after a nonsuit, he may commence another suit against the defendant for the same cause of action, which may be advisable, if he can come better prepared with evidence, or can otherwise repair the defect which was the cause of his failure; but, if a verdict is once given, and judgment follows, he is barred. *Brown.*

A nonsuit is properly the voluntary act of the plaintiff in deserting his action; and the difference between a *nonsuit* and *non pros.* is, that in the former the plaintiff, being called upon in court to proceed, advisedly abandons the suit, because he sees it is likely to go against him; in the latter, he simply neglects to take the proper steps. A nonsuit may, however, be entered by the court above, on application made by the defendant, pursuant to leave reserved by the judge at the time of trial. And, since the judicature act, 1875, any judgment of nonsuit, unless the court or a judge otherwise directs, is to have the same effect as a judgment upon the merits for the defendant. *Mozley & W.*

NORTHERLY. Is not synonymous with "north." Garvin *v.* Dean, 115 *Mass.* 577; Howard *v.* College of the Holy Cross, 116 *Mass.* 117.

Northly. In a deed of land, where there is no object mentioned to incline the course towards the east or west, is construed to mean due north. Brandt *v.* Ogden, 1 *Johns.* 156.

Northwardly. Means due north. Seaman *v.* Hogeboom, 21 *Barb.* 398, 404.

It was held not synonymous with "north" in Craig *v.* Hawkins, 1 *Bibb*, 53.

Noscitur a sociis. It is known from its associates. The meaning of a word or clause may be discovered from the context. When the meaning of any particular word is doubtful or obscure, or where a particular expression, when taken by itself, is inoperative, the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument: one provision of a deed or other instrument must be construed by the bearing it will have upon another. In the construction of statutes, also, the above rule is applied to ascertain the meaning of a word or clause by reference to the context, and thus to arrive at the intention of the legislature. For examples of the application of this rule, see *Broom Max.* 588. And compare, also, the maxim, *ex antecedentibus et consequentibus fit optima interpretatio.*

NOT. This vernacular negative occurs in a few technical phrases.

Not found. The words indorsed on a bill of indictment by a grand jury, when, for insufficiency of evidence or other reasons, they reject it. The old formula was *ignoramus*, q. v.

Not guilty. The plea by which, in actions of tort, according to the common law, and in prosecutions by indictment, the defendant denies the commission of the tort or offence alleged; traverses the charge as an entirety.

When a defendant pleads not guilty in a criminal charge, he thereby puts himself upon trial, and is entitled to all the chances of escape from conviction which the rules of law afford him in case of the evidence being doubtful, or from any other cause, notwithstanding he may in fact have committed the act which is usually taken to constitute the offence. An accused person is, therefore, in all cases, justified in pleading not guilty to a criminal charge. On the other hand, in civil cases, when a defendant pleads not guilty, he is said to plead the general issue, whereby he is taken to deny the gist of the action. For example, in actions for torts, the plea of not guilty operating as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, it follows that, in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, but will not operate as a denial of the plaintiff's occupation of the house. And again, in an action for slander of a plaintiff in his office, or profession, or trade, the plea of not guilty will operate as a denial of speaking the words, of speaking them maliciously and in the defamatory sense imputed, and with reference to the plaintiff's office, or profession, or trade; but will not operate as a denial of the fact of the plaintiff holding the office, or profession, or trade alleged. See *Smith Act. at Law*, 533.

Not guilty by statute. In English practice, a plea of the general issue by a defendant in a civil action, when he intends to give special matter in evidence by virtue of some act or acts of parliament, in which case he must add the reference to such act or acts, and state whether such acts are public or otherwise. *Rule* 21 *of Trinity Term*, 1853. But, if a defendant so plead, he will not be allowed to plead any other defence, without the leave of the court or a judge. *Jud. Act*, 1875 (38 & 39 Vict. ch. 77), first sched. ord. xix. r. 16. *Mozley & W.*

Not possessed. In English practice, a plea formerly used by the defendant

in an action of trover, to the effect that he was not possessed, at the time of action brought, of the chattels alleged to have been converted by him to his own use.

Not proven. A verdict of a jury in a Scotch criminal trial, to the effect that the guilt of the accused is not made out, though his innocence is not clear. The legal effect of such a verdict is the same as that of a verdict of not guilty; but it leaves the person under moral suspicion.

NOTARY, or **NOTARY PUBLIC.** The title of an officer known in the laws of most of the civilized countries. Anciently, a notary was a scribe or scrivener, who took minutes and made short drafts of writings and instruments, of either a public or private nature, who made the notes or memoranda required by law upon various transactions. In modern times, his more characteristic duty is to attest the genuineness of any deeds or writings, in order to render the same available as evidence of the facts therein contained in any other country. Some of the chief duties of notaries are connected with mercantile transactions, as in noting bills of exchange and promissory notes which have been presented for payment and dishonored, the noting of a foreign bill being, like the notice of dishonor of an inland bill, a necessary preliminary to bringing an action upon it against the indorsers, and (usually) against the drawer. There are many statutory extensions of the powers and duties of notaries, in various jurisdictions.

NOTE, *n.* 1. A brief, informal statement in writing; a memorandum.

2. A negotiable promise for payment of money; a promissory note, or note of hand.

A bequest by a testator of "all his notes of hand" includes promissory notes, properly speaking, single bills, and bonds. The term note of hand is a name given generally by the unlearned, in common, to all those evidences of debts which are verified under the hand of the debtor, and which the creditor keeps. It is not an apt legal term to describe a debt or a judgment, nor is it ever used in that sense as its popular one. Perry *v.* Maxwell, 2 *Dev. Eq.* 488.

Notes. The word notes, in the New York act of April 9, 1850, § 2, relating to the state law reports, comprises the reporter's summary of the points decided by the court, and his statement of the argument of counsel. Abstracts of the pleadings and the statements of facts, which, from the basis of the decisions reported, are neither "notes" nor "references." The "notes and references" intended by the act do not embrace such original notes and references as the reporter may see fit, of his own accord, to superadd to what would otherwise be, in themselves, complete reports of the cases reported by him. Little *v.* Gould, 2 *Blatchf.* 165, 180.

NOTE, *v.* To make a brief written statement; to enter a memorandum, as to note an exception.

NOTICE. 1. Information; means of knowledge. A person is said to be chargeable with notice when information of the fact is communicated to him, or when knowledge of sufficient facts is brought home to him to induce a prudent man in like circumstances to make inquiry, or when a public record exists which the person ought, in law, to consult. In this sense of the word, notice is either actual or constructive. It is termed actual when the person to be affected received knowledge; when his mind was cognizant of the fact. It is called constructive in various cases where the law treats a party as if he had received knowledge of the fact, upon grounds of public policy and general convenience in business, or because of his neglect of some duty of inquiry, or disregard of intimations which, if properly followed, would have procured for him the information. Thus, a principal or an officer is said to have constructive notice of facts made known to his agent or deputy; a purchaser of land has constructive notice of a prior deed of the land by his grantee, which has been duly acknowledged and recorded. Hence "notice" does not of necessity imply actual knowledge; for whatever is sufficient to put a man of ordinary prudence on an inquiry is constructive notice of every thing to which that inquiry would have led.

Notice, in its full legal sense, embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information. Pringle *v.* Phillips, 5 *Sandf.* 157, 165.

What is due notice is not susceptible of a fixed definition. Each case must be con-

strued by its circumstances. Lawrence *v.* Bowman, 1 *McAll.* 419.

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

Notice, in an act requiring that corporations should have same notice as natural persons of proceedings to sell an equity of redemption, was held not to apply to service of process. Vicksburg, &c. R. R. Co. *v.* McCutchen, 52 *Miss.* 645.

2. A notice is a letter or memorandum containing information, apprising a person of a proceeding in which he has an interest, or otherwise giving knowledge of matters of fact, communicated in some proper way, by advertisement, posting, personal service, &c.

Notice, in a statute requiring notice to be given, means notice in writing. Pearson *v.* Lovejoy, 53 *Barb.* 407.

The word imports something written, and given to the party for the purpose of apprising him. Fry *v.* Bennett, 7 *Abb. Pr.* 352, 355.

Where a statute requires service of a notice upon an individual, personal service is meant, unless some other mode is specified. Ruthbun *v.* Acker, 18 *Barb.* 393.

Notice, in a penal statute, was construed to mean personal notice, in St. Louis *v.* Goebel, 32 *Mo.* 295.

Notices known by various names, in great number and variety, are known in legal proceedings. We mention some of the more common ones:

Notice of action. When it is intended to sue certain particular individuals, as in the case of actions against justices of the peace, it is necessary in some jurisdictions to give them notice of the action some time before.

Notice to admit. This is a notice given by either party to a writ, calling on the other to give an admission of the genuineness of a document; and if the party notified refuses, and the document is proved, he is liable to be charged with any special expenses of making the proof, irrespective of the result upon the whole issue.

Notice of appearance. A notice given by defendant to a plaintiff that he will come forward and defend the suit. See APPEARANCE.

Notice of dishonor, or protest. A notice to the drawer of a bill of exchange or indorser of a bill or promissory note, setting forth that the person primarily liable has failed to make payment, and that the holder looks to the person notified. Strictly, protest is necessary only as to foreign bills of exchange; and the expression notice of protest is therefore scarcely applicable to checks, promissory notes, and inland bills; but it is often used as applicable to either.

Notice of lis pendens. A notice that a suit is pending, allowed to be filed as matter of public record, to the end that no person shall deal with defendant, in respect to the subject-matter of the suit, without opportunity to learn the plaintiff's claim. See LIS PENDENS.

Notice of motion. A notice given by either party in a suit, to the other, stating that, on a certain day designated, an application will be made to the court for the order or relief designated.

Notice to plead. A notice which plaintiff, under some systems of practice, must give to a defendant that the latter is required to plead to the declaration or bill; and until this notice has been served, and has expired, no proceeding in the nature of default can take place.

Notice to produce papers. A notice by one party in an action to the other to produce, at the trial, certain documents in his possession. With exceptions as to documents on which the action is founded, counterparts of originals, notices, &c., the general rule is that this notice to produce must have been given a reasonable time before the trial, or the party cannot introduce secondary evidence of the contents of the paper.

Notice to quit. A notice often required to be given by landlord to tenant, or by tenant to landlord, before the tenancy can be terminated. .

Notice of trial. A notice given by plaintiff, or by defendant where he is allowed to be actor, apprising the other party that he intends to bring the cause to trial at the next term of the court.

NOTIFIED. In legal proceedings, and in respect to public matters, the word notified is generally, if not universally, used as importing a notice given by some person whose duty it was to give it, in some manner prescribed, and to some person entitled to receive it, or be notified. Whether a person upon whom a defective notice of a

fact has been served, but who has actual knowledge of the fact, can be considered to have been "notified," see Potwine's Appeal, 31 *Conn.* 381.

NOVA. New.

Nova constitutio futuris formam imponere debet, non præteritis. A new enactment should lay down a rule for the future, not the past. Enactments should be prospective in their operation, not retrospective. A maxim usually cited in the form, *omnis nova constitutio futuris formam imponere debet, non præteritis*, q. v.

Nova statuta. New statutes. An appellation sometimes given to the statutes which have been passed since the beginning of the reign of Edward III. 1 *Steph. Com.* 68.

Novæ narrationes. A collection of pleadings in actions during the reign of Edward III. It consisted principally of declarations, as the title imports; but there were sometimes pleas and the subsequent pleadings. *Reeve Hist. Eng. Law.*

NOVATIO; NOVATION. A term derived from the civil law, but recently of frequent use in English and American reports and treatises, signifying substitution of a new engagement, indebtedness, or obligation, for an old one, as where a renewal note is given.

In the civil law, there are three kinds of novation: 1. Where the debtor and creditor remain the same, but a new debt takes the place of the old one; 2. Where the debt remains the same, but a new debtor is substituted; 3. Where the debt and debtor remain, but a new creditor is substituted. Adams *v.* Power, 48 *Miss.* 451.

Novatio non presumitur. Novation is not presumed.

NOVEL. New.

Novel assignment. See NEW ASSIGNMENT.

Novel disseisin. Originally signified a disseisin committed since the last eyre or circuit of justices. It also signifies a remedy, now obsolete, for such a disseisin, the full name of which remedy was assise of novel disseisin.

NOVELS. Certain books of the Roman law in the nature of supplementary codifications or revisions.

Novellæ constitutiones. An official compilation of various constitutions or laws promulgated by Justinian and his immediate successors, soon after the code of Justinian, in its second and revised edition, and which laws were framed to supply what had not been foreseen in the preceding laws, together with any necessary amendments or alterations, not by revising the code, but by supplements. They belong to various times between 535 and 565 A.D.

Novellæ leonis. Ordinances of the emperor Leo, which were made from the year 887 till the year 893. They changed many rules of the Justinian law. See *Bouvier; Wharton.*

NOVELTY. The patent laws of the United States restrict the privilege to inventions which are "new and useful." Considerable discussion has arisen in the cases as to what constitutes novelty, within the meaning and policy of the law. The question is that of priority of invention, but is more general in its scope and bearing. Priority relates rather to competing claims of two applicants or patentees; novelty, to the general relations of the invention to the existing state of the art. Want of novelty is a sufficient reason why the commissioner should refuse a patent; it may also be shown in the courts to invalidate a patent which has been granted. To warrant the commissioner in issuing a patent, in the first instance, he must be satisfied, upon examining the application, not only that the applicant is, as compared with any other individual claimant, the true and first inventor of the improvement, but also, and beyond this, that the thing claimed is new, as compared with the general extent of human knowledge and skill in the science or art to which it appertains.

Also it is declared to be a defence to an action for infringement to show that the invention patented has been previously described in a public work. Such description is deemed to disprove novelty, and it therefore avoids the patent, whether it was known to the patentee or not. But the description must be one which was prior in point of time to the invention of the plaintiff; and it must be a description sufficiently full and precise to enable a mechanic to construct the improvement; and it must be contained in a printed book. Description in a foreign publication, or a patent completed for the same invention in a foreign country, disprove novelty, and

defeat an application. But the law does not go beyond these limits, in allowing a claim to novelty to be disproved by the fact of usage abroad. An original inventor is entitled to receive a patent for his invention, even though, by reason of such invention having been known in a foreign country, he is not the first inventor, provided he believed himself to be the first inventor, and such foreign invention had not been patented or described in any printed publication.

Mere use of the invention in a foreign country, unaccompanied by a patent or a published description, does not, as does a use in this country, avoid the patent.

The element of novelty is determined by considerations somewhat peculiar, in the case of patents for what are called "combinations;" for a patent may be sustained for a machine embodying a novel combination of several parts, notwithstanding that each of the parts has been used in some machine formerly known. It is no objection to a patent for such a combination that some or even all of the parts have been known and used before. If the combination of them is new, and produces what is a substantially new and useful result, the combination is patentable. But a combination, to be patentable, must be substantially new, not a copy. The parts may have been used before: it is the bringing of them together that constitutes the invention. The combination must differ materially and substantially from former combinations. The invention is not "new," if all the parts of the combination have been applied to a different object before, and they are now only applied to a new object. The claim can only be sustained by establishing novelty, not as to the parts, but as to the combination.

Noverint universi per præsentes. Know all men by these presents. Formal words used at the commencement of deeds of release in the Latin forms. The corresponding English phrase has a more extended use.

NUDE; NUDUS. Bare; naked; without consideration.

Nudum pactum. A naked pact; a promise without consideration. This term is constantly used in modern law to denote a contract which is not supported by a consideration, and therefore will not sustain an action, according to the maxim, *ex nudo pacto non oritur actio*, q. v.

NUISANCE. A word which does not admit of an exhaustive, logical definition: it is a general term for all the practices, avocations, erections, establishments, &c., against which the courts will give relief, although they are not intrinsically criminal, because of their tendency to create annoyance, ill-health, or inconvenience.

Many attempted definitions are too broad; embrace too much. Thus Blackstone says: "Any thing that worketh hurt, inconvenience, or damage." So Burrill: "Any thing that annoys, incommodes, or offends; any thing that renders the enjoyment of life and property uncomfortable." So Brown: "Any thing which unlawfully annoys or does damage to another." War, pestilence, and famine are within these phrases; so is a commercial panic, or a riot of dissatisfied workmen; so is arson, murder, or robbery; so are false imprisonment, malpractice of surgeons, and negligence by railway engineers: yet none of these things come within the proper extension of "nuisance." The notions presented by the term, properly used, seem to be, first, that there is some use of one's property or rights; and, second, that it is carried beyond the limits which a just regard to the welfare of the community or of individuals affected prescribes. An exercise of private rights which the law condemns because excessive and injurious to others, is a nuisance. This, however, is no proper definition, because one must still resort to the decisions to learn what exercise of rights will be condemned for such reasons. We regard the word as indefinable. For the very numerous cases in this country in which particular things have been adjudged to be nuisances or not to be, see *U. S. Dig.* tit. Nuisance.

Nuisances are termed *public*, when they affect the surrounding community generally, when they impair the rights of neighboring residents as members of

the public; and *private*, when they specially injure individuals.

The relief obtainable is generally either abatement (which is the right of persons injured by a nuisance to remove it), injunction, action for damages, or criminal prosecution.

A common nuisance is that offence against the public which consists in doing a thing which tends to the annoyance of all persons, or neglecting to do a thing which the common good requires. 8 *Bac. Abr.* 223, tit. Nuisance; State *v.* Mayor, &c. of Mobile, 5 *Port.* 279, 311.

The term nuisance means, literally, annoyance, — any thing that works hurt, inconvenience, or damage. Miller *v.* Burch, 32 *Tex.* 208.

A nuisance is either public or private. A public or common nuisance is such as affects or interferes with the king's subjects in general; a private nuisance is such as only affects or interferes with an individual in his individual capacity. A private nuisance may be remedied by action, or in some instances by abatement; a public nuisance producing private damage by action, or (making the attorney-general a party) by information in chancery, or by indictment at common law. *Brown.*

A public nuisance cannot be tolerated on the ground that the community may realize some advantages from it. Works *v.* Junction Railroad, 5 *McLean*, 425.

It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly. Bepley *v.* State, 4 *Ind.* 264.

An erection authorized by a constitutional act of the legislature, and constructed within the authority conferred, cannot be adjudged a nuisance. Harris *v.* Thompson, 9 *Barb.* 350; Plant *v.* Long Island R. R. Co., 10 *Id.* 26; Williams *v.* N. Y. Central R. R. Co., 18 *Id.* 222.

The term public nuisance applies only to something occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance. Hinchman *v.* Paterson, &c. R. R. Co., 17 *N. J. Eq.* 75.

Accordingly, if a railroad prove an obstruction to the street, and a public injury, it is not punishable as a nuisance, if constructed as prescribed by the charter. *Ib.* s. p. People *v.* Law, 34 *Barb.* 494; Danville, &c. R. R. Co. *v.* Commonwealth, 73 *Pa. St.* 29.

A work authorized by the legislature — as here, a railroad drawbridge over a navigable river — cannot be adjudged a nuisance, if executed in an authorized manner and place. Easton *v.* N. Y., &c. R. R. Co., 24 *N. J. Eq.* 49.

The character of what would be a nuisance, at common law, is not changed by a statute prohibiting it and giving a new remedy. Wetmore *v.* Tracy, 14 *Wend.* 250.

In general, any serious obstruction to the navigation of a public river is a nuisance. Mayor, &c. of Georgetown *v.* Alexandria Canal Co., 12 *Pet.* 91; People *v.* Vanderbilt, 26 *N. Y.* 287, 298.

A bridge across a navigable stream is not necessarily to be enjoined as a nuisance. Whether it partakes of that character depends upon circumstances, upon the extent to which it interferes with navigation, and the relative importance of the traffic accommodated and interrupted by it. Devoe *v.* Penrose Bridge Co., 3 *Am. Law Reg.* 79.

The fact that a bridge is a great public benefit will not prevent its being a nuisance, if it obstructs navigation. Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 *How.* 518.

A bridge over a navigable stream, erected for public purposes, and producing a public benefit, and leaving a reasonable space for the passage of vessels, is not a nuisance. Mississippi & Missouri R. R. Co. *v.* Ward, 2 *Black*, 485.

A drawbridge over a navigable river, although it unavoidably causes some delay to passing vessels, is not necessarily such an obstruction to the navigation as amounts to a nuisance. The delay will be submitted to from public necessity. Works *v.* Junction Railroad, 5 *McLean*, 425; Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 *How.* 518.

Any excess or irregularity in the exercise of a power, conferred by statute, to maintain a dam in a navigable river is a public nuisance, *pro tanto;* and any person may so far abate the dam as to restore the navigation as saved by the act. Renwick *v.* Morris, 7 *Hill*, 575.

In general, any serious obstruction of a public highway is a nuisance. Harlow *v.* Humiston, 6 *Cow.* 189; Lansing *v.* Smith, 8 *Id.* 146; Dygert *v.* Schenck, 23 *Wend.* 446.

Digging a ditch across a highway, though it be on one's own land, is a nuisance; and if he digs a ditch and builds a bridge over it, he is answerable to any one injured in crossing, if the injury happens without gross negligence of the sufferer. That the ditch and bridge were carefully constructed, &c. is no defence. Dygert *v.* Schenck, 23 *Wend.* 446.

Whether an obstruction of a highway is a nuisance or not, depends upon the question of fact whether the passage is rendered less commodious. State *v.* Mayor, &c. of Mobile, 5 *Port.* 279.

Erecting a fence across a public highway is a public nuisance, and is indictable. State *v.* Miskimmons, 2 *Ind.* 440.

A fence built across a private road is not a public nuisance. Drake *v.* Rogers, 3 *Hill*, 604.

Placing logs in the highway is a nuisance, but not so if they are placed by defendant on his own land adjoining the highway. Harlow *v.* Humiston, 6 *Cow.* 189.

A violation of the duty of turnpike proprietors to keep the road of the width pre-

scribed by its charter, or to keep it safe and passable, is indictable as a nuisance. Waterford & Whitehall Turnpike Co. *v.* People, 9 *Barb.* 161.

An unnecessary encroachment by a railroad corporation upon a turnpike, by placing its track thereon, and failing to restore the turnpike to its original width and former state, is a public nuisance. Moshier *v.* Utica & Schenectady R. R. Co., 8 *Barb.* 427.

A post, tree, or other object, on the margin of a turnpike road, is not *per se* a nuisance, though it may become so by the neglect of the proprietors to keep the road in the condition prescribed by the charter, by which such object becomes an obstruction or inconvenience to the travelling public. Franklin Turnpike Co. *v.* Crockett, 2 *Sneed*, 263.

To leave an area in a city dangerously or inconveniently open, is a nuisance. Chicago City *v.* Robbins, 2 *Black*, 418.

A dangerous opening in a much-frequented street, in a large town, may be, under certain circumstances, a public nuisance. Beatty *v.* Gilmore, 16 *Pa. St.* 463.

Telegraph posts, erected under duly recorded specifications and decisions by the selectmen of a town or council of a city through which the lines of the company pass, are not a public nuisance. Commonwealth *v.* Boston, 97 *Mass.* 555.

To place on the footway of a public street a stall or stand for the sale of fruit is a public nuisance, although the defendant pay rent to the adjoining proprietor. Commonwealth *v.* Wentworth, *Bright.* 318.

To make a noxious trade a nuisance, it is not necessary that it should endanger the health of a neighborhood. If it produces that which is offensive to the senses, and impairs the enjoyment of life and property, this is enough. Catlin *v.* Valentine, 9 *Paige*, 575; Brady *v.* Weeks, 3 *Barb.* 157.

Works of internal improvement, erected by the state for the benefit of the citizens at large, do not become a public nuisance because they may render the neighborhood unhealthy by reason of the obstruction of running water, and the consequent overflowing of the adjacent lands; nor is their character changed by a transfer into the hands of a private corporation, with a requirement that the works shall be kept up for the purposes of their creation. Commonwealth *v.* Reed, 34 *Pa. St* 275.

To constitute conducting a lawful business in a populous city an indictable public nuisance, that it should be prejudicial to health is not necessary; but it is not sufficient that its exercise be merely disagreeable. There must be annoyance, calculated to interrupt the public in the reasonable enjoyment of life or property. See Campbell *v.* Seaman, 63 *N. Y.* 568; Macomber *v.* Nichols, 34 *Mich.* 212.

The trade and occupation of carriage-making, or of a blacksmith, is a lawful and useful one; and a building erected for its exercise is not a nuisance *per se*. But if such building, though erected on the builder's own land, and occupied in the usual manner, be in an improper place, where its use will probably result in an injury to another, this is, of itself, a wrongful act, for which the wrong-doer is responsible to one essentially injured thereby. Whitney *v.* Bartholomew, 21 *Conn.* 213.

An action on the case may be maintained for a nuisance caused by the running of railroad cars and engines, ringing bells, blowing off steam, &c., in the neighborhood of a church or meeting-house on the Sabbath and during public worship, where the noises so caused annoy and molest the congregation worshipping there, so as greatly to depreciate the value of the house, and render the same unfit for religious worship. First Baptist Church *v.* Schenectady, &c. R. R. Co., 5 *Barb.* 79.

A nuisance may consist in attaching steam-power to works already on one's premises, causing such a vibration of adjoining premises and noise as to depreciate their value for rent, although the purpose — *e.g.* sawing marble — was useful and lawful. McKeon *v.* See, 4 *Robt.* 449.

A cemetery, an immigrant depot, a tannery, a gunpowder mill, a railroad, a slaughter-house, a fat-boiling establishment, or the like, is not necessarily a nuisance; but may be adjudged one, upon proof that, under the circumstances and as conducted, it is annoying, injurious, or unwholesome. Begein *v.* Anderson, 28 *Ind.* 79; Musgrove *v.* Catholic Church of St. Louis, 10 *La. Ann.* 431; Phœnix *v.* Commissioners of Emigration, 1 *Abb. Pr.* 466; State *v.* Street Commissioner, 36 *N. J. L.* 283; Wier's Appeal, 74 *Pa. St.* 230; Williams *v.* New York, &c. R. R. Co., 18 *Barb.* 222; Bell *v.* Ohio, &c. R. R. Co., 25 *Pa. St.* 161; Cropsey *v.* Murphy, 1 *Hilt.* 126.

The noise of a steam-engine, under some circumstances, may become a private nuisance; but the use of a steam-engine is not *prima facie* a nuisance on account of the danger to life from explosion. Davidson *v.* Isham, 9 *N. J. Eq.* 186.

Spring-guns, although justifiably placed to protect life or property, yet, if they cause actual danger to passers-by in the street, and if this annoyance to the public is shown to be of a real and substantial nature, are a nuisance. State *v.* Moore, 31 *Conn.* 479.

Upon common-law principles, all erections and establishments adapted to sports or amusements having no useful end, and which are notoriously fitted up and continued with the view to make a profit for the owner, are nuisances; not because the law discourages recreations, or objects to persons voluntarily providing facilities for amusing themselves, but because permanent establishments to make profit out of amusements are usually perverted into nurseries of vice and crime. Such establishments must have licenses from the local

authorities. Tanner *v.* Trustees of Albion, 5 *Hill*, 121.

Acts of mere personal misconduct may be adjudged nuisances where they create sufficient annoyance or injury; such as:

A common scold. United States *v.* Royall, 3 *Cranch C. Ct.* 620; Commonwealth *v.* Mohn, 52 *Pa. St.* 243.

Driving a carriage through the streets of a populous city, in such a manner as to endanger the safety of the inhabitants. United States *v.* Hart, *Pet. C. Ct.* 390.

Collecting together a large crowd in the public highways and streets of a city, by means of "violent and indecent language addressed to persons passing along the highway," thereby obstructing the free passage of the street. Barker *v.* Commonwealth, 19 *Pa. St.* 412.

Profane swearing, if so used as to become specially offensive; for instance, if public, or loud and continued. State *v.* Powell, 70 *N. C.* 67; State *v.* Graham, 3 *Sneed*, 134.

Urinating in a spring near a public highway, from which travellers are accustomed to drink. State *v.* Taylor, 29 *Ind.* 517.

Breaking into plaintiff's dwelling-house, and making a great noise, whereby plaintiff's wife miscarried, &c. Commonwealth *v.* Taylor, 5 *Binn.* 277.

The publication of an advertisement calculated to alarm the public mind unnecessarily. State *v.* Cassidy, 6 *Phila.* 82.

Stationing before the door of an auction-room a man with a placard, "beware of mock auctions," is a private nuisance. Gilbert *v.* Mickle, 4 *Sandf. Ch.* 357.

A person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. Boom *v.* City of Utica, 2 *Barb.* 104.

A house may be a nuisance from being kept in a negligent and filthy state. State *v.* Purse, 4 *McCord*, 472.

A dwelling-house, divided into small apartments, and thickly inhabited, may be abated during the prevalence of cholera, as a nuisance. Meeker *v.* Van Rensselaer, 15 *Wend.* 397.

Keeping ferocious or very noisy animals, though of kinds which are lawful subjects of property, may become a nuisance, by reason of the danger or inconvenience to the vicinage which they cause, under the circumstances. Brill *v.* Flagler, 23 *Wend.* 354; Putnam *v.* Payne, 13 *Johns.* 312; Hinckley *v.* Emerson, 4 *Cow.* 351.

NUL. No; none. A law-French particle of negation, forming a portion of many phrases, among which are the following:

Nul agard. No award. The name of a plea in an action on an arbitration bond, by which the making of any legal award is denied.

Nul disseisin. No disseisin. The name of a plea in a real action, by which the defendant denies that there was any disseisin, forming, thereby, the general issue.

Nul prendra advantage de son tort demesne. No one shall take advantage of his own wrong. A wrongful act is not to be allowed to benefit the wrong-doer. The author of a wrong, who has put a person in a position in which he had no right to put him, cannot take advantage of his own illegal act. Hawkins *v.* Hall, 4 *Myl. & C.* 281. This maxim applies to that very extensive class of cases in which fraud is alleged to have been committed by one of the parties to a transaction, and is relied upon as a defence by the other. It is from the principle set forth therein that the doctrine of estoppel *in pais* is in many cases referable. Where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. The Latin form of the maxim is, *nullus commodum capere potest de injuria sua propria.*

Nul tiel record. No such record. The name of a plea by which is denied the existence of the record on which the action is founded. It is the usual plea in an action of debt upon a matter of record, such as a judgment. The name is also applied to a replication to a plea of matter of record. Such a pleading is proper to introduce matter tending to destroy the validity of the record, which does not contradict the record itself; such as matter showing lack of jurisdiction of the court from which the alleged record emanates.

Nul tiel record is a plea pleaded in that form of trial which is called trial by the record. This form of trial is only used in one particular instance, and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like, and the opposite party pleads *nul tiel record, i.e.* that there is no such matter of record existing; whereupon issue is joined, which is called an issue of *nul tiel record;* and in such cases the court awards a trial by inspection and examination of the record. *Brown.*

Nul tiel record is the proper form of issue

whenever a question arises as to what has judicially taken place in a superior court of record; for the law presumes, that, if it took place, there will remain a record of the proceeding. But if the court is not of record, the issue should be directly upon the fact whether any such proceeding took place, and not upon the existence of any judicial memorial. Dyson *v.* Wood, 3 *Barn. & C.* 449; 2 *Chit. Arch. Prac. by Pren.* 924-931.

Nul tort. No wrong. The name of a plea in a real action, by which the defendant denies that he committed the wrong alleged by the plaintiff, thereby forming a species of general issue.

Nul waste. No waste. The name of a plea in an action of waste, denying the committing of waste, and forming the general issue.

NULL. Destitute of force; inefficacious; inoperative; invalid; void of effect. Nullity: lack of force or efficacy; entire lack of operative qualities; also, particularly in the plural, acts or proceedings which are destitute of efficacy, or are wholly void.

Null and void. It is extraordinary that there should be cases in which it has been held that the words "null and void" should not have their usual meaning; but the word void has certainly been construed as voidable, when the proviso was introduced in favor of the party who did not wish to avoid the instrument. Pease *v.* Morrice, 2 *Ad. & E.* 94.

Nullity of marriage. Besides the power to entertain suits for divorce, which assume that there was a valid marriage which requires to be dissolved, there is a jurisdiction of courts to entertain a suit founded on a complaint that an assumed or pretended marriage never had any validity in law, but, from relationship of parties, incapacity of either, want of compliance with essential requirements, &c., was void from the outset. This is called a suit of nullity of marriage.

The object of a suit instituted for the purpose of having marriages declared null and void is twofold: 1. Where, although the marriage is *ipso facto* null and void, and no declaratory sentence is absolutely necessary, yet it is expedient to procure a sentence, in order to prevent any pernicious consequences which might take place hereafter, from the death of witnesses or other contingencies, rendering the proof of the invalidity of the marriage difficult or impossible. Such is a suit for declaring a second marriage null and void, when at the time of its celebration one of the parties had been previously legally married, and the marriage had not been dissolved by death or judicial sentence; also a suit for the purpose of having a marriage *de facto* declared void by reason of legal invalidity, arising from a non-compliance of the marriage law, or from force. 2. Where the marriage is voidable only; for, should a judicial sentence of the divorce court not be obtained during the lives of both the parties, the marriage cannot, after either's death, be questioned anywhere. *Wharton.*

NULLIUS FILIUS. The son of nobody; a bastard.

NULLUS. No; no person. The initial word of several Latin maxims and phrases, among which are the following:

Nullus commodum capere potest de injuria sua propria. No one shall take advantage of his own wrong. This maxim applies alike whether one seeks to take advantage of his own wrong as a cause of action or as a defence. And the word *injuria* — translated wrong — has a signification in this connection wider than that sometimes given to it. Thus in cases of contracts, where a party binds another to a condition impossible to be performed, or does some act which renders performance of the contract by the other party impossible, this is a wrong on his part from which the law will not permit him to derive advantage. So a creditor who, taking advantage of his insolvent debtor's position, has compelled the debtor to give him an obligation to pay the debt in full, as a condition of his acceding to a composition, or who has taken a fraudulent conveyance of the debtor's goods, to the injury of other creditors, will not be allowed to retain or enforce the advantage thus obtained. For further illustrations of the principle, see *Brown Max.; Whart. Max.*

Nullus videtur dolo facere qui suo jure utitur. No one is deemed to act wrongfully who is exercising a right. Within limits, an exercise of one's right is not an actionable tort, though maliciously done, and injurious, and so of the performance of an act authorized by law. But this is met by another principle: *sic utere tuo ut alienum non lædas*

Nulla bona. No goods. The name of the return made by a sheriff to a writ

of *fieri facias*, where he has found no goods of the party named in the writ whereon to levy. The emphatic words of the return in Latin indorsed upon the writ give the name to the return.

Nulla persona. No person. *Persona* means a being regarded as having rights and being subject to obligations; the word includes not only natural persons, but artificial ones, even cities; and includes those who have not acquired or have forfeited or surrendered their rights, as rebels, infants and (under former laws) married women. *Trayn.*

Nullum arbitrium. No award. The name of a plea in an action on an arbitration bond, for not fulfilling the award, by which the defendant alleges that there was no award.

Nullum exemplum est idem omnibus. No example is the same for all purposes.

Nullum fecerunt arbitrium. They made no submission. The name of a plea in an action upon an obligation for performance of an award, by which the defendant denies that any submission to arbitration was made.

Nullum simile est idem. No like thing is the same; similarity is not identity. Thus, to hold an estate *as* a freehold is not to have a freehold. A check nearly resembles a bill of exchange, but it is not the same thing. So partnership resembles both joint tenancy and tenancy in common, yet it differs from both in important particulars. *Story Partn.* § 90; *Burrill.*

Nullum simile quatuor pedibus currit. No simile runs on four feet. A simile is not to be expected to hold in every thing; to go on all-fours.

Nullum tempus occurrit regi. No time runs against the king; lapse of time does not bar a right of the sovereign. The law determines that there can be no negligence or laches in the sovereign, and therefore no delay in asserting his remedy would bar the king's right. From this doctrine it followed not only that the civil claims of the sovereign sustained no prejudice by lapse of time, but that criminal prosecutions for felonies or misdemeanors might be commenced at any distance of time from the commission of the offence. The doctrine has always been subject to exceptions (*Broom Max.* 65), and has been largely qualified by legislation in modern times; so that not only must indictments and prosecutions for criminal offences be commenced within certain designated periods, but civil rights of action of the government may be lost by failure to prosecute or assert them within a limited time.

In England, several statutes have, from time to time, made inroads, for the public welfare, into this royal prerogative. By statute, the crown is not to sue for lands, tenements, rents, &c., other than liberties and franchises, where the parties have been in possession sixty years before the commencement of the suit; nor to sue after sixty years for any lands, tenements, rents, &c., by reason of any such lands, &c., having been in charge to the crown; nor after adverse possession of lands for twenty years, save by information of intrusion.

To criminal prosecutions at common law, at the suit of the crown, there is no limitation; but, by statute law, proceedings for many minor offences are required to be taken within a limited period.

The maxim under consideration does not apply to lands, &c., purchased by the sovereign out of the privy purse. *Whart. Max.*

Nullum tempus occurrit reipublicæ. No time runs against the commonwealth; lapse of time does not bar a right of the state. It is in this form that the preceding maxim is quoted in the United States, as applicable to rights of action by the government; subject, of course, to similar exceptions and limitations imposed by statutes.

NUMERATA PECUNIA. Money counted; money paid by count.

NUNC PRO TUNC. Now for then. A phrase applied to acts allowed to be done after the time when they should be done, with the same effect as if done at the proper time. Leave of court must be obtained for the doing of things *nunc pro tunc;* but leave is granted freely to subserve the purposes of justice. Even a judgment has been ordered to be entered *nunc pro tunc;* but usually only where delay has arisen from the act of the court itself.

When a party has omitted to take some step which he ought to have taken, — as to file an affidavit or to enter up judgment, for instance, — the court will sometimes permit him to do it after the proper time has passed by for that purpose, and will allow it to have the same effect as if it had been regularly

done; and this, in the case of the affidavit, is called filing it *nunc pro tunc*, or, in the case of entering up judgment, is called entering it *nunc pro tunc; i.e.*, doing it now for (or instead of) then. By rule No. 56 H. T. 1853, all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent to the court or a judge to order a judgment to be entered *nunc pro tunc*. Under this rule, a judgment is frequently allowed to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the court; and usually in the case of the death of a party, *e.g.* if a party dies after special verdict, or after a special case has been stated for the opinion of the court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument and pending the time taken for argument, or while the court is considering its judgment. The power to order judgment to be entered *nunc pro tunc* belongs, at common law, to the courts. *Brown.*

By the judicature act, 1875, 1st sched. ord. xli. r. 2, where any judgment is pronounced by the court or by a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced; and the judgment shall take effect from that date. And, in other cases, by rule No. 3, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry; and the judgment shall take effect from that date. *Mozley & W.*

NUNCUPATIVE WILL. A disposition of property to take effect at death, made by declaration; an oral testament.

In many jurisdictions, soldiers and sailors in actual service are allowed, in view of the exigencies peculiar to their condition, to make wills by word of mouth, under certain restrictions, and subject to after formalities; and these are known as nuncupative wills. Otherwise, wills are required to be in writing.

A nuncupative will can only be a verbal declaration, made in presence of witnesses called on to notice it, and not reduced to writing by direction of the testator. He must intend, at the time, that the verbal declaration so declared shall be his will. Unexecuted verbal instructions for a will, which are intended to be reduced to writing and signed, cannot be proved as a nuncupative will. Matter of Hebden, 20 *N. J. Eq.* 473.

A nuncupative will is an oral testament, declared by a testator *in extremis*, before a sufficient number of witnesses, and afterwards reduced to writing. The Stat. 29 Car. II. ch. 3, restricted nuncupative wills, except when made by mariners at sea and soldiers in actual service. And, by Stat. 1 Vict. ch. 26, § 9, such wills are abolished, subject to a provision that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate, as he might have done before the making of this act. See 11 Geo. IV. & 1 Wm. IV. ch. 20. *Wharton.*

NUNQUAM. Never. The initial word of several Latin phrases and maxims; among them, the following:

Nunquam crescit ex post facto præteriti delicti æstimatio. The quality of a past offence is never aggravated by that which happens subsequently. The character and extent of a crime are determined at the time it is committed; no subsequent act of the offender can enhance it.

Nunquam indebitatus. Never indebted. The name of a plea in an action of *indebitatus assumpsit*, by which the defendant alleges that he is not indebted to the plaintiff. This plea was also substituted in English practice for the plea of *nil debet*, as the general issue in an action of debt on simple contract.

Nunquam præscribitur in falso. There is never a prescription in case of falsehood. No right of prescription can be founded upon that which is criminally false. In this maxim of the civil law, the word *falso* represents what is usually termed the *crimen falsi* (q. v.); and the distinction intended is, that the rule which allows a defective title to be perfected by prescription does not apply where the title is founded *in falso*, as upon forgery of a deed.

NUPER OBIIT. Lately deceased. The name of a writ, in old English practice, issued on behalf of a coheiress, dispossessed by her coparcener of lands of which their common ancestor died seised in fee-simple, to establish a proper division of the lands. The name was derived from the Latin words in a clause of the writ referring to the ancestor who had lately deceased.

NUPTIÆ. Nuptials; marriage.

Nuptiæ secundæ. A second marriage. In the canon law, this term included any marriage subsequent to the first. See BIGAMY.

Nuptias non concubitus sed consensus facit. Not cohabitation, but consent, constitutes marriage. See *Consensus, non concubitus, nuptias facit.*

O.

OATH. A reverent appeal to God, in corroboration of what one says, invoking, according as his declaration is sincere or deceptive, the divine blessing or punishment in another life.

In the vernacular, oaths may be reverent or profane: the word standing alone means either kind. In jurisprudence, when oath is used without some qualifying word, the meaning generally is a reverent oath, — a lawful, formal oath.

In the Scotch law, according to Bell, an oath is an affirmation, or denial, or promise, attested by the name of God. The judicial oath of a witness is in the terms: I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know, or as the same shall be asked of me. This is somewhat more solemn in form (though not different in purport) than the usual American form, as administered by the clerk of court to the witness, who either kisses a copy of the gospels, or raises the right hand towards heaven: You solemnly swear that in this issue joined between, &c., you will tell the truth, the whole truth, and nothing but the truth, so help you God.

Oaths are called *judicial*, when administered under direction of law in some judicial proceeding; and *extra-judicial*, when there is no authority of law for taking them. The penalties of perjury do not attach to false oaths of the latter class.

Official oath generally signifies an oath prescribed to be taken by an officer, before entering on his duties, that he will faithfully discharge them, or pursuing other form of declaration according to the directions of the law applicable. It is more accurately called oath *of office*. Being promissory in their nature, oaths of this class do not subject the affiant to a prosecution for perjury, in case of a subsequent breach of official duty.

As to form of oath, the general principle of modern law is to administer it in whatever form the witness recognizes as binding upon his conscience; as exposing him, in case of a violation, to divine retribution. Accordingly, persons who repudiate all belief in a God and a system of rewards and punishments in a world to come, have, except under enabling statutes of recent times, been considered incompetent to take an oath. A *corporal* oath is one taken by the form of laying the hand on or kissing a copy of the gospels.

The word oath, in many of the statute-books, includes affirmation; that is, a person who declares conscientious scruples against taking any form of oath, may satisfy any statute requiring an oath by making a solemn affirmation; and one who has made an affirmation instead of an oath is (under such statutes) liable to the punishment of perjury, if his affirmation is false, to the same extent as if it had been an oath.

An oath is an affirmation or denial of any thing, before one or more persons who have authority to administer the same, for the discovery and advancement of truth and right, calling God to witness that the testimony is true: therefore, it is termed *sacramentum*, a holy band, or tie. *Jacob.*

An affirmation, negation, or promise, corroborated by the attestation of the Divine Being; an appeal to God. *Wharton.*

A religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth. King *v.* White, 1 *Leach Cr. Cas.* 430.

An oath is a solemn adjuration to God to punish the affiant, if he swears falsely. The sanction of the oath is a belief that the Supreme Being will punish falsehood; and, whether that punishment is administered by remorse of conscience or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood. Blocker *v.* Burness, 2 *Ala.* 354.

The calling upon God to witness that what is said by the person sworn is true, and invoking the divine vengeance upon his head, if what he says is false. Brock *v.* Milligan, 10 *Ohio*, 123.

A statute which requires an oath to be administered "by the court or judge" is complied with, if the oath is administered by the clerk in open court, under the direction of the court, and tested by the clerk. Oaks *v.* Rodgers, 48 *Cal.* 197.

Where tax-payer was asked by assessor, "You take your oath that that is all, do you?" and answered, "Certainly I do," this was held not to be a lawful oath. Arnold *v.* Middletown, 41 *Conn.* 206.

The terms corporal oath and solemn oath are synonymous; and an oath taken with the uplifted hand is properly described by either term in an indictment for perjury. Jackson *v.* State, 1 *Ind.* 184.

OB. On account of; for. Several Latin phrases and maxims, commencing with this word, are more commonly introduced by *in*, q. v. Others are here defined:

Ob continentiam delicti. On account of the contaminating character of the offence. This use of the word *continentia* is probably without classical authority. The phrase expresses a ground for extending a sentence of condemnation, in maritime law, to property not confiscated on other grounds; as in the case of a vessel condemned for carrying despatches for the enemy in time of war, the sentence may be extended to the cargo *ob continentiam delicti*. The Atalanta, 6 *Rob. Adm.* 440.

Ob contingentiam. On account of connection; by reason of similarity. In Scotch law, this phrase expresses a ground for the consolidation of actions.

Ob turpem causam. For a base cause; for an immoral consideration. See the maxim, *Ex turpi causa non oritur actio*.

OBIT. A corruption of the Latin *obiit*, or *obivit*, he died. Signifies a funeral solemnity or office anciently performed for the dead, most commonly when the corpse lay in the church, uninterred; also, the anniversary office. The anniversary of any person's death was called the obit; and to observe such day with prayers and alms or other commemoration was the keeping of the obit. We have not met the word in modern books, except in the compound post-obit, a bond given by an heir expectant, drawn payable after the one from whom he will inherit shall die.

OBITER. By the way; in passing. An opinion of a judge, expressed merely by the way, in course of argument or as illustration, not a decision upon a question arising in the case before him, is termed *obiter dictum*, or simply *dictum* (q. v.), and is sometimes said to be *obiter*.

Such opinions are not considered authoritative; nor would they be received as such by the court, if the question on which they had been expressed came up at a subsequent period for judgment. They are only of importance commensurate with the reputation of the judge delivering them. *Trayn. Max.*

OBJECT. In the phrase "articles or objects charged with an internal tax," used in the act of July 13, 1866, § 9, the word objects is not limited in meaning to objects which are tangible and material in form, as goods or products, but is comprehensive, and includes "gross receipts" of express or stage companies. Wells *v.* Shook, 8 *Blatchf.* 257.

Objects of a power. Where property is settled subject to a power given to any person or persons to appoint the same among a limited class, the members of the class are called the objects of the power. Thus, if a parent has a power to appoint a fund among his children, the children are called the objects of the power. *Mozley & W.*

OBLATIO. Offering; tender. In the civil law, this term denotes a tender by a debtor to his creditor of a sum of money in payment of the debt.

OBLIGATION. 1. In a general sense, a binding; a legal recognition of a person's engagement or undertaking; an enforceable duty, assumed or imposed.

2. In a stricter sense, and much more common in practical jurisprudence, a sealed instrument containing an engagement or promise; it includes bonds and other writings similarly enforceable, but not having the form and all the characteristic incidents of bonds.

An obligation or bond is a deed whereby a person obliges himself, his heirs, executors, and administrators to pay a certain sum of money to another at an appointed day; and he who so obliges himself, or enters into such a bond, is termed the obligor, and the party to whom he so obliges or binds himself is termed the obligee. Such is the use of the term obligation, in English law; but the word is commonly used in a much more general sense in jurisprudence, as denoting any liability incurred by one person to another, in virtue either of an agreement of the parties or their disagreement; and an obligation is said to arise either *ex contractu* or *quasi* so, or *ex delicto*, or *quasi* so.

Again, obligations are of many varieties, — being either, first, perfect (*i.e.* actionable, or *civiles*), according to the laws of the particular country; or, second, imperfect (i.e. *naturales*, or moral), according to the

same laws. And, as a general rule, all systems of law (other than the English law) allow to such latter varieties of obligation a partial legal efficacy, *e.g.* making them good by way of defence to an action at any rate. *Brown.*

Obligation is: 1. Legal or moral duty, as opposed to physical compulsion. 2. A duty incumbent upon an individual, or a specific and limited number of individuals, as opposed to a duty imposed upon the world at large. 3. The right to enforce such a duty (*jus in personam*), as opposed to such a right as that of property (*jus in rem*), which avails against the world at large. (*Austin.*) 4. A bond containing a penalty, with a condition annexed, for the payment of money, performance of covenants, or the like. (*Cowel;* 2 *Bl. Com.* 340.) *Mozley & W.*

Obligation is a bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like: it differs from a bill, which is generally without a penalty or condition, though a bill may be obligatory. Obligations may also be by matter of record, — as statutes and recognizances, to which there are sometimes added defeasances, like the condition of an obligation; but it is when the writing is simple or single, without any defeasance or condition, that it is most properly called an obligation. Before the coming in of the Normans, writings obligatory were made firm with golden crosses, or other small signs or marks. But the Normans began the making such bills and obligations with a print or seal in wax, impressed with every one's special signet, attested by three or four witnesses. In former time, many houses and lands thereto passed by grant and bargain, without scrip, charter, or deed, only with the landlord's sword or helmet, with his horn or cup; and many tenements were demised with a spur or currycomb, with a bow or with an arrow. *Jacob.*

The term writing obligatory, in a pleading, imports a sealed instrument. Clark *v.* Phillips, *Hempst.* 294.

In construing a statute designating the order for payment of debts belonging to different classes, an indebtedness of an attorney for money collected should be considered as embraced in the phrase "bonds or other obligations," and not in the class "open accounts." The technical meaning of obligation is an undertaking under seal; but that sense is sufficiently expressed in the use of "bonds;" and it is not the only meaning of "obligation." It means a tie by which one is bound under the laws of the land to do a given act, such as to pay money; and an indebtedness of an attorney is an obligation, because by the laws of the state his estate is bound to pay whatever sum was collected; while by "open accounts" is meant a debt subject to future adjustment by which it may be reduced or modified. "Obligations," when used in addition to "bonds," must be construed as meaning something different from bonds. Smith *v.* Ellington, 14 *Ga.* 379.

An indebtedness upon a written guaranty should be deemed embraced in the phrase "bonds or other obligations," in such a statute. Obligation, in the most technical sense, means a bond; but, in a more popular sense, and one which may well be attributed to the statute, it signifies the instrument or writing by which a contract is evidenced. The courts of Georgia have held that all written contracts are to be classed as obligations in the distribution of assets. Hargroves *v.* Cooke, 15 *Ga.* 321.

The term obligation, in a statute providing that persons severally liable on the same obligation or instrument, &c., may be included in the same action at the plaintiff's option, should be construed in its legal meaning. Such a provision does not embrace causes of action not evidenced by a writing. In the legal sense, "obligation" means a bond, or other writing in the nature of a bond, such as statutes merchant and staple, recognizances, &c. If the word in such an enactment is taken in its popular signification, of any act by which a person becomes bound to or for another, or to perform something, the statute will embrace every conceivable liability, written or unwritten, by which one man may be bound to another, and in regard to which there may be a several liability; which is not intended, and would be inconvenient. Strong *v.* Wheaton, 38 *Barb.* 616.

"Obligation" is sometimes used as equivalent to "legal liability" or "legal duty." Crandall *v.* Bryan, 15 *How. Pr.* 48.

The words, bonds or other obligations, in a statute, do not include promissory notes. Rippon *v.* Townsend, 1 *Bay*, 445.

Whether an enactment that "an obligation or written contract of several persons shall be joint and several, unless otherwise expressed," can be applied to a negotiable promissory note, see Gale *v.* Myers, 4 *Houst.* 546.

Obligation of contracts. The constitution of the United States restricts the states from passing laws impairing the obligation of contracts, which provision has given rise to several decisions of the supreme court upon what is meant by the obligation of a contract, and particularly what is the line of distinction between the obligation of a contract and the remedy upon it. The general course of decision is, that the obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made: these are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation and right. The obligation meant is not the moral efficacy which inheres and subsists in

the contract itself, *proprio vigore*, but in its enforceability, in the law applicable to the contract. Whatever belongs to the remedy may be altered according to the will of the state, provided the alteration does not impair the enforceability of the contract; and such alterations may apply to past as well as future contracts. But any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. Hence a law which, though addressed to the remedy, in effect deprives a party of *all* remedy, is unconstitutional. Bronson *v.* Kinzie, 1 *How.* 311; Green *v.* Biddle, 8 *Wheat.* 1; Curran *v.* Arkansas, 15 *How.* 304; Walker *v.* Whitehead, 16 *Wall.* 315. The objection to a law, on the ground of its impairing the obligation of a contract, is not allowed to depend, however, on the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Green *v.* Biddle, 8 *Wheat.* 1.

Under these views, state statutes of the following character have been sustained by the supreme court, on the general ground that they effected the remedy, rather than the obligations of contracts: Statutes abolishing imprisonment for debt, or discharging debtors from imprisonment; the right of imprisonment is no part of the contract. Mason *v.* Haile, 12 *Wheat.* 370; Beers *v.* Haughton, 9 *Pet.* 329. Statutes allowing a new trial. Calder *v.* Bull, 3 *Dall.* 386; Baltimore & Susquehanna R. R. Co. *v.* Nesbit, 10 *How.* 395; League *v.* De Young, 11 *Id.* 185. A statute annulling former transactions for fraud, &c., and extending the time within which valid acts may be established by suit. League *v.* De Young, 11 *Id.* 185. A statute giving summary proceedings by trial without a jury, for settling disputes relative to land titles in a specified county, under which act proceedings were had to determine a controversy relative to a title in which both parties claimed under a grant from the state, which grant contained no covenant on the part of the state. Here, the only contract made by the state was a grant without covenant to do or not to do any further act in relation to the land. The act in question did not attempt to take the land from the patentee, but left the grant in full effect; and the proceedings of the commissioners under the law operated upon titles derived under and not adversely to the patent. Jackson *v.* Lamphire, 3 *Pet.* 280. Statutes of limitations. McElmoyle *v.* Cohen, 13 *Pet.* 312; Townsend *v.* Jemison, 9 *How.* 407. A statute prescribing the rule of evidence to govern the mode of proving an instrument; *e.g.*, as to whether the subscribing witnesses need be called. Wilcox *v.* Hunt, 13 *Pet.* 378.

OBLIGEE. The person to whom a bond or written obligation is made; the one entitled (primarily) to enforce it.

OBLIGOR. The person by whom a bond or written obligation is made; the one bound by it.

OBSCENE. Offensive to the general moral sense of the community, by reason of tendency to excite the lustful passions of the sensual; indecent; lewd; prurient. Obscenity: the character or quality of thus offending; also, the offence of disseminating, exhibiting, or uttering, in public, that which is indecent, lewd, or prurient.

Obscene publication. The question whether a publication is obscene does not depend upon its being true or false, but upon its tendency to inflame the passions and debauch society. That which offends modesty, is indecent and lewd, and tends to the creation of lascivious desires, is obscene; and this tendency is matter of fact, to be judged by the jury. A book purporting to give medical instruction may be amenable to the law as an obscene publication; and the testimony of scientific men, that its statements and descriptions are true, will not be a justification, if the jury are satisfied that the purpose and effect of the publication was to

debauch society for the purpose of gain, rather than to benefit the public. See Commonwealth *v.* Landis, 8 *Phila.* 453.

OBSOLETE. Is sometimes applied to laws, to signify that, although never formally repealed, they have become inoperative. The general impression conveyed by it probably is, that great lapse of time, during which a statute has never been enforced, may deprive it of efficacy; but there is good reason to doubt whether from mere lapse of time the courts can assume to discard a statute as no longer binding. The fact that no one has invoked it for however many years scarcely warrants, taken alone, repudiating the statute, when at last it is invoked. There should be some general change in manners and customs; some long and well-settled practice inconsistent with the law; some circumstances co-operating with lapse of time, — to authorize courts to pronounce laws obsolete. A statute making it the duty of the commissioner of pensions to report annually the money paid out in pensions to revolutionary soldiers might well be deemed obsolete when revolutionary soldiers were all dead; a statute directing militia-men to attend for drill, provided with one extra flint to each musket, might well be deemed obsolete when flint-locks went out of use; a statute prescribing that the money in a treasury should be annually weighed would be properly considered obsolete, after the funds came, under authority of a later legal-tender law, to consist of paper money of various denominations. In any such case, a court might well refuse to enforce a penalty prescribed in the statute for failure to obey it, although the statute had never been repealed; on the ground that by change of circumstances, gradually arising through great lapse of time, the performance of the duty had become impracticable or useless, without occasion ever arising to suggest to the legislature the propriety of a formal repeal. But this is probably the true ground and limit of any American doctrine of holding laws obsolete. The case should be a very strong one to warrant a court in setting aside an enactment merely because for many years it had not been administered.

The word obsolete, written on the margin of his will by a testator, but not signed by him nor by any person for him in the mode prescribed by statute, does not operate as a revocation of the will. Lewis *v.* Lewis, 2 *Watts & S.* 455.

OBSTRUCT. The offence of obstructing an officer, or obstructing process, is committed when the officer is prevented by actual violence, or by threatened violence accompanied with the exercise of force or with evident means of employing it, from executing his writ. Mere threats are not enough; and on the other hand actual use of violence is not always necessary. Where an officer having a writ to dispossess a person is about to do so, and the person refuses to surrender and threatens violent resistance which he appears able to make, this constitutes criminal obstruction. United States *v.* Lowry, 2 *Wash.* 169.

The words obstruct, hinder, prevent, in the fugitive slave act of 1850 (9 Stat. at L. 452, § 7), mean substantially the same thing. The statute makes it criminal to knowingly and willingly frustrate or retard the attempted recapture of a fugitive slave by his master, or his representative, whether it be by force, active or passive, or by stratagem. The Christiana Case, 4 *Am. L. J.* 489, 490.

Obstruction is not such a term of art, in railway business, as to require explanation by an expert; as, for instance, whether it includes a hand-car on the track. Nashville, &c. R. R. Co. *v.* Carroll, 6 *Heisk.* 347.

A fence along a highway is an obstruction thereof, if it prevents public travel from being perfectly safe, although it does not extend across the track. Mosher *v.* Vincent, 39 *Iowa*, 607.

"Obstruction," as used in Pa. consolidation act of 1854, § 28, requiring the city councils to keep the navigable waters within Philadelphia free from obstruction, does not include a rock forming part of the natural bed of the river. Snyder *v.* Philadelphia, 78 *Pa. St.* 23.

Obtemperandum est consuetudini rationabili tanquam legi. A reasonable custom is to be obeyed as law.

Obtulit se. Offered himself. The emphatic words of the entry on the record in the common-law practice, where one party to a suit offered himself, and the other did not appear. Sometimes found in the form *optulit*, abbreviated *opp.*

OCCUPANS. Occupant. See OCCUPY.

Occupantis fiunt derelicta. Things abandoned become the property of the first taker. This is the rule of the common law as to abandoned property. As to the principles of maritime law in

regard to vessels and cargoes abandoned at sea, see DERELICT.

OCCUPY. To possess, applied to tangible property; to control, actually, for purposes of enjoyment. Occupancy: possession, actual control, of corporeal property. Occupant; occupier: one who has possession or controls things actual.

In the vernacular, these words are used with a shade of meaning of being within the thing spoken of: one is said to occupy a house or a tract of land, but not often to occupy ordinary chattels. In law, such a distinction is less noticed: occupy may be used like "possess," in respect to chattels; especially in the expression title by occupancy.

Most of the definitions of "occupancy" are narrower than that we give, in this respect, that they limit it to possession of things having no previous owner. Thus Blackstone and most of the dictionaries say, it is the taking possession of those things which before belonged to nobody. We suggest that this limitation arises from confounding "occupancy" with "title by occupancy." The true view seems to be, that occupy and its inflexions may well enough be used in the sense of possess; there cannot, however, well be a title by occupancy, that is, one founded in mere possession, except of things without a prior owner. There is, indeed, fair warrant in the older books, and in those which merely repeat the older books, for giving "occupancy" a very technical meaning as a mode of acquiring property by assuming possession of something which belongs to nobody. And, on the other hand, there is a use of the words in public-land laws, homestead laws, "occupying-claimant" laws, cases on landlord and tenant, and like connections, which seems to require the broader sense of possession, although there is, in most of these uses, a shade of meaning discarding any prior title as a foundation of right. Perhaps both uses or views may be harmonized, by saying that in jurisprudence occupancy or occupation is possession, presented independent of the idea of a chain of title; of any earlier owner. Or, "occupancy" and "occupant" might be used for assuming property which has no owner, and "occupation" and "occupier" for the more general idea of possession. Judge Bouvier's definitions seem partly founded on such a distinction, and there are indications of it in English usage. It does not appear generally drawn in American books.

In international law, occupancy, and still oftener occupation, are used of the possession of and rule over a territory, obtained by conquest or by discovery.

Occupant is he who first gets possession of a thing. An island in the sea, precious stones on the sea-shore, treasure discovered in the ground that has no particular owner, — belong to him who first gets occupation of them. This law of occupancy is founded upon the law of nature, according to which, on the coming of inhabitants to a new country, he who first enters on part of it, and manures it, gains the property; so that it is the actual possession and manurance of the land which was the first cause of occupancy, and, consequently, is to be gained by actual entry. By the ancient law, where a man finds a piece of land which no other possesses, or hath title unto, and enters upon the same, this gains a property, and a title by occupancy: but this manner of gaining property of lands has long since been of no use in England; for lands now possessed without any title are in the crown, and not in him who first enters. But the mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover as plaintiff against all the world, except such as can prove an older and better title in themselves. A man could not, however, be an occupant, but of a void possession; and it was not every possession of a person entering that could make an occupancy, for it must be such as would maintain trespass without farther entry; and there could be no occupancy by any person of what another had a present right to possess; and occupancy must be of things which have natural existence, as of land, &c., and not of rents, advowsons, fairs, markets, tithes, &c., which lie in grant, and are incorporeal rights and estates; and there could not be an occupant of a copyhold estate. Moreover, no right of occupancy was allowed where the king had the reversion of the lands; for the reversioner has an equal right with any other man to enter upon the vacant possession; and where the king's title and a subject's concur, the king's is preferred: against the king, therefore, there could be no prior occupant. The true ground of occupancy is, that anciently all trials of titles were by real actions; therefore, he who had the freehold was one to whom the law had a special regard. Other reasons were, that he who had right paramount might know how to try his action:

and, that the lord might know how to avow for his services, he ought to know who was his tenant; therefore, the law provided there should be a person on whom he should avow. And the subject and object of the occupant are only such things as are capable of occupancy, and not the freehold at all, into which he neither doth nor can enter; but the law casts the freehold immediately upon him who hath made himself occupant of the land, or other real thing whereof he is occupant. The title by general occupancy of estates *pur autre vie* is now universally prevented by 29 Car. II. ch. 3, § 12; 14 Geo. II. ch. 20, § 9; but that of special occupancy by the heir at law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. *Jacob; Tomlins.*

Occupancy is defined to be the "taking possession of those things which before belonged to nobody;" hence the title which a person so acquires in things is called title by occupancy. Occupancy is frequently divided into general and special occupancy. General occupancy occurred where a person was tenant *pur autre vie*, and died during the life of the *cestui que vie*, in which case the person who first entered on the land after his death might lawfully retain possession thereof, as long as the *cestui que vie* lived by right of occupancy, because it belonged to nobody. Special occupancy occurred where an estate was limited to a man and his heirs, or the heirs of his body, during the life of another person, by which the heir or heirs of the body of such grantee might enter on the death of the ancestor, and hold possession as special occupant, having an exclusive right, by the terms of the original contract, to occupy the lands during the residue of the estate granted. General occupancy, in the sense before described, was abolished by the statute of frauds, and the remnant of the estate was made distributable among the creditors (if any), and the surplus remaining over was (after Stat. 14 Geo. II. ch. 20) to be distributed among the next of kin of the deceased grantee. The whole law is now regulated by the Stat. 1 Vict. ch. 26, which re-enacts the provisions of both the last-mentioned statutes relative to occupancy. *Brown.*

"Possession" and "occupancy," when applied to land, are nearly synonymous terms, and may exist through a tenancy. Thus, occupancy of a homestead, such as will satisfy the statute, may be by means other than that of actual residence on the premises, by the widow or child. Walters *v.* People, 21 *Ill.* 178.

Stocking a great pond with a new species of fish, and closing the outlet with a wire screen, constitute an occupancy of the pond for purposes of artificially cultivating and maintaining fish therein, within the meaning of the Massachusetts statute of 1869, § 384. Commonwealth *v.* Weatherhead, 110 *Mass.* 175.

The occupancy required by the statute to protect a homestead may be by a tenant for the benefit of the widow and minor children. Brinkerhoff *v.* Everett, 38 *Ill.* 263.

Occupancy implies the exclusion of every one else from enjoyment. Redfield *v.* Utica & Syracuse R. R. Co., 25 *Barb.* 54.

Settlers and occupants, within the meaning of the pre-emption act of Congress, May 29, 1830 (4 Stat. at L. 420), are those who resided personally on the public land in question, or who occupy and use it. Settlements and occupancy cannot be effected by proxy. 3 *Op. Att.-Gen.* 126. And see Ford *v.* Kennedy, 1 *Oreg.* 166.

By the terms "settlers" and "occupants," used in the pre-emption acts, are meant those who personally cultivate and reside on, or who personally cultivate, use, and manage, the public lands. While actual residence on the land is not indispensable, yet, with cultivation, it is the highest evidence of that personal connection which is indispensable. 3 *Op. Att.-Gen.* 182.

When a mortgagee of a mill property makes an entry, under his mortgage title, upon the premises, and demands of the tenant holding by parol lease from the mortgagor to attorn to him, and the tenant assents to such demand, such entry and attornment are quite sufficient to make the mortgagee the "occupant" of the mill, within Rev. Stats. ch. 116, § 24, which provides that, when a person whose land is flowed by a mill-dam has obtained a verdict for damages caused thereby, he "may maintain an action of assumpsit or debt therefor, in the court of common pleas, against the person who shall own or occupy the mill when the action is brought." Abbott *v.* Upham, 13 *Metc.* (*Mass.*) 172.

"Occupant" and "party in possession," as used by the Nevada legislature in the act in regard to the "selection and sale of lands," &c., are not strictly synonymous. "Occupant" means one dwelling upon and occupying a part of a tract of land; but does not necessarily imply that the party is in possession of the whole. O'Neale *v.* Cleaveland, 3 *Nev.* 485.

"Occupant" implies that a person is in the actual, *bona fide* possession of a lot, as a resident. One who has never had actual possession cannot be an occupant. Hussey *v.* Smith, 1 *Utah T.* 129.

The word occupation, applied to real property, is, ordinarily, equivalent to "possession." In connection with other expressions, it may mean that the party should be living upon the premises; but, standing alone, it is satisfied by actual possession. Lawrence *v.* Fulton, 19 *Cal.* 683; People *v.* Ambrecht, 11 *Abb. Pr.* 97; Mourilyan *v.* Labalmondiere, 1 *El. & E.* 533.

The piling of sawed lumber upon a wharf, to season, and the payment of wharfage therefor, was held not an occupation of

the wharf, within the sense of a statute providing for the taxation of residents, &c., in Stockwell *v.* Brewer, 59 *Me.* 287.

The phrase occupied as a residence, in the statute exempting homesteads, means that the premises shall be the home of the party claiming a homestead right. Temporary absence by the party and his family, without acquiring another home, is not an abandonment of the right. Potts *v.* Davenport, 79 *Ill.* 455.

A warrant directing an officer to search for certain liquors, in a certain dwelling-house, described as the premises occupied by the plaintiff, does not justify a forcible entry into the plaintiff's barn, adjoining his dwelling-house. Jones *v.* Fletcher, 41 *Me.* 254.

"Occupied," as used in a statute exempting from taxation property occupied by a charitable corporation, includes a case of recent purchase followed by diligent present preparations to build and occupy for the purposes of the institution. New England Hospital for Women and Children *v.* City of Boston, 113 *Mass.* 518.

"Occupied," as used in the homestead exemption act, cannot apply to a public street or alley, whereof the debtor owns the fee. Weisbrod *v.* Daenicke, 36 *Wis.* 73.

OCTO TALES. Eight such. The name of a writ, in old English practice, issued to the sheriff, where there is a deficiency of jurors, to summon eight more such men as were summoned upon the first panel.

ODIO ET ATIA. An old writ which was directed to the sheriff to inquire whether a man committed to prison on suspicion of murder was committed on just cause of suspicion, or only out of malice. And if upon an inquisition it were found that he was not guilty, then another writ was directed to the sheriff to bail him. *Termes de la Ley.*

Odiosa et inhonesta non sunt in lege præsumanda. Odious and dishonest acts are not to be presumed in law. This maxim is also found in the form, *odiosa non præsumantur*, — odious things are not presumed.

Fraud and covin are never presumed, even in third parties whose conduct only comes in question collaterally. So the law presumes against vice and immorality, and on this ground presumes strongly in favor of marriage; so that cohabitation and reputation are held to be presumptive evidence of marriage, in all cases, except in prosecutions for bigamy, and in cases where damages are claimed for adultery. *Best Evid.* § 349.

ODHAL. Complete property as opposed to feudal tenure. The transposition of the syllables of odhal makes it allodh, and hence (Blackstone considers) arises the word allod or allodial. All-odh is thus put in contradistinction to fee-odh. 2 *Bl. Com.* 45, note; *Mozley & W.*

OF. An alteration of a bond, correcting it, by substituting in it the word "to" for "of," was held immaterial, both because it did not alter the meaning and construction of the bond, and because the condition was absurd with "of" in the place of "to." United States *v.* Hatch, 1 *Paine*, 336.

A deed, after mentioning in the description of one parcel of land conveyed a county road, conveyed also "all the land situate and lying north of the road aforesaid, bounded north of the heirs of M. C.'s land, and west on" another road distinctly identified. It was held that the words "bounded north of the heirs of M. C.'s land" must be construed as defining the northern boundary of the premises granted; either upon the ground that the word "of," in the clause, was used in its obsolete, but perfectly grammatical, meaning of "by," as in the familiar examples, "seen of men," "led of the spirit," "tempted of the devil;" or upon a presumption that the scrivener inadvertently repeated "of," which he had used correctly in previous boundaries, instead of substituting "on," as he should have done, conformably to a change of expression, and as he properly did in the boundary next following. Hannum *v.* Kingsley, 107 *Mass.* 355.

An averment that a person named is "of" a specified county sufficiently imports that he is a resident of that county. Porter *v.* Miller, 3 *Wend.* 329.

An assignment which directed the assignee to pay the respective debts "of" the creditors of the assignor, was sustained as meaning not the payment of debts owed by the creditors, but payment of debts owed to the creditors by the assignor. Pine *v.* Rikert, 21 *Barb.* 469, 475.

"Of," in a contract to sell goods of another, was held equivalent to "manufactured by another," in Powell *v.* Horton, 2 *Bing. N. Cas.* 668.

Of course. Steps in the proceedings in a suit are said to be taken or allowed as of course, as when they are so much a matter of established routine that no application to the court depending on any argument and judicial deliberation is necessary.

OFFENCE. A breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights; a punishable violation of law; a crime; also, sometimes, a crime of the lesser grade; a misdemeanor.

The most convenient use of this and the affiliated terms is, to employ "crime" and "offence" as equivalent

and interchangeable, and as embracing the whole class of punishable acts; and to employ "felony" and "misdemeanor" to distinguish two divisions, which it is convenient to make, of ordinary crimes or offences, according to their degree of guilt and severity of punishment. But "offence" is often used in the sense of a light crime; a misdemeanor.

Offences are either capital or not capital: capital offences are such as draw down the punishment of death on the offender, such as high treason, felony, &c. Offences not capital are those of a less important nature, and which are generally termed misdemeanors. *Brown.*

"Offence" is any crime, or act of wickedness. The word is used as a genus, comprehending every crime and misdemeanor, or as a species, signifying a crime not indictable, but punishable summarily, or by the forfeiture of a penalty. Offences are divided into three classes; viz., treasons; felonies or major offences; and misdemeanors or minor offences. *Wharton.*

OFFER. Imports a voluntary proposal. Riggs *v.* Denniston, 3 *Johns. Cas.* 198.

There is a distinction between "offering" and "promising" a reward to a voter. State *v.* Harker, 4 *Harr.* 559.

"Offer" and "attempt" are convertible terms. Commonwealth *v.* Harris, 1 *Pa. L. Gaz.* 455.

OFFICE. 1. The elementary idea of the word, when used in its abstract sense, seems to be, a duty of transacting affairs of a certain class, imposed by appointment from a superior authority. The necessary power is implied; but the etymology presents duty as a prominent element.

The most frequent occasions to use the word arise with reference to a duty and power conferred on an individual by the government; and, when this is the connection, "public office" is a usual and more discriminating expression. But a power and duty may exist without immediate grant from government, and may be properly called an office; as the office of executor, the office of steward. Here the individual acts towards legatees or towards tenants in performance of a duty, and in exercise of a power not derived from their consent, but devolved on him by an authority which *quoad hoc* is superior.

Taking the word more particularly with reference to government appointments, the following are accepted definitions:

Where one man hath to do with another's affairs against his will, and without his leave, this is an office, and he who is in it is an officer. *Carth.* 478.

Office is defined to be, a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging whether public, as those of magistrates; or private, as of bailiffs, receivers, or the like. 2 *Bl. Com.* ch. 3, p. 36.

Any man is a public officer who hath any duty concerning the public. And he is not the less a public officer where his authority is confined to narrow limits; for it is the duty of his office, and the nature of that duty, which make him an officer, and not the extent of his authority. *Carth.* 479; *Jacob.*

Office is a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private. The idea of an office clearly embraces the ideas of tenure, duration, fees, or emoluments, rights and powers, as well as that of duty. *Burrill.*

An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties. A clerk appointed by a head of a department, under authority of law, holds an office. United States *v.* Hartwell, 6 *Wall.* 385.

A statute authorizing compensation to all clerks and employes in any public office, includes persons lawfully engaged in the performance of the proper duties of any office, whether serving within the four walls of the building or apartment appropriated to the principal business and records of the office, or acting elsewhere. The word refers to the functions performed, not to the place where the service is rendered. A foreman of the laborers employed on public grounds, if appointed by the commissioner having charge of the grounds, and serving under his direction, is employed "in his office," within the meaning of such a statute, although his duties are performed in the open grounds and parks, and not in the rooms appropriated to the commissioner. Stone *v.* United States, 3 *Ct. of Cl.* 260.

In the abstract, the word office signifies a place of trust. In legal idea, an office is an entity, and may exist, though without an incumbent. People *v.* Stratton, 28 *Cal.* 382.

When an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law,

and exercises functions affecting the public, assigned to him by law, he must be regarded as a public officer. Whether he has been commissioned in form can make no difference; the commission is but evidence of title to the office. A county treasurer is an officer of the county, though he holds no commission from the governor. Bradford *v.* Justices, 33 *Ga.* 332.

An office is a right to exercise a public function or employment. Leach *v.* Cassidy, 23 *Ind.* 449; Waldo *v.* Wallace, 12 *Ind.* 569.

Offices may be classed as civil and military; and civil offices may be classed as political, judicial, and ministerial. Political offices are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer. Judicial, are those which relate to the administration of justice. Ministerial, are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior. It is a general rule that a judicial office cannot be exercised by deputy, while a ministerial one may. Waldo *v.* Wallace, 12 *Ind.* 569.

The right to exercise the duties and take the compensation therefor, of county recorder, is an office; and so is the right to the employment and pay of a county commissioner. Dailey *v.* State *ex rel.* Huffer, 8 *Blackf.* 329.

An office such as legislators are forbidden to create and then enjoy, is any continuing charge or employment or duty, defined by rules prescribed by law and not by contract. Shelby *v.* Alcorn, 36 *Miss.* 273.

The position of an attorney or counsellor is not an office or public trust, within constitutional provisions prescribing an oath of office for officers, generally. The legal meaning of office is an employment on behalf of government, in any station or public trust not transient, occasional, or incidental. In common parlance, the term has a more general signification, as in saying the office of executor or guardian. But in the legal sense, an attorney or counsellor does not hold an office, but exercises a privilege or franchise; and so of physicians. Matter of Oaths, &c., 20 *Johns.* 492; Matter of Dorsey, 7 *Port.* 293, 393; Leigh's Case, 1 *Munf.* 483.

The station of a solicitor of the court of chancery is an office or public trust, within the meaning of the constitution of New York, and the solicitor is to take the oath prescribed by the constitution, and no other. Matter of Wood, 1 *Hopk.* 6. And see Waters *v.* Whittemore, 22 *Barb.* 595.

An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation, which may at any moment be abolished by government or given up by the incumbent. There can be neither property nor contract in it. It is but a deputation for the benefit and advantage of the government. Smith *v.* Mayor, &c. of New York, 37 *N. Y.* 518.

A power to inspect and authorize the purchase of certain articles for public use, conferred upon individuals by name, by act of a legislature, is not an office or public trust. People *v.* Nichols, 52 *N. Y.* 478.

Attorneys are in a certain sense public officers; but they are not within the statute which provides that every office shall become vacant by the incumbent ceasing to be an inhabitant of the state. That statute is applicable to offices filled by election or by appointment by the governor, being intended to provide for filling vacancies, and is manifestly inapplicable to the case of attorneys. Richardson *v.* Brooklyn City & Newtown R. R. Co., 22 *How. Pr.* 368.

The place of medical superintendent of a hospital for the insane, under the act of March 27, 1876 (Ohio L. 80), is an office, within Const. art. 15, § 4. State *v.* Wilson, 29 *Ohio St.* 347.

The office of director in the institution for the education of the deaf and dumb, is an office of honor, within the meaning of the constitution, and is vacated by the holder's accepting the office of marshal under the United States. Dickson *v.* People, 17 *Ill.* 191.

The office of surveyor-general is a lucrative office and that of comptroller an office of profit, under the constitution. People *v.* Whitman, 10 *Cal.* 38.

The right to do the state printing is an office of profit and trust, the sale of which is prohibited by principles of public policy. Ellis *v.* State, 4 *Ind.* 1.

The office of reporter of the supreme court is lucrative, within the meaning of the constitution of Indiana; so also is that of colonel of volunteers, as now existing; and such colonel is not now an officer in the militia; and the acceptance of a colonelcy by the reporter vacates the reportership. Kerr *v.* Jones, 19 *Ind.* 351.

The post of treasurer of a public corporation, such as the city of Wilmington, in Delaware, is not a civil office in the state, within the meaning of the constitutional exclusion of the clergy from civil office. State *v.* Wilmington City Council, 3 *Harr.* 294.

The post of member of the board of water commissioners for the city of St. Louis is a civil office, within the provision of the constitution that "no senator or representative shall be appointed to any civil office under this state," &c. State *v.* Vallé, 41 *Mo.* 29.

Every office is considered public, the duties of which concern the public. Commissioners to lay out a road are public officers. People *v.* Hayes, 7 *How. Pr.* 248; People *v.* Bedell, 2 *Hill*, 196.

2. In a concrete sense, office signifies the designated suite of apartments or established building wherein the func-

tions of a public appointment or employment are chiefly performed; the local head-quarters of an officer.

The word office, as used in Mass. Rev. Sts. ch. 126, — prescribing a punishment of any person who shall "break and enter any office," &c., with intent to commit larceny, — does not include the ordinary passenger-room of a railroad depot. The enclosure usually called the ticket-office, where the books of the railroad corporation are kept, and where the tickets are kept and sold, and where the business of the corporation is transacted, might perhaps with propriety be called an office; but not so of a room appropriated for the use of passengers only. Commonwealth *v.* White, 6 *Cush.* 181.

Office book. Such books for public records as are kept under authority of law, in the offices of government, are called office books.

Office copy. A transcript made under the sanction of a public officer, of any deed, record, or other instrument in writing, deposited in his custody; an authenticated or certified copy of a record, from the proper office.

Office found. This expression arises from the English practice relative to inquests to determine the title to escheated property. See INQUEST.

An inquest of office is an inquiry made by the king's sheriff, coroner, or escheator, by virtue of his office, or of a writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels, &c. The result or determination of this inquest, ascertaining as to the king's right, is termed, briefly, "office found."

Office grant. A designation of a conveyance made by some officer of the law to effect certain purposes, where the owner is either unwilling or unable to execute the requisite deeds to pass the title.

Office hours. That portion of the day during which a public office ought to be open, and the incumbents in attendance, for the transaction of business, are its office hours; they differ according to the law governing the particular office.

Office of judge. A criminal suit in an ecclesiastical court, not being directed to the reparation of a private injury, is regarded as a proceeding emanating from the office of the judge, and may be instituted by the mere motion of the judge. But, in practice, these suits are instituted by private individuals, with the permission of the judge or his surrogate; and the private prosecutor in any such case is, accordingly, said to "promote the office of the judge." *Coote's Eccl. Pract.*

OFFICER. One invested by a superior authority, and particularly by government, with the duty and power of transacting affairs of a certain class; an incumbent of an office; a person designated to execute some function of government.

All persons by authority of law intrusted with the receipt of public money, or through whose hands money due to the public may pass to the treasury, are public officers, within the meaning of the Pa. Stat. 1842, § 1, abolishing imprisonment for debt, except in a proceeding to recover "moneys collected by any public officer;" whether the service be general or special, transient or permanent. Commonwealth *v.* Evans, 74 *Pa. St.* 124.

One who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer. "Office" implies authority to exercise some portion of the sovereign power of the state. Olmstead *v.* Mayor, &c. of N. Y., 42 *N. Y. Superior Ct.* 481.

A person who has been elected, but who has not qualified and entered upon his office, is not an officer. Cordiell *v.* Frizell, 1 *Nev.* 130.

He is not "in office." Jump *v.* Spence, 28 *Md.* 1.

A person who, in pursuance of directions of the secretary of the navy, pays navy and privateer pensions, does not thereby become an officer of the United States. Browne *v.* United States, 1 *Curt. C. Ct.* 15.

A deputy of a United States marshal is an officer of the United States. United States *v.* Tinklepaugh, 3 *Blatchf.* 425.

Any person who executes process on a foreign minister, is to be deemed an officer, under section 25 of the act of 1790, which protects such minister from arrest. United States *v.* Benner, *Baldw.* 234.

"Officer" does not always include a purser in the navy. *Exp.* Randolph, 2 *Brock. Marsh.* 447, 481.

"Officer of election," in an act of congress, does not include the governor of a state. United States *v.* Clayton, 2 *Dill.* 219.

The receiver of a national bank, appointed by the comptroller of the currency, with the concurrence of the secretary of the treasury, is an officer of the United States. Platt *v.* Beach, 2 *Ben.* 303, 316.

Navy agents are officers of the United States. Armstrong *v.* United States, *Gilp.* 399.

The phrase officers and seamen, in a special act for the relief of the widows and orphans of the officers and seamen of a United States vessel, does not include marines serving on such vessel. 8 *Op. Att.-Gen.* 28.

What persons are "officers" or are "employed in the civil service," and as such entitled to increased compensation under the "twenty per cent resolutions" of Congress, — see Twenty per cent Cases, 20 *Wall.* 179; United States *v.* Saunders, 22 *Id.* 492; and many cases in *Ct. of Cl. Rep.*

Clerks in the executive departments of the federal government or of a state are officers. Talbot *v.* United States, 10 *Ct. of Cl.* 426; Vaughn *v.* English, 8 *Cal.* 39.

A special deputy of a sheriff is not an officer. Kavanaugh *v.* State, 41 *Ala.* 399.

Commissioners appointed under some state statute to execute a function designated, have been held not to be officers, in People *v.* Middleton, 28 *Cal.* 603; Bunn *v.* People, 45 *Ill.* 397; Conrey *v.* Copland, 4 *La. Ann.* 307.

Managers of a state lottery were held agents, not officers, of the state, in State *v.* Platt, 4 *Harr.* (*Del.*) 154.

A road supervisor is not such an officer as is referred to in the statute against resisting officers in the service of process or in the discharge of their duties: it contemplates only such officers as are authorized to execute legal process. State *v.* Putnam, 35 *Iowa*, 561.

A police juryman is not an officer, within a clause of the constitution prohibiting a person from holding more than one office. Such clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office. State *v.* Montgomery, 25 *La. Ann.* 138.

A collector of city taxes is a public officer, within the exception in the bankrupt act of 1841, of debts created in consequence of a defalcation as a public officer, from the operation of a discharge. Morse *v.* City of Lowell, 7 *Met.* 152.

A pension officer of the United States is not an officer of the general government, so as to be disqualified under the state constitution from holding an office of trust or profit under this state. Lindsey *v.* Attorney-General, 33 *Miss.* 508.

A representative in the state legislature is a public officer. Morril *v.* Haynes, 2 *N. H.* 246.

The post of health officer of New York is included in the class denominated in the constitution of that state as "other officers." Matter of Whiting, *Edm. Sel. Cas.* 498.

The superintendent or principal keeper of the Albany county penitentiary is a public officer. Porter *v.* Pillsbury, 11 *How. Pr.* 240.

A board of supervisors of a county is not a public officer, within the meaning of a statute giving double costs when the action is against a public officer. People *v.* Supervisors of Niagara, 50 *How. Pr.* 353.

The licensing of a merchant under the United States revenue laws does not render him an officer of the United States, or not liable to a state tax. State *v.* Bell, *Phill. L.*, 76.

That the public printer is not within the constitutional provisions relative to officers, see Brown *v.* Turner, 70 *N. C.* 93.

A supervisor of roads, in Ohio, is an officer, within a statute punishing resistance to a sheriff, constable, or other officer. Woodworth *v.* State, 26 *Ohio St.* 196.

County commissioners are officers, within a statute restricting the powers of the several courts to punish for contempts. Hummel's Case, 9 *Watts*, 416.

County commissioners are not officers of the commonwealth, within code of 1860, § 48, prohibiting bribery. Commonwealth *v.* Neely, 3 *Pittsb.* 527.

A provision for the punishment of embezzlement committed by any cashier "or other officer" of a bank, includes embezzlement committed by the president and directors of a bank. Commonwealth *v.* Wyman, 8 *Met.* 247.

The treasurer of a railroad company is an officer, &c., of an incorporated company, within a statute relative to embezzlement by such persons. Commonwealth *v.* Tuckerman, 10 *Gray*, 173.

That the trustees of a corporation — *e.g.* a building society — are not embraced within the term officers, see Second Manhattan Build. Assoc. *v.* Hayes, 2 *Keyes*, 192.

Trustees of an insurance company, one of whom was its solicitor, and the other its travelling agent, — the by-laws not designating these as officers, — were held not to be officers, in Commonwealth *v.* Christian, 9 *Phila.* 556.

That a professor is not properly an officer of the college corporation, but a person in its employment, see Union County *v.* James, 21 *Pa. St.* 525; *Exp.* Bailey, 27 *Eng. L. & Eq.* 190.

A professor in a state university is not a public officer in such a sense as to prevent his employment as such by the board of regents of the university, from creating a contract relative between himself and the board. Butler *v.* Board of Regent, 32 *Wis.* 124.

Officer de facto, or de jure. One is said to be officer *de jure* when he is clothed with full legal right and title to the office, though circumstances, such as the intrusion of an unauthorized person, may prevent his performance of the duties. He is officer *de facto* when, having some apparent authority or color of title, he is actually in the possession of the office, exercising its functions,

though his appointment or election may be irregular, or the validity of his title disputed and undetermined. Usually both these characters concur. But when one person exercises the office *de facto*, while another is entitled *de jure*, the general rule is, that, as far as the public and the rights of third persons are concerned, acts of the officer *de facto* will be sustained.

An officer *de facto* is one who has the reputation of being the officer he assumes to be, and who holds the office under some power having color of authority to appoint. Such color may be given by a statute that is repugnant to the constitution. *Exp.* Strang, 21 *Ohio St.* 610, 618. See DE FACTO.

OFFICIAL, *adj.* Connected with a public appointment; pertaining to the functions of an office. Official, *n.*: an officer; a person holding some appointment, or clothed with some authority or station.

Official, or official principal. In the ancient civil law, signified him who was the minister of, or attendant upon, a magistrate. In the canon law, it is especially taken for him to whom any bishop doth generally commit the charge of his spiritual jurisdiction; and, in this sense, the chancellor of the diocese is called the official principal. The word official also includes the depnty of an archdeacon. (*Cowel; Toml.*) *Mozley & W.*

This was the name given to a judicial officer of high ecclesiastical authority in the province of Canterbury, and who was appointed by and under the authority of the archbishop. He had extraordinary jurisdiction in almost all ecclesiastical causes; and all appeals from bishops and their surrogates were directed to him. His ordinary jurisdiction extended throughout the whole province of Canterbury; but his citation, except upon appeal or by letters of request, was confined to his own diocese. This office was at one time separate from that of the dean of the arches' court of Canterbury; but as the two courts met at the same place (formerly Bow Church, *de Arcubus*), and the dean of the arches frequently performed the duties of the official, in the course of time they became, and ever afterwards remained, completely united and identified. The court of the official principal was, therefore, called the arches' court of Canterbury. *Brown.*

Official assignee. The officers of the bankruptcy courts appointed by the lord chancellor under the bankruptcy acts for the purpose of acting, as occasion might require, with other assignees in the winding up of bankrupts' estates, were called, in English practice, the official assignees. They are now, as regards the country districts, abolished; in London, they are attached to the new bankruptcy court, to perform such duties as the lord chancellor shall direct.

Official liquidator. A person appointed by the judge in chancery, in whose court a joint-stock company is being wound up, to bring and defend suits and actions in the name of the company, and generally to do all things necessary for winding up the affairs of the company, and distributing its assets. 3 *Steph. Com.* 24.

Official managers. Persons appointed to superintend the winding up of insolvent companies, under the control of the court of chancery. *Wharton.*

Official referees. Officers to be attached to the supreme court of judicature, to whom the trial of any question in any civil proceeding, before the high court of justice or before the court of appeal, may be referred by the court or by any divisional court or by a judge for inquiry and report. *Stat.* 36 *&* 37 *Vict.* ch. 66, §§ 56, 83; *Mozley & W.*

Official use. An active use before the statnte of uses, which imposed some duty on the legal owner or feoffee to uses; as a conveyance to A, with directions for him to sell the estate, and distribute the proceeds amongst B, C, and D. To enable A to perform this duty, he had the legal possession of the estate to be sold. *Wharton.*

Officina justitiæ. The workshop of justice. A name given to the English chancery, as the place from which all writs issued under the great seal, returnable into the courts of law.

Officium nemini debet esse damnosum. An office ought to be injurious to no one; no one should suffer from the discharge of a duty. This is a maxim of the Scotch law, applicable, to a great extent, to private as well as public obligations and duties. *Bell Dict.*

OHIO. The word Ohio, when occurring alone, in surveys of lands, in point of fact bordering upon the Ohio river, was held to mean the Ohio river; and to import, in their connection, that the boundary lines laid down ran to that stream. Madison *v.* Ilildreth, 2 *Ind.* 274.

OLD NATURA BREVIUM. A law tract, published in the reign of Edward III., containing those writs which were then most in use, and annexing to each a short comment concerning their nature and the application of them, with their various properties, effects, and consequences. This work became a model to Fitzherbert, in writing his "Natura Brevium." (*Reeve Hist. Eng. Law.*) *Mozley & W.*

OLD STYLE. The mode of reckoning time, which prevailed in England and

the colonies, until the year 1752. This method differed from the New Style, at present in use, in the following particulars:

The year commenced on the 25th of March, instead of, as now, on the 1st of January. The reckoning of days was based on the assumption that every fourth year was a leap-year, — no exception being admitted, — instead of, as now, but ninety-seven leap-years in four hundred years. The rules for determining the feast of Easter were far less elaborate than at present.

So far as regards the second point above mentioned, the Old Style is still observed in Russia.

The New Style was introduced into the British dominions by Stat. 24 Geo. II. ch. 23, passed in 1751, and came into operation in the following year. It had prevailed in the Roman Catholic countries of the continent since the year 1582. *Mozley & W.*

Old; new. In a statute giving power to lay out new roads and discontinue old ones, "old" does not necessarily mean long-existing, ancient. The phrase "a new road," in such a statute, means a road newly laid out where one was not; and the words "old road" are the opposite thereto, and mean one laid out and used, whether long ago or of more recent date. Some user is necessary to warrant discontinuing a road as "old." People *v.* Griswold, 67 *N. Y.* 59.

OLERON. A small island off the coast of France; anciently of commercial importance.

Laws of Oleron. The title of a highly valued compilation of maritime laws, promulgated some time during the twelfth century, from Oleron. For a translation, see 1 *Pet. Adm. Appx.* and for fuller accounts, see 1 *Pars. Shipp. & Adm.* 9; 3 *Kent*, 12.

OLOGRAPH. An instrument wholly written by the person from whom it emanates. Olographic: written by the hand of the signer; autographic.

OMNIS. All; every; every thing.

Omnis definitio in jure periculosa est. Every definition in law is dangerous. This seems to be an abridgment of the maxim of the civil law, *omnis definitio in jure civili periculosa est, parvum est enim ut non subverti posset*, — every definition in the civil law is dangerous, for there is very little that cannot be overthrown. As every rule of the law is liable to some exception, and the least difference in the facts of the case may render its application useless, an exact definition either of the meaning or application of a statute or rule of law is dangerous, and should not be attempted.

In the general case, it is impossible to foresee all the circumstances or cases to which a law may be applied; and to define or limit its application beforehand might result in great injustice. Such definition is farther dangerous, because cases may arise in which the definition might require to be modified or abandoned, and in this way decisions on the same law, not conformed to each other, might be pronounced. The definition referred to in the maxim is that which is put upon a law by the judge administering it, and does not refer to definition or limitation imposed by the law itself. All laws, so far as this is possible, ought to be so defined as to leave no doubt as to the cases to which they are applicable; and, farther, so as to leave the application of the law as little as possible to the discretion or opinion of the judge. See *Optima est lex quæ minimum relinquit arbitrio judicis.*

Omnis exceptio est ipsa quoque regula. Every exception is itself also a rule. Compare *Exceptio probat regulam.*

Omnis innovatio plus novitate perturbat quam utilitate prodest. Every innovation disturbs more by its novelty than it benefits by its utility. This expresses, not a settled principle of the law, but rather a frequent argument against changes in the law, upon the consideration that an innovation may occasion more harm and derangement of order by its very novelty than benefit by its actual utility. See *Broom Max.*

This is the rule adopted by the legislature, in considering proposed new laws, and by the courts of law and equity in reference to adjudged cases; the rule being that, where the existing law or established precedents reasonably meet the evil to be remedied or the case to be decided, neither the one nor the other ought to be disturbed. The legislature does not, however, hold to the rule as strictly as the courts. *Whart. Max.*

Omnis nova constitutio futuris formam imponere debet, non prætentis. Every new enactment should lay down a rule for the future, not for the past. Legislation should be prospective, not retrospective.

An exact English equivalent for

the word *constitutio* — above translated "enactment" — is not readily found. In translating this maxim, *constitutio* is usually rendered "statute;" it, however, may include, and the principle of the maxim seems to be applicable to, any mode of establishing new rules of law, whether by an act of a legislative or constituent body, or by judicial decision.

The tendency of recent decisions is to treat a state constitution as being a "law" within such general principles as the above maxim, as also within the provision of the federal constitution protecting the obligation of contracts. State *v.* Lancaster County, 6 *Neb.* 214; Abel *v.* Rhoads, 84 *Pa. St.* 319; Douglass *v.* Harrisville, 9 *W. Va.* 162; State *v.* Mayor, &c. of New Orleans, 29 *La. Ann.* 863; Pacific R. R. Co. *v.* Maguire, 20 *Wall.* 36; State *v.* Weston, 4 *Neb.* 216.

As applied to the enactment of statutes, the principle is, that retrospective legislation is never presumed; and, therefore, a law will only be applied to cases occurring after its date, unless it appear from the statute itself that it is intended to have retroactive effect. Penal laws are never retrospective; but remedial statutes, which are more liberally interpreted, are sometimes allowed retroactive effect.

The meaning of the maxim is, that laws ought not to be retrospective in their operation, nor to apply to past transactions, but should be made to take effect from the time of their being enacted, and apply to future transactions only; and this is the construction which is always put upon statutes of the present day, in the absence of any manifest intention to the contrary expressed upon the face of the statute. *Whart. Max.*

The exception to the general rule, that a statute is not to have a retrospective operation, especially so as to affect a vested right, must depend upon the words of the statute or the special nature of each case. But the rule that statutes ought not to be construed retrospectively, unless an intention in the legislature that they should be so construed distinctly appears, has been held not to apply to statutes which only affect the procedure or practice of the courts. *Ib.*

Omnis ratihabitio retrotrahitur et mandato æquiparatur. Every ratification relates back, and is equivalent to a command. Subsequent assent given to what has been already done has a retrospective effect, and is equivalent to a prior authority. This is a leading maxim, not only of the common law, but of maritime and commercial jurisprudence. It is applied constantly in the law of principal and agent, and to torts as well as to contracts; at least, to such torts as are capable of being adopted by the injured party, if he elects to treat the wrong-doer as his agent, and ratify the act done.

This rule applies generally to all cases of contract, and to such torts as are capable of being adopted; as where the relation of principal and agent can be considered as applicable, and where the act done is for the use or benefit or in the name of the ratifying party. The ratification, moreover, is reciprocal, and may be adopted as well for as against the party ratifying, and this even in torts; as, where a trespass is committed without previous authority, subsequent ratification will enable the party on whose behalf the act was done to take advantage of it. *Whart. Max.*

That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Wilson *v.* Tumman, 6 *Man. & G.* 236.

The doctrine *omnis ratihabitio retrotrahitur et mandato æquiparatur* is one intelligible in principle, and easy in its application, when applied to cases of contract. In cases of tort there is more difficulty. If A B, professing to act by my authority, does that which *prima facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far, there is no difficulty in applying the doctrine of ratification, even in cases of tort. The party ratifying becomes, as it were, a trespasser by estoppel; he cannot complain that he is deemed to have authorized that which he admits himself to have authorized. But the authorities go much farther, and show that in some cases, where an act which, if unauthorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and to treat it as having been done by his direc-

tion. But this doctrine must be taken with the qualification that the act of ratification must be taken at a time and under circumstances when the ratifying party might himself lawfully have done the act which he ratifies. Bird *v.* Brown, 4 *Ex.* 786, 798.

Omne majus continet in se minus. The greater contains the less. An illustration of this maxim is the power which a tenant in fee-simple possesses over the estate held in fee; for he may either grant to another the whole of such estate, or charge it in any manner he sees fit, or he may create out of it any less estate or interest. So a person having a power may do less than such power enables him to do: under a power to lease for twenty-one years, he may lease for any less number of years; or, if he has license or authority to do any number of acts for his own benefit, he may do some of them, and need not do all. Also, on an indictment charging a misdemeanor, the jury may find the prisoner guilty of any lesser misdemeanor which is necessarily included in the offence as charged. *Broom Max.* The doctrine of merger (*q. v.*) also affords an illustration of the principle.

Other forms of the maxim are *omne majus minus in se complectitur*, — the greater embraces in itself the less; *omne majus trahit ad se minus*, — the greater draws to itself the less; and, in the civil law, *in eo quod plus est, semper inest et minus*, — in that which is greater, the less is always included.

The owner of the fee-simple in land can grant out any less estate; a lessor for years a sub-lease; and so on. So a term of years becomes merged in the freehold by the lessee becoming entitled to the fee. Personalty is considered less worthy than realty, and to arise out of it, and merge into it; but not realty out of or into personalty. A simple-contract debt is less worthy than a specialty debt; and a specialty debt is less worthy than a judgment, into which it will merge upon judgment recovered in respect of it.

The accessory follows its principal; but the accessory cannot lead, nor can it exist without the principal, — it is contained within it. A release of the principal is a release of the accessory. The incident passes by a grant of the principal, *et sic in similibus. Whart. Max.*

Omne quod inædificatur solo cedit. All that is built upon it belongs to the soil.

Omne sacramentum debet esse de certa scientia. Every oath ought to be of certain knowledge. Modern practice and statutes have authorized many exceptions to this maxim.

Omne testamentum morte consummatum est. Every testament is made complete by death. A will is of no force until after the decease of the testator. Compare the maxim, *ambulatoria est voluntas usque ad vitæ supremum exitum.*

Omnia præsumuntur contra spoliatorem. All things are presumed against a despoiler. Every presumption is against a party who destroys or withholds that which might be evidence against him. This is a leading maxim in the law of evidence, resting on the policy of the law as well as upon natural equity, and of wide application in the determination of questions of fact. Its most usual application is to cases of the suppression or destruction of documentary evidence, or even of a failure to produce instruments in writing in the possession of the party.

A somewhat different sense of the maxim is, that all things are presumed against a wrong-doer. Thus in an action for the conversion of property, especially if the wrong-doer refuses to produce the property, the presumption as to its quality and value, if they are doubtful, is against him. This application of the meaning has even been extended to the criminal law, in which the general presumption in favor of innocence should much restrict the operation of such a principle. It is said that in cases of highway robbery the law, *in odium spoliatoris*, will presume fear, whenever property is taken with such circumstances of violence, or terror, or threatening by word or gesture, as would in common experience induce a man to part with his property from an apprehension of personal danger; so that, even where the prosecutor sought out the robber, and submitted to be robbed by him for the purpose of bringing him to justice, this was held to be robbery on the part of the accused. Norden's Case, cited *Foster C. L.* 129; *Best Evid.* § 411.

The most usual application of this principle is where there has been any forensic malpractice, — by eloigning, suppressing, defacing, destroying, or fabricating docu-

ments, or other instruments of evidence, or introducing into legal proceedings any species of the *crimen falsi*. This not only raises a presumption that the documents or evidence eloigned, suppressed, &c., would, if produced, militate against the party eloigning, suppressing, &c., but procures more ready admission to the evidence of the opposite side. "If," says L. C. J. Holt, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply." Anon., 1 *Ld. Raym.* 731. This rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong; and several instances of its application are to be found in the books. *Best Evid.* § 412.

This presumption is frequently applied to the law of evidence; as, where an apparently necessary witness is kept back, it will be presumed that, if produced, his evidence would be unfavorable to the party having the power to produce him. But this rule, it is said, should not be adopted in cases of privileged communications; as where, at a trial, a party's solicitor was called as a witness, and it was objected that the communication proposed to be made was professional and privileged, and so the evidence was not received, the court or jury has no right to treat this as though the party had kept back a material witness, and draw an unfavorable inference against the party; for the exclusion of such evidence was for the general benefit of the community. *Whart. Max.*

However salutary, and in general equitable, the maxim, *omnia præsumuntur contra spoliatorem*, must be acknowledged to be, it has been made the subject of very fair and legitimate doubt, whether it has not occasionally been carried too far. "The mere non-production of written evidence," says Sir W. D. Evans (2 *Evans, Poth.* 337), "which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute." So in the case of Barker *v.* Ray, 2 *Russ.* 72, 73, Lord Eldon said: "This court has a peculiar jurisdiction in cases of spoliation. . . . The jurisdiction of the court in matters of spoliation has gone a long way; indeed, it has gone to such a length, that, if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that, if you once prove spoliation, you will take it for granted that the contents of things spoliated are what they have been alleged to be, may be, in a great many instances, going a great length." Even when the positive fabrication of evidence is proved against a party, tribunals whose object is the ascertaining of truth will consider the nature of the case, and the temptation which might have led to fabrication. *Best Evid.* § 414.

The wrong-doing to which this maxim has reference is that which can be so regarded by law, and does not include those acts which, however wrong according to a moral standard, are still within the legal right of the doer. As a general rule, also, the maxim does not apply in criminal cases, where (with very rare exceptions) there is no presumption against the accused, but every thing essential to guilt must be proved. But the maxim has application in many circumstances in civil cases. *Trayn. Max.*

Omnia præsumuntur rite esse acta. All things are presumed to have been done in due form. Or, *Omnia presumuntur solemniter esse acta*, — all things are presumed to have been done with due solemnity. Until the contrary is shown, every thing is presumed to be rightly and duly performed; especially where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution. *Broom Max.* Public officers, intrusted or charged with a public duty, are, until the contrary appears, presumed to perform that duty rightfully.

The acts of a court of justice, within its jurisdiction, are to be presumed to be rightfully done; but in inferior courts and proceedings by magistrates this maxim does not apply to give jurisdiction. Mayor *v.* Cox, 2 *L. R. H. L.* 239.

Although by no means a universal rule, the principle expressed in this maxim is a general rule of the common law, and has been extended rather than restricted by modern statutes and the course of judicial decisions. For numerous examples of its application, and of some exceptions to and limitations of the rule, see *Broom Max.; Best Evid.* §§ 353–365.

Besides the forms of the maxim given above, the rule is often expressed thus: *omnia præsumuntur legitime facta donec probetur in contrarium*, — all things are presumed to have been lawfully done, until proof is given to the contrary.

This maxim relates chiefly to acts of an official nature, as judgments, decrees, orders of court, and acts of any public officer, done by properly, or apparently properly, constituted authorities; which acts will be presumed to be rightly done and the authorities rightly constituted, until the contrary be proved. The maxim also applies to all cases of waiver, by acquiescence, lapse of

time, &c., where consent and agreement will be presumed; and it is forcibly applied in settling ancient titles. *Whart. Max.*

The maxim must not be understood as of universal application. The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed. The true principle intended to be conveyed by the rule *omnia præsumuntur rite esse acta* seems to be, that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this view, where there is a general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy. *Best Evid.* § 353.

The principle which attaches so much faith to public documents rests in a great degree on the rule, *omnia præsumuntur rite esse acta*, a maxim unquestionably just when restrained within its due limits, but which loses much of its force when the document is only of a *quasi* public nature; *i.e.*, drawn up by individuals acting in some sense, indeed, on the part of the public, but having a personal interest in the existence of the facts they profess to record or attest. *Id.* § 118.

Omnia quæ sunt uxoris sunt ipsius viri. All things which are the wife's are the husband's. The rule of the common law, that property of a woman became, by marriage, the property of her husband, has been greatly restricted and almost abolished by recent legislation.

Omnibus ad quos præsentes literæ pervenerint, salutem. To all to whom the present letters may come, greeting. A form of address anciently used in the commencement of grants, &c., public and private.

ON. As denoting contiguity or neighborhood, may mean "near to," as well as "at." Burnam *v.* Banks, 45 *Mo.* 349.

On also occurs in some phrases which have received judicial construction.

On account of whom it may concern. A clause in marine policies of insurance, denoting that all persons who have an insurable interest in the property, and a lawful right to be insured, are embraced in the benefit of it; equivalent to "for whom it may concern."

On or about. This phrase is used in reciting the date of an instrument or occurrence, to avoid the injurious consequences of error in the recital of date, &c.

On or before. When a party stipulates to pay "on or before" a certain day, he has a right to pay before the day, and to demand performance of the agreement of the other contracting party. Wall *v.* Simpson, 6 *J. J. Marsh.* 155.

A provision requiring payment to be made "on or before the first of January in each year," means that the payment may be made any indefinite time, no matter how long before Jan. 1. People *v.* Walker, 21 *Barb.* 630.

On demand. An act to be done "on demand," must be done within a reasonable time after demand. Blackwell *v.* Fosters, 1 *Metc.* (*Ky.*) 88.

On duty. A policy of insurance of a steamboat, providing that a watchman shall be on duty at all times, means that he shall be on or about the boat, so that a fire thereon will not progress without discovery. Gibson *v.* Farmers', &c. Ins. Co., 1 *Cin.* 410.

On hand. A legacy provided for in a will "of all the money on hand or in bank at the time of my decease," will pass money in the hands of an agent. Copia's Estate, 5 *Phila.* 214.

On, or as soon as. A written agreement to convey land on Aug. 1, 1835, "or as soon as the vendee shall pay $2,000," is limited to Aug. 1 for execution. The words "or as soon as the vendee," &c., refer to the period between the date of the contract and the same Aug. 1; and a tender of a deed after that time will not be sufficient to support an action for the purchase-money. Felter *v.* Weybright, 8 *Ohio*, 167.

On the stocks. An insurance on "a bark on the stocks" covers only the vessel as far as its construction may have proceeded. It does not cover timbers not united to the keel or the structure thereon of the contemplated bark, although completely prepared to be used in it. Hood *v.* Manhattan Fire Ins. Co., 11 *N. Y.* 532.

On trial. The provision of Mass. Stat. of 1863, ch. 33, allowing a term to be continued until a case on trial at the end thereof is finished, must be taken literally, and does not apply to a case begun and suspended at some previous time during the term. Commonwealth *v.* MacLellan, 121 *Mass.* 31.

On water. A stipulation in a contract for the hire of a slave, that he should not be "employed on water," is not violated by sending him with horses to water in the shallow part of a deep river, with express instructions from the hirer not to ride them into deep water, although the slave is drowned by riding into the deep part of the stream. Madre *v.* Saunders, 3 *Jones L.* 1.

ONE THOUSAND. Interpreted to mean one hundred dozen, or twelve hundred. Smith *v.* Wilson, 3 *Barn. & Ad.* 728.

ONERARE. To charge or burden.

Onerari non. Not to be charged. The name of a plea in an action of debt, by which the defendant alleges that he ought not to be charged with the indebtedness.

Oneratur nisi. He is charged, unless. This is the name of an entry formerly made in the English exchequer, upon the sheriff's entering his accounts for issues, amercements, &c.; the full form being *oneratur nisi habeat sufficientem exonerationem*, — he is charged, unless he may have a sufficient discharge. The entry was usually abbreviated to *O. Ni.*

It was the course of the exchequer, as soon as the sheriff entered into and made up his account for issues, amerciaments, &c., to mark upon each head *O. Ni.*, which denoted *oneratur nisi habeat sufficientem exonerationem*, and presently he became the king's debtor, and a *debet* was set upon his head; whereupon the parties *paravaile* became debtors to the sheriff, and were discharged against the king, &c. But sheriffs now account to the commissioners for auditing the public accounts. *Wharton.*

ONUS. A burden, charge, or duty.

Onus probandi. Burden of proving; the burden of proof, *q. v.*

The strict meaning of the term *onus probandi* is, that if no evidence is adduced by the party on whom the burden is cast, the issue must be found against him. Davis *v.* Rogers, 1 *Houst.* 44.

Oneris ferendi. Of bearing a burden. In the civil law, the name of a servitude by which a wall is bound to sustain the weight of adjoining structures.

Ope et consilio. By aid and counsel. A phrase applied in the civil law to accessories in the commission of crimes, in the same manner as the phrase "aiding and abetting" in the common law. Sometimes used in the form *ope consilio.*

OPEN, *v.* 1. Spoken of a trial or hearing, to open is to make oral explanation, at the commencement, of the questions involved, and general nature and course of the evidence to be offered.

Opening is used as participle and adjective, and participial noun, in this general sense of the word. Thus a counsel, making the customary address at the commencement of a trial, is said to be engaged in opening (*part.*) the cause; and the address is called the opening (*adj.*) speech, or, briefly, the opening.

In trials of issues of fact before a court and jury, it is the practice for the plaintiff's counsel to state briefly the substance and effect of the pleadings in the cause, in order that the jury may know what are the issues about to be tried; and this is termed opening the cause, or opening the pleadings. The opening by plaintiff's counsel follows the impanelling of the jury; it is a brief statement of the pleadings and of the general facts of the plaintiff's case, as counsel believes they will be proved. In turn, the defendant's counsel, when the plaintiff rests, makes an opening for the defence, explaining the grounds on which he relies to defeat the case which has been presented.

2. Spoken of a decree, judgment, or order already passed, to open is to grant the party against whom it bears a new opportunity to be heard, done in the exercise of judicial discretion, upon considerations of fairness and justice, and not of strict right.

Opening is used, in this sense, as a participle and participial noun; not, that we have observed, as an adjective.

When a party against whom a decree, judgment, or order has been made, is able to show error or irregularity in it, or that it is, for any reason, void, so that he is relieved from it as matter of right, the court is said to set it aside, to vacate it. Open is not appropriate in this class of cases; but imports that although the party is legally bound, yet he has shown such reasons, by way of excuse for his default, new evidence in his favor, surprise, injustice, or the like, that the court is induced in its discretion to give him a new opportunity to be heard. This may be done, subject to such terms as the court sees fit to impose to prevent hardship to the adverse party. But the whole subject is regulated by statutes, varying in different jurisdictions.

Open court. This expression is to be understood as conveying the idea that the court must be in session, organized for the transaction of judicial business; or, may possibly mean public, — free to all. The object of a statute that divorce cases shall

be tried in open court is not merely to prevent secret proceedings therein, by providing that no one shall be refused admittance to the court while such cases are on hearing, but rather that the trials shall be before the courts themselves, and not elsewhere, or at any other times, than the law prescribes for the sessions of courts. Hobart *v.* Hobart, 45 *Iowa*, 501.

Opening an account. Declaring, judicially, that a party, as an agent, executor, &c., who has rendered an account of his dealings, shall not be absolutely bound by it, but may show that it contains errors to his prejudice.

Opening biddings. Under the long-established practice of the English court of chancery, when landed property was sold under decree, the court was accustomed to order the property to be put up again for sale, whenever a reliable offer to bid a higher price than that obtained by the first sale was reasonably made.

Under this practice of opening biddings, wherever it prevails according to English precedents, a person desirous of opening a bidding must, at his own expense, apply to the court, by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person certified as the purchaser of the lot, and to the parties in the cause. If the court approve of the sum offered, the application will be granted, and, on the order being drawn up, entered, and served, a new sale must be had before the chief clerk. The order is made at the expense of the person opening the biddings; and he must bear the expense of paying in his deposit, and pay the costs of the first purchaser, and interest, at the rate of four per cent, on such part of the purchase-money as the chief clerk shall find to have lain dead. Biddings may be opened more than once, even on the application of the same person, if a sufficient advance is offered, but, in general, cannot be opened after the confirmation of the certificate of the highest bidder. Where the biddings are opened, the advance is to be deposited immediately.

In England, this practice of opening biddings was found at length to produce inconvenience, by discouraging the outset sale; for a purchaser, though in good faith and at a price not unreasonably low, was never sure of his bargain. Hence it was restricted by Stat. 30 & 31 Vict. ch. 48, § 7, passed in 1867; and the opening of biddings is now allowed only in cases of fraud or misconduct in the sale.

In the various states, the practice on this subject varies somewhat, with a very general leaning, as we understand, to the doctrine that a court under whose decree a sale is made has power to open the biddings, but will not in general do so merely to obtain a higher price: fraud or irregularity, or gross inadequacy of price, such as raises suspicion of fraud, must be shown.

Opening a commission. An entering upon the duties under a commission, or commencing to act under a commission, is so termed. Thus the judges of assise and *nisi prius* derive their authority to act under or by virtue of commissions directed to them for that purpose; and, when they commence acting under the powers so committed to them, they are said to open the commissions; and the day on which they so commence their proceedings is thence termed the commission day of the assises. *Brown.*

Opening a rule. The act of restoring or recalling a rule, which has been made absolute, to its conditional state, as a rule *nisi*, so as to readmit of cause being shown against the rule. Thus, when a rule to show cause has been made absolute, under a mistaken impression that no counsel had been instructed to show cause against it, it is usual for the party at whose instance the rule was obtained to consent to have the rule opened, by which all the proceedings subsequent to the day when cause ought to have been shown against it are in effect nullified, and the rule is then argued in the ordinary way. *Brown.*

Opening a rule is where the court allows the propriety of a rule to be again open for argument after it has been made absolute. Where a rule has issued improvidently through a mistake of the officer of the court, or in a case in which the court had no jurisdiction to grant it, the court will allow it to be opened for the purpose of correcting the mistake or discharging the rule; but this will not in general be done on any other ground. *Lush Pr.* (*Steph.*) 662.

3. Spoken of some documentary matters, to open is used in a sense partly literal, partly figurative, meaning that the seals are broken, and the document brought into view and use.

Thus, one speaks of opening a deposition; attending at the opening of sealed proposals, &c.

4. Spoken of a court of tribunal, to

open it is to announce in form that it is convened, and ready for transaction of business.

5. Spoken of a highway, to open means to establish it and make it available to public travel; but the meaning is often restricted or extended by the context.

A power to "open and keep in repair" streets, &c., was held to carry an implied power to alter the grade or level, in Smith *v.* Corporation of Washington, 20 *How.* 135.

The power conferred by an act on the authorities of a city to "open and extend" streets, was held to include construction, as well as laying out, in Sugar Refining Co. *v.* Mayor, &c. of Jersey City, 26 *N. J. Eq.* 247.

OPEN, *adj.* Subject to alteration and correction, unliquidated, unsettled, as an open account; accessible to all, free to the public, as an open court; apparent, known, made public, unconcealed, as open indecency. There are some other senses of rare occurrence.

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

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

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

Open account, in legal as well as in ordinary language, means, an indebtedness subject to future adjustment, and which may be reduced or modified by proof. Nisbet *v.* Lawson, 1 *Ga.* 275.

The phrase open accounts, in a statute of limitations, does not include the current account of a general agent of his expenditures for his principal. Dolhonde *v.* Laurans, 21 *La. Ann.* 406.

An account cannot be considered an open account, and as such prescribed by three years, under La. act of March 5, 1852, § 2, where it was signed and returned by the debtor, with a statement in detail of its debtor and creditor items. Dixon *v.* Lyons, 13 *La. Ann.* 160.

Open entry. An open and peaceable entry, within Mass. Gen. Sts. ch. 140, § 1, is an entry not opposed by the mortgagor or person claiming the premises, and made in the presence of two competent witnesses, whose certificate thereof is sworn to and duly recorded within thirty days, in the registry for the county where the land lies. Thompson *v.* Kenyon, 100 *Mass.* 108.

Open insolvency. The "open and notorious insolvency," which excuses an assignee of a note from proceeding against the maker, before he can sue assignor or indorser, implies not merely the want of sufficient property to pay all of one's debts, but the absence of all property, within reach of the law, applicable to the payment of any debt. The insolvency of the estate of the maker of the note is not sufficient to excuse the assignee from proceeding against it. Nor does the death of the maker furnish such excuse, for the law supplies a representative where the decedent does not, and provides a remedy against the estate. Hardesty *v.* Kinworthy, 8 *Blackf.* 304.

Open lewdness. If a man indecently exposes his person to a woman, and solicits her to have sexual intercourse with him, and persists in so doing, notwithstanding her opposition and remonstrance, this is "open and gross lewdness and lascivious behavior," for which an indictment will lie, under Vt. Rev. Stat. ch. 99, § 8. The crime contemplated by that statute does not depend upon the number of persons to whom a man exposes himself. State *v.* Millard, 18 *Vt.* 574.

Open policy, in marine insurance, is one in which the value of the subject insured is not fixed or agreed upon in the policy, as between the assured and the underwriter, but is left to be estimated in case of loss. The term is opposed to "valued policy," in which the value of the subject insured is fixed for the purpose of the insurance, and expressed on the face of the policy. *Arnould Mar. Ins.* (4th ed.) pp. 217, 218; *Crump Mar. Ins.* § 369.

OPERATE. The phrase "to operate on the lands," in a contract regulating the rights of associates in an adventure for purchasing and dealing with a tract of land, was held to include not only offering the land for sale in parcels, at an advance, but also selling the timber to be cut and removed. Eaton *v.* Smith, 20 *Pick.* 150.

OPERATION. See UNIFORM IN OPERATION.

OPERATIVE. The provision of the bankrupt act of 1841, giving a priority in payment to debts due to operatives, included apprentices. *Exp.* Steiner, 1 *Pa. L. J. R.* 134.

OPPOSING INTEREST. By "opposing interest," — in the provision of the bankrupt law, that if creditors do not

choose an assignee in bankruptcy, "the judge, or, if there be no opposing interest, the register, shall appoint," — is meant not merely an interest contending, by vote, for the election of a particular person, but an interest in opposition to any exercise of the power of appointment by the register. Where it appeared, upon a petition for review of proceedings before a register for the appointment of an assignee, that no specific objection was made before him, to his making an appointment, but the controversy was as to the person to be chosen, and the opposition was to the individual finally named by the register, it was held that the appointment should be confirmed. *Re* Jackson, 14 *Bankr. Reg.* 449.

OPTIMUS. Best. The initial word of several Latin maxims.

Optimus interpres rerum usus. The best interpreter of things is usage. The principle that custom or usage is an important guide to construction, particularly of statutes, is expressed in several maxims: *Optimus interpres legum consuetudo*, — the best interpreter of laws is custom; otherwise, *optima est legum interpres consuetudo*, — custom is the best interpreter of laws, &c. The signification is that a custom or usage, following upon a statute, is the best interpreter of what the statute was meant to enact, as showing what was regarded as the meaning and purpose of the statute among those by whom, or for whom, the act was passed. *Trayn. Max.* Another view of the principle is, that the exposition of a law is to be preferred which is approved by constant and continual use and experience. *Broom Max.*

This maxim may not inaptly be called a creature of circumstance, and the reason of it, a state of things acquiesced in rather than agreed to, the law of times of ignorance and indifference; and though old customs still remain, and habit and practice, for convenience of people and encouragement of commercial enterprise, assume with us the name of custom, yet written law is, in modern times, gradually assuming the ascendancy over, if not the total abrogation of, custom. Custom, however, whether particular or general, is law, and usage is evidence of custom. Common or general custom is the common law of the country, and particular custom the particular law of the place, person, or thing to which it applies. There are, however, some limits to a custom. It must be obligatory, reasonable, and certain. It must not be against the good of the public, nor the many, and in favor of a few, or one person. It must have existed, without interruption, from time immemorial. And it cannot prevail against a public statute, or express contract *inter partes*.

The maxim, *modus et conventio vincunt legem*, may also be considered in connection with this. *Whart. Max.* 152.

The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful and equivocal character. It may also be admitted to ascertain the true meaning of a particular word in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. *The Reeside*, 2 *Sumn.* 567.

This maxim approves a statute, which is so clearly expressed and well defined as to leave the judge little room, if any, for the exercise of his own judgment or opinion; a law so clear, that the rights or duties thereby created may be at once discerned; while the judge is approved who adheres most to the terms of the law he is administering, and relies as little as possible on his own views of its interpretation, meaning, or intention. *Trayn. Max.* 413.

Optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi. That law is the best which leaves least to the discretion of the judge; that judge is the best who acts least upon his own. That system of law is the best which confides as little as possible to the discretion of the judge; that judge the best who relies as little as possible on his own opinion. *Broom Max.* 84.

OPTION. 1. In reference to contracts, a choice between alternatives; a right of election.

2. In ecclesiastical law, the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such bishop; in lieu of which the bishop used to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the diocese within the bishop's disposal, as the archbishop himself should choose; which, therefore, was called his option. *Cowel*; 1 *Bl. Com.* 381; 2 *Steph. Com.* 669.

Optional writ. Original writs were either *optional* or *peremptory*. An optional writ, otherwise called a *præcipe*, was a writ commanding a defendant to do a thing required, or else to show the reason wherefore he had not done it; thus giving the defend-

ant his choice, either to redress the injury or to stand the suit. *Mozley & W.*

OPTULIT. See OBTULIT.

OR. This disjunctive particle, and the conjunction "and," are frequently read interchangeably in the construction of instruments: this is done, however, as a matter of construction, and to effectuate the intent of parties, and not in any views depending on the proper meaning of the words.

With respect to wills, in particular, the books abound in cases in which "or" in a will has been read "and," and *vice versa*. But the ground is that, in view of the context and attendant circumstances, the change is necessary to accomplish the evident design.

"Or," in its ordinary signification, corresponds to either; meaning one or the other of two, but not both. It is sometimes construed to mean "and," when such construction appears clearly necessary to give effect to a clause in a will, or to some legislative provision; but never to change a contract at pleasure. Indeed, to say that "or" can ever mean "and" seems to be an inaccurate expression. It should rather be said, that for strong reasons, and in conformity with a clear intention, "or" has been changed or removed, and "and" substituted in its place. Douglass *v.* Eyre, *Gilp.* 147. Compare United States *v.* Haun, 8 *Am. Law Reg.* 663.

The rule is well settled, that, in construing a will, when the change becomes necessary to carry into effect an evident or clearly shown intent of the testator, "or" may be read "and," or "and" construed as "or." Cornish *v.* Wilson, 6 *Gill*, 299; Sawyer *v.* Baldwin, 20 *Pick.* 378; Roome *v.* Phillips, 24 *N. Y.* 463.

But this change or substitution can never be made, unless the context or clearly established intention of the testator requires it. Sawyer *v.* Baldwin, 20 *Pick.* 378; Holcomb *v.* Lake, 24 *N. J. L.* 686; Armstrong *v.* Moran, 1 *Bradf.* 314.

"Or," in a limitation over, means "and," where the effect of construing it disjunctively would be to disinherit the issue of the devisee. Raborg *v.* Hammond, 2 *Harr. & G.* 42.

"Or" was construed as "and" in a bond payable to "Squire Parker *or* Thomas Parker," from evidence introduced to prove the consideration under the scaling laws, in Parker *v.* Carson, 64 *N. C.* 563.

A bond to prosecute with effect, or perform, is good, though in the statute the word is "and" instead of "or." Robinson *v.* Brinson, 20 *Tex.* 438.

In an appointment of a person to act as "agent or surveyor" of a fire insurance company, the term surveyor cannot be taken as limiting the word agent. Lycoming Fire Ins. Co. *v.* Woodworth, 83 *Pa. St.* 223.

The rule which allows "and" to be read "or" cannot be applied to sustain an affidavit to obtain a discharge in insolvency, which declares that the debtor has not disposed of any property for the future benefit of himself and family, when the statute under which the discharge is sought requires an affidavit that he has not disposed of any for the benefit of himself *or* family. Such affidavit only negatives a disposal for the joint benefit of the debtor and his family; whereas the object of the statute is to secure proof that none has been made for the benefit of either. Hall *v.* Sweet, 40 *N. Y.* 97.

In an action of trespass for an injury done by a dog to the plaintiff's sheep, brought on a statute that "every owner *or* keeper of any dog shall forfeit to any person injured by such dog double the amount of the damage sustained by him," the declaration charged the defendants as the owners *and* keepers of the dog which did the mischief. It was held that the plaintiff must prove that the defendants were both the owners *and* the keepers of the dog; to prove that they were either the owners *or* the keepers was not enough. Buddington *v.* Shearer, 20 *Pick.* 477.

The use of "or," instead of "and," in an indictment, is fatal only where it renders the statement of the offence uncertain. People *v.* Gilkinson, 4 *Park. Cr. R.* 26.

When necessary to harmonize the provisions of a statute, or give effect to all of its provisions, the word "or" may be read as "and," and conversely. State *v.* Brandt, 41 *Iowa*, 593.

"And" cannot be construed to mean "or" in a penal statute. United States *v.* Ten Cases of Shawls, 2 *Paine*, 162.

"Or," in a statute imposing punishment if any person shall place obstructions in a watercourse, whereby the flow of water is lessened, *or* navigation impeded, was read "and," in State *v.* Pool, 74 *N. C.* 402.

"Break or enter," in the Pa. act of 1860, § 135, defining burglary, means "break and enter." Rolland *v.* Commonwealth, 82 *Pa. St.* 306, 326.

"And" was construed to mean "or," in the supplementary statute of 1863, ch. 78, § 2, prescribing "fine and imprisonment," &c.; the original law (Gen. Sts. ch. 87, § 7) reading "fine or imprisonment," &c., in Commonwealth *v.* Griffin, 105 *Mass.* 185.

"And" was construed to mean "or," for which it had been substituted in codifying former statutes, which its conjunctive sense would operate a repeal of, in Hughes *v.* Smith, 64 *N. C.* 493.

"Or" means "and," in the clause "unlawful or forcible entry," in the re-enacted forcible entry law of Wisconsin, notwithstanding the substitution. Winterfield *v.* Stauss, 24 *Wis.* 394.

Or bearer; or order. These words in notes or bills are words of negotiability;

without which, or other equivalent words, the instrument will not possess that quality. Mechanics' Bank *v.* Straiton, 3 *Abb. App. Dec.* 269.

Or other. An indictment for selling spirituous liquors without license, in charging the kinds of liquors sold, used the words "or other spirituous liquors." Held, that the use of the disjunctive was not a defect. Morgan *v.* Commonwealth, 7 *Gratt.* 592.

Or otherwise. In the act of July 6, 1812, punishing one who transports in any wagon, &c., or otherwise, any munitions of war, &c., plainly means the thing by which the articles are transported, when the punishment by way of forfeiture is prescribed. United States *v.* Sheldon, 2 *Wheat.* 119, 211.

ORATOR. The plaintiff in a cause or matter in chancery, when addressing or petitioning the court, used to style himself "orator," and when a woman, "oratrix." But the phrase has long gone into disuse, and the customary phrases are now plaintiff and petitioner. *Brown.*

ORDAIN. To ordain, according to the etymology and general use of the term, signifies to appoint, to institute, to clothe with authority. When the word is applied to a clergyman, it means that he has been invested with ministerial functions or sacerdotal power. Ordination, properly speaking, is restrained to the investiture of authority. In the Episcopal Church, the conferring on a person the holy orders of deacon or priest is the invariable mode of ordination. In the Methodist Church, the deacons and priests have conferred on them, by a general ordination, the investment of their ministerial functions, but are never by that act placed over a particular church. Kibbe *v.* Autram, 4 *Conn.* 134.

ORDEAL, or ORDEL. The most ancient species of trial, called also *judicium Dei* (the judgment of God), and based generally on the notion that God would interpose miraculously to vindicate the guiltless. This was of two sorts:

Fire ordeal, which was performed either by taking up in the hand, unhurt, a piece of red-hot iron; or else by walking barefoot and blindfold over nine red-hot plowshares, laid lengthwise at unequal distances. If the party escaped being hurt, he was adjudged innocent; otherwise, he was condemned as guilty.

Water ordeal, which was performed either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt therefrom; or by casting the person suspected into a river or pond of cold water; and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. *Mozley & W.*

There were four sorts of ordeal: campfight, *duellum*, or combat; fire ordeal; hot-water ordeal; cold-water ordeal. They are all abolished. *Wharton.*

ORDER. In a general sense, includes almost any command, direction, or mandate, emanating from authority.

The kinds of orders most frequently drawn in question in jurisprudence are two:

1. As a commercial instrument, an order is a brief note, resembling a single bill of exchange, drawn by one person addressed to another, and directing the payment of money, or delivery of money to a third person, by whom it is borne to the individual addressed.

An order drawn on another, payable in government scrip, is merely an authority from the drawer to receive the scrip; and, if it is not delivered, the holders can only resort to the drawer to recover the consideration paid. Wilamouicz *v.* Adams, 13 *Ark.* 12.

An executor placed the amount of certain legacies in the hands of A, who thereupon gave the executor a writing acknowledging the receipt of it, and promising to pay the same with interest to the legatees, by an order from the executor, when the legatees should become of age. Held, that the word order, mentioned in the writing given by A, did not import exclusively a written instrument, but that any express direction by the executor, though merely verbal, was sufficient. Treat *v.* Stanton, 14 *Conn.* 445.

"Order," as used in N. H. Rev. St. ch. 14, § 3, making the protest of any bill of exchange, note, or order, duly certified, &c., evidence of the facts stated in such protest embraces a draft not negotiable, and payable only on a certain contingency. Dakin *v.* Graves, 48 *N. H.* 45.

"Order" does not ordinarily mean a cash draft. Hinnemann *v.* Rosenback, 39 *N. Y.* 98.

2. In the practice of the courts, an order is the formal paper embodying any direction of a court or judge other than a judgment or decree, and made to be entered of record, as one of the proceedings in a cause.

The distinction between order and requisition is that the first is a mandatory act, the latter a request. Mills *v.* Martin, 19 *Johns.* 7.

An order is any direction of a court or judge made or entered in writing, and not included in a judgment. *N. Y. Code of Pro.* § 400.

The words, all previous orders, in the Md. Code, art. 5, § 22, are as comprehensive as the words, all previous orders and decrees, employed in acts 1830, ch. 185, and 1845, ch. 367; their meaning is the same. The design of the section is, as was that of these acts from which it was codified, to open, upon an appeal from a

final decree, all previous orders and decrees constituting a part of the preliminary proceedings leading to the passage of such final decree. Bull *v.* Pyle, 41 *Md.* 419.

Order of filiation. The usual name of an adjudication in bastardy proceedings, declaring the defendant the father of the child, and prescribing what maintenance he shall provide.

Orders of the day. Any member of the house of commons who wishes to propose any question, or to "move the house," as it is termed, must, in order to give the house due notice of his intention, state the form or nature of his motion on a previous day, and have it entered in a book termed the order-book; and the motion so entered, the house arranges, shall be considered on particular days, and such motions or matters, when the day arrives for their being considered, are then termed the "orders of the day." *May Parl. Prac.*

ORDINANCE. May mean a law, statute, or decree of almost any nature; but in modern usage is most frequently applied to the laws of a municipal corporation.

Some state papers, operative as fundamental laws, but not precisely describable as constitutions or acts, have, however, been termed ordinances; such as the ordinance of 1787, for the government of the north-western territory.

Older authorities in English parliamentary practice draw a distinction between acts and ordinances, like this: that an ordinance was but a temporary act, not introducing any new law, but founded on acts formerly made; an act was a perpetual law, not to be altered but by queen, lords, and commons. This distinction is not now observed.

Sir Edward Coke says that an ordinance of parliament is to be distinguished from an act of parliament, inasmuch as the latter can be only made by the king and a threefold consent of the state, whereas the former may be ordained by one or two of them. At the time that the right of the commons to participate in legislation was yet only in growth, a distinction was taken, for the first time, in the reign of Edward III., between ordinances and statutes, the former being experimental acts passed for a time only, and, as it were, on trial, and which might afterwards be, and often were, converted into statutes, *i.e.* permanent acts, or else might be continued for a time, or discharged altogether. *Brown.*

ORDINARY, *n.* The title of a judicial officer: in England, clothed with ecclesiastical jurisdiction; in several of the United States, vested with powers in regard to wills, probate, administration, guardianship, according to the statute in force.

An ordinary, in the civil law, is a judge who has authority to take cognizance of causes in his own right, and not by deputation; in the common law, one who has exempt and immediate jurisdiction in causes ecclesiastical. Also, a bishop; and an archbishop is the ordinary of the whole province, to visit and receive appeals from inferior jurisdictions. Also, a commissary or official of a bishop, or other ecclesiastical judge having judicial power; an archdeacon; officer of the royal household. *Wharton.*

Ordinary of assise and sessions. A deputy of the bishop of the diocese, anciently appointed to give malefactors their neck verses, and judge whether they read or not; also, to perform divine services for them, and assist in preparing them for death. *Wharton.*

Ordinary of Newgate. An attendant upon condemned malefactors in that prison to prepare them for death; he records the behavior of such persons. *Wharton.*

ORDINARY, *adj.* Common; reasonable to be expected; usual.

Ordinary business. An assignment of securities belonging to a corporation, made under the corporate seal, to secure to the assignee an admitted debt, arising in the business of the company, was held to be "ordinary business of the company," which a quorum of directors might authorize under a by-law authorizing such a quorum to transact all ordinary business, notwithstanding the value of the securities involved was very large. Whether a transaction is small or large cannot affect the question whether it is "ordinary business." Hoyt *v.* Thompson, 19 *N. Y.* 207; 3 *Bosw.* 290.

An exemption from turnpike tolls, of any person travelling upon the "ordinary domestic business of family concerns," does not extend to the case of physicians going to visit their patients. Centre Turnp. Co. *v.* Smith, 12 *Vt.* 212.

Such an exemption does not include an individual passing to another town from that in which he resided, in order to purchase lumber for his own use, it not appearing that he went to a mill. Second Turnpike *v.* Taylor, 6 *N. H.* 499.

Ordinary care. That degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances, to avoid injury. It should be in proportion to the danger to be avoided, and the consequences involved in its neglect. Toledo, &c. R. R. Co. *v.* Goddard, 25 *Ind.* 185; Johnson *v.* Hudson River R. R. Co., 6 *Duer*, 633.

What constitutes ordinary care will vary with the circumstances. In general, the term means that kind and degree of care which prudent and cautious men would use, — such as is required by the exigency

of the case, and such as is necessary to guard against probable danger. Brown *v.* Kendall, 6 *Cush.* 292.

Ordinary care is a relative term. What would be ordinary care in sailing a vessel or driving a horse would not be ordinary care in driving a locomotive. The caution must be measured always by the probabilities of danger from the thing used, just as it requires more diligence and care to control a wild than a tame animal, a strong and vicious than a weak and timid one. Moore *v.* Central R. R. Co., 24 *N. J. L.* 268, 286.

The term has relation to the situation of the parties and the business in which they are engaged, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which it is to be exerted. Fletcher *v.* Boston & Maine R. R. Co., 1 *Allen*, 1; Cunningham *v.* Hall, 4 *Allen*, 268; Pennsylvania R. R. Co. *v.* Ogier, 35 *Pa. St.* 60.

What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. But the question is, What would and should a reasonable and prudent man do, in such an exigency,—not what is usually done by persons in like employments? The word ordinary has a popular sense, which would greatly relax the rigor of the rule. The law means by ordinary care the care reasonable and prudent men use under like circumstances. Cayzer *v.* Taylor, 10 *Gray*, 274.

Ordinary care is equivalent to reasonable care, and necessarily involves the idea that such care was to be used as a reasonable person, under like circumstances, would adopt to avoid an accident. Fallon *v.* City of Boston, 3 *Allen*, 38.

As used in defining the nature of the care and skill expected of a physician or surgeon in his employment, the words ordinary and reasonable care have been used interchangeably. Perhaps ordinary is more indicative of such care and skill, to the common mind. Kendall *v.* Brown, 74 *Ill.* 232, 237.

The degree of care required to constitute ordinary care, which the owner of a domestic animal is bound to exercise to prevent injury being done by it, depends upon the character and disposition of the animal. Meredith *v.* Reed, 26 *Ind.* 334.

A failure, on the part of any one engaged in the pursuit of his own peculiar occupation, to observe precautionary rules, established by competent authority to guard against accidents and prevent injuries to others, is, in legal contemplation, a want of ordinary care. Philadelphia, &c. R. R. Co. *v.* Kerr, 25 *Md.* 521.

Ordinary diligence. Is that degree of care which men of common prudence generally exercise in their affairs, in the country and the age in which they live. Erie Bank *v.* Smith, 3 *Brews.* 9.

The term ordinary duties, when spoken of the acts of a bank cashier, does not comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the customary way. His ordinary duties are to keep 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; to receive directly, or through the subordinate officers of the bank, and hold moneys and notes of the bank; to deliver up all discounted notes and other securities, when they have been paid; to draw checks for withdrawing the funds of the bank which have been elsewhere deposited; and, as the executive officer of the bank, to transact most of its routine business. United States *v.* City Bank of Columbus, 21 *How.* 356.

Ordinary fences. In a statute speaking of "unruly cattle, that will not be restrained by ordinary fences," does not mean lawful fences, but such fences as are common, and sufficient to restrain orderly cattle. Hine *v.* Wooding, 37 *Conn.* 123.

Ordinary language. As used in N. Y. Code of Pro. § 149, subd. 2, regulating pleadings, means the established and customary use of legal terms, at the time when the code was enacted. Bell *v.* Yates, 33 *Barb.* 627, 629.

Ordinary neglect, or negligence. The omission of that care which a man of common prudence usually takes of his own concerns. Scott *v.* Depeyster, 1 *Edw.* 513, 543. See Wells *v.* N. Y. Central R. R. Co., 24 *N. Y.* 181; also GROSS.

The degree of negligence necessary to authorize a recovery against a hirer of an animal injured in his charge is the omission of that diligence in the use and care of it which the generality of mankind use as to their own. And the omission of such diligence is called ordinary negligence. Moore *v.* Cass, 10 *Kan.* 288.

Ordinary process of law. In the Missouri tax laws, does not mean ordinary personal judgment and execution, but such process as is adopted to enforce a lien or specific charge upon the property specially assessed. Neenan *v.* Smith, 50 *Mo.* 525.

ORDINATION. In ecclesiastical law, is the conferring holy orders, or initiating a person into the priesthood. In England, the first thing necessary, on application for holy orders, is the possession of a title; that is, a sort of assurance from a rector to the bishop, that, provided the latter finds the party fit to be ordained, the former will take him for his curate, with a stated salary. The candidate is then examined by the bishop or his chaplain respecting both his faith and his erudition; and various cer-

tificates are necessary, particularly one signed by the clergyman of the parish in which he had resided during a given time. Subscription to the thirty-nine articles is required; and a clerk must have attained his twenty-third year before he can be ordained a deacon, and his twenty-fourth, to receive priest's orders. The ceremony of ordination is performed by the bishop, by the imposition of hands on the person to be ordained. In the English church, and in most Protestant countries where the church is connected with the state, ordination is a requisite to preaching; but in some sects ordination is not considered necessary for that purpose, although it is considered proper, previously to the administration of the sacraments. *Wharton.* See ORDAIN.

ORDNANCE OFFICE. A public department of the English government, consisting of six officers, called respectively the master-general, the surveyor-general, the clerk of the ordnance, the principal storekeeper, the secretary to the master-general, the secretary to the board. The surveyor-general, clerk of the ordnance, and principal storekeeper, constituted, together, what was called the board of ordnance. The department was under the control of the master-general and the board. It was the duty of the master-general to direct personally all matters relating to the corps of artillery and engineers. It was the duty of the board to superintend the construction and repair of fortifications, barracks, and military buildings in the United Kingdom and in the colonies, and of the colonial government buildings; also the supply of arms, ammunition, and military stores for the army and navy, and the contract and issue of fuel, lights, and the various military supplies, both at home and abroad, and of provisions and forage for the army in Great Britain; also the surveys, both civil and military, required at home and abroad, and the direction of the scientific works pertaining to the corps of engineers. By Stat. 18 & 19 Vict. ch. 117, passed in 1855, the estates and powers of the officers of ordnance are transferred to one of her majesty's principal secretaries of state. *Mozley & W.*

ORE TENUS. By word of mouth; orally; verbally. Pleadings and many other proceedings were anciently carried on *ore tenus*, at the bar of the court, in the common-law practice. Oral proceedings are seldom allowed in modern times, except before inferior courts, justices of the peace, &c.

ORIGINAL. Occurs, without much deviation from the vernacular meaning, in several technical terms and phrases.

Original bill. 1. This was the name of the ancient mode of commencing actions in the court of king's bench.

2. In equity pleading, a bill which relates to some matter not before litigated in the court by the same persons, standing in the same interests, is called an original bill, in contradistinction from a cross-bill, a bill of revivor, of supplement, &c. See BILL.

Original charter. A Scotch phrase for that charter which is granted first to the vassal by the superior. *Wharton.*

Original contractor. In the Missouri mechanic's lien law, includes a party furnishing material to a railroad company, under a contract with its president. Hearne *v.* Chillicothe, &c. R. R. Co., 53 *Mo.* 324.

Original conveyances. Those conveyances by means whereof the benefit or estate is created or first arises. The term includes: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange. 2 *Bl. Com.* 309, 310.

Original entry. The first series of entries made in a set of books of account, as distinguished from the charges and credits as they appear when classified and posted. The rule is, that the book of original entries is the primary one, to be produced in evidence.

Original estate. An original is the first of several estates, bearing to each other the relation of a particular estate and a reversion. An original estate is contrasted with a derivative estate; and a derivative estate is a particular interest carved out of another estate of larger extent. *Pres. Est.* 125.

Original inventor. A person, to be entitled to the character of an inventor, must himself have conceived the idea embodied in his improvement. If, however, he is aided by the suggestions of others in arriving at the useful result, and if, after all the suggestions, there was something left for him to devise and work out by his own skill and ingenuity, he may still be regarded as the first and original discoverer. But if the suggestions and communications of others go to make up a complete and perfect machine, embodying all that is embraced in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid. Pitts *v.* Hall, 2 *Blatchf.* 229.

Original jurisdiction. Authority to take cognizance of a controversy in its first condition, and to try and determine the questions of fact, and apply the law, as distinguished from appellate jurisdiction. See APPELLATE.

Original owner. The words original owners, in the prospectus of an oil company, are not terms of art, science, or trade, requiring the aid of experts for explanation. Simons *v.* Vulcan Oil, &c. Co., 61 *Pa. St.* 202.

Original writ. An original writ was the process formerly in use for the commencement of personal actions. It was a mandatory letter from the king, issuing out of chancery, sealed with the great seal, and directed to the sheriff of the county wherein the injury was committed, or was supposed to have been committed, requiring him to command the wrong-doer or accused party either to do justice to the plaintiff, or else to appear in court and answer the accusation against him. This writ is now disused, the writ of summons being the process prescribed by the uniformity of process act for commencing personal actions; and under the judicature act, 1873, all suits, even in the court of chancery, are to be commenced by such writs of summons. *Brown.*

Original writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms. Many of these forms are of a remote and undefined antiquity; but others are of later origin, and their history is as follows: The ancient writs had provided for the most obvious kinds of wrong; but in the progress of society, cases of injury arose, new in their circumstances, so as not to be reached by any of the writs then known in practice; and it seems that either the clerks of the chancery (whose duty it was to prepare the original writ for the suitor) had no authority to devise new forms to meet the exigency of such cases, or their authority was doubtful, or they were remiss in its exercise. Therefore, by the statute of Westm. 2, 13 Edw. I. ch. 24, it was provided, "that as often as it shall happen in the chancery that in one case a writ is found, and in a like case, falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the next parliament," &c. This statute, while it gives to the officers of the chancery the power of framing new writs in a like case with those that formerly existed, and enjoins the exercise of that power, does not give or recognize any right to frame such instruments for cases entirely new. It seems, therefore, that for any case of that description no writ could be lawfully issued, except by authority of parliament. But, on the other hand, new writs were copiously produced, according to the principle sanctioned by this act, *i.e.* in a like case, or upon the analogy of actions previously existing; and other writs, also, being added from time to time, by express authority of the legislature, large accessions were thus, on the whole, made to the ancient stock of *brevia originalia.* All forms of writs, once issued, were entered from time to time, and preserved in the court of chancery in a book called "The Register of Writs," which in the reign of Henry VIII. was first committed to print, and published. This book is still an authority, as containing in general an accurate transcript of the forms of all original writs as then framed; but a variation from the register is not conclusive against the propriety of a form. *Wharton.*

ORPHAN. A fatherless child. *Jacob.*

A fatherless child, or minor, or one deprived of both father and mother. *Wharton.*

A minor, or infant, who has lost both of his or her parents. Sometimes, the term is applied to such a person, who has lost only one of his or her parents. *Bouvier.*

"Orphan" may mean either a minor, who has lost both parents, or one who has lost only one. A devise for the benefit of the Roman Catholic orphans of a specified region is void for uncertainty, for the reason, among others, that it is impossible to determine whether whole or half orphans are meant. Heiss *v.* Murphy, 40 *Wis.* 276, 290.

Orphanage part. That portion of an intestate's effects which his children are entitled to, by the custom of London. This custom appears to be a remnant of what was once a general law all over England; viz., that a father should not by his will bequeath the entirety of his personal estate away from his family, but should leave them a third part at least, called the children's part, corresponding to the "bairns' part," or *legitim,* of Scotch law, and also (although not in amount) to the *legitima quarta* of Roman law.

Orphans' court. A term sometimes used in the United States, as the title of a court having jurisdiction over the probate of wills, and the administration and settlement of decedents' estates, usually called probate court. The title orphans' court is applied to courts of this character, in Delaware and New Jersey.

OSTENSIBLE PARTNER. One who lets his credit be pledged as a partner, — as in the case where a man's name appears in a firm, or where he interferes in the management of the business, so as to produce in strangers a reasonable belief that he is a partner. The person so acting is answerable as a partner to all who deal with the firm, without having notice at the time that he is a stranger to it in point of interest. 2 *Steph. Com.* 101–104; *Mozley & W.*

OTHER. The expression other actions, following an enumeration of some well-known common-law actions, does not include militia cases, bastardy cases, the assessment of damages under the mill acts, nor the assessment of damages for laying out highways in the country. If all the actions enumerated are common-law actions, the maxim of *noscitur a sociis* is applicable, and raises a fair inference that the "other actions" were intended to be of the

same description. Valentine *v.* City of Boston, 20 *Pick.* 201.

A power in a will to the executrix to let, collect rents, and "to do all 'other acts' as fully as the testator could do if living," means acts needful and necessary for the carrying out of the powers granted, — such as advertising, appointing collectors, distraining, putting on needful repairs to the houses, &c. The erection of an additional building is not authorized by such words. Cusack's Estate, 3 *Brews.* 325.

Under a policy which mentioned dried fish among articles free from average, unless general, adding also "all other articles perishable in their own nature," it was held that pickled fish were not included. Baker *v.* Ludlow, 2 *Johns. Cas.* 289.

The words "or any other banking-game," in the statute against gaming, must be construed according to the intent of the legislature; and they include any banking-game, though not named in the act. Randolph *v.* State, 9 *Tex.* 521.

A meeting of a mutual fire-insurance company, called "for the purpose of making such alterations in the by-laws of said company as may be deemed necessary, and for the transaction of such other business as may come before them," cannot, after voting to increase the number of directors (which is not limited by the by-laws), elect the additional directors; and an assessment or call made at a meeting of the board of directors, at which only the additional directors so chosen are present, is void. People's Mut. Ins. Co. *v.* Westcott, 14 *Gray*, 440.

Under Mass. St. 1804, ch. 125, defining the powers and duties of turnpike corporations, and which provides that a certain toll shall be paid "for each coach, chariot, phaeton, or other four-wheel spring carriage," it was held that the term coach is not controlled by the words other four-wheel spring carriage, and that a stage-carriage, the body of which was suspended on thorough-braces, attached to four braced iron jacks, is a coach, within the provision of the statute. Housatonic River Turnp. Corp. *v.* Frink, 15 *Pick.* 443.

A clause in a turnpike charter, imposing tolls upon "coaches, chariots, and other four-wheeled pleasure carriages," includes stage-coaches used for the conveyance of the mail and of passengers. Cincinnati, &c. Turnp. Co. *v.* Neil, 9 *Ohio*, 11.

"Other crime," in U. S. Const. art. 4, § 2, and laws relative to the surrender of fugitives from justice, means any offence indictable by the laws of the state demanding the surrender. Brown's Case, 112 *Mass.* 409.

An act declaring that certain affidavits shall not be invalidated by "clerical or other defects," refers to defects of a formal kind only. An affidavit which contains no statement of facts should not be held sufficient under such a provision. Town of Duanesburgh *v.* Jenkins, 40 *Barb.* 574.

The words "or other device," in an act forbidding gaming, are not to be considered as too uncertain. United States *v.* Speeden, 1 *Cranch C. Ct.* 535.

"Other estate," in a statute giving a remedy against any one suspected of having "fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate," of an insolvent, is not confined to personal property, but extends to real estate. Although, generally, "other," following an enumeration of particulars, is construed as embracing unenumerated particulars of like nature only, yet here, the history and objects of the statute indicate that a broader use was intended. Harlow *v.* Tufts, 4 *Cush.* 448.

A contract with a reservoir company, permitting the owner of a cotton-mill to draw water to run his mill, "or such other mill or mills as may be erected upon his said privilege," is not restricted to objects of the same kind, but, in this case, would include a paper-mill. Phœnix Cotton Manuf. Co. *v.* Hazen, 118 *Mass.* 350.

"Other person," found in a statute after mention of a specific class, means other like person. State *v.* Stoller, 38 *Iowa*, 321.

The term other person, in Rev. Stat. ch. 134, § 31, subd. 9, which exempts from execution the tools, &c., of "any mechanic, miner, or other person," does not include a judgment debtor who is a farmer; it being the clear intention of the legislature to define, in subd. 7, the farming tools and implements, &c., which shall be exempt from execution. Bevitt *v.* Crandall, 19 *Wis.* 581.

A mortgage on "locomotives and all other personal property" certainly covers the locomotives, even if it be too uncertain to cover more. Pennock *v.* Coe, 23 *How.* 117.

"Other structures," in a law giving a mechanic's lien on wharves, piers, bulkheads, and bridges, and other structures connected therewith, includes sheds erected upon piers occupied by a steam navigation company, for offices and other business. Collins *v.* Drew, 67 *N. Y.* 149.

OTHERWISE. Authority to a corporation to take, "by direct purchase or otherwise," is an "express authority to take by devise." Downing *v.* Marshall, 23 *N. Y.* 366.

OUSTED, means to be removed or put out; thus, ouster of the freehold signifies being put out of possession of the freehold; ousted of an estate for years, signifies being turned out from the occupation of the land during the continuance of the term. *Brown.*

OUSTER. Dispossession; eviction; exclusion from lands, office, &c.

It is often spoken of as a species of tort; but it has not necessarily this meaning. The judgment rendered in *quo warranto*, excluding an intruder from a

public office, is called judgment of ouster.

Ouster is a wrong or injury that may be sustained in respect of hereditaments, corporeal or incorporeal, and carries with it the amotion of possession; for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that has a right to seek his legal remedy, in order to gain possession and damages for the injury sustained. Such dispossession may be either of the freehold or of chattels real. Ouster of the freehold is effected by various methods: by abatement, intrusion, disseisin, deforcement, or discontinuance. Ouster of chattels real consists of amotion of possession of estates held by statute, recognizance, or *elegit*, which happens by a species of disseisin or turning out of the legal proprietor before his estate is determined by raising the sum for which it is given to him in pledge; or, of amotion of possession from an estate of years, which also takes place by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land during the continuance of his term. *Wharton.*

Ouster le main. Literally, out of the hand. 1. A delivery of lands out of the king's hands by judgment given in favor of the petitioner in a *monstrans de droit.* (3 *Steph. Com.* 657.)

2. A delivery of the ward's lands out of the hands of the guardian, on the former arriving at the proper age, which was twenty-one in males, and sixteen in females. Abolished by 12 Car. II. ch. 24. (*T. L.; Cowel;* 2 *Bl. Com.* 68; 1 *Steph. Com.* 191.) *Mozley & W.*

OUTER BAR. In the English courts, barristers-at-law have been divided into two classes, — viz., queen's counsel, who are admitted within the bar of the courts, in seats specially reserved for themselves; and junior council, who sit without the bar: and the latter are thence frequently termed barristers of the "outer bar," or "utter bar," in contradistinction to the former class.

OUTFIT. A word of originally limited meaning, as applied to different trades and in its application to vessels; but it has acquired an enlarged meaning in the hands of merchants engaged in whaling voyages, adapted to their growing trade. As thus used, "outfits" is a word not clearly defined and strictly limited in its import, but is subject to be explained by proof of usage in the whaling business, and of what are generally regarded as outfits by persons in that business. Macy *v.* Whaling Ins. Co., 9 *Metc.* (*Mass.*) 354, 365.

Outfit sometimes signifies an allowance made by the government of the United States to a minister plenipotentiary or *chargé des affaires*, on going from the United States to any foreign country. *Bouvier.*

OUT-HOUSE. A building adjoining or belonging to a dwelling-house; a building subservient to, yet distinct from, the principal mansion-house, located either within or without the curtilage. *Bouvier.*

Any house necessary for the purposes of life, in which the owner does not make his constant or principal residence, is an out-house. State *v.* O'Brien, 2 *Root*, 516.

A barn not connected with the mansion-house, but standing alone several rods distant therefrom, is an out-house. State *v.* Brooks, 4 *Conn.* 446.

By the phrase, out-house where people resort, in the act to suppress gaming, is meant any house standing out and apart from houses used as dwellings or business houses. Wheelock *v.* State, 15 *Tex.* 260.

An "out-house where people resort," to be within the purview of the statute against gaming, must be one to which people have resorted on more than one occasion, or one where more persons than those actually engaged in gaming are assembled on the particular occasion when the offence is charged to have been committed. State *v.* Norton, 19 *Tex.* 102.

An open shed in a farm-yard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, is an out-house, within 7 & 8 Geo. IV. ch. 30, § 2. Rex *v.* Stallion, 1 *Moody*, 398.

A building separated from the house by a passage, used as a school-room, but within the curtilage, is an out-house, within 9 Geo. I. ch. 22, § 1, although not of the ordinary description of out-houses. Rex *v.* Winter, *Russ. & R.* 295.

An open building in a field at a distance from and out of sight of the owner's house, though boarded round and covered in, is not an out-house, within 7 & 8 Geo. IV. ch. 30, § 2. Rex *v.* Ellison, 1 *Moody*, 336.

A cart-hovel, consisting of a stubble roof supported by uprights, in a field at a distance from other buildings, is not an out-house, within 7 & 8 Geo. IV. ch. 30, § 2. Rex *v.* Parrott, 6 *Car. & P.* 402.

A was indicted for setting fire to an out-house. The building set on fire was a thatched pigsty, situate in a yard in the possession of the prosecutor, into which yard the back-door of his house opened, and which yard was bounded by fences and by other buildings of the prosecutor, and by a cottage and barn which were let to him by a tenant, but which did not open into this yard. It was held that this pigsty was an out-house, within 7 Wm. IV. & 1 Vict. ch. 89, § 3. Reg. *v.* Jones, 1 *Car. & K.* 303; 2 *Moody*, 308.

Setting fire to paper only, in a drying-loft belonging to a paper-mill, no part of which was burned, is not setting fire to an out-house, within 9 Geo. I. ch. 22. Rex *v.* Taylor, 1 *Leach*, 49; 2 *East P. C.* 1020.

A first count charged the firing of a certain building, used by O for carrying on his trade as a builder; and other counts laid the arson as of a stable, an out-house, and a stack of haulm. It was proved that some haulm had been carted from a field and stacked in a building originally intended for a stable, but afterwards divided into three parts of a wall, which reached only to the eaves. One part was used as a stable, and the part fired contained the haulm and a lot of tiles of the prosecutor, who was a builder. The fire had been kindled on the haulm. It was held that the building was improperly described as an out-house, a shed, or a stable. Reg. *v.* Munson, 2 *Cox Cr. Cas.* 186.

A building had been built for an oven to bake bricks, but afterwards was roofed and a door put to it. In this place the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor nor the person of whom he rented this building had any house or farm-yard near it, nor did any wall connect it with any dwelling-house; the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord. It was held that the building was neither a stable nor an out-house, and that, if a person set it on fire (the lean-to not being burned), he was not indictable for arson. Rex *v.* Haughton, 5 *Car. & P.* 555.

OUTLAND. The Saxon Thanes divided their hereditary lands into inland, such as lay nearest their dwelling, which they kept to their own use; and outland, which lay beyond the demesnes, and was granted out to tenants, at the will of the lord, like copyhold estates. This outland they subdivided into two parts: one part they disposed amongst those who attended their persons, called Theodans, or lesser Thanes; the other part they allotted to their husbandmen, or churls. *Jacob.*

OUTLAW. As used in Ala. act of Dec. 28, 1868, § 1, declaring counties liable for persons killed by an outlaw, &c., does not mean an outlaw in the strict common-law sense of the term, a person who has been adjudged by a regular judicial proceeding to be out of the protection of the laws. No such proceeding is known to the laws of Alabama. The term is used, in the act, in a loose sense, having reference to the disturbed condition of society at the time; and includes the lawless and disorderly persons then addicted to roving through the state in disguise, and committing, habitually, acts of violence and outrage. Dale County *v.* Gunter, 46 *Ala.* 118, 137.

The word outlaw has a strict technical signification, and means a person who is put out of the law; that is, deprived of its benefits and protection. In earlier times, he was called a "friendlesman,"—one who could not, by law, have a friend. An outlaw was said *caput genere lupinum*, by which it was meant that any one might knock him on the head, as a wolf, in case he would not surrender himself peaceably when taken. He forfeited every thing he had, whether it was in right or possession. Drew *v.* Drew, 37 *Me.* 389.

The maxim applicable to outlaws is, "let them be answerable to all, and none to them." Accordingly, any person outlawed is *civiliter mortuus*. He can hold no property given or devised to him; and all the property which he held before is forfeited. He can neither sue on his contracts, nor has he any legal rights which can be enforced; while, at the same time, he is personally liable upon all causes of action. He can, however, bring actions *in autre droit*, as executor, administrator, &c., because in such actions he only represents persons capable of contracting, and under the protection of the law. *Exp.* Franks, 7 *Bing.* 767.

OUTLAWED. When applied to a promissory note, means, barred by the statute of limitations. Drew *v.* Drew, 37 *Me.* 389.

OUTLAWRY. An ancient proceeding, putting a man out of the protection of the law, so that he became incapable of bringing an action for redress of injuries, and forfeited all his goods and chattels to the king. Outlawry was a process which might be resorted to against an absconding defendant in a civil or criminal proceeding. An outlawry for treason or felony operated as a conviction and attainder; and, anciently, a person outlawed might be killed by any one who should meet him. But as early as the reign of Edward III. it was held that no man was entitled to kill him, except the sheriff having lawful warrant. (*Cowel;* 1 *Bl. Com.* 42; 3 *Id.* 284; 4 *Id.* 319; 3 *Steph. Com.* 495; 4 *Id.* 383, 465.)

By later rules, though an outlaw could not prosecute any action, except for the purpose of reversing the outlawry, he might appear for the purpose of protecting himself from the claims of others, or might come to the court to set aside proceedings taken against him. He was not prohibited from suing or defending in another's right; he was a competent witness, though he could not be a juror. But the whole proceeding is now practically obsolete. *Mozley & W.*

OUTRAGE. A general term for any grave injury or heinous wrong; any violation of another's right which shocks the general moral sense.

It is not a law term, though often met in the decisions on wrongs and crimes. Burrill says that it is of law-French origin, formerly meaning excess; more than is one's due or right.

Outrage and indignity. In estimating damages in cases of assault and battery, mental anguish, or pain, as distinguished from physical suffering, must be included

in the meaning of outrage and indignity. McKinley *v.* Chicago, &c. R. R. Co., 44 *Iowa*, 314.

OUTRIDERS. Bailiffs errant, employed by sheriffs or their deputies to ride to the extremities of their counties or hundreds, to summon men to the county or hundred court. *Wharton.*

Ouverture des successions. In French law, denotes the right of succession which arises to one upon the death, whether natural or civil, of another. Such successor must not be either as yet unconceived, or a child *non viable*, or one civilly dead; and he must also be clear of certain moral delinquencies, for which see code civil, 727. Bastards have no rights of succession; but in case their parent leaves legitimate offspring, they have one-third of the goods which, as a legitimate child, they would have received; and if the parent leaves no legitimate offspring, but ascendants or collaterals (being brothers or sisters), then one-half; and if the parent leaves neither legitimate offspring nor ascendants nor collaterals (being brothers or sisters), then three-fourths; and in case of a total failure of inheritable relations, then the whole. The widow surviving takes the succession where the parent leaves no inheritable relations or bastards, and failing her, the state. *Brown.*

OVER. The words "over" and "under," as applied to the surface, are not precisely opposites. A person passes over a road, if he crosses it on the surface, as well as when he crosses above it, on a bridge; but he cannot be said to pass under it, unless on another surface at a lower level.

A statutory power to lower a turnpike road, so as to have a railroad pass over it, includes power to carry the turnpike across the railroad on the same level. Newburyport Turnp. Corp. *v.* Eastern R. R. Co., 23 *Pick.* 326; Boston & Maine R. R. Co. *v.* Mayor, &c. of Lawrence, 2 *Allen*, 107.

OVERDRAFT. Differs in meaning from "draft;" that often signifies the instrument asking for money. We have never met "overdraft" used for the instrument asking for too much money; it usually signifies the act of drawing too much, or the state of the account after too much has been drawn. The balance or demand against the depositor, after he has drawn out more than his balance, constitutes the overdraft.

OVERDRAW. To obtain more money from one's bank or depositary, by bill, check, or order, than the state of the account authorizes. Overdrawing: taking out more than one's balance on deposit. Overdrawn: when an account between banker and depositor shows a balance in the banker's favor, instead of in the depositor's, it is said to be overdrawn.

Bouvier defines "overdraw" as meaning to draw bills or checks upon an individual, bank, or other corporation, for a greater amount of funds than the party who draws is entitled to. But we do not understand that to draw a bill or check, even though it is presented, constitutes overdrawing, unless money is paid out upon it in excess of the balance. Certainly, a bank account is not called overdrawn, unless too much has been paid out upon it. To draw one's check for too much, which the bank refuses to pay, may be an attempt to overdraw, nothing more.

The term overdraw is not recognized or adopted by the lexicographers; but it has, nevertheless, a definite and well-understood meaning. Money is drawn from the bank by him who draws the check, not by him who receives the money; and it is drawn upon the account of the individual by whose check it is drawn, though it be paid to and for the benefit of another. No one can draw money from bank upon his own account, except by means of his own check or draft, nor can he overdraw his account with the bank in any other manner. State *v.* Stimson, 24 *N. J. L.* 478, 484.

OVERDUE. 1. Of commercial paper, dishonored; matured and unpaid; past the time named for payment, yet not paid.

Wharton defines it as meaning past the time of payment. But we do not understand that the term is applicable to paper which has been paid. To be called overdue, a note must be still due; that is, not paid, although the time of maturity has passed. In this respect, Bouvier's definition is superior: a bill, note, bond, or other contract for the payment of money at a particular day, when not paid upon the day, is overdue.

There is but a shade of difference between "overdue" and "due;" it consists in an implication of censure, which the former word conveys, and the latter does not. A bill becomes due throughout the business hours of the day on which it is by law payable; but as yet it is not overdue. If paid during that day, it ceases to be "due" at all. If not paid, it continues due; and may be

so called if no censure, no imputation of being dishonored, is intended; or it may be called "overdue," meaning to impute loss of negotiability and other consequences of default in payment of a mercantile paper.

2. Of vessels, one is said to be due, when the time at which she ought, under ordinary circumstances, to reach port, arrives, yet she has not come; and to be overdue, after that time passes without her arrival.

OVERRULE. Spoken of decisions of the courts, signifies that a court has decided a question of law adverse to a decision of it, in some former cause, so that the earlier decision loses authority as a precedent, in view of the later one. When a cause is carried up to an appellate court for review, and that court decides the question of law involved contrary to the opinion of the court below, this is not called "overruling," but "reversal." "Overruling" is confined to decisions upon the same question, rendered in independent causes. It is confined, moreover, to decisions by courts which are, *quoad hoc*, of superior authority. An inferior court cannot be said to overrule decisions of a higher court, when it decides in opposition to them.

OVERSEER. The style or title of several classes of public officers whose duties involve continuous general superintendence of routine affairs.

Overseers of highways, or roads. In several of the states, the general charge of construction and repair of highways is devolved upon a distinct board of officers, termed the overseers. In other states, a board of about the same powers and duties is known as commissioners of highways.

The term overseer of a public road, in Tenn. Code, § 1223, requiring signs to be put up by such overseer at railroad crossings, does not include a turnpike company. Louisville, &c. Turnpike Co. *v.* State, 3 *Heisk.* 129.

Overseers of the poor, in England, are public officers originally created by the 43 Eliz. ch. 2, to provide for the poor of every parish, and are sometimes two, three, or four, according to the extent of parishes. Church-wardens, by this statute, are called overseers of the poor, and they join with the overseers in making a poor's-rate, &c.; but the church-wardens, having distinct business of their own, usually leave the care of the poor to the overseers only, though anciently they were the sole overseers of the poor. (*Dalt.* ch. 27; *Wood Inst.* 93.) *Jacob.*

In the United States, overseers of the poor are public officers and liable to indictment, at common law, for any neglect of their duties or abuse of their powers; as for cruel treatment of paupers under their charge State *v.* Hawkins, 77 *N. C.* 494.

OVERT. Open; public. In the law of crimes, overt is applied to "act," to intensify the distinction between a design or intent, and something actually and manifestly done in the execution of it. In the law of sales, market overt (*q. v.*) is a public market.

Overt act. In modern prosecutions for treason in England, much stress has been laid upon the necessity of making due proof of some manifest, open act of treasonable nature, in order that no one should be condemned for mere treasonable designs or words. It is necessary, in order to a conviction, to substantiate either one overt act by at least two witnesses, or two overt acts of the same character by one witness apiece.

The importance of any such rule in the law of treason, in the United States, is much diminished by the careful definitions of treason, which the constitutions prescribe.

Overt act, in the act of congress of Feb. 12, 1793, respecting fugitives, &c., means one which is both intended and calculated to elude the master's vigilance. Jones *v.* Van Zandt, 5 *How.* 215, 228.

OWELTY. Equality. A sum paid by one of two joint owners, upon a partition of lands which cannot be quite equally divided, to equalize the shares, to make the value received by the recipient of the smallest parcel as great as that received by him who takes the largest, is called owelty of partition.

In the feudal law, when there is lord, mesne, and tenant, and the tenant holds the mesne by the same service that the mesne holds over the lord above him, this was called owelty of services. *Tomlins.*

OWN PREMISES. A statute prohibiting any person from selling wine, &c., without a license as dram-shop keeper, except a wine-grower selling "on his own premises," means that he may sell at the place of production or manufacture only. State *v.* Wyl, 55 *Mo.* 67.

OWNER. Under a statute which enacts that the "owner" may, within a time named, redeem land sold for taxes, a re-

demption may properly be made by a person who has been decreed a bankrupt, the lands having been his. Hampton *v.* Rouse, 22 *Wall.* 263.

A factor does not become "owner" of goods consigned to him for sale, by making advances upon them. By so doing, he acquires a lien, with right of possession, but is not the real owner. He is only an agent of the owner for certain purposes, and has but a limited right. That right is sometimes called a special property, but it is never regarded as a general ownership. The provisions of the abandoned and captured property act of congress, enabling the owner of property sold by the government to recover the proceeds from the treasury, do not include a factor, though he was intrusted with the property, for sale, and made advances on it. United States *v.* Villa Conga, 23 *Wall.* 35.

Whether a bailee may not, in some cases, be deemed an owner, see Park *v.* Willis, 2 *Cranch C. Ct.* 83; Act of July 13, 1866, § 9, 14 *U. S. Stat. at L.* 120.

The words "owner" and "proprietor," in a petition for dower, as descriptive of the estate of the deceased husband of the petitioner, are insufficient, because not describing an estate in fee-simple or fee-tail; which is necessary to support the petition. Davenport *v.* Farrar, 2 *Ill.* 314.

The Illinois statute making one liable to damages, as the owner of Texas or Cherokee cattle, for infection to other cattle, does not apply against one who has only a conditional ownership growing out of a lien, unless he has the actual possession and control of the cattle. Smith *v.* Race, 76 *Ill.* 490.

The penalty imposed by St. 1842, ch. 60, § 3, upon the owner, agent, or superintendent of a manufacturing establishment, for employing children under twelve years of age, cannot be enforced against a corporation in whose works such children may be employed. Benson *v.* Monson, &c. Manuf. Co., 9 *Metc.* (*Mass.*) 562.

"Owner" does not include a person who holds merely a parol contract for a conveyance of real property to him when he shall have paid the purchase-money, and who has paid a part, but not all of it. Ruggles *v.* Inhabitants of Nantucket, 11 *Cush.* 433.

"Owner," in Rev. Sts. ch. 7, § 7, — relating to taxes on real estate, — means the mortgagor, until possession taken by the mortgagee, after which the latter will be deemed the owner. Parker *v.* Baxter, 2 *Gray*, 185, 189.

"Owner," in the Minnesota homestead law, includes one who has an equitable as well as one who has a legal ownership. Wilder *v.* Haughey, 21 *Minn.* 101; Hartman *v.* Munch, *Id.* 107.

A statute giving a right of action against the owner of any locomotive or car, by the defects in which a person is injured, means the owner at the time of the injury, owner for the purposes of operating the road; and not, necessarily, the party in whom the absolute right of property is vested. If a corporation hires cars from a car-builder, and runs them on its road, the corporation, not the lessor, is the party liable to the statutory action. Proctor *v.* Hannibal, &c. R. R. Co., 64 *Mo.* 112.

A statute providing for compensation to owner of lands taken, is broad enough for any interest which a person may have in lands affected by an improvement, whether a fee or an estate less than a fee. Schoff *v.* Improvement Co., 57 *N. H.* 110.

By "owner," in provisions in a railroad charter regulating compensation for condemnation of lands, is meant the person having some legal estate which the company proposes by the condemnation to acquire. Under the more comprehensive expression of "persons interested" are included also other individuals having some independent right or interest therein, not amounting to an actual legal estate; such as an easement of a right of way, inchoate rights of dower or curtesy, or encumbrances, such as by judgments or mortgages which are charges or liens on the legal estate. State *v.* Easton, &c. R. R. Co., 36 *N. J. L.* 181.

A statute providing for an appraisal, "upon the application of the owner or owners, their heirs or assigns," designates the person equitably entitled to receive compensation, rather than the person having a legal estate in the land. Danforth *v.* Suydam, 4 *N. Y.* 66.

A statute providing that no highway shall be opened or worked without a release by the owner of the land, or an assessment of his damages, means the person entitled to the legal estate in the land. Smith *v.* Ferris, 13 *N. Y. Supreme Ct.* 553.

Generally, by "owner," in the mechanic's lien law, is meant the person on whose request and employment the building is erected, — the one who employs the contractor, and engages to pay for the structure. McDermott *v.* Palmer, 11 *Barb.* 9; McMahon *v.* Tenth Ward School Officers, 12 *Abb. Pr.* 129.

A widow to whom dower has never been assigned is not "the owner" of any of the land in which she is entitled to dower, within the meaning of the Kansas mechanic's lien act. Ermul *v.* Kullok, 3 *Kan.* 499.

"Owner," in the New Jersey mechanic's lien law, does not include a mortgagee. Tompkins *v.* Horton, 25 *N. J. Eq.* 284.

"Owner," in the Ohio mechanic's lien law, is not limited to an owner in fee, but includes also an owner of a leasehold estate. If the ownership is in fee, the lien is on the fee; if it is of a less estate, the lien is on such smaller estate. Choteau *v.* Thompson, 2 *Ohio St.* 114.

One who has sold lots, and agreed to make a building-loan, does not continue to be "owner," within the meaning of the mechanic's lien laws, merely because the title is not, by the agreement of sale, to be

transferred to the vendee until the completion of the proposed building. Loonie *v.* Hogan, 9 *N. Y.* 435; 2 *E. D. Smith*, 681.

Lessees of land for years, with covenant for renewal, have such an interest in the land as will bring them within the jurisdiction of a court authorized to fix the compensation a railroad shall pay to "owners." North Pennsylvania R. R. Co. *v.* Davis, 26 *Pa. St.* 238.

Under a statute exempting property of a given description, owned by a debtor, his interest in property of which he is part owner is exempt. Radcliff *v.* Wood, 25 *Barb.* 52.

"Owner," in the Ohio statute exempting property from execution, does not apply to the husband occupying the separate property of the wife as a homestead. Davis *v.* Dodds, 20 *Ohio St.* 473.

OYER. Originally, a law-French verb, meaning to hear.

In ancient practice, when a defendant sued upon a written instrument, of which he had no copy, desired to know its precise contents as they were to be set up against him before pleading, he might crave oyer; that is, petition to hear the instrument read to him, before he should interpose a plea. Thereupon, it is said that in ancient times the paper was produced and read in court, in defendant's hearing; but, later, a copy is furnished him, and by this copy he pleads, and the cause is tried. In this sense, oyer is now-a-days used as if it were a noun; and the phrase profert and oyer (*q. v.*) signifies the practice of proffering a written instrument as a cause of action, and desiring a copy or inspection before pleading.

Previous and preparatory to pleading in bar, the defendant may crave oyer of the writ or bond or other specialty upon which the action is brought, — that is, to hear it read to him; the generality of defendants, in the times of ancient simplicity, being supposed incapable to read it themselves; whereupon, by the old practice, the whole is entered verbatim upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. But now, to demand oyer of an obligation, is not only to desire the plaintiff's attorney to read the same, but to have a copy thereof, that the defendant may consider what to plead to the action. *Jacob.*

Oyer and terminer. This phrase is sometimes understood to mean to hear and terminate. A truer rendering is, hear and determine. *Terminer*, in the phrase, is doubtless an elision or corruption of *determiner*.

At all events, the phrase is now understood to mean a class of courts of original criminal jurisdiction of the higher sort. In English practice, a commission of oyer and terminer is a commission under the king's great seal, directed to certain persons, among whom two common-law judges are usually appointed, empowering them to hear and determine treasons, felonies, robberies, murders, and criminal offences in general. And courts of oyer and terminer and general jail delivery were (at least prior to the judicature act) tribunals held before the queen's commissioners, among whom are usually two judges of the superior courts of law at Westminster, twice in every year in every county of the kingdom, the metropolis and its vicinity excepted.

In New York, the phrase is used as the title of a court of leading original jurisdiction in criminal causes.

Oyez. Hear ye. The introductory word of proclamations by a public crier, as on opening court, originally used in the French forms, and retained as the commencement of the English forms of proclamations, but pronounced as if an English word. In American courts, the words hear ye are generally used.

O, YES. It is said to be a corruption of the French *oyez, i.e.* bear ye; and is sometimes used in courts by the public crier, to command attention, when a proclamation is going to be made. *Brown.*

P.

PACK. To pack a jury is a current expression, meaning to employ contrivance and improper influence for securing upon the panel members predisposed to find a desired verdict. The jury is packed when it is filled with adherents of the prosecution or friends of the accused.

PACKAGE. A package, within the meaning of U. S. Rev. Stat. § 3437, imposing internal revenue tax upon friction matches in parcels or packages of one hundred or less, means a bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand. A parcel is a small package; "parcel" being the diminutive of "package." Each of the words denotes a thing in form suitable for transportation or handling, or sale from hand to hand. Where a manufacturer put up matches in boxes containing two drawers or compartments, each holding forty odd matches, held, that each compartment was not taxable as a separate package or parcel; but the whole box was chargeable with one tax. United States *v.* Goldback, 1 *Hugh.* 529.

The word package, in a provision inserted in an express receipt, that if the value of the property is not disclosed the shipper will not demand of the carrier more than fifty dollars for the loss "of each package" receipted for, does not include a bale of cotton, a hogshead of tobacco, or the like. The term packages, as here used, must be interpreted to mean small parcels or bundles, whose appearance would give no adequate information to the carrier of their value. In such cases there is great propriety in requiring the value to be named, in order to enable the carrier to make a charge answerable to the responsibility, and at the same time to inform him of the care required. But it is otherwise where the appearance of the article itself indicates its value and advises the carrier of the care required in the transportation. Southern Ex. Co. *v.* Crook, 44 *Ala.* 468.

The word packages may be understond as embracing cotton bales. Lamb *v.* Camden, &c. R. R. Co., 2 *Daly*, 454, 480.

"Package," in old English law, signifies one of various duties charged in the port of London on the goods imported and exported by aliens, or by denizens the sons of aliens. *Tomlins.*

PACKET. In the act of Congress of March 2, 1827, § 3, prohibiting private conveying of letters and packets, includes newspapers. 4 *Op. Att.-Gen.* 276.

PACT. An agreement. The word is common in books founded on the civil law, and in Louisiana decisions, but is rarely used alone under common-law systems. It appears, however, in the terms nude pact and compact.

PACTUM. An agreement; a pact. In the civil law, this term is applied to any agreement or convention not having a specific name, and which was without consideration; such an agreement would not furnish ground for a cause of action, but might constitute a defence.

In the Roman law, with some exceptions, those agreements that the law does not directly enforce, but which it recognizes only as a valid ground of defence, were called *pacta.* Those agreements that are enforced — in other words, are supported by actions — are called *contractus.* The exceptions are few, and belong to a late period. *Hunt. Rom. Law*, 375.

The term, as used in Latin phrases and maxims adopted by the common law, has often a more general signification, and is not restricted to the technical sense given above. See NUDUM PACTUM.

Pactum constitutæ pecuniæ. An agreement for payment of money as appointed. A term designating in the civil law an agreement by which a person appointed to his creditor a certain day or a certain time, at which he promised to pay; or, simply, an agreement by which a person promises a creditor to pay him.

Pactum or *pactio* is any agreement other than a *contractus.* The institutes do not contain any definition of *contractus* nearer than the following, of *obligatio:* a legal bond which ties us down so that we must needs do something, according to the laws of our state. *Hunt. Rom. L.* 281.

The *pactum de constituto* may be defined as a promise by any one to discharge an existing obligation of another on a day named, or to give security for its fulfilment. (Dig. 13, 5, 28; Dig. 13, 5, 21, 2.) In what respect, then, does this informal agreement (pact) differ from the stipulation (*fidejussio*)? Both *fidejussio* and *constitutum* are accessory to an existing obligation, and in this respect are both contrasted with *mandatum.* In form, the difference between them is simply that one is made by, and the other without, interrogation of the surety. The only apparent distinction, then, is that *fidejussio* contemplated as possible an immediate liability of the surety; while the *pactum de constituto* postponed the liability of the surety to a future day. This difference, apparently trivial, rests upon a sound basis. In *fidejussio* there need be no valuable consideration; but in the pact there was a consideration, — namely, the forbearance of the creditor to sue; for the essence of the contract was to give time to the debtor. *Hunt. Rom. L.* 358.

Pactum de non petando. An agreement not to demand; an agreement between a creditor and his debtor, that the former will not demand from the latter the debt due. By this agreement the debtor is freed from his obligation.

This is not unlike the covenant not to sue of the common law.

Pacta privata jure publico derogare non possunt. Private agreements cannot derogate from public law. Otherwise expressed, *pactis privatorum juri publico non derogatur*, — agreements of private individuals do not derogate from public law.

This maxim of the civil law imports that no private bargain or arrangement between individuals can validate any contravention of the law, or render that valid and binding which the law declares to be invalid and ineffectual. Thus an agreement not to object to an obligation for a debt incurred at gambling does not validate the obligation or bar objection, because the fixed rule of law is that such obligations cannot be enforced. Nor, in like manner, will such an agreement validate an obligation which proceeds *ob turpem causam*. This applies merely to contracts which are in themselves illegal, impolitic, or *contra bonos mores*. It is not, therefore, to be regarded as absolute, for there are some legal provisions which may be derogated from by private bargain. *Trayn. Max.*

Pacta quæ turpem causam continent non sunt observanda. Agreements which embrace a base consideration are not to be observed. Contracts founded upon an immoral consideration are not binding. See *Ex turpi causa non oritur actio.*

Paine forte et dure. See *Peine forte et dure.*

PAIRING OFF. Members of a legislative assembly lose their votes upon any question, unless they are themselves present when the question is put; voting by proxy is not allowed in these bodies. Hence, when a member wishes to absent himself from the house, and at the same time is anxious not to diminish the strength of his party by the loss of his vote during his absence, he seeks out some member of the opposite party who is also anxious to absent himself, and by mutual agreement the two (or "pair" of) members arrange to be absent at the same time, the effect of which, of course, is, that on all questions which occur during their absence a vote is neutralized on each side; and thus the relative numbers on any given division are precisely the same as if both members were present. This system is known by the name of "pairs," and members acting under this arrangement are thence said to "pair off" upon any question in which a division of the house takes place during their absence.

PAIS; PAYS. Originally, the country, the neighborhood, the people of the vicinage.

The early idea of trial by jury was, that, in the first instance and for the determination of matters of fact, private controversies and trials for crime should be submitted to the decision of persons selected from the neighborhood where the controversy arose or the parties resided or the crime was perpetrated. Hence these matters were said to be tried *per pays*, — by the country. And the prisoner, when asked how he would be tried, was expected to answer, by God and my country; God and my neighbors. Likewise matter of a nature proper to be determined by the neighborhood tribunal, in distinction from questions of pure law, which must await final decision by the judges, was called matter *in pais;* and an estoppel raised by such matters, not by a record or deed, was called an estoppel *in pais.* These last expressions are still current.

PALACE COURT. A former English court of legal jurisdiction, held in the borough of Southwark, and having cognizance of personal actions arising within twelve miles of the palace of Whitehall. It was abolished by Stat. 12 & 13 Vict. ch. 101, § 13. See MARSHALSEA.

Pallio cooperire. Literally, to cover with a cloth. The phrase refers to an ancient English custom, according to which, when parents of children born out of wedlock afterwards intermarried, the children, together with the father and mother, stood under a cloth extended while the marriage was solemnizing. This was in the nature of adoption; and by such custom the children were taken to be legitimate in a popular sense; though by the common law the marriage of parents could not fully legitimate previously born children. See *Jacob.*

PANDECTS. The name of the chief of the compilations of the civil law prepared under the auspices of the Emperor Justinian, and forming collectively the Corpus Juris Civilis. The Pandects are

also known as the Code Justinian, or the Digest, *q. v.* This is the leading compilation of the Roman civil law.

We condense from Wharton's Dictionary an epitome of the contents of the Pandects, showing the character and order of the contents.

The Pandects are divided into fifty books, each book containing several titles, divided into laws, and the laws generally into several parts or paragraphs.

The first is called *principium*, being the beginning of the law; the rest are called paragraphs.

The first book begins with laying down the general principles of justice, and sets forth its different kinds; it then proceeds to treat of divisions of persons and things; senators are mentioned next; and lastly, magistrates, their delegates and assessors.

In the second, we have an account of the power of magistrates, and their several jurisdictions, continents; how a defendant is to be brought to try an issue, and of bail for action. The subject of the latter part of this book is covenants, and *transactiones* or imparlances.

The third book explains, in the first place, who those persons are that are allowed to sue at law; and as infamous persons are not admitted so to do, the second title treats of them. The following, of those whose assistance is required in legal proceedings, as attorneys, &c.; and lastly, the third book treats of the oath of calumny.

The fourth book explains the different causes for restoring a question to its normal state, and of an act done under coercion or fear of death. The next subject it treats of is compromises and arbitrations; after which it speaks of innkeepers and others in whose custody we leave any thing.

The fifth states, after having treated of judgments, who ought to make an assignment of the demand of inheritance, and of the impeachment of a will for informality.

The sixth treats of real actions by which private persons recover their own; which actions may be civil and direct, or prætorian or equitable.

The seventh respects burdens termed personal (*servitutes*), usufructs (leases), hirings.

The eighth treats of real burdens, prædial and urban.

The ninth speaks of personal, assimilated to the real, actions, such as actions for damage or crime committed by a slave, and actions of the *lex aquilia;* and, as connected with this last at the end of the book, of the action for damage done by throwing things into a highway, and of noxal actions.

The tenth book treats of mixed actions, such as the action of bounding and butting, *finium regundorem;* the action for partition of an inheritance or other particular thing; of the action called *ad exhibendum*, to compel the party "to produce," which is preparatory to the real action above mentioned.

The eleventh book treats of interrogatories upon facts; of such matters as are to be heard before the same judge; of seduced or runaway slaves; of gambling, false measurements of land; and, lastly, of burials and funeral expenses.

The twelfth book explains those personal actions by which the descendant shall be obliged to transfer the demise of inheritance of any thing, such as the action for a loan, and some others which go by the name of *condictio*, in its proper signification; that of fixing a day for the appointment of a judge.

The thirteenth book speaks also of some of these actions, and then of things lent, and of the actions relating to pledges.

The fourteenth and fifteenth books treat of actions arising from contracts made by three persons, but whereby such are bound; and, lastly, of *sctm macedonianum.*

The sixteenth contains *sctm velleianum*, compensations, and the actions concerning deposits.

The seventeenth treats of commission (*mandatum*) and partnership.

The eighteenth contains the law on the usual covenants of contracts of sale, the mode of their decision, and on what ground these contracts may be receded from, and upon whom the gain or the loss of the thing sold is to fall.

The nineteenth, in the first part, treats of actions of bargain and sale, of actions

of hiring, of the action for computation of value, called *æstimationis*, of permutation, of the action on the terms of the contract, called *præscriptis verbis*, arising from innominate contracts.

The twentieth book treats of pledges of the precedence of creditors, and the subrogation of the rights of prior lien; of the *distractio pignoris*, or sale of things pawned; and the redemption of the pledge, or extinguishment of lien.

The twenty-first explains the ædile's edict concerning the sale of slaves and animals; dispossession, called *evictio;* warranty, and the exception of the thing bought and delivered.

The first part of the twenty-second treats of usury, fruits, dependencies, accessaries to things, and default; the second, of proofs and presumptions, and of ignorance of the law or fact.

The twenty-third is upon espousals, marriage, dowry, agreements made relatively to that subject, and of lands given in dowry.

The twenty-fourth lays down the law of gifts between husband and wife; of divorce and recovery of the marriage portion.

The twenty-fifth treats of expenses laid out upon dowries; of actions for the recovery of things carried away by a wife or other person, against whom no action of theft lies; of the obligation to acknowledge children, and provide for their maintenance; and, lastly, of concubines.

The twenty-sixth and twenty-seventh books treat wholly of guardianships, *tutela*, and *curatela*, and of the actions which result from them; of exemption from wardship, and the alienation of goods belonging to wards, *pupillæ*, or *minores*.

The twenty-eighth book contains the law of wills; the institution and disinheritance of children; of the institution of an heir; of substitutions; of conditions required in institutions; and of the right of deliberating before accepting an inheritance.

The twenty-ninth book treats of the military wills; of the acquisition of an inheritance, and of the opening of wills, &c., and of codicils.

The thirtieth, thirty-first, and thirty-second treat of legacies and bequests in trust in general.

The thirty-third, and likewise the first titles of the thirty-fourth, treat of particular legacies; the Catonian regulations; of legacies reputed never to have been left, and those of which unworthy persons are deprived.

The thirty-fifth speaks of conditional legacies, and of the law *falcidia*, reserving a certain portion of the inheritance for the heir.

The thirty-sixth explains the *sctm tribellianum*, regulating bequests in trust; the time when legacies and fiduciary bequests become due, and the security the heir is obliged to give for their liquidation, if left conditionally; and of their foreclosure in default of such security.

The thirty-seventh book speaks first of the succession to a deceased person's estate, called universal, granted by the prætor, under the name of *bonorum possessio;* after which it treats of hotchpot (*collationes*), of goods and dowry, and the right of patronage.

The thirty-eighth book lays down the duties of freedmen to their patrons; the law of their succession; of intestate succession under the authority of the prætor; and, lastly, of domestic and legal heirs, and of the *sctm tertullianum* and *orphilianum*.

The thirty-ninth book first shows the means which the law or the prætor furnishes to prevent any one from receiving damage, where a personal, real, or mixed action will not lie; these means are, caveat against a new work (*cautio damni infecti*), and the action of eavesdrop (*de aqua pluvia arcenda*); it ends with the explanation of donations which come into operation during the life of the donor, and of such as are made in contemplation of death.

The fortieth book relates to manumissions, distinguishing between ingenui, freedmen, and slaves, and explaining their rights.

The forty-first treats of the different modes by which property in things is acquired by the law of nations; of possession; of prescriptions; and, lastly, of lawful causes authorizing possession, and consequently making it capable of prescription.

The forty-second treats, in the first place, of things adjudged; of definitive and interlocutory sentences; of confessions in judgment; of the assignment of goods; of the causes of seizure and its effects, and of the privileges of creditors; it then passes to curators appointed for the administration of goods, and for the revocation of acts done to defraud creditors.

The forty-third treats of injunctions and possessory actions.

The forty-fourth first treats of exceptions and defences, and then of obligations and actions.

The forty-fifth, of stipulations.

The forty-sixth, of sureties, novations and delegations of payment and discharges of acceptilations, stipulations, and some bails for action.

The forty-seventh treats of offences termed private.

The forty-eighth begins with public judgments; then follow accusations, inscriptions, prisons, and all public offences; thence it passes to the *sctm turpillianum* and abolition of crimes; and, lastly, it treats of the torture, punishments, confiscations, exile, transportation, and of the bodies of malefactors executed.

The forty-ninth treats of appeals, and matters relating thereunto; it then gives an account of the rights of exchequer; of matters relating to captives, military discipline, soldiers, and veterans.

The fiftieth book treats of the rights of cities and citizens; of magistrates and their children; of public offices, and the causes which exempt persons from them; and also of the right of immunity; after, of deputies and ambassadors; of the administration of things belonging to cities; of public works, fairs, promises (termed *pollicitationes*), judgments given in extraordinary cases by magistrates; of brokers and factors; of taxes laid upon the provinces; and, lastly, it ends with the interpretation and signification of law terms, and of the rules of the law.

Besides this distribution of the Digest into fifty books, it was divided into seven parts; but the reason that induced the emperor to make this division is not known. Some supposed it was done in order to separate the different matters, and include all that related to one subject in one part, consisting of several books. Others attribute it to the superstitious respect of the ancients for the number seven, as the most perfect.

The first part contained the first four books.

The second part, entitled *de judiciis*, contained all, beginning with the fifth to the end of the eleventh.

The third part, *de rebus*, included all to the end of the nineteenth.

The fourth part included the accessories to contracts and actions arising out of marriage and guardianship, ending with the twenty-seventh book.

The fifth, entitled *de testamentis*, began with the twenty-seventh and ended with the thirty-sixth.

The sixth is entitled *de bonorum possessionibus*, at the commencement of the thirty-seventh book, and ends with the forty-fourth.

The seventh contains the remaining six books.

The division of the Pandects into the *digestum vetus*, *digestum novum*, and the *infortiatum*, belongs to the fifteenth and sixteenth centuries.

PANEL. 1. The list, roll, or schedule embracing the names of persons summoned to attend as jurors; also, the body of persons in attendance under the summons is sometimes called the panel.

The word panel includes the jurors returned upon a special *venire*, to fill out the deficiency after the regular panel has been exhausted. People *v.* Coyodo, 40 *Cal.* 586.

2. In Scotch law, one who appears to take his trial for a crime is called the panel, during the subsequent proceedings; thus the term is equivalent to "prisoner at the bar."

PANIER. In the parlance of the English har societies, is an attendant or domestic who waits at table and gives bread (*panis*), wine, and other necessary things to those who are dining. The phrase was in familiar use amongst the knights templars, and from them has been handed down to the learned societies of the Inner and Middle Temples, who at the present day occupy the halls and buildings once belonging to that distinguished order, and who have retained a few of their customs and phrases. *Brown.*

PAPER-BOOK. A formal collection,

copy, or file of the pleadings and written proceedings in a cause, customarily prepared for the use of the judges, upon the hearing of an argument.

The term seems to comprehend the various kinds known as appeal-book, demurrer-book, motion-papers, transcript of the record, and the like.

PAR. Literally, equal. As often used, it may be more lucidly rendered apparent worth, nominal value.

When stocks or evidences of debt are salable in the market at their nominal value, they are said to stand or to sell at par; they are called above or below par, if they bring more or less than their apparent worth.

The words "to be paid in currency that is at par," in a promissory note, mean currency equal to gold. Crim *v.* Sellars, 37 *Ga.* 324. See also Galloway *v.* Jenkins, 63 *N. C.* 147.

Par value means pound for pound, or a dollar in money for every dollar in security. Delafield *v.* State of Illinois, 2 *Hill*, 158; 8 *Paige*, 527.

Where an act of the Pennsylvania assembly (1841) required the notes of the suspended United States bank to be taken at par, it was held that "par" meant the amount really due, including interest. Hogg's Appeal, 22 *Pa. St.* 479.

Par of exchange. A phrase difficult of explanation, unless the general facts connected with remittances of money between countries employing different systems of currency are somewhat understood. When the state of the money markets of two such countries is such that, aside from all questions of weight and fineness of coin, interest for time bills have to run, credit of individual drawers of bills, &c., or, making due allowance for all these elements, a given sum of money in one country will buy a bill or draft upon the other for the amount in its currency which is the legal equivalent of the sum paid in the home market, then exchange between the two countries is said to be at par. In other words, par of exchange is actual or marketable equality of two currencies, corresponding to their legal, theoretic equality. But if the balance of trade between the two countries is such that very many in the one are drawing upon the other, and only few or none drawing back, the privilege of drawing upon the other becomes valuable, and a premium must be paid for the exercise of it; in other words, exchange on that country is above par. Conversely, it may fall below par.

The expression has some use, though of less importance, in reference to remittances between different cities of the United States, though the exchanges are estimated in the same currency.

Pari delicto. In equal fault. See *In pari delicto.*

Pari materia. In an equal matter; on a like subject. See *In pari materia.*

Pari passu. By equal progress; at an equal rate; without preferences. Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund, without any precedence over each other.

Parium judicium. Judgment of one's peers. The right of trial by one's peers; particularly, the right of a commoner to trial by a jury of his peers; hence the right of trial by jury.

Paribus sententiis, reus absolvitur. Where the opinions are equal, the defendant is acquitted. An equal division of the court operates as a decision in favor of the defendant. Called by Lord Coke "an old rule." 4 *Inst.* 64. A like principle applies in modern times to decisions in appellate courts; if the judges are equally divided, the judgment ought to he reviewed is affirmed.

PARAGE; PARAGIUM. Equality of condition, dignity, or rank. The word was used in the feudal law, and was applied in cases where heirs took of the same stock and by same title, but from right of primogeniture, or some other cause, the shares were unequal. The younger was said to hold of the elder hy right and title of parage, meaning that his share was equal in every thing but the quantity; he did not owe homage or fealty. The word is not in modern use; it appears, however, in disparage, which means to depreciate or undervalue another's condition.

Paragium was also commonly taken for the equal conditions betwixt two parties, to be contracted in marriage; for the old laws did strictly provide that young heirs should be disposed in matrimony *cum paragio*, with persons of equal birth and fortune, *sine disparagatione. Jacob.*

PARAMOUNT. Above; superior.

Burrill explains that it is a compound of the old French words *par*, by, and *amount*, above, or *amounter*, to ascend; and that it is the correlative of *paravail*, downwards.

In feudal law, it was applied to distinguish the primary or original lord from an intermediate or mesne lord, from whom the ultimate tenant held immediately, while yet his title was deduced from the superior; thus, if the king granted large tracts of land to A, B, and C, and they in turn granted them in small tracts to tenants, A, B, or C was, as towards his tenants, lord, while the king was lord paramount as towards all.

In modern real-property law, paramount is properly applied to a title which is superior to another, in the sense of being source of it, of giving it life and validity. Thus the title of the landlord is paramount to that of his tenant. The word is not infrequently misapplied, by using it to denote that a title is superior to another in the sense of extinguishing or overthrowing it. This is a perversion. If an owner of land grants it in January to A, and in July to B, and they two are in litigation as to which of them, on account of payment of consideration, earlier recording, notice of the other's equities, &c., has the better right to the lands, the title which is adjudged to prevail is the better or superior title, but not a title paramount to the other. The right of a patentee of public lands to dispossess a squatter is not because the patent is a paramount title. Titles paramount and paravail, in the proper sense of the words, are consistent and harmonious; both coexist, but the paramount one is the origin and source of the other.

PARAPHERNA; PARAPHERNALIA; PARAPHERNAUX BIENS. These are the Latin, the Anglicized, and the modern French law names of property of a wife outside of her dowry; being chiefly and usually her apparel and ornaments, such as are suitable to her degree. The civil law and common law alike recognized some special property of a wife in these things, excepting them from the general doctrine of the husband's rights in his wife's personalty; though the rules as to what might be deemed paraphernalia and the extent of the wife's right varied somewhat. Throughout the United States (except, perhaps, in Louisiana), the distinction has never had much attention or importance, and is practically extinguished at the present day in the numerous states which have legislated to secure to married women the continued ownership and enjoyment of all their property.

Thus pearls and jewels, usually or sometimes worn by the wife, although articles of mere ornament, have been held to fall within the term paraphernalia. A widow has been sustained in the claim to her gold watch and several gold rings, as paraphernalia, which had been given to her at the funerals of relatives. Mangey *v.* Hungerford, 2 *Eq. Cas. Abr.* 156; *Brown.*

What shall be considered as paraphernalia of the wife is a question for the court. A gold watch, worth $100, the gift of a husband to his wife, cannot be considered as among the paraphernalia of the wife, when the husband, at the time of the gift, was a man of limited means or small property, and afterwards died insolvent. Vass *v.* Southall, 4 *Ired. L.* 301.

PARATUM HABEO. I have him in readiness. The form of a return by a sheriff to a *capias ad respondendum*, signifying that he had the defendant in readiness to be brought into court.

PARAVAIL. Below; inferior.

Burrill derives the word from the French *par*, by, and *avaler*, to descend, to be under; and contrasts it in etymology as well as in conventional meaning with its correlative paramount, *q. v.* Lord Coke and other ancient writers think that the last or lowest tenant was called the tenant *par avails*, — that is, by the avayls, avails, or profits, — because he was the one who made the land profitable to himself and to the lords above him. We prefer Burrill's suggestion; but the conflict is a good example of the delusiveness of the system of etymological derivations.

Whatever the origin of the term, it was applied to either the holder or the title.

PARCEL. A distinct portion.

Spoken of lands, it is used in conveyancing as equivalent to piece; and meaning any tract of indeterminate size, usually not large. Spoken of merchandise, it means a moderate quantity

separated from the main bulk, and put up for sale and transportation. Compare PACKAGE.

Parcel, as used in provisions of the Iowa revision, § 781, directing the treasurer to "make out a deed for each lot or parcel of land sold," and, to "offer for sale, separately, each tract or parcel advertised," is properly applied to a section; thus a tax-deed for a section is valid. Martin *v.* Cole, 38 *Iowa*, 141.

Parcel makers. Two officers in the exchequer who formerly made the parcels or items of the escheator's accounts, wherein they charged them with every thing they had levied for the king during the term of their office. *Cowel.*

PARCENER. One of tenants in coparcenary, *q. v.*

Parcenary is in use as the equivalent of coparcenary. But we judge the best nomenclature of the subject to be to use coparcenary as the name of the estate or relation; to call the tenants, when spoken of collectively, coparceners; to use parcener when speaking of a single tenant in coparcenary; and to disuse parcenary altogether.

PARCUS. In old English law, a place appointed for confining estrays; a pound; also, a portion of private grounds set apart for keeping deer; a park.

Parco fracto. The name of an old English writ against one chargeable with pound breach, or the offence of breaking into a pound, and taking out the cattle there confined.

PARDON. Governmental forgiveness of an offence; authorized remission of a punishment of crime; the executive act by which a convict may be released from penalties.

The distinction between pardon, amnesty, and reprieve seems to be that pardon permanently discharges the individual designated from all or some specified penal consequences of his crime, but does not affect the legal character of the offence committed; while amnesty (*q. v.*) obliterates the offence, declares that government will not consider the thing done punishable, and hence operates in favor of all persons involved in it, whether intended and specified or not; and reprieve (*q. v.*) only temporarily suspends execution of punishment, leaving the legal character of the act unchanged, and the individual subject to its consequences in time to come. "General pardon" is sometimes used in the sense of amnesty.

Pardons may be granted upon conditions; hence they are called conditional or absolute, according as conditions to be observed by the offender are imposed, as that he shall leave the jurisdiction, that he shall make certain restitution, &c., or are not.

In one of the decisions, the doctrine of conditional pardon is apparently placed upon the ground that pardon is in the nature of a deed requiring acceptance by the offender; that unless there is acceptance the pardon is inoperative. But this view requires reconsideration. There is no more necessity or propriety in considering acceptance by the prisoner necessary to the validity of a pardon, than in demanding his acceptance to constitute the sentence of punishment valid. The sentence of the court is the command of one branch of the government that a specified punishment be inflicted; and this should be carried into effect whether the prisoner consents or not. The pardon is the command of another branch of the government, authorized to interfere in the matter, remitting the sentence, dissolving its obligations, and discharging the administrative officer of all duty under it. This command should be obeyed whether the prisoner assents or not. It does not seem to be admissible that a sheriff could justify inflicting the penalty of death on a pardoned convict, on the ground that the latter declined to accept the pardon; yet such would be the consequence of requiring assent to give the pardon validity. If, indeed, conditions are affixed, these are inoperative without assent; and if that is withheld, the pardon fails; but this is not because consent to the pardon was necessary, but because the conditions on which it was predicated never came into existence.

The power of the president, under the constitution, to "grant reprieves and pardons," includes conditional as well as absolute pardons. *Exp.* Wells, 18 *How.* 307, 309.

A general power conferred upon the governor, by the constitution, to grant reprieves and pardons, involves the power to grant conditional pardons. A pardon may also be partial; the remission may be of

all, or of a designated part only, of the penal consequences of the crime. People *v.* Potter, 1 *Edm.* 235; 1 *Park. Cr.* 47.

Pardon is the forgiveness of an offence granted by the executive, sometimes before, but usually after, conviction, to one who is certainly guilty. It is not noticed by the court, unless in some way pleaded by the person pardoned. Amnesty is the abolition or oblivion of the offence, granted by the legislative power, before trial, generally to whole classes who, it is supposed, may be guilty. State *v.* Blalock, *Phill. L.* 242.

The word pardon includes the idea of release; and a pardon by the governor of one convicted of conspiracy, even after sentence, will operate a release of all fines imposed for the offence, though these fines were due, not to the commonwealth, but to the county. Cope *v.* Commonwealth, 28 *Pa. St.* 297.

The crown, in exercise of its prerogative of mercy, may pardon after conviction either of treason or of felony. But such pardon may not be given in anticipation of a conviction, and so as to be pleaded in defence to a prosecution. The pardon relates of course only to the particular conviction for which it is given. *Brown.*

Pardon is the remitting or forgiving of an offence committed against the king, and is either *ex gratia regis*, or by course of law. Pardon *ex gratia regis* is that which the king affords by virtue of his prerogative. Pardon by course of law is that which the law in equity affords for a light offence; as casual homicide, when one killeth a man, having no such intention. *Jacob.*

PARDONEE; PARDONER. Pardonee would be a proper designation for a recipient of a pardon; an offender to whom clemency had been extended. But there is no use of the term pardoner in the correlative sense, as the pardon is always granted by the crown, president, governor, &c. In the days when the popes issued indulgences, persons who carried the indulgences about and sold them to any who would buy them were styled pardoners.

PARENS. A parent, *q. v.*

Parens patriæ. Father of the country. This phrase expresses that relation of the sovereign to the subject by virtue of which he has a kind of guardianship over various classes of persons, who, from their legal disability, stand in need of protection, such as infants, idiots, and lunatics. In the United States, the people constitute the *parens patriæ.*

PARENT. The lawful father, or the mother of a person. Parentage: ancestors; kindred in the direct line ascending.

"Parents" is generally confined to the immediate father and mother, "ancestors" being used when more remote relatives are intended. But parentage is often used of the whole line of descent.

PARERGON. A supplement or appendix. The name is especially applied to a work in great repute, published in 1726 by Dr. John Ayliffe, Fellow of New College, Oxford. The full name of this work is "Parergon Juris Canonici Anglicani" (A Supplement of the Anglican Canon Law); but it is generally referred to shortly as "Ayliffe's Parergon." The work commences with a historical introduction; then various subjects relating to ecclesiastical law are treated in alphabetical order. The treatment of these subjects forms the main body of the work. Then follows a list of the monasteries dissolved by Henry VIII.; then a table of the fees payable to the officers of the ecclesiastical courts. *Mozley & W.*

PARES; PARI. See PAR.

PARISH. In old English ecclesiastical law, a parish was a circuit of ground committed to the charge of one parson or vicar, or other minister having the care of souls therein. It was thus a territorial division, but of ecclesiastical character and purpose.

According to Jacob and Tomlins, "parish" did anciently signify what was afterwards called the diocese of a bishop; but in their day it had come to mean the circuit of ground in which the people belonging to one church do inhabit, and the particular charge of a secular priest. It is derived from Saxon words signifying priest-shire. How ancient the division of England into parishes is, may be difficult to ascertain; it seems to be agreed that in the early ages of Christianity in the island, parishes were unknown, in the modern territorial sense. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.

Camden attributes the formal division of parishes to about the year 630, Hobart to about 1179, and other authorities to various intermediate dates. Some intermediate date is more probable, for Selden has clearly shown that the clergy lived in common, without any division of parishes, long after the time mentioned by Camden; and it appears from the Saxon laws that parishes were in being long before the date of that council of Lateran to which they are ascribed by Hobart.

By the time of King Edgar, about the year 970, the system of arbitrary or voluntary appropriation of tithes having proved disadvantageous, it was ordered that every one should pay tithes to the church to which his parish pertained. This proves that the kingdom was then universally divided into parishes; which division happened probably not all at once, but by degrees; for it seems certain that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. But later, the boundaries of the one afford no inference or evidence whatever of the boundaries of the other. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish; which accounts for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels. Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned.

But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other reasons, were never united to any parish, but continued extra-parochial; and their tithes are payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church.

In the settlement of many of the colonies, particularly in that of Massachusetts, divisions of territory similar to the English parishes were made, under the same name, for the purpose of administering ecclesiastical government, which, in those days, was largely mingled with civil administration. As the charge of religious affairs was gradually relaxed by the state, the territorial character of the parish became less and less distinct, until now, in most parts of the country, "parish" signifies an incorporated body of persons or quasi corporation, organized in a locality for the purpose of there maintaining a particular church, but without territorial sway or civil powers.

In Louisiana, however, the word is the name of the general civil division of the state, corresponding to "county" elsewhere. A parish, there, is a bounded portion of the state, set off for the purposes of independent government in local affairs, and is also a quasi corporate organization of the inhabitants of such a portion of territory.

Populous and extensive parishes are now, however, under various acts of parliament, divided into smaller ecclesiastical districts for spiritual purposes. (2 *Steph. Com.* 750–754.) *Mozley & W.*

. A precinct or parish is a corporation established solely for the purpose of maintaining public worship, and its powers are limited to that object. It may raise money for building and keeping in repair its meeting-house and supporting its minister, but for no other purpose. A town is a civil and political corporation, established for municipal purposes. They may both subsist together in the same territory, and be composed of the same persons. Inhabitants of Milford *v.* Godfrey, 1 *Pick.* 91.

Parish apprentice. The children of parents unable to maintain them may, by law, be apprenticed, by the guardians or overseers of their parish, to such persons

as may be willing to receive them as apprentices. Such children are called parish apprentices. The reception of a parish apprentice was formerly compulsory, but, by Stat. 7 & 8 Vict. ch. 101, § 13, passed in 1844, this is no longer so. 2 *Steph. Com.* 230.

Parish clerk. An officer of a church, generally appointed by the incumbent. By custom, however, he may be chosen by the inhabitants. Formerly, the parish clerk was very frequently in holy orders, and was appointed to officiate at the altar; but now his duty consists chiefly in making responses in church to the minister. By the common law, he has a freehold in his office. (1 *Bl. Com.* 395; 2 *Steph. Com.* 700, 701; *Toml.*) The office seems now to be falling into desuetude. *Mozley & W.*

Parish constable. A petty constable exercising his functions within a given parish. *Mozley & W.*

Parish court. The name applied in Louisiana to local courts in each parish, having jurisdiction to a limited amount in civil suits, and an extensive jurisdiction in probate matters; corresponding in most respects to county courts or probate courts in other states.

PARISHIONER. The residents of an English parish, known as "parishioners," have, in that character, important rights of local government.

Parishioners are a body politic for many purposes; as to vote at a vestry, if they pay scot and lot: and they have a sole right to raise taxes for their own relief, without the interposition of any superior court; may make by-laws to mend the highway, and to make banks to keep out the sea, and for repairing the church, and making a bridge, &c., or any such thing, for the public good. *Encyc. Lond.*

PARK. In English law, a portion of one's grounds which he has, by lawful right, enclosed and stocked with beasts of chase. Compare CHASE.

Manwood defines a park to be a privileged place for beasts of venary, and other wild beasts of the forest and chase, *tam sylvestres, quam campestres;* and says that it differs from a chase or warren, and it must be enclosed; for, if it lies open, this is good cause of seizure of it as being forfeited, just as a free chase is, if it be enclosed; besides, the owner cannot have an action against such as hunt in his park, if it lies open.

According to Jacob and Tomlins, to a park three things are required: a grant thereof; enclosures by pale, wall, or hedge; beasts of a park, such as the buck, doe, &c. For a park consists of vert, venison, and enclosure; and if it is determined in any of them, there is a total disparking.

No man can erect a park without license under the broad seal; for the common law does not encourage matter of pleasure, which brings no profit to the commonwealth. But there may be a park in reputation, erected without lawful warrant.

Blackstone defines park as an enclosed chase extending only over a man's own grounds. While the word park properly signifies an enclosure, yet it is not every field or common which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park; for the king's grant, or, at least, immemorial prescription, is necessary to constitute one. Though in modern times the difference between a park in law and mere enclosed grounds is, in many respects, not very material, only that it is unlawful at common law for any person to kill any beasts of park or chase, except such persons as possess the franchise of forest, chase, or park. See *Manw. For. Laws; Cro. Car.* 59; *Co. Inst.;* 2 *Bl. Com.* ch. 3, 38.

PARLIAMENT. The legislative branch of the supreme power of Great Britain; consisting of the king or queen, the lords spiritual and temporal, and the representatives of the commons of the realm, in parliament assembled.

The word parliament (which was first applied to general assemblies of the states under Louis VII., in France, about A.D. 1150) was not used in England till the reign of Henry III.; and the first mention of it, in English statute law, is said to be in the preamble to Stat. Westm. 1, 3 Edw. I., A.D. 1272. When, therefore, it is said that parliaments met before that era, it is by considering the earliest form of the national assembly as a parliament. Great councils of the nation existed in England both under the Saxons and Normans, and appear to have been common among all the nations of the north of Europe. They were called by the Saxons *michel-synoth*, or great council; *michel-gemote*, or great meeting; and *wittena-gemote*, meeting of wise men, — by the last of which they are

now most familiarly known. There appear to have been *wittena-gemotes* in each of the kingdoms composing the Saxon Heptarchy; and these, after the union of the kingdoms, became united into one great assembly or council. The precise character of these councils cannot at this lapse of time be confidently stated. Historians are not agreed even as to how far the commons were united with the nobles in the actual exercise of the legislative authority. Reliable early authorities seem to agree that from the most ancient period the commons were to some extent an integral part of the national council; and Mr. Sharon Turner goes so far as to say that he considers it incumbent on the historical antiquary to show, not when the people acceded to the *wittena-gemotes*, but when, if ever, they were divested of the right of attending them; for the German national councils, from which this Saxon institution derives its origin, were attended by all the people; and "the total absence of any document or date of the origin of the election of representatives by the freeholders of counties is the strongest proof that the custom has been immemorial, and long preceded the Norman conquest." Upon the other hand, it is urged that the Norman nobles are not likely to have tolerated much active co-operation in legislative authority from the representatives of the Saxon commonalty, and that the faint traces which ancient records show of the attendance of such representatives may be well explained by understanding that they attended as petitioners and witnesses.

For American readers, it is sufficient to understand that the main constitution of parliament, as it has existed in modern times, is attributed, according to Blackstone, to the Magna Charta, in which King John promised to summon all archbishops, bishops, abbots, earls, and greater barons, personally, and all other tenants-in-chief under the crown, by the sheriff and bailiffs, to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary; and this constitution has subsisted, in fact at least, from the year 1266, 49 Hen. III.; there being still extant writs of that date to summon knights, citizens, and burgesses to parliament. There are writs of earlier date than that mentioned by Blackstone, which involve the principle of representation, though not to the same extent.

The authority of parliament extends over the United Kingdom, and all its colonies and foreign possessions. There are no other limits to its power of making laws for the whole empire than those which are common to it, and to all other sovereign authority, — the willingness of the people to obey, or their power to resist them. It is not restricted, as our legislatures in this country, by positive constitutional restrictions. Its authority is supreme.

The sittings of parliament are, theoretically, at the will of the sovereign. It is convened by royal summons. The two instances in which the lords and commons have met of their own authority — namely, previously to the restoration of King Charles II., and at the revolution in 1688 — form no constitutional exception to this rule. There is, however, one contingency upon which the parliament may meet, without summons, under the authority of an act of parliament. The Stat. 6 Anne, ch. 7, enacts that "in case there should be no parliament in being at the time of the demise of the crown, then the last preceding parliament should immediately convene and sit at Westminster, as if the said parliament had never been dissolved." By the 37 Geo. III. ch. 127, a parliament so revived would only continue in existence for six months, if not sooner dissolved. And as parliament can only commence its deliberations at the time appointed by the sovereign, so it cannot continue them any longer than the crown permits. Parliament may be prorogued, that is, postponed without dissolution, by royal command, signified to both houses, or by writ under the great seal, or by commission. The effect of a prorogation is at once to suspend all business, until a new summons issues. The sovereign may also put an end to the existence of that parliament, by ordering a dissolution; in that case, a new election of members of the house of commons is necessary, before another meeting of parliament can be held.

The chief distinctive power of the house of lords is its judicial review of the decisions of the courts; this, however, has been modified in importance in recent years by the reorganization of the courts and creation of a high court of appeal, under the judicature acts. The lords also have the exclusive right to mature bills affecting the peerage; and these the commons may not amend.

The chief distinctive powers of the house of commons are those of imposing taxes, and voting money for the public service. Bills for these purposes can only originate in that house; and the lords may not make any alterations in them, except for the correction of clerical errors. The commons has also the sole power of determining all matters touching the election of their own members, and involving therein the rights of the electors.

Both houses of parliament possess various rights and privileges for the maintenance of their collective authority, and for the protection, convenience, and dignity of individual members. The power of commitment for contempt has always been exercised by both houses. The house of lords, in addition to the power of commitment, may impose fines. Freedom of speech is one of the privileges claimed by the speaker on behalf of the commons; but it has long since been confirmed as the right of both houses of parliament, by statutes. The law presumes that every thing said in parliament is with the view to the public good, and necessary for the conduct of public business; but, should the member publish his speech, he is viewed as an author only; and, if it contain libellous matter, he will not be protected by the privilege of parliament.

The persons of members are free from arrest or imprisonment in civil actions, but their property is as liable to the legal claims of all other persons as that of any private individual. Their servants do not enjoy any privilege or immunity whatever.

The privilege of freedom from arrest has always been subject to the exception of cases of "treason, felony, and surety of the peace." Peers are always free from arrest; and, as regards the commons, their privilege is generally held to exist for forty days after every prorogation, and forty days before the next appointed meeting. Each house of parliament is acknowledged to be the judge of its own privileges. See *Jacob; Wharton;* 1 *Bl. Com.; May Parl. Pract.*

Parliamentum diabolicum. A parliament held at Coventry, 38 Hen. VI., wherein Edward, Earl of March (afterwards King Edward IV.), and many of the chief nobility were attainted, was so called; but the acts then made were annulled by the succeeding parliament. *Jacob.*

Parliamentum indoctorum, or **indoctum.** The lack-learning parliament. A parliament held 6 Hen. IV., whereunto, by special precept to the sheriffs in their several counties, no lawyer, or person skilled in the law, was to come. *Jacob.*

Parliamentum insanum. A parliament assembled at Oxford, 41 Hen. III., so styled from the madness of their proceedings; and because the lords came with armed men to it, and contentions grew very high between the king, lords, and commons, whereby many extraordinary things were done. *Jacob.*

Parliamentum religiosorum. In most convents there has been a common room into which the brethren withdrew for conversation; conferences there being termed *parliamentum.* Likewise, the societies of the two temples, or inns of court, call that assembly of the benchers or governors, wherein they confer upon the common affairs of their several houses, a parliament. *Jacob.*

Parliamentary agent. Those solicitors who make it a part of their business to serve in efforts to promote or oppose the passing of private bills, and to conduct other proceedings in parliament for pecuniary reward, are called, in England, parliamentary agents. No person may act as an agent before the house of commons until he has subscribed a declaration engaging himself to observe the rules of the house. Nor may any member or officer of the house act as an agent. *May Parl. Pract.* ch. 26.

Parliamentary tax. Such taxes as are imposed directly by act of parliament — *i.e.* by the legislature itself, as distinguished from those which are imposed by private individuals or bodies, although under the authority of law — are styled parliamentary. Thus a sewers rate, not being imposed directly by act of parliament, but by certain persons termed commissioners of sewers, is not a parliamentary tax; whereas

the income tax, which is directly imposed, and the amount also fixed, by act of parliament, is a parliamentary tax.

PAROL. Not under seal, or not in writing.

Parol is often used as if precisely equivalent to "oral" and "verbal." We think, however, there is justification in usage, and very great convenience in distinguishing the various words in this group, as follows: Verbal should mean that which is embodied in language, as distinguished from that which is implied, inferred, or imputed, and irrespective of whether the language is written or not. Oral should mean that which has been expressed in speech only, and not embodied in writing: it negatives writing. Parol should mean that which may or may not be in writing, but which need not be in writing; the writing is accidental, not a prescribed or necessary formality. Thus slander is properly called oral, for it is necessarily in word of mouth only; if written, it ceases to be slander. Parol evidence to vary a contract is a proper expression; for the idea is, any evidence, either narratives of witnesses or matters appearing by other independent papers. The rule that in certain cases parol evidence may be received, does not confine the party to oral testimony, but allows any legitimate evidence outside the writing in controversy. Contracts which do not require a seal, and may be valid whether in writing or by word of mouth, are properly classed as parol; for the idea is to treat the writing as unimportant, not to deny it. But the usage is not strictly uniform. And there are some connections in which the want of any noun corresponding to oral renders it natural to use parol in its original signification of speech. Thus, where the English statute of frauds declares that all leases, or any uncertain interest in lands, "created by livery only, or by parol, and not put in writing and signed," shall have the effect of estates at will only, one cannot well substitute "oral" for "parol" (though "by parol" might be replaced by "orally"), although the thought negatives writing, and so renders some inflexion of "oral" the proper word.

The pleadings in an action are also, in our old law French, denominated the parol, because they were formerly actual *viva voce* pleadings in court, and not mere written allegations, as at present. *Brown.*

Parol agreement. This phrase is sometimes used to signify an agreement by word of mouth. That notion is better expressed by oral agreement; and parol agreement may well, and usually does, include writings not under seal, as well as oral engagements; since at common law, prior to the statute of frauds, there was no difference between an agreement by word of mouth and one in writing, without seal.

Parol arrest. An arrest, ordered by a court or magistrate, of a person who has committed an offence, such as an assault or contempt, in open court, so that the judge acts upon his own vision, and without need of any written complaint or proof, is a parol arrest.

Parol demurrer. A plea interposed to stop or stay the pleadings in an action. In many real actions brought by or against an infant under the age of twenty-one years, and also in actions of debt brought against him, as heir to any deceased ancestor, either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age, or (in our legal phrase) that the infant may have his age, and that "the parol may demur," that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. This plea of parol demurrer was abolished by Stat. 11 Geo. IV. & 1 Wm. IV. ch. 47, as to proceedings under that statute, which are chiefly decrees for the sale of real estate to pay debts. But since the trustee act, 1850, and trustee extension act, 1852, a resort to the last-mentioned statute is seldom necessary. *Brown.*

Parol evidence. Evidence that need not be in writing; or, when the construction or effect of any particular instrument is in question, evidence independent of that instrument. Documentary evidence must be embodied in writing, oral evidence is by word of mouth, parol evidence is such as may be either: the writing is unimportant.

PARRICIDE. The offence of killing one's father; also, a person guilty of killing his father.

This word has, in the civil and French law, the force of a technical name of a specific crime; inasmuch as, under these systems, the murder of a parent

receives an aggravated punishment. And the offence includes mother-killing; also, as we understand, the killing a brother or sister, or one's children. As these homicides are not distinguished in punishment where the common law prevails, the word is there not technical: it merely imports the general recognition which the community may entertain of the graver enormity of this class of homicides. It may have the broader meaning; but, as generally used, it imports the killing a father; while matricide is used for killing a mother, fratricide for killing a brother, sororicide for killing a sister, and others might be mentioned. Each of these may denote either the offence or the offender.

Wharton gives two other words of this group: *parenticide*, "one who murders a parent," and *paricide*, "a word to be distinguished from *patricide*, or *parricide* (the second *r* in which is simply a softened *t*), in that the one is a murderer generally, the other a murderer of his father; the derivation evidently being in one case from *parem*, an equal, and *cædo*, to kill, that is, the murder of a fellow-citizen, of one not a slave; but in the other, from *patrem*, a father, and *cædo*." But we have never met either of these in actual use.

By the Roman law, parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea. *Jacob.*

In addition to the punishment of death, for parricides, the Scotch law (act 1594, ch. 220) ordains that he who has slain "his father or mother, gudschir or gudedame" shall suffer a total corruption of blood, *in linea recta*, and be "discherished in all time thereafter, for their lands, heritages, tacks, possessions," which are to devolve on the next collateral relation, in the same manner as if the direct line had failed. *Bell.*

PARS. A part. Also, a party, either to an agreement or to an action or other legal proceeding.

Pars enitia. The eldest part. The share of the eldest on a partition between coparceners. See ENITIA PARS.

Pars rationabilis. A reasonable part. The part of a man's goods which the law gave to his wife or to his heirs upon his decease.

Pars rationabilis is the ancient division of a man's goods into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children, and so *e converso*; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them. This law has been altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels. *Wharton.*

Pars viscerum matris. Part of the mother's bowels; an unborn child.

Parte inaudita. One side being unheard. Spoken of a cause in which one party only has had a hearing; or of making a decree without a hearing.

Parte integrante sublata, tollitur totum. Taking away an integral part destroys the whole.

Parte non comparente. The party (or one party) not having appeared. The condition of a cause called, in Anglo-American law, default.

Partes finis nihil habuerunt. The parties to the fine had no estate.

PARSON. In English ecclesiastical law, the rector of a parochial church.

The rector or incumbent of a parochial church, who hath full possession of all the rights thereof. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is himself a body corporate, in order to protect and defend the rights of the church, which he personates, by a perpetual succession. (*Cowel*; 1 *Bl. Com.* 384; 2 *Steph. Com.* 677.) In a larger sense, the word parson includes all clergymen having ecclesiastical preferment. *Tomlins.*

Parsonage. A certain portion of lands, tithes, and offerings, established by law, for the maintenance of the minister who hath the cure of souls. *Tomlins.*

The word is more generally used for the house set apart for the residence of the minister. *Mozley & W.*

PART. A portion; share.

Bouvier says that the terms part and counterpart were formerly in use for the two copies, interchanged, of a written covenant. In modern practice, part is not much in use in this sense; the two papers are indifferently called counterparts. If occasion arises for distinguish-

ing them, the terms original and duplicate are more usual designations.

In some connections, part seems equivalent to partial; as in the phrases part-owner, part performance; unless such phrases are to be explained as inversions, for sake of conciseness or emphasis, — of owner of part, performance of part.

Part may appropriately apply to an undivided part. Vrooman *v.* Weed, 2 *Barb.* 330.

Where a testator bequeathed the residue of his estate to be divided between a son and two daughters, the son to have half a part, and the daughters the remainder, it was held that the word part meant share, and that the son therefore took one-sixth. Fulford *v.* Hancock, 1 *Busb. Eq.* 55.

Under the laws of the United States authorizing foreign coin to pass current at certain rates for each dollar and parts of a dollar, the phrase, parts of a dollar, is to be construed in reference to the division of a dollar as established in the coinage of the United States; and a twenty-cent piece is not within the act. United States *v.* Gardner, 10 *Pet.* 618.

An enactment authorizing the purchase of any railroad partly or wholly completed was held not to include a private railroad built from mines to iron-works, wherefrom the rails had been removed by an order of court. McCandless's Appeal, 70 *Pa. St.* 210.

Part owner. One of several persons who own a thing in common.

The term is particularly applied to co-proprietors of vessels. Vessels are generally owned by several persons, and the adjustment of their authority and interest is important; yet they are not partners. Hence "part owners" is in constant use in that branch of the law.

Part performance. The doing some portion, yet not the whole, of what either party to a contract has agreed to do. This has an important effect in curing the objection that the contract was not reduced to writing; also, in entitling the party to enforce a specific performance by the other.

Partial loss. A term of marine insurance, signifying damage to a thing insured not amounting to entire destruction nor construed as equivalent to that. If the *res* is destroyed or rendered wholly valueless, this is actual total loss; and if not, yet if the injury is so great as to entitle the insured to abandon what remains to the underwriters, and claim the whole insurance money, this is a constructive total loss. Damage or injury less than either of these is a partial loss.

The expression, in its application to portions of cargo which are the subject of distinct ownership, is equivalent to "particular average."

Partial loss implies a damage sustained by the ship or cargo, which falls upon the respective owners of the property so damaged; and, when happening from any peril insured against by the policy, the owners are to be indemnified by the underwriters, unless in cases excepted by the express terms of the policy. Padelford *v.* Boardman, 4 *Mass.* 548.

The terms "partial loss" and "average" are understood, in this country, to mean the same thing. "Partial loss" includes both general and particular average. Wadsworth *v.* Pacific Ins. Co., 4 *Wend.* 33, 39.

A total loss of a part of the interest — *e.g.* if one of twenty hogsheads of sugar insured is washed out — is a partial loss. American Ins. Co. *v.* Griswold, 14 *Wend.* 399, 472.

Where an injury results to a vessel from a peril insured against, but the loss is neither actually nor constructively total, it is a partial loss. Globe Ins. Co. *v.* Sherlock, 25 *Ohio St.* 50.

Partial loss is one in which the damage done to the thing insured is not so complete as to amount to a total loss, either actual or constructive. In every such case the underwriter is liable to pay such proportion of the sum which would be payable on total loss, as the damage sustained by the subject of insurance bears to the whole value at the time of insurance. (2 *Steph. Com.* 132, 133; *Crump Mar. Ins.* § 331.) *Mozley & W.*

PARTICEPS. A part taker; a sharer. In old English law, it signified a part owner; but is disused in this sense.

Particeps criminis. A participator in the crime; an accomplice. The term is applied not only to parties to crimes, but also to parties to contracts or to tortious transactions, as in cases of fraud.

PARTICULAR. Occurs, without material deviation from the vernacular meaning, in some phrases which are technical.

Particular average. Particular average is the damage or loss, short of total, falling directly upon specific property; while general average is the liability of property to contribute to the loss of or damage to something else. Bargett *v.* Orient Mut. Ins. Co., 3 *Bosw.* 385, 395.

"Particular average," as used in a policy, may mean partial loss, and "free of particular average" be construed as equivalent to "against total loss only." If goods of

one kind in one ship are insured by one description and valuation against total loss only, the total loss of some of them, though in separate packages, is considered but a partial loss of one entire subject of insurance, and gives no right to recover against the insurers as for a total loss of that part. In all the cases in which part of a cargo has been treated as a distinct subject of insurance, the goods lost have been either of a different kind from those saved, or so valued or described, by packages or otherwise, as to distinguish them. Pierce *v.* Columbian Ins. Co., 14 *Allen*, 320.

Particular estate. A limited legal interest or property in lands or tenements, as distinguished from the absolute property or fee-simple therein, is usually so termed; and he who holds or enjoys such a limited interest therein is thence sometimes called the particular tenant. Thus, if A has the absolute property or fee-simple in certain lands, and he demises them to B for a term of seven years, or life, the legal interest which B would thus acquire therein would be called the particular estate with reference to A's estate in fee-simple; *i.e.*, it would be a particle or portion carved or cut out of A's fee-simple. *Brown.*

Particular lien. A lien which is confined to a debt due for or on account of a specific article, as in ordinary sales for cash. Brooks *v.* Bryce, 21 *Wend.* 14.

A general lien is the right to retain a thing, not only for charges specifically arising out of or connected with that identical thing, but also for a general balance of accounts between the parties, in respect to other dealings of the like nature. *Story Agency*, § 354; McKenzie *v.* Nevius, 22 *Me.* 138, 150.

Particular tenant. One who holds a limited estate which has been carved out of the fee. See PARTICULAR ESTATE.

Particulars. This signifies details of grounds of claim; items of demand; a statement of what specific things are alleged against or demanded from a defendant. Such a statement is termed the particulars; or a bill of particulars; or, in English practice, a particular.

In ordinary actions, a creditor who sues for a debt, pleading it in general terms, may be compelled to give the defendant a bill of particulars of his demand; that is, to set forth the items of which it is composed, giving dates, consideration, sum charged, &c. In like manner, if defendant pleads payment, plaintiff may, in some courts, have a bill of particulars of sums and dates; or, if a set-off is pleaded, may have a bill of particulars of that. The English patent law, Stat. 15 & 16 Vict. ch. 83, § 16, required that plaintiff suing for an infringement "shall deliver with his declaration particulars of the breaches complained of in the said action; and the defendant, on pleading thereto, shall deliver with his pleas, and the prosecutor in any proceedings by *scire facias* to repeal letters-patent shall deliver with his declaration, particulars of any objections on which he means to rely at the trial in support of the pleas in the said action, or of the suggestions of the said declaration in the proceedings by *scire facias* respectively; and, at the trial of such action or proceedings by *scire facias*, no evidence shall be allowed to be given in support of any alleged infringement or of any objection impeaching the validity of such letters-patent which shall not be contained in the particulars delivered." In the English criminal practice, when the charge is preferred in general terms, the prosecution may be ordered to furnish the accused with a statement of the particulars of the acts intended to be proved. In ejectment, if there is any reasonable doubt as to the lands, &c., for which the action is brought, defendant may obtain an order calling upon the plaintiff to give him a bill of particulars; and a defendant may be ordered to give particulars of the premises for which he defends. In New York, a court in which an action for criminal conversation is pending has power, in a proper case, to require plaintiff to furnish defendant before trial with a bill of particulars of the acts he expects to prove.

Many statutes exist, in different jurisdictions, authorizing and regulating the grant of an order for particulars; but it is generally considered that the power to require one is not the creature of statute; that the courts have a general jurisdiction, independently of statute, to order a detailed statement of the demand in any litigation, or of the defence, to be given, that surprise may be avoided and substantial justice promoted.

Particulars of sale. The conditions of a sale at auction, details of the property which is to be sold, and the terms on which the sale is to take place.

PARTITION. Allotment of shares; division.

In jurisprudence, it is usually used of the right, or of proceedings to enforce the right, which either of joint owners of real property has to demand a division, and that his share be set off to him in severalty.

Partition may take place by voluntary agreement and act of the parties; or by suit addressed to the ordinary equitable jurisdiction of a court having chancery powers; or by a special statutory petition and award of commissioners, which, in most jurisdictions, is provided as a more convenient and less expensive means than a suit. The word does not necessarily import corporal division; land which cannot be parted may be sold, and the proceeds divided.

PARTNER. An associate in the pecuniary interest of an adventure; one of persons joined in interest in a business; a sharer in the profit and loss of an enterprise. Partnership: the relation between persons united in interest and control in a business undertaking; the union of two or more to conduct an enterprise, and divide profits and losses.

Persons may be partners as between themselves (that is, each may have the rights of a partner towards his associates), who are not to be deemed partners as towards third persons. And, conversely, persons may be partners in a firm as towards the public (that is, one may be liable to those who give credit to the firm on the faith of his supposed membership), who are not partners towards each other. In any discussion as to what constitutes partnership, or who are partners, it is important to bear in mind whether partnership *inter sese* or towards third persons is under consideration.

Partners who have a real interest in the business, but whose names are concealed from the public, are called *dormant* partners; while those whose names appear in the firm, while they have no interest or share and take no part, are called *nominal* partners. This distinction, however, relates altogether to the question of partnership as towards third persons.

Limited partnerships in the United States, and the same is to some extent true of public companies (limited) in England, are firms or associations organized under statutes which allow large partnership bodies to do business, enjoying a limited liability of some or of all the members, if they will pursue certain directions given by the statutes, intended to secure the public against fraud or loss by their dealings. See CORPORATION; LIMITED PARTNERSHIP.

General definitions.

Partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 *Kent Com.* 23.

A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. *Story Partn.* § 2.

Partnership, in its extended and complete sense, is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionally between them. *Watson Partn.* 1.

Partners are where two or more persons agree to come into any trade or bargain, in certain proportions agreed upon. In order to constitute a partnership, a communion of profit and loss between the parties is essential; and this is the true criterion to judge by, where the question is whether persons are partners or not. The shares of the parties must be joint, but it is not necessary they should be equal; and the parties jointly interested in the purchase must also be jointly interested in the future sale. (1 *H. Bl.* 43, 48.) *Tomlins.*

Partnership is where two or more persons agree to carry on any business or adventure together, upon the terms of mutual participation in its profits and losses. *Mozley & W.*

The true criterion of a partnership is, that each member of it stands in the relation of a principal to the other members, who in that regard are his agents (Cox *v.* Hickman, 8 *H. C.* 268); consequently, a person may share profits without being a partner, as well by the common law as under the Stat. 28 & 29 Vict. ch. 86, and may in that manner escape all liability for losses. On the other hand, a person who is not a partner may, by holding himself out as one, become liable for losses, although not entitled to share in profits. (*Exp.* Watson, 19 *Ves.* 461.) *Brown.*

Partnerships are either public or private. Public partnerships are usually denominated companies or societies. They consist

of a large number, definite or indefinite, of joint undertakers, who have joined themselves to carry on some important matter. Some of them are incorporated by letters-patent or by act of parliament; while others are unincorporated, as most of the fire and life insurance companies, and are, in fact, ordinary partnerships, the laws respecting which are the same. They usually, however, divide their capital into shares, each partner holding one or more of them, up to a certain restricted number, transferable under certain regulations; the business is intrusted to officers, generally, under the superintendence of directors, elected from the general body, for whose transactions the whole company is responsible. A charter is sometimes procured to limit the risk of the partners; for, when societies are incorporated, the members are liable to the extent of their shares only, but when unincorporated their liability is unlimited.

The public incorporated trading companies are not partnerships, within the legal principles governing those privately and voluntarily formed by individuals. In such public companies, whose trade is carried on under the corporate name, the members as such are not, as a general rule, subject to the bankrupt laws; nor are they liable in their individual capacities, nor the one for the debts or engagements of the others; in short, they are only liable upon the trade and contracts carried on and made in the corporate character, to the extent of their respective shares or interests in the joint stock.

Private partnerships are contracted by the mere consent of the parties, no charter or license being necessary. This consent may be expressly testified by articles of copartnership or positive agreement, or may be implied from the acts and conduct of the parties, which is as effective as one that is express. And persons having a mutual interest in the profits of any business carried on by them, or appearing ostensibly as joint traders, are to be recognized and treated as partners by the world, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to such an exhibition. *Wharton.*

A partnership, as between the partners themselves, may be defined to be a contract of two or more persons to unite their property, labor, and skill, or some of them, in the prosecution of some joint and lawful business, and to share the profits in certain proportions. And, as between the partners, the partnership property may consist either of real or personal estate, or of both; and in each case their ultimate rights are the same. It does not matter in whose name the real estate may be held. Gray *v.* Palmer, 9 *Cal.* 616, 638.

A partnership is a voluntary contract between two or more persons for joining together their money, goods, labor, and skill, to carry on business jointly, with an agreement to divide proportionally in the profits, and also the losses. There must be an agreement, either express or implied, reciprocally to participate in the losses as well as the profits of the concern. This communion of profit and loss is essential to constitute a complete partnership, as well between the parties as in respect of strangers, who deal with them. There must be a common interest in the stock of the company, and a personal responsibility for the partnership engagements. The shares of the parties in the concern must be joint; but it is not necessary they should be equal. The sharing the profits without also sharing the loss will not constitute a partnership. Where a party furnishes his labor, and agrees to receive a share of the profits as a compensation for his labor, or in lieu of wages, he is not a partner. Beecham *v.* Dodd, 3 *Harr.* (*Del.*) 485.

Partnership can be formed only by voluntary agreement, express or implied, by two or more competent persons, joining together their property, labor, skill, and experience, or one or more of them, in the transaction of business for their joint benefit and profit. It may be for a specific purpose, or be confined even to a particular transaction. Plunkett *v.* Dillon, 4 *Houst.* 338.

Partnership and community are not to be confounded. The first is based on the contract of the parties, which creates the community; the last may exist independently of any contract whatsoever. It is founded on the voluntary contract of the parties, as contradistinguished from the relations that may arise between them by mere operation of law, independent of such contract. Pickerell *v.* Fisk, 11 *La. Ann.* 277.

A partnership, with all its incidents, may be created without articles in writing. Buffum *v.* Buffum, 49 *Me.* 108.

A parol agreement of copartnership, for the purchase of lands, is within the statute of frauds, and will not be enforced in equity. Larkins *v.* Rhodes, 5 *Port.* 195.

A dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as company, sons, &c. Jones *v.* Fegely, 4 *Phila.* 1.

The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced, there is a partnership until legally dissolved. Hartman *v.* Woebr, 18 *N. J. Eq.* 383.

To constitute a general partnership, it is enough that the parties agree to conduct a business, and to share its profit and loss. Whether the business is of a general nature, or is confined to particular transactions, the partnership is general. Eldridge *v.* Troost, 3 *Abb. Pr.* N. S. 20.

A partnership may be contracted to take effect at a future time, or on certain conditions. Avery *v.* Lauve, 1 *La. Ann.* 457.

A contract for constituting a partnership, assigning the performance of certain things to put the business to be carried on into operation, constitutes a partnership at the signing of the contract, not from the commencement of the business itself. Aspinwall *v.* Williams, 1 *Ohio*, 84; Austin *v.* Williams, 2 *Id.* 64; Crary *v.* Williams, *Id.* 65.

Various definitions of the word partnership, and of the terms general, special, and limited partnerships, stated. Bigelow *v.* Elliott, 1 *Cliff.* 28.

Community of interest in capital or in profits.

For numerous American cases sustaining the rule that participation in profits and losses of a business, as having a joint and immediate interest in them, and not merely by way of reference to them as a measure of compensation, is the principal criterion of partnership; and for many decisions asserting or denying partnership in particular cases, — see *U. S. Digest*, tit. Partnership; *Abb. N. Y. Digest*, tit. Partnership.

As towards third persons, partnership arises from a community of interest between two or more, and a sharing of profit and loss. Bostwick *v.* Champion, 11 *Wend.* 571, 580.

Partnership may exist where there is a joint interest either in the property or in the profits and losses of an adventure. Martin *v.* Tidwell, 36 *Ga.* 332.

To constitute a partnership, there must be a community of interest, participation in profit and loss; and this joint interest must continue to the time of the contract. Felichy *v.* Hamilton, 1 *Wash. C. Ct.* 491.

A mere participation in profits will not make persons partners as between themselves, whatever effect it may have as towards third persons, unless they so intend. As towards third persons, a partnership may arise by mere operation of law, against the intention of the parties thereto; but the actual intention of the parties will alone constitute a partnership as between themselves. Hazard *v.* Hazard, 1 *Story C. Ct.* 371.

Whether or not an agreement to share the profits of a venture will make the parties thereto, as between themselves, partners, depends upon their intention. Niehoff *v.* Dudley, 40 *Ill.* 406.

To constitute a partnership as between the parties themselves, there must be a joint ownership of the partnership funds, as well as an agreement to participate in the profits and losses of the business. Chase *v.* Barrett, 4 *Paige*, 148.

Mere community of interest in property does not make men partners: there must be some joint adventure, and an agreement to share in the profit and loss. Holmes *v.* United Ins. Co., 2 *Johns. Cas.* 329; Post *v.* Kimberly, 9 *Johns.* 470; Boeklen *v.* Hardenburgh, 37 *N. Y. Superior Ct.* 110; Porter *v.* McClure, 15 *Wend.* 187.

Partnership may exist in a single transaction, as well as in a series. If there is a joint purchase, with a view to a joint sale, and a communion of profit and loss, this will constitute a partnership. *Re* Warren, *Daveis*, 320.

A mere joint proprietorship or contract, such as a joint guaranty of payment of a bond, does not constitute partnership; there must be a mutual interest in profit and loss. *Exp.* Miller, 1 *N. Y. Leg. Obs.* 38.

Joint purchasers, without an agreement of partnership, are not entitled to the remedies, nor subject to the responsibilities, of partners. Brady *v.* Calhoun, 1 *Pa.* 140.

Although a purchase of property be on separate and not on joint account, yet if the interests of the purchasers are afterwards mingled with a view to a joint sale, a partnership exists from the time that the shares are brought together. Rogers *v.* Nichols, 20 *Tex.* 719.

To constitute persons partners, as between themselves, there must be an interest in the profits, as profits. An agreement to divide gross earnings is not sufficient. Pattison *v.* Blanchard, 5 *N. Y.* 186; Heimstreet *v.* Howland, 5 *Den.* 68; Merwin *v.* Playford, 3 *Robt.* 702.

Each member must have an interest in the profits as a principal trader; a mere reception of a portion of the profits is insufficient. Campbell *v.* Dent, 54 *Mo.* 325; Beudel *v.* Hettrick, 35 *N. Y. Superior Ct.* 405.

The profits must be shared as the result of the capital and industry in which both are interested, and not as a measure of compensation only; each must have an interest in the stock, with a right of control. Ogden *v.* Astor, 4 *Sandf.* 311.

One who is employed in the business of a firm in a subordinate capacity, having no interest in the capital, nor sharing liability for losses, is not rendered a partner by the fact that he is to receive a portion of the profits in compensation for his services. Burckle *v.* Eckhart, 3 *N. Y.* 132; 1 *Den.* 337; Vanderburgh *v.* Hull, 20 *Wend.* 70; Osbrey *v.* Reimer, 49 *Barb.* 265.

The rule that actual participation in the profits, as principals in general, creates a partnership as between the participant and third persons, whatever may have been the real relation of the former to the firm, has no application to a case of mere service or special agency, where the employe has no power in the firm, and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same, or to compel an account. Unless an employe is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the general rule; his condition is not different from that of an ordinary creditor. Berthold *v.* Goldsmith, 24 *How.* 536; Parker *v.* Fergus, 43 *Ill.* 437; Hallet *v.* Desbau, 14 *La. Ann.* 529; Conklin *v.* Barton, 43 *Barb.* 435; Chapline *v.* Conant, 3 *W. Va.* 507.

The mere fact that the remuneration of

a party is to depend on the contingent profits of a business, does not constitute him a partner. This is a common mode of paying agents and servants. Bull *v.* Schuberth, 2 *Md.* 38; Morgan *v.* Stearns, 41 *Vt.* 398.

S. P. under the Spanish code of commerce of 1829, art. 269. Taylor *v.* Sotolingo, 6 *La. Ann.* 154.

Where one agrees for a share of the profits in a concern, as compensation for his services, although as to third persons he would be considered a partner, he would not be, as between the parties. Price *v.* Alexander, 2 *Greene*, 427.

An employe whose compensation depends on the profits of the business, and who, if nothing be made, is to receive nothing, and who, on several occasions has held himself out as a partner, will be responsible as such to third persons, though *inter se* the parties never intended a partnership. Lee *v.* Bullard, 3 *La. Ann.* 462.

A person who receives a portion of the profits of a business, as compensation for his services, does not thereby become a partner so as to authorize him to release a debt due to the principal, created by his agency. Smith *v.* Perry, 29 *N. J. L.* 74.

An agreement that one shall receive a salary for his services, together with a commission of seven per cent on the profits, after deducting the salary and rent of the store, does not constitute a partnership. Miller *v.* Bartlett, 15 *Serg. & R.* 137.

A compensation for services, in the form of a commission on profits, creates no such interest in the concern as constitutes a partnership. Dunham *v.* Rogers, 1 *Pa. St.* 255; Brockway *v.* Burnap, 16 *Barb.* 309; Good *v.* McCartney, 10 *Tex.* 193; Ambler *v.* Bradley, 6 *Vt.* 119.

Where one person advances capital, and another gives his personal services, for which he is to receive a portion of the profits, there is a partnership existing between them, both as between themselves and as regards third persons. Dob *v.* Halsey, 16 *Johns.* 34.

Where there is a joint purchase of property, although only for a particular adventure, upon an agreement to share jointly in the ultimate profit or loss, a partnership arises, authorizing one partner to give notes in the firm name in relation to the business. Cumpston *v.* McNair, 1 *Wend.* 457.

An agreement by which one party is to furnish merchandise and pay the rent of a store, and the other to sell the merchandise for one-half the profits, does not constitute a partnership, for there is no community of losses. Lamb *v.* Grover, 47 *Barb.* 317.

If one advances money to a merchant, and the profit for its use is to be dependent upon the results of trade, he will be liable as partner, though as between themselves he was not to risk any part of his advance, or to share in the losses of the trade. And the fact that the partners omitted compliance with municipal regulations as to the formation or registry of partnerships will not affect this liability. Oakley *v.* Aspinwall, 2 *Sandf.* 7.

A contract, however obscurely or inartificially drawn, by which the parties agree to contribute merchandise to "a certain concern," one to be the salesman, the other to pass as proprietor, and both to share equally in the expenses and profits, will be a partnership. Marks *v.* Stein, 11 *La. Ann.* 509.

Joint contractors who share the profit and loss under their contract are partners. Belknap *v.* Wendell, 21 *N. H.* 175.

Where a contractor for carrying the mail agrees with a sub-contractor that the latter shall perform one-half the service, and be entitled to one-half the compensation, this does not constitute a partnership between the two. Wilkinson *v.* Jett, 7 *Leigh*, 115.

An arrangement between B and C for "mutually keeping house," by which C is to pay the house-rent and butcher's bill, and B is to pay the other bills for the family expenses, does not, as matter of law, make B and C partners, or authorize C to bind B to third parties for the rent. Austin *v.* Thomson, 45 *N. H.* 113.

If three enter into an agreement, by the terms of which one is to do certain things, and the other two certain other things, each at their own expense, and each to be entitled to an equal share of the profits arising out of the subject-matter of the contract, this does not constitute them all partners, and make them all liable for expenses incurred by either in the performance of their part of the contract. Heckert *v.* Fegely, 6 *Watts & S.* 139.

The mere fact that one is to receive a certain portion of the net profits of a firm, in consideration of his acceptance of certain drafts, will not make him liable as partner, if there was no holding out as such, and his name has not been used as partner. Polk *v.* Buchanan, 5 *Sneed*, 721.

An agreement between parties in regard to the transaction of a certain business, wherein all furnish specified proportions of the capital, jointly own the property purchased, which is to be sold for their joint and mutual benefit, and each is to contribute his skill and assistance to the business, and share in specified proportions in the final profit or loss thereof, which are to be ascertained at the close of the business, will, as between the parties themselves, although they may not have been aware that such was its legal effect, create a partnership. Duryea *v.* Whitcomb, 31 *Vt.* 395.

Use of real property.

The joint ownership of real estate does not create a partnership therein: a special contract in writing is necessary for that purpose. Benton *v.* Roberts, 4 *La. Ann.* 216.

There may be a partnership for the buying and selling of lands. Dudley *v.* Littlefield, 21 *Me.* 418.

The joint ownership of land, though not a partnership, is yet controlled, in some re-

spects, by analogous rules. Smith *v.* Wilson, 10 *La. Ann.* 255.

When persons are engaged in working a mining claim which they have purchased, and share the profit and loss, they are partners, although there is no express stipulation for such communion of profit and loss. Duryea *v.* Burt, 28 *Cal.* 569.

The agreement of one joint owner of a plantation with the other, to receive a fixed compensation per annum for his interest, is not a partnership, but merely a lease of the joint interest. McIlvaine *v.* Armfield, 5 *La. Ann.* 302.

A purchase of land by two persons jointly, and the erection of a building thereon by one of them with the consent of the other, do not make them partners. Sikes *v.* Work, 6 *Gray*, 433.

An agreement, by which one party is to let another have all the timber on his land, and the other is to saw it, and pay said first party one-fifth of the gross proceeds, creates a partnership between the parties. Fail *v.* McRee, 36 *Ala.* 61.

Where two persons agree to raise together a crop of corn, on certain agreed terms, and divide the product, the agreement constitutes a partnership, and the product, until divided, is joint property, and in the joint possession of the parties; and one cannot bring an action at law against the other on the contract. Allen *v.* Davis, 13 *Ark.* 28.

An agreement between two parties to carry on a particular business, in which real estate belonging to one of them is to be used, will be deemed to constitute a partnership, if the owner of the real estate is to be compensated for its use, by a percentage of the profits of the business; and it is immaterial that, in the written contract between the parties, such compensation is described as rent. Dalton City Co. *v.* Dalton Manuf. Co., 33 *Ga.* 243.

Where an agreement is made between two parties that one shall furnish a farm with a certain amount of teams and labor, and the other shall manage the farm and give certain labor, the crops to be divided between them, a partnership is not constituted. Blue *v.* Leathers, 15 *Ill.* 31.

A partnership in growing crops may be formed, and proved by parol, but not a partnership in the crops, arising out of an alleged particular partnership in lands and negroes. It is not a partnership by contract, but by consequence of an alleged partnership in immovables. Gantt *v.* Gantt, 6 *La. Ann.* 677.

An agreement, by which one is to furnish a circular-saw mill, and men and horses to keep it in operation, and another is to furnish the logs, and the feed for hands and horses, the lumber to be equally divided between them, does not constitute a partnership. Stoallings *v.* Baker, 15 *Mo.* 481.

A landlord who rents property and furnishes materials at a stipulated price to a firm, with which they carry on their business, does not become thereby a member of the firm, or responsible for their debts. Jones *v.* O'Farrel, 1 *Nev.* 354.

If the parties agreeing to buy land and build a mill subscribe articles, framed for the purpose of regulating their common action in regard to the common property and the prosecution of the work, they do not thereby become partners, unless the articles in terms establish that relation. Pillsbury *v.* Pillsbury, 20 *N. H.* 90.

An agreement by a landlord with his tenant to take a share of the profits of the demised premises, by way of rent, does not constitute a partnership between them, so as to prevent an action at law by the landlord against the tenant for the rent. Perrine *v.* Hankinson, 11 *N. J. L.* 181.

An agreement by one to work another's farm on shares, not looking to a sale of the products, does not make them partners. Putnam *v.* Wise, 1 *Hill*, 234.

A contract between the owner of land-warrants and a locator, to locate the warrants for a certain portion of the lands, each party to contribute a share of the expenses, does not create a partnership between them. M'Arthur *v.* Ladd, 5 *Ohio*, 514.

An agreement by two to buy land jointly, and share the proceeds, constitutes a partnership. Ludlow *v.* Cooper, 4 *Ohio St.* 1.

Management of patent-rights.

A joint interest in a patent does not make those interested partners. Parkhurst *v.* Kinsman, 1 *Blatchf.* 488.

An association between two persons, one of whom has invented a method of clarifying sugars, to obtain a patent for it in their joint names, and sell its use for a certain sum on each box of sugar clarified, of which each is to have a percentage, does not make them commercial partners. Hermanns *v.* Duvigneaud, 10 *La. Ann.* 114.

The mere fact that one owns an interest in a certain patent, to develop which certain work was performed, does not necessarily of itself make him a partner with the other owner, and liable as such for the work. Bocklen *v.* Hardenburgh, 37 *N. Y. Superior Ct.* 110.

Management of vessels.

A lay or share in the proceeds or catchings of a whaling voyage does not create a partnership in the profits of the voyage, but is in the nature of seaman's wages, and governed by the same rules. Coffin *v.* Jenkins, 3 *Story*, 108.

The owners of whale-ships, in the absence of special agreements, making their relation a partnership, are not partners, but tenants in common; the other owners are not liable to contribute according to their shares to one owner, who has been obliged to pay more than his share in fitting out the vessel. Macy *v.* DeWolf, 3 *Woodb. & M.* 193.

An agreement between the owner of a vessel and the captain, that each should pay certain expenses, and divide the freight,

with a power to the captain to invest it on joint account, constitutes a copartnership. Cox *v.* Delano, 3 *Dev. L.* 89.

Joint ownership of a vessel does not create a partnership, nor are the interests of all the joint owners barred by a sale on execution against part. Hopkins *v.* Forsyth, 14 *Pa. St.* 34.

The subscription list of a newspaper, when published by more than one, is partnership property; and, when one of the partners dies, it does not survive to the surviving partner, but belongs to, or is to be administered as part of, the joint estate. Holden *v.* M'Makin, 1 *Pars. Sel. Cas.* 270.

Where one party furnishes a boat, and the other sails it, an agreement to divide the gross earnings does not constitute a partnership. Bowman *v.* Bailey, 10 *Vt.* 170.

Joint associations.

A joint-stock company, formed for the purpose of dealing in lands, will be held a partnership. Clagett *v.* Kilbourne, 1 *Black*, 346.

A joint-stock company, constituted for the purpose of trading in land, is a partnership; and land owned by the company is not subject to judgment and execution in behalf of a separate creditor of a member of the company. Kramer *v.* Arthurs, 7 *Pa. St.* 165.

Although it appears that persons sued as purchasers of goods were organized as a joint-stock company, yet, if they were not incorporated, they constitute a partnership, and, though an extensive one, are, in the main, subject to the rules and liabilities governing that relation. Manning *v.* Gasharie, 27 *Ind.* 399.

An unincorporated body of men, associated for the purpose of banking, is but a partnership, the members having the same rights, and subject to the same liabilities. Boisgerard *v.* Wall, 1 *Smed. & M. Ch.* 404.

Joint-stock associations are not in all cases copartnerships. Cox *v.* Bodfish, 35 *Me.* 302.

Union of distinct firms.

An association of separate owners of several steamboats into a joint concern, to run their vessels upon the Hudson river, and to collect and receive the earnings of the boats in a common fund, out of which the expenses of all the boats are to be paid is no more than a private copartnership in a particular business or transaction. The Swallow, *Olcott Adm.* 334.

If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route, to receive the fare and give through-tickets, this does not, of itself, constitute them partners as to passengers who purchase through-tickets, so as to render each one liable for losses occurring on any portion of the line. Ellsworth *v.* Tartt, 26 *Ala.* 733.

A pool arrangement between the owners of different steamboats, whereby the excess of net earnings of one boat over the other is to be divided at the end of the season, does not, alone, constitute a partnership so as to create a joint liability for the negligence of either. Fay *v.* Davidson, 13 *Minn.* 523.

An agreement between proprietors of connecting stage lines, that each shall run his portion of the route at his own expense, &c., but in connection with the other, and with power to receive fare on his portion for the whole route, and that the gross amount of all the fares received shall be divided periodically between them, in proportion to the distances the passengers have been carried by them respectively, does not constitute a partnership as between the parties so as to prevent one suing the other at law. Pattison *v.* Blanchard, 5 *N. Y.* 186.

A union of three distinct companies of passenger carriers, one on the Atlantic, one on the Isthmus, and one on the Pacific, forming one connected line, and included by the agent in one advertisement, but each issuing separate tickets, and having no joint interest in the passage-money or joint liability for loss, was held not to constitute a partnership. Briggs *v.* Vanderbilt, 19 *Barb.* 222.

An agreement between two houses to share commissions on sales of goods forwarded by one to the other, does not constitute a partnership. Pomeroy *v.* Sigerson, 22 *Mo.* 177.

An agreement by which a manufacturing firm give another firm, to whom they are largely indebted, the entire control and management of their business, assigning all their machinery and tools to the latter firm, and authorizing them to collect all moneys due the former, and therewith to pay said indebtedness, at their pleasure, does not constitute the two firms copartners. Brundred *v.* Muzzy, 25 *N. J. L.* 268.

A contract between a railroad company and individuals engaged in transporting merchandise to and from the termini of the railroad, regulating such transportation, will not make them partners. Mohawk R. R. Co. *v.* Niles, 3 *Hill*, 162.

PARTUS. Offspring. According to Bouvier, it is sometimes used in the limited sense of a child at its birth.

Partus sequitur ventrem. The offspring follows the womb. The application of this maxim, which is taken from the civil law, is in determining the title; and the meaning is, that, in the absence of special circumstances to indicate a different ownership, the owner of the mother is deemed the owner of her increase; the brood belongs, presumably, to the owner of the fowl; the foal, to the owner of the mare; the litter, to the owner of the dam. While slavery prevailed in the southern states, the rule was there deemed applicable to progeny of negroes; if the father was free and

the mother slave, the child took the mother's condition, and belonged to her owner. At the present day, the rule has no application, either in England or the United States, to human beings.

PARTY. One of persons uniting in an act, contract, or suit; one who shares in doing something.

In some connections, two or more persons who are united in action or interest distinct from or opposed to that of others are spoken of as composing one party; but more usually each individual, each person, natural or artificial, is called a party.

A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually; also, a side or part, composed of one or more individuals. *Burrill.*

The term parties includes all persons who are directly interested in the subject-matter in issue, who have a right to make defence, control the proceedings, or appeal from the judgment. Strangers are persons who do not possess these rights. Hunt *v.* Haven, 52 *N. H.* 162.

"Party" usually means one of two opposing litigants. It is not confined to natural persons, but may well include municipal corporations. Hollis *v.* Davis, 56 *N. H.* 74.

"Party," in a statute prescribing the course of proceeding in actions pending at the death of either party, means the party who is in the eye of the law the meritorious cause of action. Saltmarsh *v.* Candia, 51 *N. H.* 71.

Where two are sued, one of them does not, by suffering a default, cease to be a party to the record. Rich *v.* Husson, 4 *Sandf.* 115; Austin *v.* Fuller, 12 *Barb.* 360.

Where the action is not upon contract, and two persons are named as defendants, but one only is served, the other is not a party. Robinson *v.* Frost, 14 *Barb.* 536.

The complaining witness in a criminal proceeding against another person is not a party thereto, within the technical meaning of the word. Parsons *v.* People, 21 *Mich.* 509.

"Party," in Ky. Rev. Stat. ch. 37, § 35, — providing that no party shall be allowed to testify by virtue of section 22, &c., — is equivalent to "person," as used in section 22. Manion *v.* Lambert, 10 *Bush*, 295.

A statute allowing an action to be maintained by representatives for causing death where it might have been maintained by the party, if living, does not exclude the case of a death of a married woman. The word party is not used in a merely technical sense, as the one whose name must be used upon the record, but rather in that of person. Green *v.* Hudson River R. R. Co., 31 *Barb.* 260; 32 *Id.* 25.

In general, when it is used without qualification and with reference to suits, "party" means some one named in the record, and does not include a person merely interested. Douglass *v.* Gardner, 63 *Me.* 462.

The phrase, a party to the proceeding, used in a statute, embraces only such persons as are parties in a legal sense, and who have been made or have become such in some mode prescribed or recognized by law, so that they are bound by the proceeding. Robinson *v.* Vanderberg County, 37 *Ind.* 333.

A statute which directs that the coroner shall serve process in suits to which the sheriff is a party, does not apply to suits in which the sheriff is interested, but is not technically a party. Merchants' Bank *v.* Cook, 4 *Pick.* 405.

Party is a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons; they are parties in the writ, and parties on the record; and all others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties. Merchants' Bank *v.* Cook, 4 *Pick.* 405; Walker *v.* Hill, 21 *Me.* 481.

Under a statute allowing any person aggrieved by an order, &c., of a probate judge to appeal, sureties on the bond of a deceased and insolvent guardian have the right to appeal from the decree of the judge settling an account of his guardianship, and fixing an amount as due from his estate to the estate of the ward; though under a statute allowing a "party" aggrieved to appeal, the rule would be different. Farrar *v.* Parker, 3 *Allen*, 556.

A statute authorizing "any party aggrieved" to appeal, embraces only such persons as are technically parties to the action, or their representatives. Martin *v.* Kanouse, 2 *Abb. Pr.* 390.

A party to an action, within the meaning of provisions of the New York code relative to examination of parties, is one who is named plaintiff or defendant, and appears on the record as such. Woods *v.* De Figaniere, 1 *Robt.* 607.

That "parties," used in reference to a suit, sometimes includes persons immediately interested in the subject-matter, although not named on the record, see Robbins *v.* City of Chicago, 4 *Wall.* 657; Burr *v.* Bigler, 16 *Abb. Pr.* 177; Taber *v.* Gardner, 6 *Abb. Pr.* N. S. 147.

The expression, party to the action, in Minn. Rev. Stat. 456, ch. 66, § 47, allowing summons to be served by the sheriff, &c., or by any other person not a party to the action, excludes only parties named in the proceedings, and not one who, though interested, does not appear on the record. Owens *v.* Gotzian, 16 *Am. L. Reg.* N. S. 181.

A statute requiring a particular affidavit to be made "by the party" demanding an appeal, or applying for a remedy under the statute, is satisfied where the remedy is

sought in behalf of a corporation, by an affidavit made by the president, secretary, or other proper officer or agent. New Brunswick Steamboat & Canal Co. *v.* Baldwin, 14 *N. J. L.* 440.

Where a deed is executed by the attorney of the grantor, or officer or agent of a corporation, lawfully authorized, he is the party executing the same who may make the acknowledgment. Lovett *v.* The Steam Saw-mill Assoc., 6 *Paige*, 54.

A statute enacting that the holder of any negotiable note or bill may institute one suit against the whole or any number of the parties liable to such holder, but shall not institute more than one suit on such note or bill, should be construed as embracing all the makers as one party, all the indorsers as another, &c.; and, therefore, a suit and judgment upon such joint note or bill against one maker, or one indorsee, &c., will constitute a bar to any other suit against any other maker or indorser, &c. Archer *v.* Heiman, 21 *Ind.* 29.

The term party, employed in a constitutional provision for the removal of civil actions from one court to another, as applied to causes where there can be no severance, must be taken in a collective and representative sense; where there are more persons than one as plaintiffs or defendants, all applications to remove must be taken as made on behalf of all the persons constituting the "party," plaintiffs or defendants, as the case may be. Cooke *v.* Cooke, 41 *Md.* 362, 369.

Although the word party, in a statute requiring that "the party demanding an appeal shall file an affidavit made by the said party," &c., literally comprehends all the persons who are plaintiffs or defendants in a cause, and a literal compliance with the statute might require all the appellants to unite in one affidavit, yet this would be an unreasonably strict construction. The object of the statute is to prevent vexatious and dilatory appeals; and this is sufficiently guarded against by requiring the affidavit of any one of several appellants. Van Campen *v.* Ribble, 17 *N. J. L.* 433.

The word, in such connection, ought to be construed liberally, to promote the remedy intended. Jackson *v.* People's Bank, 9 *N. J. Eq.* 205.

A statute allowing judgment to be rendered on appeal for either party stands for plaintiff or defendant, and includes all the persons belonging to that particular class. Sheldon *v.* Quinlen, 5 *Hill*, 441.

The word party, in a statute prescribing that a certain application shall be verified by the oath of the party making it, may mean either a single individual, or a class or number of persons holding a certain interest, or united in a certain relation. Which of these meanings it bears is to be determined from the context. If the object seems to be to search the conscience of the applicant or petitioner, the act may reasonably be construed as requiring, where more persons than one unite in an application under it, the oath of each. People *v.* Croton Aqueduct Board, 5 *Abb. Pr.* 316.

A statute declaring every contract for the sale of lands void, unless subscribed by the party by whom such sale is to be made, or by the agent of such party lawfully authorized, requires signatures of all the vendors, when more than one unite in the contract of sale. Snyder *v.* Neefus, 53 *Barb.* 63.

The phrase each party, in a statute allowing each party a given number of challenges, includes all the persons named as plaintiffs or as defendants; and it follows that each party thus defined is entitled to the prescribed number of peremptory challenges, and no more. Snodgrass *v.* Hunt, 15 *Ind.* 274.

It should be construed, in such a statute, as applying severally to each defendant having a distinct issue to maintain; to all in a body, where all have a common defence, though they answer severally. Hundhausen *v.* Atkins, 36 *Wis.* 518.

The word party, in a statute regulating applications for change of venue, was held to signify all of the defendants or all of the plaintiffs in an action; although, in the statute relating to challenging jurors, each of several defendants setting up separate defences is held to be a "party." Rupp *v.* Swineford, 40 *Wis.* 28.

Parties and privies. Parties to a deed or contract are those with whom the deed or contract is actually made or entered into. By the term privies, as applied to contracts, is frequently meant those between whom the contract is mutually binding, although not literally parties to such contract. Thus, in the case of a lease, the lessor and lessee are both parties and privies, the contract being literally made between the two, and also being mutually binding; but if the lessee assign his interest to a third party, then a privity arises between the assignee and the original lessor, although such assignee is not literally a party to the original lease. *Brown.*

Party and party. This phrase signifies the contending parties in an action; *i.e.*, the plaintiff and defendant, as distinguished from the attorney and his client. It is used in connection with the subject of costs, which are differently taxed between party and party and between attorney and client. Such charges and expenses as are necessarily incurred in the prosecuting and defending the action, and which arise, as it were, out of the proceedings themselves, are denominated costs in the cause; the payment of which is usually exacted from the defeated or unsuccessful party, in favor of the other. In addition to these, there are others, which,

though not arising directly out of the proceedings themselves, are usually paid by each party to his own attorney, whatever may have been the result of the cause; and these are commonly called costs as between attorney and client, as distinguished from the costs in the cause, or, as the latter are sometimes called, costs as between party and party.

The scale upon which costs as between solicitor and client are calculated is more liberal than that upon which costs as between party and party are calculated; and the court, in a proper case, will direct all the costs of a proceeding to be paid out of the estate as between solicitor and client, but more often the direction for payment is as between party and party only.

Party structure, is a structure separating buildings, stories, or rooms which belong to different owners, or which are approached by distinct staircases or separate entrances from without; whether the same be a partition, arch, floor, or other structure. (*Stat.* 18 *&* 19 *Vict.* ch. 122, § 3.) *Mozley & W.*

Party-wall. A wall between two adjoining owners, built at common expense and used for common advantage.

It usually stands half on the land of each, but the land underneath, as well as the wall, may be owned in common.

The title to such walls, and the rights and liabilities of the co-owners, are subject to several peculiar rules, which differ, however, somewhat in different jurisdictions.

PASS, *v.* 1. In speaking of conveyances or sales, that is said to pass which is transferred from one party to the other, by force of the instrument or contract. Thus the title is said to pass by delivery of the deed; appurtenances are said to pass by a conveyance of a lot and buildings; and, by another form of the expression, the deed, the delivery, &c., is said to pass the lands or the goods.

2. In speaking of practice of courts, a judgment or decree is said to pass or to be passed, when it is rendered or made.

When an auditor appointed to examine into any accounts certifies to their correctness, he is said to "pass" them; *i.e.*, they pass through the examination without being detained or sent back for inaccuracy or imperfection. *Brown.*

When the proceedings are entered upon the *nisi prius* record, it used to be taken to the master's office and there examined by the proper officer, who then signed it; and the record was then said to be "passed." *Brown.*

"Pass" means, 1. To bring or come into force; of an act of parliament, grant, or public charter; the word being used to indicate that the act, grant, charter, &c., passes or is passed through the necessary stages to its full and complete legal effect and operation. 2. To be conveyed by deed, will, or other conveyance. Here the word is used of the subject-matter of the conveyance. Thus it is often a question whether such an estate passes by a clause in a deed or will by which property is conveyed; the meaning of the question being, whether such an estate is comprised in the property so conveyed. *Mozley & W.*

3. Likewise a bill or resolution pending before a deliberative or legislative body is said to pass, or to be passed, when all the requisites to effective assent have been finally and formally given. A bill has passed the house or the senate when a majority of either has voted for it, and this has been duly attested by the presiding officer. It may be said to have passed when both houses have voted for it, though it has not received executive approval, if the connection shows this is excluded; but, generally, "to pass," or "passed," applied to a law, includes approval of the crown, president, or governor.

4. When the offences of forgery or counterfeiting are under discussion, to pass is to circulate, put forth, or utter the counterfeit or forged coin or instrument.

Passing a paper is putting it off in payment or exchange. Uttering it is a declaration that it is good, with an intention to pass, or an offer to pass it. United States *v.* Mitchell, *Baldw.* 366.

Pass, utter, publish, and sell, are in some respects convertible terms, and, in a given case, pass may include utter, publish, and sell. The words uttering and passing, used of notes, do not necessarily import that they are transferred as genuine: the words include any delivery of a note to another for value, with intent that it shall be put into circulation as money. United States *v.* Nelson, 1 *Abb. U. S.* 135.

"Pass," as used with reference to money, does not necessarily imply a transfer for a valuable consideration. It rather means to deliver as money, or as a known and conventional substitute for money. To sustain an indictment for passing a counterfeit bill, it must be proved that the accused passed the bill to another as money, or to

be used as money, with the guilty purpose of defrauding the community; but it is not necessary that the person to whom it is actually delivered should take any beneficial interest in it, to make out an uttering and passing to him. Commonwealth *v.* Starr, 4 *Allen*, 301.

The staking counterfeit money at a gaming table, as good money, is an attempt to utter or pass it; and losing it at play is a passing of it against law. State *v.* Beeler, 1 *Brev.* 482.

Pledging a counterfeit note, which was to be redeemed at a future day, is not a passing, within the meaning of the act of Tennessee. Gentry *v.* State, 3 *Yerg.* 451.

Pass-book. A kind of memorandum book which bankers and some classes of merchants issue to their customers, adapted to be carried back and forth by the customer, and in which a record of his deposits or purchases may be made. Being in the customer's general possession, it is a check upon the entries made by the other party in his own books. The significance of the name seems to be in the fact that the book passes back and forth; the customer keeps it, but the dealer makes the entries.

PASS, *n.* An authoritative or official writing, permitting a person restricted within limits, to go beyond the designated bounds.

When a territory is in military occupation or under martial law, civilians must often obtain a pass before they will be allowed to go beyond certain lines. A pass may be issued by a sheriff, authorizing a prisoner to go where he otherwise might not. Under the former law of slavery, slaves, in many places, could not leave their plantations, without passes from their owners.

PASSAGE. As used commercially, signifies travel by water; affreightment of passengers; a voyage, or carriage of persons, by a vessel.

Bouvier considers it is also used in the sense of passage-money, in such connections as "paying one's passage." This treats it as a noun of similar form with expressage, postage, poundage, and many others in which the termination -age seems to signify a pecuniary charge for the service indicated by the root of the word. But we think the phrases in which "passage" thus appears are better explained by supplying some apt word as understood; thus we should explain the expression, my passage to Europe was one hundred and fifty dollars, as meaning *the cost of* my passage was one hundred and fifty dollars; or the expression, paying one's passage, as meaning paying *for* one's passage.

In the legal use, passage is spoken, chiefly, of laws; and is nearly equivalent to enactment. See PASS, subd. 3.

Spoken of a law, "prior to the passage" means prior to the going into effect. Charless *v.* Lamberson, 1 *Iowa*, 435.

An act of laying duties on goods imported "from and after the passage of the act," takes effect the beginning of the day on which it is passed, and not from the time of its being signed by the president. United States *v.* Williams, 1 *Paine*, 261.

The time of passage of a statute is when the act has gone through all the constitutional forms, including the approval of the governor. Wortman *v.* Philadelphia, 33 *Pa. St.* 202.

"Passage of this act" refers to the time when the act was passed, although prohibitions therein take effect at a subsequent date. Eliot *v.* Cranston, 10 *R. I.* 88.

"Forty days from its passage," referring to a statute, means forty days from the signature by the governor, or passage over his veto, or expiration of time for its return, if neither signed nor vetoed. Logan *v.* State, 3 *Heisk.* 442.

Passage-money. The sum paid for carrying a passenger by water; fares payable to a carrier by vessel; charges of a voyage.

PASSAGE COURT. An ancient court of record in Liverpool, once called the mayor's court of pays sage, but now usually called the court of the passage of the borough of Liverpool. This court was formerly held before the mayor and two bailiffs of the borough, and had jurisdiction in actions where the amount in question exceeded forty shillings. In 1834, the Stat. 4 & 5 Wm. IV. ch. 92, was passed for amending the proceedings and practice of this court. It provided that the court might be held before the mayor and bailiffs, or before the mayor and one of the bailiffs, or before the two bailiffs only; and that it should be lawful for his majesty, his heirs and successors, to appoint a barrister-at-law, of not less than seven years' standing, to be assistant to the mayor and bailiffs in the trial of causes and the hearing of arguments; and that the mayor and bailiffs should not sit without the assistance of such barrister. Actions brought in this court, where the amount in question does not exceed £20, are not to be removable therefrom except by writ of error. By Stat. 7 Wm. IV. & 1 Vict. ch. 98, § 11, passed in 1837, the registrar may hold courts without

the presence of the mayor and aldermen. The procedure of the court is further amended by Stat. 1 & 2 Vict. ch. 99, passed in 1838. *Mozley & W.*

PASSIVE. Occurs in some technical phrases.

Passive debt. According to the books, the debts which a person owes are sometimes called passive debts, to distinguish them from the debts which are due to him: these latter are called active debts, because they may assist him in raising funds. We have not met the phrase actually used.

Passive trust, or use. Passive uses were resorted to before the statute of uses, in order to escape from the trammels and hardships of the common law, the permanent division of property into legal and equitable interests being clearly an invention to lessen the force of some pre-existing law. For similar reasons, equitable interests were, after the statute, revived under the form of trusts. As such, they continued to flourish, notwithstanding the signal amelioration effected at a later period in the law of tenure, because the legal ownership was attended with some peculiar inconveniences. For, in order to guard against the forfeiture of a legal estate for life, passive trusts, by settlement, were resorted to, and hence trusts to preserve contingent remainders; and passive trusts were and are created in order to prevent dower.

Where an active trust was created, without defining the quantity of the estate to be taken by the trustee, the courts endeavored to give, by construction, the quantity originally requisite to satisfy the trust in every event; but, if a larger estate was expressly given, the courts could not reject the excess; and although the estate taken, whether expressly or constructively, might not have exceeded the original scope of the trust, yet, if eventually no estate, or a less estate, were actually wanted, the legal ownership remained wholly or partially vested in the trustee as a merely passive trustee. 1 *Hayes Conv.* 103.

PASSPORT, is said to mean, strictly, a license to pass a port or haven; that is, a license for the safe passage of any man from one place to another. *Termes de la Ley; Cowel;* 1 *Bl. Com.* 260; 4 *Id.* 68; 2 *Steph. Com.* 494. As generally used, in modern times it signifies a kind of document carried by a merchant vessel in time of war, intended to evidence the nationality of the vessel, and protect her from belligerents; also, a safe conduct, or permission granted in time of war, for the removal of persons or effects from a hostile country. *Burrill.* Also, and more frequently, a warrant of protection and authority to travel, granted by the competent officer to persons moving from place to place. *Brande.*

PATENT. Open.

The word is, originally, an adjective applicable to any document or writing which is subject to any one's perusal, not closed, or sealed in the sense of secured against inspection. But its chief use for many years has been as a designation of letters-patent; an instrument issued by the sovereign power, for public reading, and embodying some grant of authority, franchise, or privilege. Thus the word, in common use, by elision, is equivalent to letters-patent; and in this use it appears as a noun.

Patentee is one to whom letters-patent, either for an invention or for lands, have been granted. As such letters are always granted by the sovereign power, the correlative, patentor, is not in use. 5 Mod. 227

A great variety of grants from governments may be, and in England are, made by means of letters-patent; but in this country two are of prominent importance, — letters-patent granted by the United States, securing to an inventor the exclusive right (for a term of years) to his invention; and letters-patent granted by the United States or by a state, granting some portion of the public lands. The two are commonly known as patents for inventions, or patents for lands. When a patent is spoken of, the context and attendant circumstances must be considered to determine which of the two is meant.

Patent ambiguity. An uncertainty or question between two meanings of language which arises on bare inspection of the words themselves. See AMBIGUITY; LATENT AMBIGUITY.

Patent of precedence. Letters-patent granted to such barristers as the crown thinks fit to honor with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents, which is sometimes next after the attorney-general, but more usually next after his majesty's counsel then being. These rank promiscuously with the king's (or queen's) counsel, but are not the sworn servants of the crown. 3 *Bl. Com.* 28; 3 *Steph. Com.* 274.

Patent office. The bureau or estab-

lishment at the seat of government charged with the duty of receiving and passing upon applications of inventors, issuing patents thereon, preserving the appropriate records, and other duties incidental thereto.

Patent-right. A right secured by letters-patent, and almost always a right to a discovery or invention.

During the reigns of the Stuarts, and of Elizabeth, the practice of royal grants, by letters-patent, of exclusive rights to carry on some business or manufacture, was extensive, and became oppressive and injurious. It was curtailed by the Stat. 21 Jac. I. ch. 3 (see MONOPOLY), which, however, preserved and allowed the issuing of letters-patent to inventors securing to them the exclusive control of their inventions. Upon this reservation in the statute the modern English system of patent law is considered to be founded. The mode in which a patent is to be obtained is, however, prescribed by much more recent statutes, particularly Stat. 15 & 16 Vict. ch. 83, and 16 & 17 Vict. ch. 5 and 115, dating in 1852 and 1853. The course of proceeding is thus outlined by Mozley & Whiteley. The application is made by petition, the allegations of which are to be supported by a solemn declaration that the petitioner is the true and first inventor, and that the invention is not in use in this country by any other person, to the best of his knowledge and belief. This petition and declaration are to be left at the office of the commissioners of patents for inventions, and with them an instrument called the "provisional specification," describing the nature of the invention; or the applicant may insert a "complete" instead of a "provisional" specification, more particularly describing the nature of the invention. The next step is for the applicant to give notice to the commissioners of his intention to proceed with his application. The intention will be advertised, and time will be given for lodging objections to the grant; which, being heard, the law officer may grant a warrant for the sealing of the letters-patent. The warrant being sealed by the commissioners, the lord chancellor may thereupon cause the letters-patent to be sealed. In the letters-patent is contained a proviso that they are to be void, if the specification is incorrect. The acts above cited also declared it competent, upon petition to the crown, to obtain an extension of this patent-right after the expiration of the fourteen years allowed by the statute of James, for such further period as the privy council shall think is fit or proper for the due remuneration of the inventor.

In the United States, the constitution contains an express grant to congress of power to promote the progress of science and the useful arts, by securing to inventors the exclusive use of their discoveries. Under this power, successive acts of congress have been passed, and an extensive system of issuing patents has arisen. The laws most important are, 1, the act of 1836, which repealed previous legislation, and, with some auxiliary and amendatory laws, governed the subject down to 1870; and, 2, a codification or revision of the patent laws made in 1870, and afterwards reenacted, with changes of arrangement and expression and some amendments, in the Revised Statutes. For a full account of the American system of patent law, see the *Revised Statutes*, also *Curtis Patents;* 1 *Abb. U. S. Cts. Prac.* ch. Patents; *Abb. Nat. Dig.* tit. Patents.

Patent-right dealer. Any one whose business it is to sell, or offer for sale, patent-rights. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 118.

Patent rolls. The official records of royal charters and grants; covering from the reign of King John to recent times. They contain grants of offices and lands; restitutions of temporalities to ecclesiastical persons; confirmations of grants made to bodies corporate; patents of creation of peers, and licenses of all kinds. *Hub. Evid. Suc.* 617 · 32 *Phila. Law Lib.* 429.

PATER. Father. The initial word of several Latin maxims and phrases, viz.:

Pater est quem nuptiæ demonstrant. He is the father whom the marriage indicates as such. This rule is applied in the civil law to children born before the marriage; but, in the common law, it is limited to children born after marriage. All children born in wedlock are presumed to be the legiti-

mate children of the husband and wife. The presumption may, however, be rebutted.

The marriage of the parties is the criterion adopted by the law, in cases of ante-nuptial generation, for ascertaining the actual parentage of the child. If a man marries a woman who is with child, the English law presumes that he is the father of such child. Rex *v.* Luffe, 8 *East*, 193.

Paterfamilias. The father of a family. In Roman law, the head or master of a family, whether actually a father or not. As to the authority of the *paterfamilias*, see PATRIA POTESTAS.

This word is sometimes employed, in a wide sense, as equivalent to *sui juris*. A person *sui juris* is called *paterfamilias*, even when under the age of puberty. In the narrower and more common use, a *paterfamilias* is any one invested with *potestas* over any person. It is thus as applicable to a grandfather as to a father. *Hunter Rom. Law*, 49.

Pater patriæ. Father of the country. See PARENS PATRIÆ.

PATRIA. Paternal; also, the pays or vicinage; the men of a neighborhood. Thus, when it is said *inquiratur per patriam*, a jury of the neighborhood is meant.

Patria potestas. Paternal authority. This name was given, in the Roman law, to that power which the *paterfamilias* had over all the members of his family, — the family including his wife, children, and grandchildren, as well as those who became members of the family by marriage or adoption. At one time, this power was very extensive, — for under it the *paterfamilias* could sell, abandon, or put to death any member of his family; but subsequently it was much limited, and ultimately it gave the *paterfamilias* scarcely any other right than that of demanding as his own any property which was acquired or succeeded to by a member of the family.

The *patria potestas* is the name for the rights enjoyed by the head of a Roman family over his legitimate children. The *potestas* could be enjoyed only by Roman citizens; and thus the loss of citizenship involved the loss of the *potestas*. The powers enjoyed by a father over his children were identical with those that a master possessed over his slaves; but this statement is subject to a very important qualification. Within the domain of private law, a son was scarcely to be distinguished from a slave; but in the sphere of public rights and duties, the son was free and independent. The state had the first claim on its citizens; and, where its demands intervened, the paternal despotism was excluded. Thus a son could be elected magistrate, although he could not marry without his father's consent; and he could act as tutor even against his father's wishes, because the office of tutor was a public duty. In the same way, a son could act as *judex*, or judicial referee, even to his own father. Again, a son elected consul could himself superintend the ceremony of his own emancipation from the *potestas*. Within the sphere of private law, however, the position of a son is strictly to be compared with that of a slave. *Hunter Rom. Law*, 43.

It was the existence of the *potestas* that determined the legal constitution of a Roman family, so artificial as it seemed to us, as indeed it did to the jurisconsults of the empire. The Roman family cannot be defined as consisting of parents with their children: it was composed of those persons who were subject to the *potestas* of the same individual, whether they were his children, grandchildren, or great-grandchildren, or entirely unconnected with him in blood. Hence a child, who had been emancipated from the *potestas*, was at first, from a legal point of view, no member of the family; while a stranger, introduced by adoption, was regarded, to all intents and purposes, as the offspring of the head of the family. So far was this view carried, that the conception of blood relationship was submerged in that of persons living under the same *potestas*. A sister, who was married into another family, and placed under a different *potestas*, was looked on as no longer related to her brothers for any legal purpose. The history of Roman law discloses a series of changes by which the Roman family was brought nearer and nearer to the modern point of view. *Id.* 48.

At first, the father is despot, or owner; he has all the essential rights of ownership, — the right to use the son's services, the right to part with them, the right to destroy. But gradually these rights are limited: the father ceases to be the proprietor; he becomes the natural protector and guardian of his children. Such was the tendency of Roman law; although, as appears from the latest law, it never went so far in the direction of giving independence to the child, as is now considered necessary in all civilized nations. *Id.* 47.

PATRIMONY. Distinguishes the property which one has received from his father; or sometimes, more largely, that which he has received from his mother or ancestors.

PATRON. In ecclesiastical law, one

who has the gift of a benefice. In the Roman law, one who stood in a certain relation of defender or protector of another was called his *patronus*.

PATRONAGE. The right of appointing to office, presented as a perquisite, privilege, or personal right; not in the aspect of a public trust.

In ecclesiastical law, the right of presentation to a church or benefice.

PATROON. The proprietors of certain manors created in New York in colonial times were so called.

PAUPER. A Latin adjective, originally signifying poor; but used as a noun, as the technical designation of a person so poor that he must be supported at public expense; also, of a suitor, who, on account of poverty, is allowed to sue or defend without being chargeable with costs.

In a general sense, all poor persons may be said to be paupers, but not as the word is used in the statutes. A pauper is defined to be a poor person, particularly one so indigent as to depend upon the parish or town for support. Lee County *v.* Lackie, 30 *Ark.* 764.

In the technical sense, "pauper" does not apply to a poor person smitten with a contagious disease, who, on account of his sickness, receives aid from the county, though under a pauper act. La Salle County *v.* Reynolds, 49 *Ill.* 186.

A pauper is one unable to support himself or herself, and having no one legally liable for his or her support. As a grandfather or grandmother, if of sufficient ability, is liable for the support of a grandchild, one having such a grand-parent, even if the father is living and unable, is not a pauper in legal contemplation, and so cannot be bound out as such by the guardians of the poor. Whiting's Case, 3 *Pittsb.* 129.

Pauper does not necessarily imply a person who has actually received support from the town. It may be used indiscriminately to designate poor and indigent persons standing in need of relief, and poor persons likely to become chargeable, as well as such poor persons as have actually received support from the town. Walbridge *v.* Walbridge, 46 *Vt.* 617.

PAVE. Corporations which have a right to pave the streets may raise or lower particular parts of any street, if such raising or lowering should be necessary for performing the work in a reasonable and proper manner; and the individuals who may be injured by it have no right of action for such injury, unless expressly given by statute. Smith *v.* Corporation of Washington, 20 *How.* 135; Hooe *v.* Mayor of Alexandria, 1 *Cranch C. Ct.* 98.

A power given, in a city charter, to pave streets, includes the usual means to cover the streets with stone or brick, so as to make a convenient surface for travel. This may comprise macadamizing and gutter-making. Warren *v.* Henly, 31 *Iowa*, 31.

An assessment for reflagging a street is an assessment for "repaving," within a statute authorizing the courts to vacate an assessment for repaving upon property for which an assessment has once been paid for paving the same streets. To pave is to cover with stones or brick or other suitable material, so as to make a level or convenient surface for horses, carriages, or foot-passengers, and a sidewalk is paved when it is laid or flagged with flat stones as well as when paved with brick, as is frequently done. The difference in the material could not change the character or general identity of the work as embraced in the generic term, which includes any process for covering a street or walk or public place with stone or brick or concrete, so as to give a level surface, convenient for use in the manner and for the purpose for which it was intended. Matter of Phillips, 60 *N. Y.* 16.

PAWN, *n.* The thing bailed in the contract of pledge.

It is also in use as a verb, meaning to pledge, to leave as security; and sometimes appears in the sense of the contract of pledge. Using it only as meaning the thing left as security, and using pledge only as a verb, or as meaning the bailment or contract, would tend to accuracy of expression.

Pawn, or pledge, is a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. *Wharton.*

Pawnbroker. One who makes it a business to loan money on security of things left in pledge.

Any person whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money lent thereon. Act of July 13, 1866, § 9, 14 *Stat. at L.* 116.

PAY. To deliver, in satisfaction of a debt, duty, or obligation, the thing due. Paid: discharged by delivery of the value called for.

To pay, as usually understood, means to deliver money; this is, however, not necessarily involved. The word does, however, imply a delivery of value, and that it is the value called for by the engagement to be discharged. For, when that engagement calls for something else than a simple delivery of value,

performance is the proper term; and when something else than what it calls for is delivered and accepted, this is a compromise, or a discharge, but "pay" does not apply.

To pay is to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged. Beals *v.* Home Ins. Co., 36 *N. Y.* 522.

The word implies an indebtedness. Lent *v.* Hodgman, 15 *Barb.* 274.

The word does not necessarily import a discharge of the obligation by money. To pay is to discharge an obligation by a performance according to its terms or requirements: if the obligation be for money, the payment is made in money; if for merchandise or labor, a delivery of the merchandise or a performance of the labor is payment; or if for the erection of a building, performance according to the terms of the contract is payment. The assent of insurers to an indorsement upon a policy of the words, "Pay the loss to T," does not impair their right, if the policy so allows, to discharge their obligation by replacing the property insured, instead of paying its value. Tolman *v.* Manufacturers' Ins. Co., 1 *Cush.* 73.

PAYABLE. Dischargeable by delivery of value, usually money. Also, matured; ready to be discharged immediately; due now.

Payable as convenient. A written contract containing a provision that a certain sum shall be payable as convenient, cannot be construed so that it shall not be payable at all, but only as an extension of credit. Black *v.* Bachelder, 120 *Mass.* 171.

Payable in trade. In a dealer's written contract to pay a specified sum for services rendered, "payable in trade" means payable in such articles as the promisor deals in. Dudley *v.* Vose, 114 *Mass.* 34.

PAYEE; PAYER. The person to whom, as principal, payment ought to be or has been made; and the person by or from whom it should be or has been made, respectively. Payor, in the latter sense, occurs rarely.

The agent to or through whom money may be passed in payment is not called payee or payer: the terms relate to the person ultimately interested. The words do not import that payment has been made, by any means, as strongly as grantor and grantee import that a grant has passed, or vendor and vendee that a sale has occurred. The person who is named in a note as the one to whom the money is due is called the payee, from the drawing of the note, and after dishonor.

PAYMASTER. The style or title of an officer charged with making payments; as to the army.

PAYMENT. The act of discharging a debt, duty, or obligation, by delivering a value for which it calls; also, the money or other value delivered.

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

An oral undertaking of the owner of a building, that he will pay certain debts of the contractor, does not constitute a payment for which he must be allowed, under a statute provision that the owner shall be allowed, in settling the liens of sub-contractors, whatever payments he has made in good faith to the contractor; even though, after notice of the sub-contractor's lien, he has actually paid the debts, as promised. Gridley *v.* Sumner, 43 *Conn.* 14.

Payment signifies not merely the delivery of a sum of money, but the performance of an obligation. It is an act requiring the exercise of the will, — of consent to the extinguishment of the obligation. Bloodworth *v.* Jacobs, 2 *La. Ann.* 24.

Payment may be made either in money, or in money's worth; but, to amount to a payment, the thing must be done, the money must be paid, or the thing taken as money must be passed, so as presently to become the property of the other party. A promise or undertaking to pay either in money or other thing is not a payment: the contract is executory, whereas payment is executed, is a thing done. Rhodes *v.* Chesson, *Busb. L.* 336.

Payment implies satisfaction by money, and not a security by pledge of real estate. Bailey *v.* Pittsburg, &c. Gas, &c. Co., 69 *Pa. St.* 334.

It means satisfaction by money, not by an exchange or compromise, or an accord and satisfaction. Manice *v.* Hudson River R. R. Co., 3 *Duer*, 426, 441.

Payment is never used in the law in a vindictive sense. It is the discharge of an obligation in money, or an equivalent, usually with the assent of both parties. Thus a creditor cannot seize his debtor's property, and declare at his own pleasure that he will take it in satisfaction of his demand. Brady *v.* Wasson, 6 *Heisk.* 131.

Payment into court. When the

defendant, in an action brought for a given sum, admits either the whole or a part of the plaintiff's claim, he often, with the view of avoiding expense in the prosecution of the action, makes what is termed "a payment into court;" that is, he pleads that he brings a sum of money into court, ready to be paid to the plaintiff if he will accept the same, and that the plaintiff has no claim to a larger amount; and this plea is accompanied by an actual payment of the specified sum into the hands of the proper officer of the court, where the plaintiff, or usually his attorney, may, upon application, obtain it. Should the plaintiff, after this, proceed with the action, he does so at the peril of being defeated, and having the costs to pay; unless he should, upon the trial, prove that a further sum still remains due to him from the defendant. The payment into court protects defendant from interest and costs, unless the plaintiff establishes some part of the contested portion of his demand.

Payment out of court. When money is to be paid out of court, the order directing the payment is taken to the chancery pay-office, and in due course a check for the amount will be given by the paymaster-general. *Mozley & W.*

PEACE. 1. Amity between states or nations; the opposite of war.

2. Orderly, quiet behavior of individuals towards one another; good conduct within a community.

Assaults and violence are called breaches of the peace; one who is required to give security to refrain from disorder is said to give surety of the peace, or to give bond to keep the peace; a well-behaved citizen entitled to full protection is said to be within the peace of the state or of the queen.

Peace of God and the church. An old English expression for that use which the king's subjects had from trouble and suit of law between the terms of court. *Cowel.*

PECULIAR. A particular parish or church that has jurisdiction within itself, and exemption from the ordinary. There are several sorts: Royal peculiars, which are the sovereign's free chapels, and are exempt from any jurisdiction but that of the sovereign; peculiars of the archbishops, exclusive of the bishops and archdeacons, which arose from a privilege they had to enjoy jurisdiction in such places where their seats and possessions were; peculiars of bishops, exclusive of the jurisdiction of the bishop of the diocese in which they are situate; peculiars of bishops in their own dioceses, exclusive of archidiaconal jurisdiction; peculiars of deans, deans and chapters, prebendaries, and the like, which are places wherein, by ancient compositions, the bishops have parted with their jurisdiction as ordinaries to these societies. *Whurton.* See also COURT OF PECULIARS.

There is mention in our books of peculiars of archdeacons; but they are not properly peculiars, only subordinate jurisdictions; and a peculiar is *prima facie* to be understood of him who hath a co-ordinate jurisdiction with the bishop. *Jacob.*

PECULIUM. A little money; separate property. In the Roman law, the private or separate property of one who was not *sui juris;* particularly, the limited amount of money or property which a son or a slave was allowed to have, separate from the accounts or stocks of his father or master.

Slaves did a great portion of the intellectual as well as the manual work of Rome; and it was found expedient to reward their zeal and fidelity by allowing the enjoyment and control of property. Whatever was thus allowed them was called *peculium.* It consisted of the savings made by a slave, or of presents given to him in reward of his services, and which his master was willing he should keep as his own property. Every thing turned on the intention of the master. If he intended to surrender to the slave the exclusive control and enjoyment of any thing as his *quasi* property, then it was *peculium;* otherwise not. The consent of the master and the delivery of the thing to the slave (unless it was already in his possession) created the *peculium.* So the expressed intention of the master to put an end to the *peculium* at once destroyed it, even without the necessity of redelivering the things to the master. The *peculium* was also extinguished if the slave ran away or was stolen, or if nobody knew whether he was alive or dead.

A *filiusfamilias* was exactly in the position of a slave as regards property; whatever would have been acquired by him if he became independent, became the property of his *paterfamilias.* But by degrees the *filiusfamilias* obtained some rights of property. The first mitigation was to allow him to enjoy *peculium* on the same terms as a slave. Beyond this stage, no improvement was made in his lot during the republic. Under Cæsar or Titus, a soldier *filiusfamilias* was particularly relieved from his proprietory disability in respect of certain acquisitions. The property that he was allowed to enjoy was called *peculium castrense,* and it may be defined as consisting of whatever he ob-

tained by gift of his parents or relatives for his equipment, or himself acquired on service and by service. By successive enactments, the privilege conferred on soldiers of retaining their prizes and equipment in full ownership was extended to persons engaged in the higher civil offices. *Hunter Rom. Law*, 145.

Bona castrensia et quasi castrensia were the goods which a *filiusfamilias*, under the Roman law, was entitled to bequeath by will, or otherwise dispose of without the consent of the *paterfamilias*. Being under the power of his father, all property which he acquired, generally speaking, became the property of his father; but, in course of time, the emperors allowed sons to acquire certain goods of their own, which were called *peculia*. These were four in number. The *peculium profecticum* comprised every thing derived by the son out of the estate of the father, but in this the father acquired the absolute property. The *peculium castrense*, being property acquired by the son on account of military service (thence deriving its name), as well as the *peculium quasi castrense*, comprising all presents from the emperor, and every thing acquired in the exercise of civil and ecclesiastical duties, were the absolute property of the son, which he could dispose of by will or otherwise. The *peculium adventicium* comprised every thing coming to the son, except in the three ways already stated; but this was subject to the management of the father, and of which he enjoyed the usufruct or life-rent. On the father's death, but only then, this *peculium* became the absolute property of the son. *Trayn. Max.* 56.

PECUNIA. Among the ancients, cattle were the chief form or representative of wealth; hence *pecunia*, formed from *pecus*, a flock or herd, came to be a general name, in the Roman law, for property or wealth, and particularly for chattel or movable property. In modern times, it and its derivatives are used altogether in the sense of money.

Pecunia numerata. Money counted; and, secondarily, money paid, counting being an almost inseparable incident of payment.

Pecunia non numerata. Money uncounted, or not paid.

Pecunia sepulchralis. Money anciently paid to the priest at the opening of a grave, for the good of the deceased's soul.

Pecunia trajectilia. Money lent on marine risks.

PECUNIARY. Monetary; in or relating to money.

Pecuniary causes. Causes cognizable in the ecclesiastical court, which arise from the withholding ecclesiastical dues, or the doing or neglecting some act whereby some damage accrues to the plaintiff. These causes are contrasted by Blackstone with causes matrimonial and testamentary, which were formerly also matters of ecclesiastical cognizance. 3 *Bl. Com.* 88. By Stat. 20 & 21 Vict. ch. 77, passed in 1857, the testamentary jurisdiction was transferred to the court of probate; and by Stat. 20 & 21 Vict. ch. 85, passed in the same year, the matrimonial jurisdiction was transferred to the court for divorce and matrimonial causes. *Brown.*

PEDAGE; PEDAGIUM. Old English and Latin terms for a charge exacted in ancient times for the privilege of passing, on foot or on horseback, through any forest or tract of country. Somewhat analogous to the current expression, paying one's footing.

PEDIGREE. The statement of a person's descent and family relationships; the history of a family in successive generations.

Pedigree includes not only descent and relationship, but also the facts of birth, marriage, and death, and the times these events happened. American Life Ins. Co. *v.* Rosenagle, 77 *Pa. St.* 507.

PEDIS POSITIO; PEDIS POSSESSIO. A placing of the foot; a possession of the foot. Latin terms for entry upon or possession of landed property; since walking or standing upon the land was a natural symbol of possessing it.

Pedis possessio, is of frequent occurrence in modern real-property cases. It signifies actual possession of the lands in question; inclosure, occupancy, &c.

PEER. Originally, an equal; thus trial by one's peers signifies trial by those of equal condition or rank with the accused.

In the feudal law, vassals of a lord who sat in his court for the trial of other vassals were called the *pares*, or peers, in view of all being equals in degree.

In modern English law, the various members of the nobility are called peers, as a collective name. As there are various grades of rank among them, the appropriateness of the term, etymologically, is not very apparent. Some authorities say it is because they are all equal in the privilege of sitting and voting in the house of lords; others, that it is because they are, with refer-

ence to the great division between nobility and commonalty, the equals of the sovereign.

Peerage. The dignity of the lords or peers of the realm; also the nobility, taken collectively.

Peeress. A woman who has the dignity of peerage, — which may be either in her own right or by right of marriage.

PEINE. Punishment.

Peine forte et dure. Severe and hard punishment. This was the name of what may be regarded as a punishment for refusing to plead to an indictment for felony, but more probably was a torture employed to coerce a plea.

In early English times, conviction for felony involved, as the principal part of the punishment, the forfeiture of lands and goods; and, if attainder might follow, the consequences to the sons of the convict were even more serious. Hence, if a person accused of felony, and apprehending conviction, was owner of any considerable property, and had a family for whom he desired to preserve it, he had a powerful motive to avoid a trial; and this he could do by refusing to plead. For, by the precedents of the common law, a plea by the accused was an indispensable preliminary to a trial. The *peine forte et dure* doubtless originated as a means of compelling an offender to plead who refused to do so, probably from the desire to save his property to his family; though many writers represent it as a punishment for the offence of refusing to plead, considered as refractory conduct, or a species of contempt of court. According to the accounts given, the accused, on persisting in his refusal after admonition and a few hours' delay for reflection, was remanded to prison, and placed in a low, dark chamber, and there laid on his back, on the bare floor, naked, — unless where decency forbade. Upon his body was placed as great a weight of iron as he could bear. He received no sustenance, save three morsels of the worst bread, on the first day, and, on the second day, three draughts of standing water that should be nearest to the prison-door; and such was alternately his daily diet, till he died or answered. If he answered, he was put on trial; and forfeiture of his estate followed, if a conviction was the result. But if he persevered until death relieved him from his sufferings, his family were protected from the loss and disgrace which a conviction would have brought upon them.

Blackstone conjectures that the practice of loading the prisoners with weights was gradually introduced between 31 Edw. III. and 8 Hen. IV., at which last period it first appears upon our books.

This coercion of a plea was abolished in 1772, by Stat. 12 Geo. III. ch. 20.

PENAL. That which involves suffering: hence, more largely, that which pertains to punishment; inflicts loss by way of restraint or sanction.

Penal is used as a synonym of criminal, in secondary senses of that word. Penal and criminal offence, penal and criminal code, penal and criminal justice, are equivalent expressions. In many connections the two words are not interchangeable; as in the expressions criminal or penal action, criminal conduct, penal bill or bond.

The word penal, in a statute authorizing "all penal judgments," &c., to be reviewed, was construed to read "final," in Moody *v.* Stephenson, 1 *Minn.* 401.

Penal action. An expression employed to designate an ordinary suit at law for the collection of a penalty imposed by law for some misconduct or prohibited act.

Penal bill. An instrument formerly in use, by which a party bound himself to pay a certain sum or sums of money, or to do certain acts, or, in default thereof, to pay a certain specified sum by way of penalty, thence termed a penal sum. These instruments have been superseded by the use of a bond in a penal sum, with conditions. *Brown.*

Penal clause. That particular portion or subdivision of a statute which declares the consequences in the nature of punishment or loss which are to follow a violation of previous provisions.

Penal law, or statute. Laws imposing penalties or punishments are so called. In one sense, all laws, properly so called, are penal laws; since any infringement of the directions of a statute or disregard of the rights and duties

created may, in the absence of provisions excluding, expressly or by implication, the common-law rule, be followed by fine and imprisonment. But ordinarily, when a "penal law" is mentioned, the meaning is a law which expressly defines or limits the punishment of any offence, — whether such offence is one previously known to the law, or one created by the very law which provides the punishment.

In parliamentary practice, inasmuch as a penal statute is, to the extent of the penalty, a money-bill, the commons claim the exclusive right of framing all such enactments, the lords and crown having merely a right of assent. *Mozley & W.*

The question whether a given provision in an act of parliament is a penal one or not, is sometimes important. For instance, it is a rule that penal statutes must be construed strictly; that is, narrowly. It may also be sometimes a question whether a sum of money, payable under a statute by a person who has done or omitted to do certain things, is intended to be so payable by way of penalty or by way of composition. If the former, then the act to which the penalty is annexed is itself illegal, and cannot be made the foundation of a legal contract; whereas, in the latter case, no such consequence will follow. *Brown.*

Penal laws are those which prohibit an act, and impose a penalty for the commission of it. They are of three kinds, — *pœna pecuniaria, pœna corporalis,* and *pœna exilii.* (2 *Cro. Jac.* 415.) *Wharton.*

A constitutional provision, directing the disposition of "fines assessed for any breach of the penal laws," should be considered as applying only to breaches of the criminal law, properly so called; that is, to crimes and misdemeanors. It does not extend to a statute penalty, recoverable in debt. A suit on a penal statute is not a criminal, but a civil, cause. Such a statute, therefore, is no part of the criminal law. Common Council of Town of Indianapolis *v.* Fairchild, 1 *Ind.* 315.

Penal servitude. A punishment introduced in 1853, by Stat. 16 & 17 Vict. ch. 99, in lieu of transportation beyond seas. Every person sentenced to this punishment may be kept in any prison or place of confinement in the United Kingdom, or in any river, port, or harbor thereof, or in some place in her majesty's dominions beyond seas, duly appointed for such purpose by order in council, according as the secretary of state may, from time to time, direct; and may, while confined there, be kept to hard labor, and otherwise dealt with, in like manner as persons formerly sentenced to transportation might be dealt with while so confined. The act above referred to was amended, in 1857, by Stat. 20 & 21 Vict. ch. 3, which abolished transportation; and was further amended, in 1864, by Stat. 27 & 28 Vict. ch. 47, by section 2 of which it is provided that no person shall be sentenced to penal servitude for a shorter period than five years. (4 *Steph. Com.* 449–452; *Oke Mag. Syn.* 940–945; *Cox & Saund. Cr. Law,* 311.) *Mozley & W.*

Penal sum. A sum declared by bond to be forfeited, if the condition of the bond is not fulfilled. This is otherwise called the penalty of the bond. If the bond is for the payment of money, the penal sum is generally fixed at twice the amount.

PENALTY. 1. Punishment; especially a pecuniary fine, or mulct.

2. Money recoverable by virtue of a statute imposing a pecuniary loss or payment by way of punishment.

3. A sum named in a bond as the amount to be forfeited by the obligor, in case he does not comply with the conditions of the bond.

In early common-law times, this penalty could be enforced by action in the law courts, if the condition was not punctually performed; but courts of equity early assumed jurisdiction to relieve obligors, and require bond creditors to be satisfied with so much of the penalty as would cover the debt and interest, with what would meet their just demand. Courts of law fell into the same practice; and it is now generally established. Hence the penalty, or penal sum of a bond, is, as respects amount, a nominal sum, — only a limit on the creditor's recovery.

A penalty is an agreement to pay a greater sum, to secure the payment of a less sum. It is conditional, and can be avoided by the payment of the less sum before the contingency agreed upon shall happen. By what name it is called is immaterial. Henry *v.* Thompson, *Minor,* 209, 227.

That penalty does not import punishment of the person, see Kinney *v.* Hosea, 3 *Harr.* (*Del.*) 77.

The word penalty does not necessarily imply a fixed sum; any thing imposed as a punishment, whether specific or measured by the value of the interest affected by the act complained of, may be a penalty. Merchants' Bank of N. H. *v.* Bliss, 13 *Abb. Pr.* 225, 237.

PENANCE. An act involving shame or suffering, which a convict is required to perform by way of punishment.

The distinction is, that punishment is inflicted on the offender by officers of the

law; penance is self-inflicted, being compelled by ecclesiastical censure.

The *peine forte et dure* was, however, sometimes called penance.

Penance is an ecclesiastical punishment used in the discipline of the church, which affects the body of the penitent, by which he is obliged to give a public satisfaction to the church for the scandal he has given by his evil example. Thus, for incontinence, the offender is usually enjoined to do a public penance in the parish church, bareheaded and barefooted, in a white sheet, and to make open profession of his crime in a prescribed form of words, which is augmented or moderated according to the quality of the offence and the discretion of the judge. So in smaller faults and scandals, a public satisfaction or penance, as the judge shall decree, is to be made before the minister, church-wardens, or some of the parishioners, respect being had to the quality of the offence and circumstances of the fact; as in case of defamation or laying violent hands on a clerk, or the like. And as these censures may be moderated by the judge's discretion, according to the nature of the offence, so also they may be totally altered by a commutation of penance; and this has been the ancient privilege of the ecclesiastical judge to admit that an oblation of a sum of money for pious uses shall be accepted in satisfaction of public penance. But penance must be first enjoined before there can be a commutation; or otherwise it is a commutation for nothing. *Wharton.*

PENDENS. Pending, as *lis pendens*, a pending suit.

Pendente lite. Pending suit; during litigation; during the actual progress of a suit.

Thus letters of administration may be granted *pendente lite*, where a suit has been commenced touching the validity of a will. One who buys property in litigation is called a purchaser *pendente lite*. An allowance granted to a wife, to be paid by her husband, to enable her to prosecute or defend a divorce suit, is often called alimony *pendente lite*.

Pendente lite nihil innovetur. Pending a suit nothing should be changed.

During the pendency of a suit no change should be made in property which is the subject of it, as by a conveyance by one of the parties, which may affect the rights of his opponent. Such a conveyance is not, however, absolutely void; but the grantee takes the property subject to the rights of the parties to the litigation.

Pendentes. More fully, *fructus pendentes*, a civil-law term for fruits not yet plucked; ungathered crops.

PENDING. A petition for a highway, as soon as filed with the clerk of the proper court, is pending. Wentworth *v.* Farmington, 48 *N. H.* 207.

Although judgment has been recovered in an action, the action is pending as long as such judgment remains unsatisfied. Wegman *v.* Childs, 41 *N. Y.* 159.

"Pending" applies to a judgment on which successive *fi. fas.* and *venditionis* have been issued, but not fully satisfied. Ulshafer *v.* Stewart, 71 *Pa. St.* 170.

PENITENTIARY. A place for confinement of convicts.

It is sometimes the name of a particular prison, sometimes used generically.

The word penitentiary is used in Kansas statutes to denote a prison or place of punishment; and therefore it is not error to sentence a prisoner to hard labor in the penitentiary, although there is no penitentiary in the state, and no statute authorizing such punishment for the offence charged. Millar *v.* State, 2 *Kan.* 174.

PENSION, *n.* A periodical allowance of money, especially one made by government in consideration of past services, either of the recipient or of some one on whom the recipient depended. Pension, *v.*: to grant a person the right to a stated pecuniary allowance. Pensioner: properly, one who makes a periodical payment; but, by a firmly settled perversion, the recipient of a pension.

Some of the books give, as one definition of pension, an allowance made to any one without an equivalent. But this seems traceable to Johnson's Dictionary, and to be tinged with some personal feeling. We do not understand that the word particularly suggests the notion of a gratuity. In pensions from government there is no present, immediate consideration returned; and it may well be that in instances the power to grant pensions is perverted, by bestowing them on those to whom no equivalent can be attributed; but the sense of the word is an allowance bestowed for past services. And in other connections there is an immediate, reciprocal consideration.

Pensions have been granted on an extended scale in the United States and in England to soldiers and sailors, and members of the immediate families of deceased soldiers and sailors. In Eng-

land, there is an extension of this policy to other classes of beneficiaries. With reference to government pensions, usage has become settled of calling the recipient of a pension a pensioner. Etymologically, this seems a solecism. By analogy, the recipient of the money should be called the pensionee; the party paying it is properly the pensioner. And the word is so used in the older parlance of English colleges, where a pensioner is a student, who, not being on any foundation, not holding any scholarship, is expected to pay periodically for his commons and tuition. This opposite meaning of the word should be remembered; but pensioner, in ordinary use, oftenest means recipient.

That which in the Inner and the Middle Temple is called a parliament, and in Lincoln's Inn a council, is in Gray's Inn termed a pension; that is, an assembly of the members of the society, to consult of their affairs. Certain annual payments of each member of the inns of court are also so termed. There is also a writ called a pension writ, which seems to be a sort of peremptory order against those members of the society who are in arrear with their pensions and other dues. *Brown.*

Pensioner. One who is supported by an allowance at the will of another; a dependent. It is usually applied (in a public sense) to those who receive pensions or annuities from government; who are chiefly such as have retired from places of honor and emolument. *Jacob.*

Pensioners are a band of gentlemen, so called, in attendance upon the king's person (*Cowel*); also persons receiving payments from the crown, or receiving periodical payments, especially for past services. Also, persons making periodical payments are sometimes so called; thus, resident undergraduates of the university of Cambridge, who are not on the foundation of any college, are spoken of as pensioners. *Mozley & W.*

Pension writ. A peremptory order against a member of an inn of court who is in arrear for his pensions (that is, for his periodical dues), or for other duties. *Cowel.*

PEON. In Mexico, a debtor held by his creditor in a qualified servitude to work out the debt; a serf. *Webster.*

PEONIA. In Spanish law, a foot-soldier's portion of lands conquered; a parcel of land of varying size. In the Spanish provinces in America, it measured fifty feet in width by one hundred in length.

PER. By; through; during. This word is used to introduce many Latin phrases, among which are the following:

Per; per and cui. A writ of entry against an alienee or descendant of the original disseisor was said to be brought in the *per*, because it stated that the tenant had not the entry but *by* the original wrong-doer. But, when brought against a second alienee or descendant of the disseisor, it was said to be in the *per* and *cui*, because it stated that the tenant had not entry but *by* and under the prior alienee, *to* whom the disseisor himself demised it. Compare POST.

Per annulum et baculum. By ring and staff. This phrase indicates the symbolical mode, in old English law, of conferring an ecclesiastical investiture by ring and crozier.

Per aversionem. By turning away. A term applied in the civil law to a sale of goods in bulk, not by measure or weight, and for a single price; nearly equivalent to the common English phrases, "in gross," "by the lump." The derivation of the expression is uncertain; but it is attributed to the supposed averting of the buyer's attention from any careful examination of the property.

Per capita. By heads; according to the number of individuals. This is a term of the civil law; but is extensively used in the modern law of distribution and descent, indicating the manner in which descendants take as individuals, not by right of representation. The general rule is, that where several descendants are equally near of kin to the intestate, or stand in equal degree, they take equally *per capita;* that is, according to their numbers, share and share alike, in their individual rights, without reference to the stock from which they may have sprung. See CAPUT; PER STIRPES.

Per curiam. By the court. A phrase frequently used in the reports, to distinguish a decision or opinion of the court from that of a single judge.

Per formam doni. By the form of the gift. By the direction of the grantor or donor, as distinguished from the operation of the law. See MODUS.

Per fraudem. By fraud. A term applied to a replication to a plea, alleging

something which appears to be a discharge, but which the replication alleges to have arisen out of fraud, and therefore to be invalid.

Per infortunium. By misadventure. This phrase is used to distinguish that class of homicides in which a man in doing a lawful act, and without intent to hurt, kills another by mere misadventure.

Per my et per tout. By the half and by the whole; having a moiety, and all. A term used to describe the nature of the possession of joint tenants. For purposes of tenure and survivorship, each is regarded as the holder of the whole; but for purposes of alienation, each has only his own share, which the law presumes to be equal.

An expression applied to occupation in joint tenancy, indicating, according to some, that the joint tenants have each of them the entire possession as well of every parcel as of the whole. (*Cowel;* 2 *Bl. Com.* 182; *Wms. R. P.* Pt. I. ch. 6.) But Mr. Sergeant Stephen considers the meaning to be, that the joint tenants are all jointly seised of the whole, with the right to transfer in equal shares. (1 *Steph. Com.* 341.) *Mozley & W.*

Per quod. By which; whereby. Technical words of pleading, in Latin, used to introduce a consequence or conclusion of law from matters of fact previously stated. Particularly, the emphatic words of the clause in a declaration, which states the special damage sustained by the plaintiff as the consequence of the matters previously alleged; which were used also as the name of such a clause.

When an action is brought by a person for defamation of character, and the offensive words do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, which is called laying his action with a *per quod:* as if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may bring his action against me for saying he was a bastard, *per quod* he lost the presentation of such a living. In all actions for slander, other than for slander to a person in his or her profession, trade, or occupation, it is necessary to add this *per quod* clause in effect, although no longer in form, inasmuch as damage is an essential part of the ground of action. *Brown.*

Per quod consortium amisit. By which he lost her company. This phrase was used in declarations in Latin in actions of trespass by a husband for an injury to his wife, introducing an averment of the loss of her society and assistance, for which he sought to recover special damage.

Per quod servitium amisit. By which he lost her (or his) service. This phrase was used in declarations in Latin in actions of trespass by a master for an injury to his servant, introducing an averment of the loss of service sustained by him, for which damages are sought. The phrase was also used as descriptive of this particular class of actions. The proceeding was the usual remedy of a father for the seduction of his daughter, on the theory of a loss by him of her services. To sustain such an action, some evidence, however slight, must be given of the relation of master and servant, and of a loss of service, or other special damage.

Per stirpes. By roots; by stocks; by right of representation. This is a term of the civil law, but is much used in the modern law of distribution and descent, indicating the mode of division in which parties entitled take each the share which their stock (a father or other ancestor), if living, would have taken; taking by right of representation, and not according to their number as individuals. The phrase is usually contrasted with *per capita*, q. v.

According to the canons of descent, the lineal descendants of any person deceased represent their ancestor, or stand in the place in which such ancestor would have stood if living at the time of the descent cast; and it is this taking by a right of representation, which is termed a succession *per stirpes* or by stocks, the branches taking the same share which their stock would have taken. Ward *v.* Stow, 2 *Dev. Eq.* 509.

Per universitatem. By the whole; as an entirety. This term is applied in the civil law to the acquisition of an entire estate, as by inheritance; as distinguished from an acquisition of a portion of an estate or single article.

Per verba de præsenti. By words in the present tense. *Per verba de futuro.* By words in the future tense. These two phrases are applied to different modes of contracting marriage; words importing a present assent to the marriage being

deemed sufficient evidence of the contract at common law, while words importing an assent to a future marriage must be followed by consummation, to establish a valid marriage, even by the canon law; and did not even then meet the requirement of the common law.

Per year, in a contract, is equivalent to the word annually. Curtiss *v.* Howell, 39 *N. Y.* 211.

PERAMBULATION. Travelling around or throughout; walking around boundaries, to inspect and settle them.

Perambulation of the forest was the surveying or walking about the forest, and the utmost limits of it, by justices or other officers thereto assigned, to set down and preserve the metes and bounds thereof. Perambulation of parishes was to be made by the minister, church-wardens, and parishioners, by going round the same once a year, in or about Ascension week; and the parishioners may justify going over any man's land in their perambulation, according to usage. There was also a perambulation of manors; also, a commission was granted to other persons to make perambulation of towns, counties, &c., and to certify the same in the chancery or the common pleas, &c. Also, the district within which an officer is authorized to make a periodical tour of inspection is said to be called sometimes a perambulation.

Perambulatione facienda. A writ which lies where two lordships lie near each other, and some encroachments are supposed to have been made, by which writ the parties consent to have their bounds severally known. It is directed to the sheriff, commanding him to make perambulation, and to set down their certain limits. (*F. N. B.* 133.) *Brown.*

Actions upon writs of perambulation were authorized in Scotland, by the act 1597, ch. 79, to settle the bounds of disputed properties adjoining each other. *Wharton.*

PERCEPTION. Taking into possession; thus perception of crops or of profits is reducing them to possession.

PERCOLATE. As used in the cases relating to the right of land-owners to use water on their premises, designates any flowage of sub-surface water other than that of a running stream, open, visible, clearly to be traced. Mosier *v.* Caldwell, 7 *Nev.* 363.

PEREMPTORY. Absolute; decisive; final; obligatory; that which does not admit of denial or dispute.

Peremptory challenge. A privilege allowed to a party to a cause or prosecution brought on for trial, of objecting to a person drawn as a juror, and having him excluded, without assigning any cause. See CHALLENGE.

Peremptory day. A day assigned for hearing in court, absolutely and without further request for postponement.

Peremptory mandamus. The second writ usually issued in cases of *mandamus*, q. v. After a *mandamus* has issued in the alternative, commanding a party either to do a certain thing or to show reason for refusing, if he makes no return, or an insufficient one, there issues what is termed a peremptory *mandamus*, commanding the party to do the thing absolutely; to which no return will be admitted but a certificate of having obeyed.

Peremptory paper. A list of the causes which are enlarged at the request of the parties, or which stand over from press of business in court. In the courts of common pleas and exchequer, when a rule moved for in one term was drawn up to show cause in the next term, or was enlarged till the following term, it was the custom to place it in a paper called the peremptory paper. Certain days were allotted in these courts for taking the peremptory paper, usually the first five or six days in each term. Regularly, it was necessary for the party who desired to support or to show cause against the rule, to do so by counsel on the very day allotted to the rule in the peremptory paper; and, if he neglected to do so, the court would not, in favor of a mere technical objection, afterwards permit the rule to be opened and discussed. (3 *Chitty Gen. Pract.* 477.) *Brown; Mozley & W.*

Peremptory pleas. Pleas in bar are so termed in contradistinction to that class of pleas called dilatory pleas. The former, viz., peremptory pleas, are usually pleaded to the merits of the action, with the view of raising a material issue between the parties; whilst the latter class, viz., dilatory pleas, are generally pleaded with the view of retarding the plaintiff's proceedings, and not for the purpose of raising an issue upon which the parties may go to trial and settle the point in dispute. Peremptory pleas are also called pleas in bar, while

dilatory pleas are said to be in abatement only.

In English practice, the dilatory pleas are understood to be for the most part abolished, in civil cases, by the orders under the judicature acts.

Peremptory rule. An order of court which must be complied with promptly and fully, without argument in opposition. In former English practice, when a plaintiff in an action was not ready to declare within the time limited, and the defendant wished to compel him to do so, defendant might procure what was termed a peremptory rule to declare, which was in the nature of an order from the court, compelling the plaintiff to declare, under pain of judgment of *non pros.* being signed against him. By the common-law procedure act, a notice to declare was substituted for this rule of court.

Peremptory undertaking. An undertaking by a plaintiff to bring on a cause for trial at the next sittings or assises. *Lush Pr.* 649.

Peremptory writ. This was an original writ, called a *si te fecerit securum,* from the words of the writ, which directed the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gave the sheriff security effectually to prosecute his claim. This writ was in use when nothing was specifically demanded, but only a satisfaction in general; as in the case of writs of trespass on the case, wherein no debt or other specific thing is sued for, but only damages, to be assessed by a jury.

PERFECT, *adj.* Complete; as a perfect obligation, one which possesses all the elements necessary to render it enforceable. Perfect, *v.*: to make complete; as to perfect an appeal, to perfect bail.

A perfect title can mean nothing less than a title which is good both at law and in equity; and such a title to land cannot rest upon a parol estoppel, especially where by statute conveyances of land must be in writing. Warner *v.* Middlesex, &c. Assur. Co., 21 *Conn.* 444.

PERFORM, *v.* To accomplish; to act as one has agreed; to do, and usually to do what one ought or properly may. A person is said to perform a contract, but to commit (not to perform) a crime. Performance: the doing what one has agreed; also, the thing done; also, the discharge of the obligation which results.

Periculum rei venditæ, nondum traditæ, est emptoris. The risk of a thing sold, but not yet delivered, is the purchaser's. When a sale has once become valid and complete, without delivery, whether by part payment or part delivery, or by a compliance with the statute of frauds, so that the property in the subject of the salé passes to the buyer, be takes also the risk of injury to it, or of its destruction. The principle is more tersely expressed in the maxim, *res perit domino,* q. v.

PERILS OF THE SEA. Marine insurance is usually understood to be an engagement to indemnify the promisee against loss of damage resulting from perils of the sea; and if the injury arises from no unusual cause, though the winds and waves may be concerned in it, the loss is to be attributed to wear and tear, for which the underwriters are not responsible. Moreover, it has long been customary in bills of lading to insert, by supposed special agreement, provisions in various forms, exempting the carrier from liability for loss or damage caused by perils of the sea. In the United States, where lake or river navigation is contemplated, and the old phrase seems not quite appropriate, "perils of navigation," "perils of the river," and the like, are employed as equivalent. We consider them interchangeable.

The perils of the sea are, strictly, the natural accidents peculiar to the water; but the law has extended the phrase to comprehend events not attributable to natural causes, as captures by pirates, and losses by collision, where no blame is attachable to either ship, or, at all events, none to the injured ship. The word peril is ambiguous; sometimes denotes the risk of inevitable mischance, and sometimes danger arising from the want of due circumspection. (*Jones Bailm.*) *Wharton.*

All losses caused by the action of wind and water acting on the property insured under extraordinary circumstances, either directly or mediately, without the intervention of other independent active external causes, are losses by "perils of the sea or other perils and dangers," within the meaning of the usual clause in a policy of marine insurance. *Baily, Perils of the Sea,* 6.

The phrase perils of the seas, in a policy of marine insurance, covers all losses or damages which arise from the extraordinary

action of the wind and sea. Tysen *v.* Moore, 56 *Barb.* 442.

In an enlarged sense, all losses which occur from maritime adventure may be said to arise from the perils of the sea; but underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, &c. These are understood to be meant by the phrase the perils of the sea, in a marine policy, and not those ordinary perils which every vessel must encounter. Hazard *v.* New England Marine Ins. Co., 8 *Pet.* 557.

If the loss of the vessel arose from the ordinary circumstances of a voyage, or from sea damage, or wear and tear, which, without any extraordinary causes, was to be expected, the insurer is not liable. But if it happened in consequence of the violence of the winds and waves, running on rocks or the like, these are perils against which the insurer agrees to indemnify. Coles *v.* Marine Ins. Co., 3 *Wash.* 159.

The mere rolling of the vessel by cross-seas, is not a peril of the seas. See The Reeside, 2 *Sumn.* 567.

If the proof shows that the vessel was seaworthy at the time of sailing, and afterwards suddenly sprang a leak and foundered, without any stress of weather or other apparent cause, this is a loss by the perils of the sea. Patrick *v.* Hallett, 1 *Johns.* 241.

To make the insurer liable, the injury must have been occasioned by a storm or accident that would injure a seaworthy vessel. Fleming *v.* Marine Ins. Co., 4 *Whart.* 59.

Injury to a flat-boat by the waves raised by a steamboat in passing, is one of the perils insured against in an ordinary policy of insurance, although the swell raised by the steamboat was an ordinary one, and the steamboat was of ordinary size. Washington Mutual Ins. Co. *v.* Reed, 20 *Ohio*, 199.

Damages sustained by collision with another vessel, without fault of the vessel insured, are caused by the "perils of the seas," within an ordinary policy of insurance. Peters *v.* Warren Ins. Co., 14 *Pet.* 99; Plaisted *v.* Boston, &c. Nav. Co., 27 *Me.* 132. S. P. as to "perils of the river." Jones *v.* Pitcher, 3 *Stew. & P.* 135.

An escape of steam, without the fault of the officers of a steamboat, whereby mules, prudently stationed on board, were injured, is a peril of the river, within the meaning of a policy insuring the mules against the perils of the river. Union Ins. Co. *v.* Groom, 4 *Bush*, 289.

A jettison, rendered necessary by a peril of the sea, is a loss by such peril, within the meaning of the exception of perils of the seas, contained in bills of lading; unless unseaworthiness of the vessel caused or contributed to the necessity for the jettison, then it does not. Nemours *v.* Vance, 19 *How.* 162.

An exception in a bill of lading of accidents happening from the "perils of the river" does not include accidental fire; the carrier is responsible for a loss by fire, although occurring without negligence or fault. Garrison *v.* Memphis Ins. Co., 19 *How.* 312.

Depredations on a ship's stores, or on her cargo, committed by her passengers or crew, in consequence of a short allowance, made necessary by the length of a voyage, is not a peril of the sea, within an exception in a bill of lading, but constitutes a charge on the ship. The Gold Hunter, *Blatchf. & H.* 300.

PERISHABLE. Ordinarily means subject to speedy and natural decay. But where the time contemplated is necessarily long, the term may embrace property liable merely to material depreciation in value from other causes than such decay. Webster *v.* Peck, 31 *Conn.* 495.

Perishable property does not include mature, merchantable corn. Illinois, &c. R. R. Co. *v.* McClellan, 54 *Ill.* 58.

A statutory authority to sell perishable goods which have been seized on an attachment, should be limited to such goods as are liable to perish before the time arrives at which they might be sold in the regular course of the proceedings. Henisler *v.* Friedman, 5 *Pa. L. J.* 147.

Under a statute allowing the speedy sale of personal property in its nature perishable, upon which an execution has been levied, the property intended is that only which will materially depreciate or be wholly lost by natural decay before the expiration of the usual time prescribed by law for sales on execution. Webster *v.* Peck, 31 *Conn.* 495.

PERJURY. The offence committed by one who, having taken an oath or affirmation, lawfully imposed, to testify truly, wilfully makes a material assertion believed to be untrue.

Definitions that have been given in past years, and were well sustained by the law of their day, confine perjury to the violation of an oath taken in a judicial proceeding; and, for a long time after the penalties of perjury began to be extended to false testimony under an affirmation, and false swearing in legal proceedings not strictly judicial, there was hesitation in applying the term perjury to these. Recent legislation in many jurisdictions has so generally extended the word to include all wilful violations of the obligation formally and legally imposed to tell the truth, that we believe the definition may properly be restated, extending it to affirmations and to oaths taken according to law, though not in court.

Numerous decisions, both in prosecutions for perjury, and in actions for slander in words supposed by plaintiff to import a charge of perjury, have established that swearing to what is false does not constitute perjury. To make out a case of perjury, there must have been an oath or affirmation in a case, and before an officer or tribunal authorized by law; the violation of a voluntary oath, or making an extrajudicial affidavit, is not perjury; and formerly, and in some jurisdictions still, it must be an oath taken in a court of justice. The offender must have wilfully made the statements charged; accidental or unintended errors are not punishable. And he must, at least, have believed the statement to have been untrue; that it should have been false in fact may not be necessary.

Perjury is a corrupt, wilful, false oath, taken in a judicial proceeding, in regard to a matter material to a point involved in the proceeding. This oath must be taken before some officer or court having authority to administer it, and he must confine his action to the authority given. And it is competent to show that the accused might have been led into a mistake; for then the oath, though untruthful, cannot have been perjury. Hood *v.* State, 44 *Ala.* 81.

Perjury at common law is the "taking of a wilful false oath by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely in a matter material to the point in issue, whether he believed or not." Commonwealth *v.* Powell, 2 *Metc.* (*Ky.*) 10; Cothran *v.* State, 39 *Miss.* 541.

Perjury is the taking of a wilful false oath by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question. The testimony must not only be wilfully false, but it must be material to the issue. The prosecutor must prove that it is thus material; and it is also necessary that it should be alleged in the indictment that the matter sworn to was material, or that the facts set forth as sworn to, and upon which the perjury is assigned, should be sufficient in themselves to establish the materiality. Commonwealth *v.* Smith, 11 *Allen*, 243.

To constitute false swearing perjury, the oath must be required by law, or by a usage sanctioned by the courts or some department of the government. But a mere ministerial officer cannot institute such usage, so as to bring such a case within the law. United States *v.* Babkock, 4 *McLean*, 113.

The registers and receivers of the different land-offices are constituted by the acts of congress a tribunal to settle controversies relating to claims to pre-emption rights, and therefore an oath administered in such a controversy, before the register alone, is extra-judicial; and, as perjury cannot be predicated of such evidence, an action of slander cannot be maintained for a charge of false swearing in such a proceeding. Hall *v.* Montgomery, 8 *Ala.* 510.

An oath taken before a commissioner authorized to administer it, is an oath which, if wilfully false, would subject the defendant to be punished as for perjury. United States *v* Nickerson, 17 *How.* 204.

The making, out of court, of a false affidavit, to be used on the hearing of an application for naturalization in a state court, the universal practice being to receive such affidavits in those proceedings, constitutes perjury, and is indictable as such in the courts of the state. State *v.* Whittemore, 50 *N. H.* 245.

Perjury may be committed either by a witness swearing to a fact which he knows is not true, or to his knowledge of a fact, when he has no such knowledge. But rash swearing to what is not true is not necessarily perjury. United States *v.* Atkins, 1 *Sprague*, 558; 9 *Monthly Law Rep.* N. S. 95.

Perjury is not committed by mere reckless swearing to what the witness would, if more cautious, learn to be false; but the oath must be wilfully corrupt. The proposition that an unqualified statement of what one does not know to be true is equivalent to a statement of that which one believes to be false may be nearly true, so far as the effect of the statement on others is concerned; but it is not a sound legal definition of perjury. There must be some fact falsely stated, with knowledge of its falsity, before there can be perjury. United States *v.* Moore, 2 *Low.* 232.

If a witness, on his examination, make a false statement, but afterwards correct it, so that his testimony is ultimately true, he is not guilty of perjury; and to charge him, without qualification, with swearing false in reference to that statement, is actionable. Henry *v.* Hamilton, 7 *Blackf.* 506.

PERMANENT. Does not always embrace the idea of absolute perpetuity. Hascall *v.* Madison University, 8 *Barb.* 174.

The phrase permanent abode means a domicile, a home, which a party is at liberty to leave as interest or whim may dictate, but which he has no present intention to change. Dale *v.* Irwin, 78 *Ill.* 170.

The phrase permanent policy is not ambiguous, and means an insurance to continue from year to year, and until terminated by an express notice by one of the parties to the contract to the other. First Baptist Church *v.* Brooklyn Fire Ins. Co., 23 *How. Pr.* 448.

To say that a clergyman has been settled permanently, means that he was called as the rector of the church for an indefinite period, and that it was intended he should

continue to hold the place until one or the other of the contracting parties should desire to terminate the connection; in which case the dissatisfied party was to have the right to be relieved of further obligations to the other, upon fair and equitable terms, and after reasonable notice, and with the concurrence or approval of the ecclesiastical authority of the diocese. Perry *v.* Wheeler, 12 *Bush*, 541.

PERMISSIVE. Allowed; suffered.

Permissive use. A passive use which was resorted to before the statute of uses, in order to avoid a barah law, as that of mortmain or a feudal forfeiture, and was a mere invention to escape consequences by secrecy. Thus, under a conveyance to A to the use of B, A simply held the possession, and B enjoyed the profits of the estate. *Wharton.*

Permissive waste. That kind of waste which is a matter of omission only; as by suffering a house to fall for want of necessary reparations. (2 *Bl. Com.* 281; 3 *Steph. Com.* 503; 4 *Kent Com.* 76 *et seq.*; 1 *Hill. R. P.* 266.) *Burrill.*

PERMIT, *v.* To allow; to give consent to; to suffer. Permission: allowance; consent; leave; sufferance. Permit, *n.*: a formal paper, embodying consent or leave from an officer or proprietor, for the performance of some act; a license.

A city ordinance that "no person shall permit swine to go upon any sidewalk," &c., means "allow by not prohibiting." Commonwealth *v.* Curtis, 9 *Allen*, 266.

Permit implies consent given or leave granted. Loosey *v.* Orser, 4 *Bosw.* 391, 404.

One who has engaged not to permit a ditch to be dug on his land, is liable, if it is made by one to whom he has sold the premises without a reatriction; such a sale permits the work. Bennett *v.* Kennedy, 7 *Wend.* 163.

PERNANCY. Taking, receiving, enjoying, &c. Thus the pernancy of the profits of an estate means the receipt or enjoyment of the profits; and he who is thus in the receipt of the profits is termed the pernor of the profits.

PERPETRATOR. A statute making the perpetrator of an act resulting in death liable for the injury may be applied to a railroad company. Philo *v.* Illinois Central Railroad Co., 33 *Iowa*, 47.

PERPETUAL. Continuous; enduring; lasting; unlimited in respect of time.

Perpetual curate. A permanent minister in holy orders of an "appropriated" church in which no vicar had been endowed, was, until the year 1868, called a perpetual curate. But by the Stat. 31 & 32 Vict. ch. 117, it is provided that every incumbent of a church (not being a rector), who is entitled to perform marriages, &c., and to claim the fees for his own use, shall be deemed and styled a vicar, and his benefice a vicarage. 2 *Steph. Com.* 682, 683.

Perpetual injunction. An injunction which is not merely temporary or provisional, and which cannot be dissolved except by appeal, or some proceeding in the nature of an appeal. An interim injunction, granted on motion, is sometimes made perpetual by the decree. *Hunt Eq.*

PERPETUATING TESTIMONY. A proceeding, allowed under different regulations in various jurisdictions, for preserving the testimony of an aged or sickly person, or one likely to remove out of the jurisdiction, in cases where the controversy requiring such testimony cannot probably be tried in season to have the attendance of the witness.

When a party in a suit in equity is desirous of preserving the evidence of witnesses concerning a matter which cannot be immediately investigated in a court of law, or when he is likely to be deprived of the evidence of material witnesses, by their death or departure from the realm, it is usual to file a bill in equity to perpetuate and preserve the testimony of such witnesses; and the court then usually empowers certain persons to examine such witnesses, and to take their depositions. The evidence so taken is then available on any future trial, if the witness or witnesses should in the mean time have died; but not otherwise. *Brown.*

PERPETUITY. Has a technical signification, as applied to attempts to invest money or restrict the alienation of land in such way as for ever to retain it for the benefit or in the enjoyment of the persons of a particular line of descent. Attempts to create perpetuities are disapproved and vigorously restricted by English laws and by the laws of most of the states.

PERQUISITES. 1. Things gotten by a man's own industry, or purchased with his own money, as opposed to things which come to him by descent.

2. Profits accruing to a lord of a manor by virtue of his court-baron, over and above the yearly profits of his land; also, other things that come casually and not yearly. *Mozley & W.*

PERSON. The person consists of both soul and body; and the phrase, the removal of such person, in a law relating to residence, means, the removal of the soul and body in life, and not the withdrawal of the former from the latter merely. Tute *v.* James, 46 *Vt.* 60.

Persons are divided by law into *natural*

and *artificial*. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws, for the purposes of society and government, which are called corporations or bodies politic. 1 *Bl. Com.* 123.

Person, used in the singular, may well mean one or more, and should be read "person or persons." People *v.* Croton Aqueduct Board, 5 *Abb. Pr.*, 316.

Person may be used as inclusive of states; but as ordinarily employed, and where the context does not indicate an intent to include them, they are not embraced. The Alabama Certificates, 12 *Op. Att. Gen.* 176; Taxation of State Railroads, *Id.* 217.

The provision of the New York statute of wills, authorizing devises to be made to any person capable by law of holding real estate, does not include a state or a nation. The testamentary capacity given by said statute extends only to devises to natural persons and to such corporations as are authorized by the law of the state to take by devise. Matter of Fox, 52 *N. Y.* 530; United States *v.* Fox, 94 *U. S.* 315.

The state is within the statute relating to frauds on persons. Martin *v.* State, 24 *Tex.* 61.

The United States is a person, within the meaning of the Kansas act, which makes it an offence for any person to cut down, injure, or destroy, or take or remove, any tree, timber, rails, or wood, "standing, being, or growing on the land of any other person," &c. State *v.* Herold, 9 *Kan.* 194.

In support of a general rule that "person" or "persons" may freely be construed to include corporations, wherever the context and general purpose admits, see Beaston *v.* Farmers' Bank of Delaware, 12 *Pet.* 102, 134; McIntire *v.* Preston, 10 *Ill.* 48; St. Michael's Church *v.* Connolly, *Bright.* 121; State *v.* Nashville University, 4 *Humph.* 157; People *v.* May, 27 *Barb.* 238; Cary *v.* Marston, 56 *Id.* 27; United States Tel. Co. *v.* Western Union Tel. Co., *Id.* 46.

For doubts of or exceptions to such rule, see State *v.* Cincinnati Fertilizer Co., 24 *Ohio St.* 611; Coddington *v.* Havens, 8 *N. J. Eq.* 590.

Even in absence of a statutory definition to that effect, "person" should be construed to include a corporation, unless it appears to have been used in a more limited sense. *Re* Oregon Bulletin, &c. Co., 13 *Bankr. Reg.* 199; Planters', &c. Bank *v.* Andrews, 8 *Port.* 404.

The word person, in its legal signification, is a generic term, and includes artificial as well as natural persons. Douglass *v.* Pacific Mail Steamship Co., 4 *Cal.* 304.

Corporations are deemed persons, within a treaty clause against confiscation and prosecutions against any persons. Society for the Propagation of the Gospel *v.* Town of New Haven, 8 *Wheat.* 464.

Corporations are to be deemed persons, within statutes of usury. Thornton *v.* Bank of Washington, 3 *Pet.* 36; Commercial Bank of Manchester *v.* Nolan, 8 *Miss.* 508; Grand Gulf Bank *v.* Archer, 8 *Smed. & M.* 151.

A corporation is included in the word person, in the civil rights act of congress of April 20, 1871; and the fact that persons hold their rights or property under the name of a corporation does not deprive them of the rights and remedies conferred by law and the constitution. North-western Fertilizing Co. *v.* Hyde Park, 3 *Biss.* 480.

Corporations are persons, within attachment laws. Planters' & Merchants' Bank *v.* Andrews, 8 *Port.* 404; Mineral Point R. R. Co. *v.* Keep, 22 *Ill.* 9. To the contrary, Mayor, &c. of Baltimore *v.* Root, 8 *Md.* 95.

The word persons, in tax laws, presumptively includes corporations. Louisville & Nashville R. R. Co. *v.* Commonwealth, 1 *Bush*, 250; Parker Mills *v.* Commissioners of Taxes, 23 *N. Y.* 242; British Commercial Life Ins. Co. *v.* Commissioners of Taxes, 31 *N. Y.* 32; 18 *Abb. Pr.* 118; 28 *How. Pr.* 41; 1 *Abb. App. Dec.* 199.

The act of congress of 1797, ch. 74, § 5, — which requires priority of payment to be made to the United States, when any person indebted to them becomes insolvent, makes an assignment, &c., — should not be construed to include corporations. The provisions of the act, taken together, are so peculiarly applicable to individual debtors, and so inappropriate to corporations, that congress cannot be deemed to have intended to include the latter. Commonwealth *v.* Phœnix Bank, 11 *Metc.* (*Mass.*) 129.

A statute restraining any person from specified acts applies equally to corporate bodies. People *v.* Utica Ins. Co., 15 *Johns.* 358.

A corporation may give a negotiable promissory note in the course of its legitimate business; since it is included in the word person, used in the statute 3 & 4 Anne. Mott *v.* Hicks, 1 *Cow.* 513; State of Indiana *v.* Woram, 6 *Hill*, 33.

A corporation is a person, within the meaning of the statute of limitations. Olcott *v.* Tioga R. R. Co., 20 *N. Y.* 210; People *v.* Trinity Church, 22 *Id.* 44; 30 *Barb.* 537.

A foreign corporation is a person out of this state, within a proviso of a statute of limitations which excepts cases where, at the time the cause of action accrues against any person, he is out of the state. Olcott *v.* Tioga R. R. Co., 20 *N. Y.* 210; Thompson *v.* Tioga R. R. Co., 36 *Barb.* 79.

The phrase living person, in an act allowing examination of parties as witnesses, was held to include corporations, in La Farge *v.* Exchange Fire Ins. Co., 22 *N. Y.* 352; Field *v.* N. Y. Central R. R. Co., 29 *Barb.* 176; Johnson *v.* McIntosh, 31 *Id.* 267; Wallace *v.* Mayor, &c. of N. Y., 2 *Hilt.* 440.

A statute making liable in damages a person inflicting an injury causing death includes corporations as well as natural

persons. Chase *v.* American Steamboat Co., 10 *R. I.* 79.

A statute providing that persons may be sued for a trespass in the county where it is committed includes a railroad company. Bartee *v.* Houston, &c. R. R. Co., 36 *Tex.* 648.

A corporation is a person, within the meaning of the mill-dam act. Fisher *v.* Horicon, &c. Co., 10 *Wis.* 351.

The word person, in the act of congress that if "any person" shall dispose of any spirituous liquor to any Indian under the charge of any superintendent or agent appointed by the United States, such person, on conviction, shall be imprisoned, &c., — includes an Indian; and an Indian may be punished for disposing of spirituous liquors to another Indian. United States *v.* Shawmux, 2 *Sawyer*, 364.

Mass. Stat. 1842, ch. 89, § 1, — providing that the action of trespass on the case for injuries to the person shall survive, — extends only to injuries of a physical character: such torts as slander, breach of promise to marry, &c., are not embraced. Smith *v.* Sherman, 4 *Cush.* 408.

A statute declaring the owner of a dog liable to any person injured by it, for the damage, includes injuries to property. "Person" should be understood as here used in its broad sense of "anybody," and not in distinction from property. Brewer *v.* Crosby, 11 *Gray*, 29.

An action for criminal conversation with the plaintiff's wife is an action for an "injury to the person" of the plaintiff. Delamater *v.* Russell, 4 *How. Pr.* 234.

The term any person, in a statute prohibiting removal of soil, will include the land-owner, if this appears consonant to the purpose entertained by the legislature in passing the act. Commonwealth *v.* Tewksbury, 11 *Metc.* (*Mass.*) 55.

PERSONA. A person; also a parson, *q. v.*

The rector of a church instituted and inducted, for his own life, was called *persona mortalis;* and any collegiate or conventual body, to whom the church was for ever appropriated, was termed *persona immortalis. Jacob.*

Persona conjuncta æquiparatur interesse proprio. A united personality is equivalent to one's own interest. Nearness of relationship is equivalent to a personal interest. The interest arising from a personal relationship is sometimes regarded in law as equal to the individual's own interest.

This is one of the maxims of Lord Bacon, by whom it is thus explained: "The law hath that respect of nature and conjunction of blood, as in divers cases it compareth and matcheth nearness of blood with consideration of profit and interest, yea, and in some cases alloweth of it more strongly." And he gives this illustration: "So, if a man menace me, that he will imprison or hurt in body my father or my child, except I make unto him an obligation, I shall avoid this duress as well as if the duress had been to my own person." *Bac. Max.*

This rule of personal connection or nearness of blood applies in the following and similar cases: Where the rights and liabilities of man and woman are changed by marriage; where a parent is permitted to defend his child against injury; where the parent is liable upon his contract for the nursing of his child; where an infant widow is liable upon her contract for the funeral expenses of her deceased husband; where relationship is a good consideration in a deed; where a wife cannot be compelled to give evidence for or against her husband, and *vice versa*, in criminal cases and in questions of adultery, or to disclose communications made to each other during marriage.

The following may serve for examples of the application of the rule in practice: A husband is entitled to his wife's personal estate and chattels real, absolutely; and to her choses in action conditionally upon his reducing them into possession during the coverture; and the rents and profits of her real estate during his life. He has the right of administration of the estate of a testator, in case his wife is made executrix, as well as of the estate of an intestate, where she is entitled as administratrix. The wife is unable to sue upon her choses in action, without joining her husband. By the marriage, the husband and wife are one in law; and the wife cannot bind herself or her husband, by deed or by simple contract, except as the agent of the husband. On a corresponding principle of accretion, the husband takes upon himself the burden of his wife's debts and other liabilities at the time of marriage; the wife has the general management of her husband's domestic affairs, and is presumed to be his general agent in such matters, and to be clothed with sufficient authority to bind the husband in contracts for all things necessary for the maintenance of herself and family, according to the husband's apparent position in society. *Whart. Max.*

PERSONABLE. An old word, signifying that a man was enabled to maintain a plea in court, that is, to bring an action, as opposed to one disabled to sue, as being an outlaw or alien enemy, &c. *Cowel.*

PERSONAL. Appertaining to the person; belonging to an individual; having the nature or partaking the qualities of human beings. Also, chattel; movable.

Personal action. In one sense of this term, it signifies actions brought upon engagements of persons, or to recover damages for acts or neglects of duty by persons, or to recover chattel property. In this sense it embraces actions which arise either upon contracts, as account, assumpsit, covenant debt, and detinue; or for wrongs, injuries, or torts, as trespass, trespass on the case, replevin, trover. In a broader but less frequent use, it denotes actions against persons (actions in which living beings are defendants), as opposed to actions *in rem*, — suits prosecuted by seizure and condemnation of property, in which the living person interested appears indirectly as "claimant," for example.

Personal actions are such actions as are brought for recovery of some debt, or for damages for some personal injury; in contradistinction to the old real actions, which related to real or landed property, &c. *Brown.*

The term personal action signifies: 1. An action which can be brought only by the person himself who is injured, and not by his representatives. 2. An action which is not for the recovery of land. *Mozley & W.*

Personal assets. Those assets of a bankrupt, insolvent, or decedent estate, which are not real property; the chattels, money, and evidences of debt available for payment of debts.

Personal chattel. Any thing movable; things which are considered as annexed to or attendant on the person of the owner.

Personal contract, or covenant. Those contracts or covenants which do not affect or involve real property, but relate to personal property, or require acts of persons, are distinguished as personal.

Personal estate, or personal property. These terms, applied to corporations, mean such portions of their capital, paid in, or secured to be paid in, as are not invested in real estate. Farmers' Loan & Trust Co. *v.* Mayor, &c. of N. Y., 7 *Hill* (*N. Y.*), 261.

The terms personal estate, property, chattels, &c., signify any movable things of whatever denomination, whether alive or dead; as furniture, money, horses, and other cattle, &c.; for all these things may be transmitted to the owner wherever he thinks proper to go, and may therefore be said to attend his person. *Brown.*

Personal expenses. An agreement to pay personal expenses on a journey entitles the traveller to charge not only actual outlay, but also such expenses as he avoided by means of facilities belonging to himself. Moore *v.* Remington, 34 *Barb.* 427.

Personal goods. The term personal goods, in the crimes act of Congress of April 30, 1790 (1 Stat. at L. 116), does not include choses in action. United States *v.* Davis, 5 *Mas.* 356.

It does include bank-notes, money, and coin. United States *v.* Murray, 1 *Cranch C. Ct.* 141; United States *v.* Moulton, 5 *Mas.* 537, 540.

The words personal goods, on the margin of a receipt or bill of lading, may be regarded as at most but a description of the character of the goods, and not as exempting the owner from freight, or the vessel from responsibility; although the owner of the goods was a passenger by another vessel of the same line. The Elvira Harbeck, 2 *Blatchf.* 336.

Personal injury. The term great personal injury must be understood as equivalent to the terms great bodily harm, or danger of loss of life or limb, or enormous bodily harm, as defined by the rules of the common law, to constitute a justification or excuse for homicide. Green *v.* State, 28 *Miss.* 687.

Personal liberty. The freedom of the individual; the civil right to go and come as one pleases.

Personal luggage. This term, as used in the passenger act of 1847, only includes wearing-apparel and bed and bedding of passengers required for their comfort and convenience on the passage. It does not extend to furniture, stoves, agricultural implements, and other articles brought with the passenger, but not necessary for his personal convenience. United States *v.* The Anna, 2 *Am. Law Reg.* 421.

Personal property. An assignment of "all goods, wares, and merchandise, and personal property of every description belonging to the late firm," &c., does not pass an interest under a contract. The words personal property, in such connection, should be confined to visible, tangible property. Kendel *v.* Almy, 2 *Sumn.* 278.

Although the words personal property, in their general signification, may include a chose in action, yet they are not infrequently used in the more limited sense of chattels, movable and tangible. Leonard *v.* Lawrence, 32 *N. J. L.* 355.

The words personal property are used as embracing goods, chattels, coin, bills, and evidences of debt, &c.; though, in their strict legal definition, they signify the right and interest of the owner in these articles. Stief *v.* Hart, 1 *N. Y.* 20, 24, 31.

The term personal property, used in the Ohio crimes act, comprehends bank-notes and other choses in action, and they can

therefore be the subjects of robbery. Turner *v.* State, 1 *Ohio St.* 422.

One characteristic of personal property (or personalty, as it is sometimes called) is that it is usually of a transitory or movable nature, and capable of being taken away by the owner wherever he pleases to go; whereas real property (or realty, as it is sometimes termed) is of a local and not transitory nature, and does not possess the attribute of mobility, or the capacity of being moved about with the person of the owner; and hence, from its substantial and permanent nature, it is termed real. *Brown.*

Personal replevin. A name applied to an action taking the place and answering the purpose of the old writ *de homine replegiando.* That writ is sometimes called the writ of personal replevin. The action or writ of personal replevin lies to review an imprisonment, and enforce, under the forms of an action, the right to liberty of an individual. In most jurisdictions, *habeas corpus* is, under modern legislation, a more expeditious and a preferable remedy.

Personal representative, means the executor or administrator, and does not include the widow. Hagen *v.* Kean, 3 *Dill.* 124.

It means executors or administrators, and not heirs or devisees of land. Anderson *v.* Austin, 34 *Barb.* 319.

It does not include an agent. Jones *v.* Tainter, 15 *Minn.* 512.

Personal security. 1. The safety of the individual; the civil right of exemption from injuries to the body.

2. Evidences of debt which bind the person of the debtor, not real property, are distinguished from such as are liens on land, by the name of personal securities.

That power to invest in personal securities embraces power to purchase a bill of exchange; see Gee *v.* Alabama Life Ins. & Trust Co., 13 *Ala. N. S.* 581.

Personal statute. Statutes which particularly affect or regulate the condition or rights and duties of persons, are sometimes called, particularly under the civil law, personal statutes.

Personal tithes, are tithes paid of such profits as come by the labor of a man's person; as by buying and selling, gains of merchandise, and handicrafts, &c. *Tomlins.*

Personal transaction, does not mean a private transaction. Howell *v.* Taylor, 18 *N. Y. Supreme Ct.* 214.

PERSONALITY. The expression personality of laws signifies all laws which concern the condition, state, and capacity of persons, as the reality of laws means all laws which concern property or things. Whenever foreign jurists wish to express that the operation of a law is universal, they compendiously announce that it is a personal statute; and whenever, on the other hand, they wish to express that its operation is confined to the country of its origin, they simply declare it to be a real statute. Livermore uses the words personality and reality. Henry, the words personalty and realty. Story preferred the former, as least likely to lead to mistakes, as personalty in our law is confined to personal estate, and realty to real estate. *Wharton.*

PERSONALTY. Personal property; the antithesis of real property.

Personalty signifies generally any personal property, in contradistinction to realty, which signifies real property. In our old law, an action was said to be in the personalty when it was brought for damages out of the personal estate of the defendant. Personalty is either pure or mixed. Pure personalty is personalty unconnected with land; mixed personalty is a personal interest in land, or connected therewith. The distinction is important with reference to the statutes of mortmain, as pure personalty is not within the operation of those statutes. *Mozley & W.*

PERTINENT. Material; relevant. Evidence which legitimately tends to prove the cause of action or defence is called pertinent.

PETIT. The old law-French word, meaning small. It appears in some compounds in modern use. The English form, petty, is used interchangeably with it.

Petty average. Some small charges which, in insurance and commercial law, are shared between ship and cargo. See *Bouvier; Burrill.*

Petty-bag office. An office which belongs to the common-law courts in chancery, and out of which all writs in matters wherein the crown is interested do issue. Such writs, and the returns to them, were in former times preserved in a little sack or bag (*in parva baga*), whereas other writs, relating to the business of the subject, were originally kept in a hamper (*in hanaperio*); and thence has arisen the distinction of the hanaper office and petty-bag office, which both belong to the common-law side of the court in chancery. (*Stat.* 5 *&* 6 *Vict.* ch. 103.) *Brown.*

Petty constable. The ordinary, local constable, as distinguished from the high constable. See *Bouvier.*

Petit, or petty jury. The lesser jury. The ordinary jury of twelve per-

sons, by which issues are tried; as distinguished from the grand jury (*q. v.*), which may contain twenty-three members, and sits to examine complaints and prefer indictments.

Petit, or petty larceny. Small larceny. Stealing property not exceeding twelve pence in value was, at common law, distinguished by this name from stealing things of greater value, and received lighter punishment. See LARCENY.

Petit serjeanty, is said by Littleton to consist in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. The services of this tenure being free and certain, it is in all respects like free socage. No wardship of lands or body could be claimed by the king in virtue of petit serjeanty. (*Cowel;* 2 *Bl. Com.* 81, 82; 1 *Steph. Com.* 210; *Wms. R. P.*, Pt. I. ch. 5.) *Mozley & W.*

Petty sessions. The meeting of two or more justices for trying offences in a summary way under various acts of parliament empowering them to do so; for committing offenders for trial; for making orders in bastardy, hearing poor-rate appeals, and other similar purposes. (4 *Bl. Com.* 272, 273; 2 *Steph. Com.* 298, 649; 3 *Id.* 67.) A bench of magistrates, which is also called a petty sessions, or a court of petty sessions, is formed by the periodical (generally weekly), as well as occasional, meetings of the justices of the peace for boroughs or for counties, ridings, or divisions, within certain recognized divisions or districts called divisions for special sessions, but really divisions for the holding of petty sessions, and transacting and determining all matters arising within those limits, as well as business required to be done in special sessions for those limits. Such divisions are popularly called petty sessional divisions. They are generally held at the most important or central town of the division, either at one of the principal inns or at the town-hall, or other public building, if there should happen to be one; but a petty sessions may be held by any two justices on their mere private agreement, for the purpose of acting either ministerially or judicially in any cases within their authority, and anywhere in the division, except in certain cases where the statute giving cognizance of the offence or other matter requires the sitting to be "at the usual place" for the division, or otherwise fixes the place of meeting, or controls the justices in their selection of the same. Justices for boroughs are forbidden, by section 100 of the municipal corporation act, 1835 (5 & 6 Wm. IV. ch. 76) to hold their petty sessions at any public inn or tavern. (*Oke Mag. Syn.* 59–63.) *Mozley & W.*

Petit, or petty treason. In old English law, inasmuch as the killing of a person in authority by an inferior, who owed him obedience, was deemed to involve somewhat of the element of breach of allegiance, which is so prominent in high treason, such killing was called petit treason. It might be committed by a servant killing his master; by a wife killing her husband; by an ecclesiastical person killing his superior, to whom he owed faith and obedience.

The punishment of petit treason was, in a man, to be drawn to the place of execution and hanged; and, in a woman (as in high treason), to be drawn and burnt to death, — which, in the year 1790, was altered to hanging. (4 *Bl. Com.* 89, 203, 204.) The crime of petit treason is now abolished by Stat. 9 Geo. IV. ch. 31, § 2, and 24 & 25 Vict. ch. 100, § 8; and any killing which formerly amounted to petit treason now amounts to murder only. (4 *Steph. Com.* 77, 78, 150, note.) *Brown.*

PETITION. Is used in jurisprudence as a general term for various formal applications made to a superior authority; such as petitions to the courts, petitions to congress or parliament, &c. Petitioner: the applicant; the one who prefers a petition. Petitionee: is not in general use; because petitions do not usually run against any person.

In the practice of American courts, a petition is frequently employed to bring a matter before the court in respect to which formal judicial action is necessary, but action or suit is inappropriate because there is no adversary party. Applications for appointment of guardian, change of trustees, sale of church property, reinvestment of funds, are familiar examples.

In equity practice, petitions are often used as ancillary to a suit in progress; as some special interference of the court is frequently required in order to the regular and effectual prosecution or defence of the suit, and in order to the immediate attainment of many objects connected with it. When such interference is required, an order of court, embodying the particular object, is applied for; and such application is frequently made by what is termed a petition, which is a statement in writing, made to the chancellor or other judge in authority, showing the cause which the

petitioner has for some order of court. Petitions to chancery are, indeed, made either in a suit or under a statute, or both; but where no suit is pending, and no statute gives the right of proceeding upon petition, then a bill is, as to most rights, the proper course.

The word petition is generally used in judicial proceedings to describe an application in writing, in contradistinction to a motion, which may be *viva voce*. Bergen *v.* Jones, 4 *Metc.* (*Mass.*) 371.

The word petition is used capriciously in English legal proceedings. Thus we speak of a petition for adjudication in bankruptcy (in the bankruptcy court), a petition for divorce (in the divorce court), but of a bill for the administration of a decedent's estate (in the court of chancery): the regular mode of commencing an ordinary chancery suit having, prior to November, 1875, when the judicature acts came into operation, been by bill. *Mozley & W.*

There are several regulations respecting petitions to parliament, which, if neglected in any one particular, will prevent their reception. When intended for the house of lords, a petition must be addressed, "To the right honorable the lords spiritual and temporal in parliament assembled;" when addressed to the house of commons, it may be directed, "To the honorable the knights, citizens, and burgesses of the United Kingdom of Great Britain and Ireland in parliament assembled;" but more usually in this form, "To the honorable the commons of the United Kingdom in parliament assembled." Its commencement must describe the petitioners, thus: "The humble petition of the electors of the parish of ——, showeth that," &c.; or, in the case of an individual, his name and occupation must be stated, thus: "The humble petition of A B, of, &c., showeth that," &c. The statement of grievance must then follow, and the whole must conclude with a specific prayer. The omission of a prayer has often proved fatal to the reception of a petition; for no mere remonstrance or detail of grievance will be received. The prayer must be thus introduced: "Wherefore your petitioners humbly pray that your honorable house will be pleased to," &c.; the particular relief expected being here stated. To the whole petition must be added the words, "And your petitioners, as in duty bound, will ever pray;" immediately thereupon must follow the signatures, of which one, at least, must be on the same sheet of paper or skin of parchment as the petition, not pasted or otherwise appended. The signatures or marks must be original, not copies nor signatures of agents on behalf of others; thus no chairman of a public meeting can sign for the whole meeting: by such an informality the petition becomes that of an individual. But the common seal of a corporation is received as the petition of the whole corporate body. A printed or lithographed petition will not be received; it must be in writing, on parchment or on paper, free from erasures or interlineations, and composed in English, or accompanied by a translation, which the presenting member certifies to be correct; but no letters, affidavits, or other documents can be annexed. Petitions are uniformly rejected, if not respectful and temperate in language, free from imputations upon the character and conduct of parliament, the courts of justice, or other constituted authorities. No reference is permitted to any debates, or to any motions supposed to be in preparation. *Wharton.*

Petition de droit, or petition of right. A proceeding for obtaining possession or restitution of property, either real or personal, from the crown, which suggests such a title as controverts the title of the crown, grounded on facts disclosed in the petition itself, in which case the petitioner must be careful to state truly the whole title of the crown; otherwise the petition shall abate. Thus, if a disseisor of lands dies without heir, and the crown enters, the disseisee has remedy by petition of right. (3 *Bl. Com.* 256; 3 *Steph. Com.* 655, 656.) The modern practice in a petition of right is regulated by Stat. 23 & 24 Vict. ch. 34, 1860, which provides that the petition shall be left with the home secretary, for her majesty's consideration; who, if she shall think fit, may grant her fiat that right be done: whereupon (the fiat having been served on the solicitor to the treasury) an answer, plea, or demurrer shall be made on behalf of the crown, and the subsequent pleadings be assimilated, so far as practicable, to the course of an ordinary action. (3 *Steph. Com.* 657, 658; *Hunt Eq.* Pt. III. Introd.) *Mozley & W.*

Petition of rights. A parliamentary declaration of the liberties of the people, assented to by King Charles I., in 1629. It is to be distinguished from the bill of rights, 1689, which was passed into a permanent constitutional statute. *Brown.*

In the first parliament of Charles I., which met in 1626, the commons refused to grant supplies, until certain rights and privileges of the subject, which they alleged had been violated, should have been solemnly recognized by a legislative enactment. With this view, they framed a petition to the king, in which, after reciting various statutes by which their rights and privileges were recognized, they pray the king "that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent, by act of parliament; that none be called upon to make answer so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the king's special command, without any charge; that persons be not compelled to receive soldiers and mariners in their

houses, against the laws and customs of the realm; that commissions for proceeding by martial law be revoked: all which they pray as their rights and liberties, according to the laws and statutes of the realm."

To this petition the king at first sent an evasive answer. This answer being rejected as unsatisfactory, the king at last pronounced the formal words of unqualified assent: "Let right be done, as it is desired." (*Stat.* 3 *Car. I.* ch. 1.) Notwithstanding this, however, the ministers of the crown caused the petition to be printed and circulated with the first insufficient answer. *Wharton.*

Petitioning creditor. Proceedings of compulsory or involuntary bankruptcy are commenced upon the petition of some creditor, in which the facts rendering the debtor a bankrupt are alleged, and an adjudication of bankruptcy is prayed. Such adjudication having passed, other creditors come in and prove their respective claims. The creditor who initiates the proceedings, on whose application the adjudication is made, is called, to distinguish him from the general mass who come in under the order for proofs, the petitioning creditor.

PETITORY. In admiralty and civil-law practice, suits which involve and litigate only the title to property are called petitory, in distinction from those which seek to recover the possession, and are called possessory.

PETTY. See PETIT.

Photographer. Any person who makes for sale photographs, ambrotypes, daguerrotypes, or pictures, by the action of light. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 120

PIEPOUDRE; PIED POUDRE. Literally, dusty foot. The term is said to have been applied, in old English times, to itinerant traders.

Piepoudre court—that is, the pedestrian's or pedler's court—was a kind of court held in old English markets, for the convenience of the itinerant traders. The title is often Anglicized in form into pie-powder; but piepoudre is the preferable spelling. The court was so called, either from the dusty feet of the suitors, or because justice is there done as speedily as dust can fall from the foot; or from *pied puldreaux*, the old French name for a pedler, or petty chapman. It was a court of record, formerly incident to every fair and market, though now fallen into disuse. The steward of him who owned or had the toll of the market was the judge: the jurisdiction extended to all matters of contract or commercial injuries arising in that very fair or market, and not in any preceding one. The injury must be done, complained of, heard and determined, within the compass of one and the same day, unless the fair continued longer. A writ of error would lie to the courts at Westminster. See *Cowel; Wharton.*

PIER. A structure erected for ferry purposes, on a river-bank, by permission of the common council of the city of New York, consisting of piles covered with flooring, is not a pier, within the meaning of the act of 1857, ch. 763, regulating the distance between piers in the port of New York. Stevens *v.* Rhinelander, 5 *Robt.* 285.

PIGNORATIO. In civil law, the obligation of the contract of pledge; also, the impounding of a stray animal, to secure payment for damage it has done. See *Bouvier; Burrill.*

PIGNUS. The civil-law term for pledge, *q. v.* It may mean either the contract of pledge, or the pawn or thing left in pledge, according to the connection.

PILFER. To pilfer, in the plain and popular sense, means to steal. To charge another with pilfering is to charge him with stealing, and is slander. Becket *v.* Sterrett, 4 *Blackf.* 499.

PILLORY. An old-fashioned contrivance for the punishment of offenders; involving, however, public disgrace rather than physical suffering. The offender had to put his head through a hole or door, as it were, and his hands through other holes, and to stand there for such time as might be appointed by his sentence. It was at first appointed for fraudulent bakers and those who used false weights, and was afterwards applied to many other offences. It was abolished for England in 1837, by 7 Wm. IV. & 1 Vict. ch. 23. (*Cowel;* 4 *Bl. Com.* 377; 4 *Steph. Com.* 443, note.)

It was in use in the colonies, but at the present day is disused in most, if not all, of the states; imprisonment being generally substituted. For a particular account, see Rex *v.* Beardmore, 2 *Burr.* 792.

PILOT. Formerly, a helmsman, or steersman; but, in modern usage, a person appointed and authorized, in view of

his skill and knowledge in respect to a particular channel, harbor, bay, port, &c., to take charge of a vessel entering such waters, and conduct or steer her through. Pilotage: the service of steering a vessel through particular waters, rendered by a person specially acquainted with them, and appointed so to do. Also, the compensation payable for such service; the fee of a pilot.

The dangerous navigation of the coasts and of the rivers of England has led to the appointment of qualified persons, who receive a license to act as pilots within a certain district, and who enjoy the monopoly of conducting vessels out of and up the various rivers, and to and from the various ports of the country. By different acts of parliament, the master of every ship engaged in foreign trade must put his ship under the charge of a local pilot, so licensed, both in his outward and in his homeward voyage. The same considerations have led to the establishment of a similar system in many of the ports of the United States; and to the enactment of laws authorizing the official appointment and commissioning of pilots, and requiring vessels whose masters refuse the services of a pilot, duly tendered, to pay pilotage, or half pilotage, notwithstanding.

Pilotage authorities. Bodies of persons in different parts of the kingdom of Great Britain and Ireland, having powers and jurisdictions with regard to the appointment and regulation of pilots for the districts in which they respectively act.

The power of appointing these "duly licensed pilots" is said, by Brown, to be mainly vested in the corporation of the Trinity House, Deptford, whose jurisdiction extends from Orfordness to London Bridge, from London Bridge to the Downs, from the Downs westward to the Isle of Wight; and all bodies or persons having the power of appointment in other places (as the commissioners of the Cinque Ports, the Trinity Houses of Hull, Newcastle, and Liverpool) are, to some extent, subject to their authority. The rates of charge for pilotage are regulated, partly by statute, partly by usage, and partly by the corporation of the Trinity House.

PIN-MONEY. A current term for a pecuniary allowance from a husband to his wife, for her personal expenses, — for dress, incidental expenditures, and pocket-money.

In England, where settlements of pecuniary affairs between husband and wife are made in more detail, and come oftener before the courts for adjudication than in this country, this term has been drawn in question, in some of the decisions. The allowance is said not to be a gift from the husband to the wife, out and out; it is not to be considered like money set apart for the sole and separate use of the wife, during coverture, excluding the *jus mariti*, but is a sum set apart for a specific purpose. It is due to the wife, in virtue of a particular arrangement, and is payable by the husband by force of that arrangement only, and for that specific purpose, and no other; also, the husband may find his wife in apparel, instead of paying her this apparel-money, as it may be called. Howard *v.* Digby, 8 *Bligh*, N. S. 269.

PIRACY. The offence of depredation, robbery, or unlawful violence upon the high seas. Pirate: one engaged in or guilty of piracy. Piratical: involving the crime or guilt of piracy; like a pirate. Piratically: after the manner of pirates.

This is substantially the definition ordinarily given. It should, perhaps, be limited in one aspect. As usually understood, the vessels of the pirate and his victims are independent. We doubt whether larceny, by force or fear, committed by one member of a ship's company upon another member of the same crew, or depredations upon a ship's stores by persons sailing on board, are piracy, though they are cases of robbery or depredation at sea. Compare United States *v.* Palmer, 3 *Wheat.* 610; United States *v.* Klintock, 5 *Id.* 144, 151.

The above is, moreover, the common-law definition; acts have been made piracy by statute which do not fall within it.

Piracy is sometimes used, in a quasi figurative sense, of violation of copyright; but, for this, infringement is the correct and preferable term.

The definition of piracy varies according to circumstances:

1. At common-law, the crime of piracy consisted in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. If committed by an alien, it was held to be felony; if by a subject, it was a species of treason, until the statute of treasons, 25 Edw. III. ch. 2.

2. By statute law, the following offences are to be deemed piratical: Hostilities by a natural-born subject against any of her majesty's subjects, under color of a commission from a foreign power; the betrayal of his trust by a commander or other seafaring person; endeavoring to make a revolt on board ship; trading with known pirates, or fitting out a vessel for a piratical purpose, &c. (4 *Bl. Com.* 71–73; 4 *Steph. Com.* 219–222.)

3. Piracy, by the law of nations, includes such piratical acts as are committed on board vessels whose *de facto* possessors are not recognized by any sovereign power as the lawful owners thereof; also, all unauthorized acts of private hostility committed at sea. *Mozley & W.*

An act of congress, providing for the suppression of "piratical aggressions," without defining what shall be deemed piratical, but leaving the courts to consult the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of congress to define and punish piracy. Congress may define by using a term of a determinate meaning, as well as by an express enumeration of the particulars included in that term. That is certain which, by necessary inference, is made certain; and the law of nations has described the crime of piracy with reasonable certainty. United States *v.* Smith, 5 *Wheat.* 153. And see United States *v.* Chapels, 2 *Wheel. Cr. Cas.* 218; United States *v.* Kessler, *Baldw.* 15, 31.

Robbery, or forcible depredation upon the sea, *animo furandi*, is piracy by the law of nations and by act of congress. United States *v.* Smith, 5 *Wheat.* 153; United States *v.* Pirates, *Id.* 184.

There is a distinction between the offence of piracy, as known to the law of nations, which is justiciable everywhere, and offences created by statutes of particular nations, cognizable only before the municipal tribunals of such nations. Dole *v.* New England, &c. Ins. Co., 2 *Cliff.* 394, 418.

The general rule of the law, that robbery on the high seas is piracy, has no exception or qualification in favor of commissioned privateers in any act of congress, in the common law, or in the law of nations. United States *v.* Jones, 3 *Wash. C. Ct.* 209.

To make a robbery on the high seas piracy, it is not necessary that it should be punishable by death when committed upon the land. United States *v.* Hutchings, 2 *Wheel. Cr. Cas.* 543.

Pirates are common sea-rovers, without any fixed place of residence, who acknowledge no sovereign and no law, and support themselves by pillage and depredations at sea; but there are instances wherein the word *pirata* has been formerly taken for a sea-captain. *Spelman.*

Pirates hold no commission or delegated authority from any sovereign or state, empowering them to attack others. They can, therefore, be only regarded in the light of robbers or assassins. They are the common enemies of all; and the law of nations gives to every one the right to pursue and exterminate them, without any previous declaration of war. But it is not allowed to kill them without trial, except in battle; those who surrender or are taken prisoners must be brought before the proper magistrates, and dealt with according to law. *Wharton.*

A pirate is one who acts solely on his own authority, without any commission or authority from a sovereign state, seizing by force, and appropriating to himself without discrimination, every vessel he meets with. Robbery on the high seas is piracy; but to constitute the offence the taking must be felonious. Consequently the *quo animo* may be inquired into. Davison *v.* Sealskins, 2 *Paine*, 324.

A pirate is one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. *Trial of the Officers and Crew of the Savannah*, p. 370.

To constitute the offence of piracy, within the act of April 30, 1790, by "piratically and feloniously" running away with a vessel, personal force and violence is not necessary. The piratical and felonious act, within the meaning of the statute, is the running away with a vessel, with an intent to convert the same to the taker's own use, against the will of the owner. The intent must be *animo furandi*. United States *v.* Tully, 1 *Gall.* 247.

If an innocent merchant-vessel is sunk or destroyed without any other object than to gratify the lawless appetite for mischief in the person who does the act, it is just as much a piratical aggression in the sense of the law of nations, and of the act of congress, as if the act were done for plunder, *lucri causa*. United States *v.* The Malek Adhel, 2 *How.* 210.

PISCARY. The right or privilege of fishing. Thus, common of piscary is the right of fishing in waters belonging to another person.

PISTOL. A pistol that has no mainspring or other necessary parts of a lock, and can only be fired off by the use of a match, or in some other such way, is not a pistol, within the meaning of the statutes prohibiting the carrying of concealed weapons, and no person should be indicted and punished for carrying such a pistol. Evins *v.* State, 46 *Ala.* 88.

Pistol, in a statute forbidding carrying any pistol, &c., concealed, is not restricted to loaded pistols. State *v.* Duzan, 6 *Blackf.* 31.

PIT. In Scotland, women sentenced to capital punishment were, in consideration of their sex, formerly drowned in a pit, instead of being hung. Hence "pit and gallows" is a phrase in old grants of criminal jurisdiction, as signifying authority to drown or hang offenders.

PITTANCE. Was anciently a little repast, or refection of fish or flesh, more than the common allowance; and the pittancer was the officer who distributed this at certain appointed festivals. *Jacob.*

PIX; PYX. An old term for the standard or test of the coin of the realm of England.

Pix jury, is a jury consisting of the members of the corporation of the goldsmiths of the city of London, assembled upon an inquisition of very ancient date, called the trial of the pix. The object of this inquisition is to ascertain whether the coin of the realm, manufactured at her majesty's mint, is of the proper or legal standard. This investigation as to the standard of the coin is called pixing it, and hence the jury appointed for the purpose is called a pix jury. The investigation takes place usually once a year; and the lord high chancellor presides, and points out to the jury the nature of their duties. *Brown.*

PLACE. The word place is associated with objects which are in their nature fixed and territorial. United States *v.* Bevans, 3 *Wheat.* 336, 390.

In the provisions of the internal revenue law, restricting the carrying on of a manufacture to the place designated in the license, the word place is not used as an equivalent for town, city, or county, so as to allow a manufacturer under one license to carry on several distinct factories in the same town. On the other hand, he is not obliged to take out two licenses because he uses two sets of apparatus, if they are used upon premises so connected as to form, in common understanding, one place of manufacture. Salt Co. of Onondaga *v.* Wilkinson, 8 *Blatchf.* 30.

That a steamboat is a place, within a statute prescribing requisites and mode of serving a warrant, see State *v.* McNally, 34 *Me.* 210.

The word place has a very wide and varied signification, so that its precise meaning can only be determined by the connection in which it is used, and by having regard to the apparent purpose of the writer. When applied to the location of a bank, it may mean the precise spot where the banking-house is erected, or the street on which, or the city or town in which, it is situated, without regard to any special boundaries, or the state, county, city, or municipal district, within whose limits and subject to whose police or other regulations it transacts its business. As it is employed in section 41 of the act of congress of June 3, 1864, — prescribing that all the shares in national banks held by individuals or corporations may be included in the valuation of the personal property of such persons or corporations in the assessments made by the state authorities, at the place where such banks are located, and not elsewhere, at the same rate as other property is taxed, — it has reference to the various systems of taxation existing under state laws, and means the political division having a right to impose taxes; the place meant is the district imposing the particular tax in question: that is to say, in the case of taxes uniform throughout the state, the whole state is meant; in the case of county taxes, the whole county; and in the case of local taxes, of whatever nature, the district for whose special use they are imposed. State *v.* Hart, 31 *N. J. L.* 434; State *v.* Haight, *Id.* 399.

"Place" is a very indefinite term. It may refer to a very small or to a very large space, and must be construed with reference to the connection in which it is used, the subject-matter, and the end in view. Thus, in section 41 of the act of congress of June 3, 1864, — allowing state taxation of shares of a national bank "at the place where such bank is located, and not elsewhere," — the reference to the place where the bank is located is for the sole purpose of determining what state shall have jurisdiction to tax the owners of the stock; and to prevent taxation of the same stock by two states, one in which the bank was located and one in which the owner resided. The provision should not be construed as preventing a state from taxing the shares in the town where the share-owner resides, instead of that where the bank is located. Clapp *v.* Burlington, 42 *Vt.* 579.

"Place" may be applied to any locality limited by boundaries, however large or however small. It may be used to designate a country, state, county, town, or a very small portion of a town. The extent of the locality designated must, generally, be determined by the connection in which the word is used A law requiring plaintiff, in an action for injuries received through defect of highways, to give defendants a notice in writing stating the place where the injury was received, calls for some specification of locality less extensive than the entire highways of the town. The plaintiff must give the defendant the best information in his power under the circumstances, — such as will reasonably inform the town of the locality in which the insufficient highway causing the injury existed, so that the officers of the town, immediately after the injury, and before the surface of the highway has materially

changed, may examine the place causing the injury, and judge of the sufficiency or insufficiency of the highway at that point, and thus be prepared to resist or yield to the claim of the injured party. To give notice that the injury was received "on the road from C to E," the distance between C and E being four and a half miles, is not a compliance with the law, because it throws on the defendant the burden of examining the condition of the highway throughout the entire distance, and gives them no means of determining whether any spot they may select is the one relative to which proof must be collected. Law *v.* Town of Fairfield, 46 *Vt.* 425.

Place of abode, or business. That is not the "place of business" of an indorser, within the rules relative to serving notice, which has no public notoriety as such, no open or public business carried on at it by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, he being only engaged in settling up his old business. Bank of Columbia *v.* Lawrence, 1 *Pet.* 578.

"Place" is often used in the statutes to denote a city or town; but it is also often used in a more restricted sense to denote a specific place within a city or town at which a person dwells or transacts business. In this latter sense, it is used in the expressions place of business and usual place of abode; and this is obviously the only possible construction, where a statute speaks of the "usual place of abode" as the place where writs and notices may be served. So the place of business of a "provision dealer" who has a shop in one town, but conducts most of his business by driving a cart through a route in another town, and selling from the cart to his customers at their houses, is the town where the shop is, and not that where the route lies. So held under a statute requiring certain dealers to have their weights and measures sealed in the town in which they had their usual place of business. Palmer *v.* Keleher, 111 *Mass.* 320.

The "place of business" contemplated by the act giving permission to one to bear arms "on his or her own premises, or at his or her own place of business," has reference to some particular locality, appropriated exclusively to a local business, such as the farm, store, shop, or dwelling-place. It does not authorize the carrying of concealed deadly weapons in the woods while hunting stock. Baird *v.* State, 38 *Tex.* 599.

PLACITUM. A plea; a suit or proceeding in court; particularly, a pleading. Usually found in the plural, — *placita*, — signifying pleas, pleadings or other judicial proceedings, suits.

In old common-law practice, the caption or title of a judgment record was termed the *placita*, that being the initial word of such caption in the Latin form.

Placita formerly signified the public assemblies at which the king presided. *Tomlins.*

Placita communia. Common pleas. All civil actions between private persons.

Placita coronæ. Pleas of the crown. Prosecutions for crimes in which the king prosecutes.

PLAIN. The phrase, plain English type, in Wagn. Stat. ch. 73, § 1, requiring innkeepers to post in their rooms a copy of the hotel law, means large or ordinary sized type, and not very small type. Porter *v.* Gilkey, 57 *Mo.* 235.

Plain statement, is one that may be readily understood, not merely by lawyers, but by all who are sufficiently acquainted with the language in which it is written. Mann *v.* Morewood, 5 *Sandf.* 557, 564.

PLAINT. The name of the complaint in some inferior English courts.

The term is not in general use in the United States, but appears in plaintiff.

Plaint is, 1. The propounding or exhibiting of any action in writing. (*Cowel.*)

2. A private memorial tendered in open court to a judge, wherein the party injured sets forth his cause of action; which was done in the old county court or other local court, when the action was brought to recover a sum under forty shillings; and the judge was bound of common right to administer justice therein without any mandate from the king. The proceeding in the local court thus differed from that in the king's courts, where actions commenced by original writ. (3 *Bl. Com.* 273.)

3. The written statement of an action in the modern county court, which is entered by the plaintiff in a book kept by the registrar for the purpose. (*Stat.* 9 *&* 10 *Vict.* ch. 95, § 59; 3 *Steph. Com.* 288; *Davis County Courts*, 5th ed. 65.) *Mozley & W.*

PLAINTIFF. The complaining party; the person bringing an action at law, or a civil action as regulated by reformed codes of procedure.

When several persons join in bringing an action, each one is a plaintiff: no tendency is noticed — as in the case of party (*q. v.*) — to speak of several individuals as composing one plaintiff.

The word is not in common use for the party bringing a suit in a court of distinct equity jurisdiction, or instituting a special statutory proceeding.

As used in the English judicature act, "plaintiff" includes every person asking any relief (otherwise than by way of counter-claim as a defendant) against

any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

In the case of the Bank of Salina *v.* Henry, it was said by the supreme court of New York, that, in the legal as well as in the ordinary use of the term, no one can strictly and properly be denominated a plaintiff in an action, unless he is named as such on the record. (1 *Hill*, 555, 557.) But the decision in this case was reversed by the court of errors, who held that the word plaintiff extended to a party in interest as plaintiff, although not the plaintiff on the record. (5 *Hill*, 523–547.) *Burrill.*

Plaintiff in error. The party aggrieved by a judgment, who sues out a writ of error to review it; the prosecutor in a writ of error.

PLANTATION. The ordinary signification is farm; and the terms are nearly synonymous. A plantation cannot be divided by imaginary lines into several, for the purpose of obtaining a number of premiums for such subdivisions as distinct plantations. Attorney-General *v.* Judges, 38 *Cal.* 291.

In North Carolina, plantation signifies the land a man owns which he is cultivating more or less in annual crops. Strictly, it designates the place planted; but in wills it is generally used to denote more than the enclosed and cultivated fields, and to take in the necessary woodland, and, indeed, commonly all the land forming the parcel or parcels under culture as one farm, or even what is worked by one set of hands. Stowe *v.* Davis, 10 *Ired. L.* 431.

PLAT, or PLOT. A map of a piece of land on which are marked the courses and distances of the different lines, and the quantity of land it contains. *Bouvier.*

We consider plat the preferable form of the word; but both are noticed in the American real-property cases.

PLEA. 1. Embraces several kinds of formal answer made by a defendant to a bill, complaint, declaration, or prosecution.

It is a general term, for there are many kinds of pleas; yet all the responses to a plaintiff's pleading are not termed pleas. And the term is used differently in common-law and equity practice.

In common-law practice, it signifies the defendant's answer to the merits of plaintiff's declaration, in distinction from his denial that the claim made is sound in law, which is a demurrer. In a broad sense of the word, it may include a demurrer. When this answer or plea sets forth at large or in detail the subject-matter of the defence, it is denominated a special plea, in contradistinction to those direct and concise answers to the declaration, termed the general issues. In equity practice, plea and answer are used of two distinct modes of interposing defence.

A plea has been defined as a short statement, in response to a bill in equity, of facts which, if inserted in the bill, would render it demurrable; while an answer is a complete statement of the defendant's case, and contains answers to any interrogatories the plaintiff may have administered. *Hunt Eq.* Pt. I. ch. 3.

See Wharton for a concise analytical statement of the pleas most in use in law and equity.

2. Pleas, the plural, is used to signify suits or actions. Thus, "holding pleas" means entertaining or taking cognizance of actions or suits; "common pleas" signifies ordinary actions or suits between man and man, as distinguished from such as are promoted and prosecuted at the suit of the crown, which are thence denominated pleas of the crown.

Plea side. The plea side of a court is that branch or department of the court which entertains or takes cognizance of civil actions and suits, as distinguished from its criminal or crown department. Thus the court of queen's bench is said to have a plea side and a crown or criminal side: the one branch or department of it being devoted to the cognizance of civil actions, the other to criminal proceedings and matters peculiarly concerning the crown. So the court of exchequer is said to have a plea side and a crown side, the one being appropriated to civil actions, the other to matters of revenue. *Brown.*

PLEAD. To deliver defendant's response, in due form of law, to the suit, action, or prosecution. Plea and to plead are generally used of defences only; other inflections of the word embrace the plaintiff's formal statements.

Burrill's explanation of the different extensions in which to plead is used is excellent, as follows: Originally and radically, to litigate, to carry on a plea or suit. In a stricter sense, to conduct that part of an action which con-

sisted in the allegations of the respective parties. In a still stricter sense, to make an allegation of fact in a cause. In the strictest sense, to make that allegation of fact, on the part of a defendant, which follows and is opposed to the plaintiff's declaration.

Plead issuably. This means, to interpose such a plea as is calculated to raise a material issue, either of law or of fact. The defendant in an action is entitled, as a matter of right, to a certain number of days to plead. If he seeks to obtain further time, it is granted to him only by way of indulgence; and the court in so doing usually annexes to its order the condition that the defendant shall plead issuably; that is, that he shall plead a fair and *bona fide* plea, as distinguished from one which is calculated only to embarrass the defendant and to retard the progress of the action. The condition so annexed is, in effect, "an agreement by the defendant to speed the cause to its conclusion, and bring it to an issue upon the substantial merits of law or fact, without regard to any formal inaccuracies in the plaintiff's statement." Barker *v.* Gleadon, 5 *Dowl.* 136.

Plead over. The expression to plead over is used in two senses. It sometimes means to pass over, or omit to take notice of, a material allegation in the declaration. Where a party pleads without taking advantage, by demurrer or otherwise, of a defect in his adversary's pleading, he is said to plead over it. Also, where a defendant, having demurred or specially pleaded, has judgment given against him on such demurrer or special plea, and proceeds to plead the general issue, he is said to plead over. The decision of the court overruling a demurrer or special plea often reserves, in terms, a right to plead over.

PLEADED. Alleged or averred, in form, in a judicial proceeding.

It more often refers to matter of defence, but not invariably. To say that matter in a declaration or replication is not well pleaded would not be deemed erroneous.

Under the United States bankrupt act of 1841, providing that a bankrupt's certificate of discharge may be pleaded as a full bar, such a certificate may be proved under a notice annexed to a plea; the word pleaded should not be strictly construed. Campbell *v.* Perkins, 8 *N. Y.* 430.

PLEADER. The draughtsman of a plea, in the broad sense of that word; one who prepared the bill, complaint, declaration, petition, answer, demurrer, or plea, &c., in question.

PLEADING, *n.* and *part.* 1. The art, business, or science of draughting the usual formal written statements of the case of either party to a judicial proceeding, particularly a suit or action; also, the act or step of interposing either, and particularly of interposing a defence.

2. Any of the usual formal written statements of a party's case is called a pleading; and the whole body of these statements in any cause is termed the pleadings. According to Termes de la Ley and Cowel, the declaration is not included in the expression the pleadings.

3. The oral advocacy of a client's cause in court, by his barrister or counsel, is sometimes called pleading; but this is a popular rather than technical use.

An affidavit made to procure an order of attachment is not a pleading, within a statute requiring a pleading to be verified. Johnson *v.* Laughlin, 7 *Kan.* 359.

The mutual allegations or statements which are made by the plaintiff and defendant in a suit or action are termed the pleadings. These are now written or printed, and delivered between the contending parties, or to the proper officers appointed to receive them; but formerly they were actual *viva voce* pleadings in open court. The pleadings in an action are designated, according to their nature, by the following terms: declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter. The principles on which these pleadings or contending statements are framed, and the manner in which they govern or affect the subsequent course of the cause, form the principal feature in the art or science of pleading, or, as it is popularly called, special pleading. *Brown.*

The term pleadings has a technical and well-defined meaning. Pleadings are written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties. Desnoyer *v.* Hereux, 1 *Minn.* 17.

PLEBISCITUM. In the Roman law, an enactment by the people, — the *plebs*,

— or upon the proposition of a plebeian magistrate, as a tribune.

PLEDGE. A species of bailment, wherein the general owner of personal property delivers it to another, to be held as security for some debt or engagement. Also, the thing delivered, the pawn (*q. v.*), is often called a pledge.

Pledgee and pledgor, pledg*er* or pledg*eor*, are the names of the parties respectively receiving and delivering any thing in pledge.

Pledgee: the party to whom a thing is delivered in pledge. Pledgor, pledg*er*, or pledg*eor:* the one making the bailment. Nearly the same remarks may be made on the orthography of this word as were made under mortgage (*q. v.*), as to the spelling of mortgagor or mortgageor. The vernacular dictionaries recommend pledg*eor;* but it is seldom seen in law-books, Bouvier, however, adopts it. Pledg*er* is sometimes met; pledgor is, so far as our recollection extends, by far the most common in the books of the law.

A pledge is a bailment of personal property, as a security for some debt or engagement. A delivery of the thing pledged is essential to the contract, and, until such delivery, the special property that the bailee is entitled to hold does not vest in him. Brewster *v.* Hartley, 37 *Cal.* 15.

A pledge is a deposit of personal effects, not to be taken back but in payment of a certain sum, by express stipulation to be a lien on it. Doak *v.* Bank of the State, 6 *Ired. L.* 309.

Pledges to prosecute. In old English law, no person could prosecute a civil action without having, in the first stage of it, two or more persons as pledges of prosecution; and if judgment was given against the plaintiff, or he deserted his suit, both he and his pledges were liable to amercement to the king *pro falso clamore.* In the course of time, however, these pledges were disused, and the names of fictitious persons substituted for them, — two ideal persons, John Doe and Richard Roe, having become the common pledges of every suitor; now, however, even these are not used in personal actions. And since the common-law procedure act, 1852, the use of such pledges has been discontinued even in the action of ejectment; and inasmuch as all the real actions were abolished by 3 & 4 Wm. IV. ch. 27, it would seem that the use of such pledges is now discontinued altogether. *Mozley & W.*

PLENE. Completely; fully; sufficiently.

Plene administravit. He has fully administered. The emphatic words of a plea by an executor or administrator, alleging that he has fully administered all the assets that have come to his hands. These words are often taken as the name of the plea.

Plene administravit, præter. He has fully administered, except. The emphatic words of a plea by an executor or administrator, alleging that he has fully administered all the assets that have come to his hands, except a certain amount, which is not sufficient to satisfy the plaintiff's demand.

Plene computavit. He has fully accounted. The emphatic words in a plea in an action of account-render, alleging that the defendant has fully accounted. These words are often used to designate the plea.

PLOT. See PLAT.

PLOUGHBOTE. See BOOT.

PLUNDER. To plunder is often used to express the idea of taking property without right to do so; but not as expressing the nature of the wrong involved, or necessarily imputing a felonious taking. Hence words charging plaintiff with having plundered a library are not actionable, without an averment of extrinsic circumstances showing they were used and understood as imputing larceny. Carter *v.* Andrews, 16 *Pick.* 1. See United States *v.* Pitman, 1 *Sprague*, 196.

PLURAL. It is now a very common statutory rule for construction of legislative enactments, that, unless the context forbids, words in the singular number shall be deemed to include the plural, and words in the plural, the singular.

PLURALITY. In the law of elections, the candidate who receives more votes than any other one, but not as many as all others, is said to have a plurality of votes, or a plurality vote.

In ecclesiastical law, plurality means the holding two, three, or more benefices by the same incumbent; and he is called a pluralist. Pluralities are now abolished, except in certain cases. 2 *Steph. Com.* 691, 692.

PLURIES. Many times; often. The emphatic word in a clause inserted in the Latin forms of writs which issued

after a first and second writ of the same kind have been issued and returned not executed. The distinctive clause is, in the Latin form, *præcipimus tibi, sicut pluries præcipimus, quod*, &c, — we command you, as we have many times commanded you, that, &c. This clause is literally translated in the English forms, and the word *pluries* has been adopted as the name of the clause and of the writ itself; the second writ in order being termed an *alias* writ, the next is a *pluries* writ, and others, if a distinction is required, are called second *pluries*, third *pluries*, &c., successively.

POACHING. The unlawful destruction of game, especially by night; also, trespassing by night on land in pursuit of game.

It is an offence of note in England, being a violation of the game laws of that country. It has not been known in the United States. The game laws which have been passed in several of the states, in recent years, are of different character and principle from those of England, looking to the preservation of the breeds, for the benefit of the public, not of individual beasts and birds, for the future sport of the owner. It is not clear that poaching would be an appropriate name for the breach of the American laws.

POCKET JUDGMENT. A statute-merchant which is enforceable at any time after non-payment on the day assigned, without further proceedings. *Wharton.*

POCKET SHERIFF. A sheriff appointed by the sole authority of the crown, not having been previously nominated in the exchequer. The practice of occasionally naming pocket sheriffs continued until the reign of George III. (1 *Bl. Com.* 342; 2 *Steph. Com.* 626.) *Mozley & W.*

POINDING. The process of the law of Scotland which answers to the distress of the English law. Poinding is of three kinds:

Real poinding, or poinding of the ground. This is the action by which a creditor, having a security on the land of his debtor, is enabled to appropriate the rents of the land, and the goods of the debtor or his tenants found thereon, to the satisfaction of the debt.

Personal poinding. This consists in the seizure of the goods of the debtor, which are sold under the direction of a court of justice; and the net amount of the sales paid over to the creditor in satisfaction of his debt; or, if no purchaser appears, the goods themselves are delivered.

Poinding of stray cattle, committing depredations on corn, grass, or plantations, until satisfaction is made for the damage. *Bell.*

This corresponds to the English process of distraining cattle *damage feasant*. *Mozley & W.*

POINT. Is used technically to signify any distinct question or matter, particularly of law, arising in a cause; as in the expression, the court did not decide the point.

POLICE. The preservation of domestic order, and civil regulation of inhabitants to enforce peace and quiet, and promote the public health and security.

Police court. The name applied to an inferior court in several of the United States, the jurisdiction of which is wholly or chiefly criminal in its nature, and very limited in its extent. Police courts usually discharge merely the functions of justices of the peace in regard to offences of importance, and have power to try merely minor offences in a summary manner. A limited civil jurisdiction is sometimes entrusted to them. This name is the title of such courts in Massachusetts, New Hampshire, and New York.

Police jury. In Louisiana, is the designation of the board of officers in a parish corresponding to the commissioners or supervisors of a county in other states.

Police-officer, or **policeman.** The designation of a member of the force employed within a municipality, in the civil enforcement of the laws for good order, peace, and quiet.

That the term police-officer does not apply to a constable, see Commonwealth *v.* Smith, 111 *Mass.* 407.

Police purposes. This phrase includes the construction of ditches, drains, and watercourses, which are demanded by, or are conducive to, the public health, convenience, or welfare. Sessions *v.* Crunkilton, 20 *Ohio St.* 349.

Police regulations. Those laws and rules established by a state, city, town, &c., for the civil enforcement of peace and good order, and the promotion of health and security of life and property, among the inhabitants.

Laws which would be objectionable on

constitutional grounds, if enacted for general or revenue purposes, are sometimes sustained to the extent to which they are necessary to a state as police regulations.

Police supervision. It is provided by the prevention of crimes act, 1871, Stat. 34 & 35 Vict. ch. 112, that where a person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, the court may, in addition to any other punishment, direct that he be subject to the supervision of the police for a period not exceeding seven years, commencing immediately after the expiration of the sentence passed on him for the last of such crimes; and that any person, so subject to supervision as aforesaid, who shall remain in any place for forty-eight hours without notifying the place of his residence to the chief officer of police for the district, or who shall fail to comply with the requisitions of the act, in periodically reporting himself to such chief officer, shall, unless he can show that he did his best to act in conformity to the law, be liable to be imprisoned, with or without hard labor, for any period not exceeding one year. (4 *Steph. Com.* 452, 453; *Oke Mag. Syn.* 320; *Cox & S. Cr. Law*, 422.) *Mozley & W.*

POLICY. Or, more fully, policy of assurance, or insurance, is the name by which the formal written instrument in which the contract of insurance is usually embodied, is known.

The term policy of insurance cannot mean a verbal contract, although such contract may be a valid one. Manny *v.* Dunlap, 1 *Woolw.* 372.

Policy of the law. This phrase, in a statute declaring that "no interest or policy of the law shall exclude a party from being a witness," &c., does not include the public policy which prevents a husband or wife from proving non-access. Tioga Co. *v.* South Creek Township, 75 *Pa. St.* 433.

POLITICAL LIBERTY. See LIBERTY.

POLL. Originally, the head; hence, secondarily, it stands for an individual person. Counting the polls is enumerating the individuals in a body; a challenge to the polls is a challenge of single jurors. See CHALLENGE. Polling a jury is asking each individual for his verdict; polling electors is taking their votes, man by man; a poll-tax is a tax of a specific sum upon each person, as distinguished from a tax on property. More remote uses of the word are noticed: "the polls" is applied to the place at an election where voters deliver their votes, man by man; a deed polled, or a deed-poll, is one shaved smooth, like a priest's poll. See DEED; INDENTURE.

POLYANDRY. The civil condition of having more husbands than one; a social order permitting plurality of husbands.

Burrill does not mention this term, and defines polygamy as the having more than one wife or husband at the same time. Some other authorities confine polygamy to plurality of wives, and employ polyandry as the complementary term. Bouvier says that polyandry is legalized only in Thibet; therefore, the importance of a distinct name for it is not probably very great. It is noticeable that bigamy is used of marriages of either sex: a woman is said to be guilty of bigamy equally with a man.

POLYGAMY. 1. The civil condition of having more wives than one; a social order permitting several wives.

2. The offence of marrying more than two wives or husbands, the previous spouses being alive and undivorced; plurality of marriages, as distinguished from bigamy in the sense of a double marriage.

3. The offence committed by a layman in marrying while any previous wife is living and undivorced; as distinguished from bigamy in the sense of a breach of ecclesiastical law involved in any second marriage by a clerk.

The above are presented as alternative definitions. All are not needed; the first is recommended. The choice will be made according as one is more influenced by the etymology of words, the history of their use, or the practical convenience of use at the present day.

The history of the words involved favors the third of the above definitions. In early times, in England, the ecclesiastical law forbade a person in orders to marry again, even after the death of a first wife; or to marry a widow. The offence, an ecclesiastical one only, of his doing so was called bigamy, *q. v.* The general civil law of the land also forbade that any man should marry while any previous wife was living and undivorced, or that any woman having one husband should marry another. This was also

sometimes called bigamy; but, to distinguish it from the different ecclesiastical breach, some authorities advised calling it polygamy. See 4 *Bl. Com.* 164; 4 *Steph. Com.* 278, note. It appears to be upon this principle that the statutes of Massachusetts employ the term polygamy, instead of bigamy.

Etymology favors the second definition. Bigamy literally means a second marriage distinguished from a third or other; while polygamy means many marriages — implies more than two.

But there are at the present day no reasons of practical convenience for adhering to either of these definitions. The distinctions they preserve are unimportant. The ecclesiastical offence is obsolete, or of no note in jurisprudence; and the offence of marrying a third or fourth or twentieth spouse while the first lives is in no respect different from that of marrying a second. But, so long as countries and governments exist in which men are under any conditions allowed to have more wives than one, there is need of a term for this civil condition, or peculiar social system, — a term which, though it may be charged with moral reprobation, does not import criminality; that is, violation of the local law. And there is equal need of a term in our own criminal law for the having more wives or husbands than one, considered as an offence. Practical considerations favor employing bigamy as the name of the offence, irrespective of how many marriages have been contracted; and polygamy, for the practice of plurality of wives, presented not as a crime, but as a condition locally recognized and allowed.

Ponderantur testes, non numerantur. Witnesses are weighed, not counted. Witnesses are estimated by the weight or importance of their testimony, and not by their number.

When there is conflicting evidence, the jury must determine the degree of credit to be given to each of the witnesses; for the testimony of one witness may in many cases be more trustworthy than opposing testimony of many. The rule has been expressed, *ponderantur testes, non numerantur;* but "*testimonia*" or "*probationes*" would be better than "*testes,*" as it is clearly not confined to verbal evidence. *Best Evid.* § 596.

PONE. Put.

1. The initial word of the mandatory clause, in Latin, of a writ, in English practice, for removing an action from an inferior to a superior court, commanding to "put before our justices, &c., the plaint which is in your county court," &c. The writ was hence termed a writ of *pone.*

2. The initial word of the mandate, in the Latin form, of the writ of attachment formerly issued in English practice on the non-appearance of a defendant, on the return of the original writ, to compel his appearance. This writ was also called a writ of *pone.* It continued to be used in replevin after it was abolished in other actions.

Ponit se super patriam. Puts himself upon the country. A phrase expressing, in English criminal practice, that the defendant pleads not guilty. The plea is entered of record usually by the abbreviation *po. se.*

POPULAR ACTION. An action authorized by statute, to be prosecuted by any person who will sue for the enforcement or recovery of the penalty incurred by transgressing some penal law. It is called a popular action because it is a proceeding which may be taken not by any one person in particular, but by any of the people who think proper to prosecute it. *Cowel.*

POOR. In a statute providing for the relief of the poor, means persons so completely destitute of property as to require assistance from the public. State *v.* Osawkee Township, 14 *Kan.* 418, 422. See PAUPER.

The poor our law takes notice of are: 1. Poor by impotency and defect; as the aged or decrepit, fatherless or motherless, those under sickness, and persons who are idiots, lunatics, lame, blind, &c., — these the overseers of the poor are to provide for. 2. Poor by casualty; such as housekeepers decayed or ruined by unavoidable misfortunes, poor persons overcharged with children, laborers disabled, — and these, having ability, are to be set to work, but, if not able to work, they are to be relieved with money. 3. Poor by prodigality and debauchery, also called thriftless poor; as idle, slothful persons, pilferers, vagabonds, strumpets, &c., who are to be sent to the house of correction, and be put to hard labor to maintain themselves, or work is to be provided for them, that they do not perish for want; and, if they become impotent by sickness, or if their work will not maintain them, there must be an allowance by the overseers of the poor for their support. *Jacob.*

Upon the dissolution of the monasteries in the reign of Henry VIII., it became neces-

sary to make some provision for the poor, as well those who were properly called indigent, *i.e.* unable, even with labor, to earn their own livelihood, as also those who were properly called poor, *i.e.* unable to live without labor. The oldest poor-law act (43 Eliz. ch. 2) preserves this distinction; but abuses having arisen out of it, of which the principal one perhaps was the extension of out-door relief to able-bodied paupers, the whole system of poor-law administration was remodelled by the Stat. 4 & 5 Wm. IV. ch. 76, and has since been still further improved. Under the Stat. 4 & 5 Wm. IV. ch. 76, which continued in force until July 31, 1847, the administration of relief to the poor throughout England and Wales was placed under the control of three commissioners, styled "the poor-law commissioners for England and Wales;" but, under the Stat. 10 & 11 Vict. ch. 109, a new board of commissioners, styled "commissioners for administering the laws for the relief of the poor in England," was appointed in their place, and was invested with all the powers and duties of the former commissioners. The style has been since altered by the Stat. 12 & 13 Vict. ch. 103, to that of the "poor-law board;" and the board under that name has been perpetuated by the Stat. 30 & 31 Vict. ch. 106. *Brown.*

Poor debtors; Poor-debtor laws; Poor-debtor's oath. In several of the United States, statutes exist which provide, in substance, that any person arrested or imprisoned for debt, or upon mesne process in an action of contract, desirous to procure his discharge from arrest, may summon his creditor before a magistrate, and there take oath that he has no property with which to pay the debt on which he is detained; and upon this oath, due proceedings being had before the magistrate designated by the law, he may be set at liberty. Persons entitled to the benefit of such laws are called poor-debtors; and the law and the oath, respectively, are known as the poor-debtor law and the poor-debtor's oath.

Poor-law board. The English official body appointed under Stat. 10 & 11 Vict. ch. 109, passed in 1847, to take the place of the poor-law commissioners, under whose control the general management of the poor, and the funds for their relief throughout the country, had been for some years previously administered. The poor-law board is now superseded by the local government board, which was established in 1871 by Stat. 34 & 35 Vict. ch. 70. 3 *Steph. Com.* 49.

PORT. A place appointed by commercial usage or law, for the landing of vessels, with reference to the discharge and reception of cargoes, the performance of their contracts of affreightment, and the execution of the laws governing importation and exportation of merchandise.

There is a distinction between a port and a harbor (*q. v.*), though the words are often used interchangeably. "Harbor" denotes the geographical or natural character of a basin; it is one fitted for the reception and mooring of vessels. "Port" denotes its civil or legal character; it is a spot designated by law where vessels may enter and discharge cargoes, and from which they may be cleared for new voyages. Ports are almost always located at harbors; but along a line of coast, where there was nothing that could properly be called a harbor, it might well be that landing-places might be designated by law as ports.

A port is an aggregate, consisting of somewhat that is natural, viz. an access of the sea, whereby ships may conveniently come; safe situation against winds, where they may safely lie, and a good shore, where they may well unlade; somewhat that is artificial, as keys and wharves, and cranes and warehouses, and houses of common receipt; and something that is civil, viz. privileges and franchises, the right of mooring, the right of selling, and other additaments given to it by civil authority. A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles, — as the port of London, in the time of King Edward I., extended to Greenwich; and Gravesend is also a member of the port of London; so the port of Newcastle takes in all the river from Sparhawk to the sea. *Hale, De Portubus Maris*, Pt. II. ch. 2.

In the revenue laws, "port" and "district" are often used as words of the same import, in cases where the limits of the port and district are the same. Ayer *v.* Thacher, 3 *Mas.* 153, 155.

The term port is to be taken in reference to the subject-matter to which it is applied; and although it generally means a harbor or shelter for vessels from storms, yet, when applied to places on a coast where there are no harbors, it may mean only a road or anchorage-place, for the purpose of loading and unloading cargoes. De Longuemere *v.* New York Fire Ins. Co., 10 *Johns.* 120; De Longuemere *v.* Firemen Ins. Co., *Id.* 126.

Where a policy contained a clause that the insurers take "no risk in port but sea-risk," it was held that the term port was not confined to the port of departure or discharge, but was used in contradistinction to

the "high seas," and referred to any port into which the vessel might of necessity enter during the voyage insured. Patrick *v.* Commercial Ins. Co., 11 *Johns.* 9.

A vessel has not arrived in port until she drops anchor or is moored. Gray *v.* Gardner, 17 *Mass.* 188.

A vessel, insured until her arrival at a certain port, is protected by the policy until she reaches the spot in that port where it is intended to discharge her cargo, and which is the usual place of discharge. But if she is destined to one or more places for the delivery of cargo, and delivery or discharge of a portion of her cargo is necessary, not by reason of her having reached any destined place of delivery, but as a necessary and usual nautical measure, to enable her to reach such usual and destined place of delivery, she cannot properly be considered as having arrived at the usual and customary place of discharge, when she is at anchor for the purpose only of using such means as will better enable her to reach it. If she cannot get to the destined and usual place of discharge in the port because she is too deep, and must be lightened to get there, and, to aid in prosecuting the voyage, cargo is thrown overboard or put into lighters, such discharge does not make that the place of arrival: it is only a stopping-place in the voyage. Simpson *v.* Pacific Mutual Ins. Co., 1 *Holmes*, 136.

Under a charter-party providing that, "if the said ship enters into the port of Lisbon, the voyage ends," it is for a jury to determine whether, by going to the outer port of Lisbon (about five miles from the town), the ship "entered" the port of Lisbon. Goddard *v.* Bulow, 1 *Nott & M.* 45. See ARRIVAL.

Port of delivery. The phrase port of delivery is sometimes used to distinguish the port of unlading or destination, from any port at which the vessel touches, in the course of the voyage, for other purposes. The Two Catherines, 2 *Mas.* 319, 331.

Port of destination. As used in a clause in a time-policy, extending the insurance beyond the term, if at its expiration the ship is at sea, until she reaches her port of destination, means any foreign port to which the vessel may be destined during the voyage, as well as her home port; and includes any usual stopping-place for ladiog or unlading cargo, although not a haven or port, in a legal sense, as a port of entry or clearance. Gookin *v.* New England Mut. Mar. Ins. Co., 12 *Gray*, 501, 516.

Port of discharge. In a policy of marine insurance, means the place where the substantial part of the cargo is discharged, although there is an intent to complete the discharge at another basin. Bramhall *v.* Sun, &c. Ins. Co., 104 *Mass.* 510.

Port of entry. A place designated by law for the landing of vessels, with reference to the execution of laws imposing duties on vessels and cargoes.

The reasons for the use of the phrase seem to be that "port," alone, is easily and often confounded with harbor, while port of entry more emphatically marks the character of the basin as a legal (not natural) landing-place; and that there is need of a term which implies, more distinctly than "port," that the execution of the duty laws is the prominent thing in question. It would be usual to say that a vessel was insured from one "port" to another; but to say that a vessel stranded upon the coast should report her manifest to the nearest "port of entry."

Port charges, dues, or tolls. Pecuniary exactions upon vessels availing themselves of the commercial conveniences and privileges of a port.

Port-greve. The chief magistrate of some maritime towns has been so styled.

Portmote; portmoot. A court kept in haven towns or ports. *Termes de la Ley.*

Port-reeve, or port-warden. An officer maintained in some ports, to oversee the administration of the local regulations; a sort of harbor-master.

PORTION. Has a somewhat technical use, to signify that part of a person's estate which is given or bequeathed to a child. It seems to imply that there are several children or beneficiaries, and that their shares are governed in amount by natural or equitable considerations, not by the arbitrary gift of the parent or testator.

Portion is especially applied to payments made to younger children out of the funds comprised in their parents' marriage settlement, and in pursuance of the trusts thereof. *Mozley & W.*

Portion disponible. In French law, that part of a man's estate which he may freely give, by act or will. A parent leaving one legitimate child may dispose of one-half only of his property; one leaving two, one-third only; and one leaving three or more, one-fourth only; and it matters not whether the disposition is *inter vivos* or by will.

Portioner. When a parsonage is served by two, or sometimes three, ministers, alternately, the ministers are termed portioners, because they receive but a portion or pro-

portion of the tithes or profits of the living. *Cowel.*

POSITIVE. Has some technical uses.

Positive condition. When the result is made dependent on something to happen, the condition is called positive, in distinction from one made to depend on a thing's not happening, called a negative condition. See *Bouvier.* Affirmative would designate this class of conditions more accurately and appropriately than positive does.

Positive law. A rule established by authority, as distinguished from one founded on natural reason or ethical considerations; express or enacted law: a statutory rule.

Positive proof. Convincing evidence. If "proof" were used, as Greenleaf recommends, in the sense of the effect of evidence, the mental conviction induced by evidence, instead of being sometimes employed as an equivalent of "evidence," there would be little or no need of the expression positive proof.

POSSE. To be able; to be possible. This Latin verb is, in law Latin, used as a substantive, with the signification of possibility. Thus a thing is said to be *in posse* which may possibly be; as distinguished from a thing in actual existence, said to be *in esse.*

Posse comitatus. The power of the county. The force of his county, which a sheriff may call to his aid in the execution of process; including, generally, the entire male population over fifteen years of age, of sound body and mind.

In English law, the *posse comitatus* is that force of the people of the county which the sheriff may command to attend him for keeping of the peace and pursuing felons; also for defending the county against the king's enemies. All persons, except peers, women, clergymen, persons decrepit, and infants under the age of fifteen, are, by Stat. 2 Hen. V. ch. 8, 1414, bound to attend this summons, under pain of fine and imprisonment. (1 *Bl. Com.* 343; 4 *Id.* 122; 2 *Steph. Com.* 629; 4 *Id.* 254.) *Mozley & W.*

POSSESSIO. 1. In the civil law. That condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all others. This condition of fact is called detention, and it forms the substance of possession in all its varieties. 1 *Mackeld. Civ. Law*, 234, § 229. See *Burrill.*

Possessio, in its primary sense, is the condition or power by virtue of which a man has such a mastery over a corporeal thing as to deal with it at his pleasure, and to exclude other persons from meddling with it. This condition or power is detention; and it lies at the bottom of all legal senses of the word possession. This possession is no legal state or condition, but it may be the source of rights; and it then becomes *possessio*, in a juristical or legal sense. Still, even in this sense, it is not in any way to be confounded with property (*proprietas*). A man may have the juristical possession of a thing without being the proprietor, and a man may be the proprietor of a thing without having the juristical possession of it, and consequently without having the detention of it. (*Dig.* 41, tit. 2, § 12.) Ownership is the legal capacity to operate on a thing according to a man's pleasure, and to exclude everybody else from doing so. Possession, in the sense of detention, is the actual exercise of such a power as the owner has a right to exercise. The term *possessio* occurs in the Roman jurists in various senses. There is *possessio* simply, and *possessio civilis* and *possessio naturalis.* *Possessio* denoted, originally, bare detention. But this detention, under certain conditions, becomes a legal state, inasmuch as it leads to ownership, through *usucapio.* Accordingly, the word *possessio*, which required no qualification so long as there was no other notion attached to *possessio*, requires such qualification when detention becomes a legal state. This detention, then, when it has the conditions necessary to *usucapio*, is called *possessio civilis;* and all other *possessio* as opposed to *civilis* is *naturalis.* (*Smith Dict. of Antiq.; Sand. Just.* 274.) *Wharton.*

2. In the common law. Possession, seisin, used especially of lands.

Bracton treats *possessio* and *seisina* as synonymous, and considers possession under a multitude of subdivisions; as civil, which was retained only by intention; natural, which was held only by the physical act; rightful and wrongful; true, and imaginary or fictitious; naked, where a person had no right, but only a mere foothold or standing; clothed, as with right, title, or prescription; and many others. There was also one kind which consisted of some degree of possession, but no right, as the possession of a guardian or creditor; another kind, which consisted of a good deal of possession and a little right, as the possession of an ancestor who died seised, another having the mere right; another kind, which consisted of a great deal of possession and some right, as where one held land for a term by the grant of a person who demised it to him, but did not die seised; and a fourth kind, consisting of much possession and much right, as where one had the mere right in s

thing, and the property of the fee, and the freehold with seisin, but of which he did not die seised. (*Bract.* fol. 39.) *Burrill.*

Possessio fratris. A brother's possession. The possession of lands by a brother, such as to make his sister of the whole blood his heir, in preference to a brother of the half blood. The doctrine is explained under the maxim below. It is often called the doctrine of *possessio fratris;* and the term is used to denote the exclusion of the half blood from the succession.

Possessio bona fide. Possession in good faith. *Possessio mala fide.* Possession in bad faith. A person is said to have possession in good faith when he acquired or entered on the property, honestly, in the belief that he had right, and without reason to believe another had a superior claim. He is said to have possession in bad faith when he took it with notice that there were competing and better rights, and that he could not honestly take. The condition of the party's knowledge at the time of acquiring governs, for most purposes.

Possessio fratris de feodo simplici facit sororem esse hæredem. Possession by a brother of an estate in fee-simple makes the sister to be heir. The principle intended to be expressed by the maxim is this: The possession of an estate in fee-simple by a brother makes his sister of the whole blood his heir, in preference to a brother of the half blood. This was the rule of the English law of descent, and is thus illustrated by Blackstone: If a man had two sons, A and B, by different wives, these two brethren were not brethren of the whole blood, and, therefore, should never inherit to each other, but the estate should rather escheat to the lord. Even if the father died, and his lands descended to his eldest son, A, who entered thereon, and died seised without issue, still B should not be heir to this estate, because he was only of the half blood to A, the person last seised, but it should descend to a sister (if any) of the whole blood to A. 2 *Bl. Com.* 227.

This continued to be the rule in England, until abolished by statute (3 & 4 Wm. IV. ch. 106). In most of the United States, as both the real and personal property of intestates are distributed among the heirs, without reference to actual seisin of the ancestor, the doctrine of *possessio fratris* has no application. In some of the states, however, the doctrine appears to have been recognized. 4 *Kent Com.* 384, 385.

In practical application, the doctrine was not limited to possession of a brother: the possession of a guardian or a tenant for years was within the rule.

The question of the possession or seisin of the ancestor is not, since the descent act (3 & 4 Wm. IV. ch. 106), of any importance in ascertaining who is heir, inasmuch as the descent is now traced from the last person entitled who did not inherit, and not from the last person seised. *Brown.*

POSSESSION. Control or custody of a thing; detention of any thing as one's own, and for enjoyment; occupation, actual or constructive, of subjects of property.

The word possession, applied to lands, may mean an actual residence on the land, or such cultivation, use, and enjoyment of the same, by visible acts of ownership, as would give notice to the owner and others of the adverse possession of the land. Kimbro *v.* Hamilton, 28 *Tex.* 560.

The "immediate right of possession" spoken of by the Michigan statute relative to the nature and qualities of estates in real property, in defining estates in possession, does not mean the absolute right of possession as against all possible rights or powers given for special purposes, and which have not been, but may or may not be, exerted or required for the accomplishment of such special purposes. The owner may be said to have an "estate in possession," unless there be some intervening estate in the land, the owner of which has a present paramount right of possession as against him. Campau *v.* Campau, 19 *Mich.* 116, 123.

The entering upon, ditching, and making roads in a cypress swamp, for the purpose of getting shingles therein, and cutting down the timber-trees and making shingles out of them, is, in law, a possession of the swamp. Tredwell *v.* Reddick, 1 *Ired. L.* 56.

In a stream not navigable, keeping up fish-traps therein, erecting and repairing dams across it, and using it every year, during the entire fishing season, for the purpose of catching fish, constitute an unequivocal possession thereof. Williams *v.* Buchanan, 1 *Ired. L.* 535.

The phrase uninterrupted possession does not convey the idea of continued, incessant, unceasing possession, but that the occupant has not been interfered with or evicted by the assertion of an adverse title. Reed *v.* Earnhart, 10 *Ired. L.* 516.

Entering upon land, partial fencing and slight cultivation, cutting timber and exer-

cising continuous public acts of ownership, constitute actual possession which the courts will maintain in an action of trespass *quare clausum fregit*, against a party intruding without superior title. McLean *v.* Farden, 61 *Ill.* 106.

The occupation of pine-land, by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. Bynum *v.* Carter, 4 *Ired. L.* 310.

Where a party takes possession of a tract of land, claiming a moiety as locator, such possession is not adverse, and, if it continues more than twenty years, does not operate as a bar. Oldhams *v.* Jones, 5 *B. Mon.* 458.

Cutting trees on a tract of land susceptible of other uses and enjoyment, and feeding hogs on it, under color of title, for seven years, do not constitute such a possession as will bar an entry. Loftin *v.* Cobb, 1 *Jones L.* 406.

Residence, though necessary to constitute a settlement, is not necessary to adverse possession. The latter may be, by cultivation and enclosure, by cultivation without enclosure, or by enclosure without cultivation; and in every case without regard to the design of the occupant, further than that it be to resist an entry by any one else. Stephens *v.* Leach, 19 *Pa. St.* 262.

When a man enters upon, improves, fences, and occupies part of another man's tract of land, and has the boundaries of his claim surveyed and marked, including woodland not enclosed, and for twenty-one years openly and exclusively uses the woodland as his own, in connection with his improvement, and as farmers ordinarily use their woodland, this is an actual possession of the woodland, and excludes the constructive possession which the law usually attributes to the title, and to the owner's actual possession of the rest of his tract. Wolf *v.* Ament, 1 *Grant Cas.* 150.

Occupying and cultivating land, and claiming title, is adverse possession. Robinson *v.* Douglass, 2 *Ash.* 364.

The claiming title, and payment of taxes upon unoccupied lands, is no adverse possession. Reed *v.* Field, 15 *Vt.* 672.

Consult ADVERSE.

Possession in statutes imposing a punishment for "having in possession" burglar's tools or other implements of crime cannot be limited to manual touch or personal custody. One who deposits the prohibited articles in a place of concealment may be deemed to have them in his possession. One who leaves them in care of his wife may be deemed to have them in possession jointly with her. State *v.* Potter, 42 *Vt.* 495.

Secreting the coin within the county and having within one's control is a possession of counterfeit coin, within the meaning of Iowa code, § 2634. State *v.* Washburn, 11 *Iowa*, 245.

Possession is the control or detention of a thing for enjoyment. One may hold or exercise it by himself, or by another who keeps or exercises it in his behalf. But the word implies exclusive enjoyment. Redfield *v.* Utica & Syracuse R. R. Co., 25 *Barb.* 54.

There are two kinds of possession: in fact, and by relation of law. Possession in fact is where the party is in the actual use and enjoyment of the land or other real estate at the commission of the injury. Possession by relation of law is where the party in actual possession becomes dispossessed, and is afterwards restored by reentry, or in some other lawful manner; he is then, during the period which has intervened between the dispossession and the restoration, deemed in possession by relation of law. Possession by relation is not so efficacious as possession in fact; for, while the latter affects all persons and reaches all purposes, the former extends, according to some of the books, only to some purposes and persons. Bacon *v.* Sheppard, 11 *N. J. L.* 197.

The word possession, in the New York factor's act, means such control of or dominion over merchandise as enables a factor rightfully to take it into actual custody, without the aid of any new authority or document furnished by the owners; in contradistinction to a right derived from documentary evidence furnished by the owners or obtained by factors, by means of their right of possession of the goods. Pegram *v.* Carson, 10 *Bosw.* 505.

Possession money. The man whom the sheriff puts in possession of goods taken under a writ of *fieri facias* is entitled, whilst he continues so in possession, to a certain sum of money *per diem*, which is thence termed possession money. The amount is 3*s.* 6*d.* per day, if he is boarded, or 5*s.* per day, if he is not boarded. *Brown.*

POSSESSORY ACTION. An action involving the claim to reduce the subject-matter to one's control and enjoyment; as distinguished from one involving the bare right only, called a petitory action (*q. v.*); a suit to obtain possession, not merely to determine title.

In the common-law use of the term, it meant an action brought for the purpose of regaining possession of land whereof the demandant or his ancestors had been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claimed. All that was alleged in this action was that the right of possession of the demandant was superior to that of the actual tenant; not necessarily that he had a right of property in the land. On the other hand, the tenant had a species of pre-

sumptive title, otherwise called an apparent right of possession, sufficient to protect him from expulsion by mere entry on the part of the adverse claimant. A possessory action was either a writ of entry or an assise. But these actions belonged to the class of real actions, and, having been for some time obsolete, were abolished in the year 1833 by Stat. 3 & 4 Wm. IV. ch. 27, § 36. 3 *Bl. Com.* 179–190; 3 *Steph. Com.* 361, 396.

In the admiralty and civil-law systems and in Louisiana, the terms possessory and petitory actions are still in use.

POSSIBILITY. An uncertain thing, which may or may not happen; such, for instance, as the chance of an heir apparent succeeding to an estate, or of a relation obtaining a legacy on the death of a kinsman. A possibility is said to be either *near* or *remote*, according to the degree of probability; examples given in the books are, that when an estate is limited to one after the death of another, this is a near possibility; but that a man shall be married to a woman and then that she shall die, and he be married to another, this is a remote possibility.

These two kinds are also called, in Cholmley's case, 2 *Coke*, 51, where the doctrine of possibilities is much discussed, *common* and *remote*.

They are also called *ordinary* and *extraordinary* possibilities. And a possibility is called *bare* when it is not complied with any interest. *Wharton.*

A possibility founded on a trust differs from a mere possibility: the first may be devised, the other not. *Tomlins.*

POST. After; afterwards. A writ of entry in a case where two or more alienations or descents have taken place between the original disseisor and the tenant in the writ, was said to be in the *post*, because it stated that the tenant had not entry unless *after* the ouster of the original intruder. Compare PER.

The word is also used to introduce many Latin phrases, among which are the following:

Post conquestum. After the conquest. Words inserted in the king's title by King Edward I., and constantly used in the time of Edward III. *Tomlins.*

Post-date. An instrument dated after the true time at which it is made, is said to be post-dated. Thus, parties making during July a contract which they designed should take effect from Aug. 1, might pass a note for the price, bearing date in July, but specifying that interest should run from Aug. 1, which would be literally according to the facts; but they would be more likely to simply date the note Aug. 1. This would be post-dating it, and would have the effect to start interest on that day.

Post-diem. After the day. A term used in pleading, as of a plea of payment after the day fixed, which is expressed by the phrase *solvit post diem*, — he paid after the day.

Post disseisin. Where one person, having recovered lands from another in a possessory action, not being an assise of novel disseisin, was afterwards disseised by the party against whom he had obtained the judgment, the act of the latter was called a *post disseisin;* and the former might have a writ of *post disseisin* against him, which subjected the post disseisor to the same penalties as a re-disseisor. *Termes de la Ley; Cowel;* 3 *Bl. Com.* 188.

Post entry. When goods are weighed or measured, and the merchant has got an account thereof at the custom-house, and finds his entry already made too small, he must make a post or additional entry for the surplusage, in the same manner as the first was done. Post entries are usually confined to cargoes of grain. *M'Culloch Com. Dict.*

Post facto. See EX POST FACTO.

Post litem motam. After suit moved; after a controversy is begun; after a dispute has arisen. This term is sometimes applied to depositions taken or other acts done after a suit is brought; but it is generally applied to declarations upon a question of pedigree, made after the beginning of a controversy out of which a suit has arisen. Such declarations are excluded, while previous declarations may be admissible. But the line of distinction is the origin of the controversy, not the commencement of the suit.

Post-mortem. After death. A term generally applied to an examination of a dead body, to ascertain the cause of death, or to the inquisition for that purpose by the coroner.

Post natus. After-born. Anciently applied to a second son, as born after the elder. Used by modern writers to

designate those born after some particular event; as the union of the crowns of England and Scotland, or the independence of the American colonies. It is the correlative of *antenatus*, q. v.

Post-note. A banker's promise to pay money at a future time, in distinction from ordinary notes payable on demand; a bank-note payable afterwards, not immediately.

Post-nuptial. After marriage. Thus an agreement entered into by a father after the marriage of his daughter, by which he engages to make a provision for her, would be termed a post-nuptial agreement.

Post-obit, or post-obitum. A post-obit bond is an agreement, on the receipt of money by the obligor, to pay a larger sum exceeding the legal rate of interest upon the death of the person from whom he, the obligor, has some expectations if he survive him. Chesterfield *v.* Jameson, 2 *Ves.* 157.

It is a bond executed by a person on the receipt of money from another, whereby the borrower binds himself to pay to the lender a sum exceeding the sum so received, and the ordinary interest thereof, upon the death of a person upon whose decease he (the borrower) expects to become entitled to some property. *Smith Man. Eq.*

POST. Has been used in England for three centuries past to signify rapid conveyance, swift travel.

Jacob and Tomlins define it as a swift or speedy messenger to carry letters.

Thus post-chaise was a species of chaise kept in readiness at appointed stations on lines of travel, by which a traveller might be carried more rapidly than by public coach over one stage of his journey; at the end of which stage he could engage fresh horses for the next, and so on. Post-boy (or postillion) was the driver of such a chaise; and post-horse, a horse kept to be used in it. To travel by post was to adopt this mode of conveyance; hence "to post," in the sense of to travel rapidly. Post-house was a station for post-horses.

Etymologically regarded, the word has no affiliation with the preposition *post*, but is deemed a contraction or Anglicism of *positus*. The post-horse was *equus positus*, a horse placed or posted at a station, in readiness for the first traveller wishing for him.

Postman. A person employed in the business of the post-office, to collect and to deliver mail matter for the local office.

Post-mark. An imprint placed by the authorities of the post-office where a letter is received to be forwarded, upon the outside, usually stating from what office and on what day it has been sent.

Such mark, being official, has been deemed presumptive evidence of the time when the letter was transmitted.

Postmaster. The officer appointed to have charge of a local office for the distribution and transmission of the mails.

Postmaster-general. An officer who has general charge and oversight of the postal business of the country. In the United States, he is the head of the post-office department, has head-quarters at Washington, and is a member of the cabinet.

Post-office. That branch of the business or operations of government which has charge of the transmission of the mails; also, the establishment, office, or place of business in each town where the mails from other places are received in bulk, and distributed to individuals addressed; and where mail matter is received from individuals, and put up for transportation.

The English postal system originated about the middle of the seventeenth century; the first attempts at establishing it are attributed to 1643 or 1644; and the permanent footing was given to it, under Cromwell, in 1657, confirmed by Stat. 12 Car. II. ch. 35. Brown says that one of the reasons inducing the government of the day to establish one general post-office was the facility which it afforded, by opening letters, of discovering secret conspiracies against the government (9 Anne, ch. 10); and this right of the government is reserved in all the subsequent statutes, and is exercised upon a warrant from one of the principal secretaries of state.

In England, the machinery of the post-office is also used in providing small insurances and annuities with government securities, under Stat. 16 & 17 Vict. ch. 45, passed in 1853. A system of savings banks has also been established in connection with the post-office, by Stat. 24 & 25 Vict. ch. 14, passed in 1861, which authorizes the post-

master-general, with the consent of the commissioners of the treasury, to cause his officers to receive deposits. The security of the government is pledged for the repayment of such deposits, with interest at 2½ per cent per annum. Electric telegraphs are also placed under the direction of the post-office, by Stat. 31 & 32 Vict. ch. 110, passed in 1868. *Mozley & W.*

To constitute a post-office, within the law, punishing stealing from a post-office, the place where the business of keeping, forwarding, and distributing mailable matter is conducted, need not be a building set apart for that use, or any apartment or room in a building; but, according to the extent of the business done, may be a desk, or a trunk or box carried about a house, or from one building to another. The place of the deposit of the mailable matter, in this sense, constitutes the post-office; and any thing taken out of that place of reception or keeping is taken from or out of the post-office, within the law, without regard to the distance of removal or circumjacent enclosures or rooms. United States *v.* Marselis, 2 *Blatchf.* 108.

Post-office department. That executive department in the government which is charged with the business of the mails.

In the United States, it has headquarters at Washington, and is under the direction of the postmaster-general.

Post-office station. In large cities, besides a general post-office, outside branch offices are opened for the local convenience of distant parts of the city; these have been called post-office stations.

Post road, or route. A road, route, or line of travel, designated by law to be pursued by contractors and conveyances in the transportation of the mails.

The designation of these is, in the United States, intrusted by the constitution to congress, and forms an important head in national legislation, inasmuch as the designation of the routes governs the location of post-offices, and determines what places shall enjoy immediate mail facilities.

Postage. Money charged for conveyance by post, particularly for the transmission of letters, newspapers, and parcels by mail.

Postage stamp. A printed ticket affixed to mailable matter, in token of payment of the charge for transmission.

Postal. Relating to the mails; pertaining to the post-office. The body of laws providing for the management of the mails and business connected with them are called the postal laws. Offences particularly affecting the mails, or prohibited by the laws regulating the post-office, are called postal offences. Postal revenues are the funds received from postages, to the post-office department. And there are other similar uses of the word.

Postal currency. During a brief period following soon after the commencement of the civil war in the United States, when specie change was scarce, postage stamps were popularly used as a substitute; and the first issues of paper representatives of parts of a dollar, issued by authority of congress, were called postal currency. This issue was soon merged in others of a more permanent character, for which the later and more appropriate name is fractional currency.

Postal money-order. See MONEY-ORDER.

POSTEA. Afterwards. The name of the entry of record of the proceedings and result of the trial of a cause, taken from the initial word of the entry of record in Latin, literally translated in the English form, "afterwards, that is to say, on," &c. In form, it is the return of the judge before whom the cause was tried, of the proceedings upon the trial, and is indorsed upon the *nisi prius* record, forming the ground for the judgment subsequently entered upon it. The *postea* ordinarily states the day of the trial, the judge or judges by name before whom the trial was had, the appearance of the parties by their respective attorneys, or their defaults, the summoning and choice of the jury, the verdict, the assessment of the damages, and the costs.

POSTERIORITY. This is a word of comparison and relation in tenure, the correlative of which is the word priority. Thus a man who held lands or tenements of two lords was said to hold of his more ancient lord by priority, and of his less ancient lord by posteriority. (*Old Nat. Brev.* 94.) It has also a general application in law consistent with its etymological meaning, and, as so used, it is likewise opposed to priority. *Brown.*

POSTERITY. Embraces not only children, but descendants to the remotest

generation. Breckinridge *v.* Denny, 8 *Bush*, 523.

POSTLIMINIUM. Reprisal; recovery; recapture; postliminy. The restoration or return of a person or thing to a former right, estate, or condition; a fiction of the civil law by which persons or things captured by the enemy, on coming again into the power of the nation to which they formerly belonged, are restored to their former state. The principle is recognized by the law of nations, but is not applied to movable property, unless the recapture is immediate.

A merchant vessel captured at sea, during war, by an enemy ship, becomes the (qualified) property of her captors, by the law of prize. If, however, before the captors succeed in taking her in for adjudication, she is recaptured by a ship of the nation to which she belongs, she does not become prize to the recapturing ship, but, under the doctrine of postliminy, the title of her original owners revives, and she must be surrendered to them.

Jus postliminii is a right to restitution after a recapture, as applied in maritime law, — a use of the phrase which is derived from the Roman *jus postliminii*, which restored the citizen of Rome who had been made a slave to his threshold, *i.e.* to his franchise. The term is therefore metaphorically used in our admiralty courts to signify a resumption of an original inherent right to a recaptured British ship in the legal owners. But the phrase is also frequently used with an analogous meaning in other branches of the law. *Brown.*

Postliminium fingit eum qui captus est in civitate semper fuisse. Postliminy supposes that he who was taken prisoner had always been in the state. See POSTLIMINIUM.

POSTLIMINY. See POSTLIMINIUM.

POSTPONE. To place after; to adjourn; to delay. Postponed: adjourned; delayed; set down for a later day. Postponement: an adjournment; a continuance.

That a cause submitted on written arguments, upon suggestion of the court, to another judge, is not "postponed," see Hager *v.* Danforth, 8 *How. Pr.* 448.

A stay of proceedings pending the execution of a commission to take testimony is not a postponement of the cause. Shufelt *v.* Power, 13 *How. Pr.* 89.

POSTREMOGENITURE. The right of the youngest born; the correlative of *primogeniture.*

POSTULATIO. 1. The name, in the Roman law, of the initial step in a criminal prosecution. It seems to have been preliminary to a formal charge or complaint, and to have been designed chiefly for settling upon a responsible accuser. See *Bouvier.*

2. In old English ecclesiastical law, a species of petition for transfer of a bishop.

Formerly, on the occasion of a bishop being translated from one bishopric to another, he was not elected to the new see; for the rule of the canon law is *electus non potest elegi;* and the pretence was that he was married to the first church, which marriage could not be dissolved but by the pope; and thereupon the pope was petitioned, and, consenting to the petition, the bishop was translated, and this was said to be by postulation; but this was restrained by Stat. 16 Rich. II. ch. 5. *Cowel; Tomlins.*

Potior est conditio defendentis. The condition of the party defending is the better. Or, *potior est conditio possidentis.* The condition of the party in possession is the better. These maxims are usually limited by some expression prefixed, such as *in æquali jure, in pari delicto*, &c. For an exposition of the principle involved, see *In pari delicto, potior est conditio defendentis.*

POTWALLERS; POTWALLOPERS. Such persons as cooked their own diet in a fire-place of their own, and were on that account entitled, by the custom of some boroughs, to vote in the parliamentary election for the borough. The rights of such persons as were entitled, on this account, at the time of the passing of the reform act, 1832, to exercise the franchise, are preserved during their lives; but the number of such individuals has, since that time, become so much diminished by death as to be of little practical importance. 2 *Steph. Com.* 360.

POUND. 1. A measure of weight.

2. A denomination of English money.

3. An enclosure maintained by authority of law for the confinement of estrays, or (in England) for custody of goods distrained.

A pound is, generally, any place enclosed to keep in beasts, but especially a place of strength to keep cattle which are distrained, or put in for any trespass done by them, until they are replevied or redeemed. In this signification, it is called pound *overt* and pound *covert.* A pound overt is an open pound, usually built on the lord's waste,

and which he provides for the use of himself and tenants, and is also called the lord's or the common pound; and a backside yard, &c., whereto the owner of beasts impounded may come to give them meat, without offence, is a pound overt. A pound covert is a close place, which the owner of the cattle cannot come to, without giving offence, such as a house, &c. There is also a difference between a common pound, an open pound, and a close pound, as to cattle impounded. Where cattle are kept in a common pound, no notice is necessary to the owner to feed them; but, if they are put into any other open place, notice is to be given; and he is then also bound to feed them; and, if beasts are impounded in a pound close, as in part of the distrainor's house, stable, &c., he is to feed them at his peril. *Jacob.*

A town pound, *ex vi termini*, is an enclosed piece of land secured by a firm structure of stone, or of posts and timber, placed in the ground; and, by the grant, or exception, in a deed of conveyance of a town pound, the land on which it stands is conveyed or excepted, not as an appurtenance, but as parcel of the subject-matter. Wooley *v.* Groton, 2 *Cush.* 305.

Pound-breach. The offence of breaking into a lawful enclosure for estrays, to take out an animal there confined.

Pound-breach is the act of breaking into a pound or enclosure in which things distrained are placed under the protection of law; and it is an offence in the eye of the law even where the distress has been taken without just cause; for, when once impounded, the goods immediately are in legal custody. The punishment varies according to the nature of the thing distrained. *Brown.*

Pound-breach is the destruction of a pound, or any part, lock, or bolt thereof, or the taking of cattle or other goods from the place where they are impounded. 3 *Bl. Com.* 146.

Pound-keeper. A local officer charged with the care of a pound, and of animals confined in it.

POUNDAGE. 1. A charge allowed to be made by the sheriff, for his expenses and services in collecting money on execution, and which he may deduct from the sum obtained.

Whether it is called poundage because, in English practice, it was a percentage of so much on each pound sterling which the officer had collected, or because it was a charge for keeping the goods taken in execution in the pound, or place of custody of goods seized, is a question which may be left to the reader's etymological preferences. The intimations in the books suggest both origins.

Originally, at common law, the sheriff was entitled to no allowance for executing writs, his office being regarded solely as an honorary one, and men of wealth and substance were usually elected to fill this post. In the progress of society, however, and on the growth of commerce, the duties of a sheriff being attended with considerable expense, and the office thereby becoming extremely onerous, different acts of parliament entitled them to certain fees and dues, one of which is poundage. *Dalt. Sheriff.*

2. The money which an owner of animals impounded must pay to obtain their release.

3. In old English law, a subsidy to the value of twelve-pence in the pound, granted to the king, of all merchandise exported or imported.

POUR. For several words anciently spelled *pour*, but from which, in modern times, the *o* is usually dropped, see PUR.

POWER. A power is, in a general sense of the word common in jurisprudence, any authority which one gives to another to act for him; as in speaking of the powers of an agent, or of a corporation; of a power of attorney, &c. In a more technical sense, in conveyancing, it signifies an authority vested in one person to dispose of an estate which is vested in another.

Powers are either common-law authorities, declarations, or directions, operating only on the conscience of the persons in whom the legal interest is vested, or declarations or directions deriving their effect from the statute of uses. A power given by a will to A, an executor, to sell an estate, to whom no estate is devised, and a power given by an act of parliament to sell estates, as in the instance of the land-tax redemption acts, are both common-law authorities. The estate passes by force of the will or act of parliament, and the person who executes the power merely nominates the party to take the estate. A power of attorney is also a common-law authority. A power to dispose of an estate or sum of money, of which the legal estate is vested in another, is a power of the second sort. The legal interest is not divested by the execution of the power; but equity will compel the persons seised of it to clothe the estate created with the legal right. Powers deriving their effect from the statute of uses are either given to a person who has an estate limited to him by the deed creating the power, or who had an estate in the land at the time of the execution of

the deed, or to a stranger, to whom no estate is given, but the power is to be exercised for his own benefit, or to a mere stranger to whom no estate is given, and the power is for the benefit of others.

Powers are either:

Collateral, which are given to strangers; *i.e.* to persons who have neither a present nor future estate or interest in the land. These are also called simply collateral, or powers not coupled with an interest, or powers not being interests. These terms have been adopted to obviate the confusion arising from the circumstance that powers in gross have been by many called powers collateral.

Or relating to the land. These are called appendant or appurtenant, because they strictly depend upon the estate limited to the person to whom they are given. Thus, where an estate for life is limited to a man, with a power to grant leases in possession, a lease granted under the power may operate wholly out of the life-estate of the party executing it, and must in every case have its operation out of his estate during his life. Such an estate must be created, which will attach on an interest actually vested in himself. Or they are called in gross, if given to a person who had an interest in the estate at the execution of the deed creating the power, or to whom an estate is given by the deed, but which enabled him to create such estates only as will not attach on the interest limited to him. Of necessity, therefore, where a man seised in fee settles his estate on others, reserving to himself only a particular power, the power is in gross. A power to a tenant for life to appoint the estate after his death amongst his children, a power to jointure a wife after his death, a power to raise a term of years to commence from his death, for securing younger children's portions, — are all powers in gross.

A power may, with reference to the particular estates in the land over which it extends, have different aspects; it may, in regard to one, be a power appendant, in respect to the other, a power in gross. Thus, where an estate is settled to A for life, remainder to B in tail, remainder to A in fee, and A has a power to jointure his wife after his death, this power is in gross as to the estate for life, but appendant or appurtenant as to the remainder in fee. It may affect the latter, but never can attach on the former.

An important distinction is established between general and particular powers. By a general power, we understand a right to appoint to whomsoever the donee pleases. By a particular power, it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children. *Wharton.*

Powers by the common law were divided into two sorts: naked powers or bare authorities, and powers coupled with an interest. Thus, when a man devises that his executors shall sell his land, this power is a naked one; that is, the power which the testator so gives to his executors to sell his land is simply a power, and does not vest any interest in the land in the executors; whereas, if a man devises lands to his executors to be sold, this is a power coupled with an interest. The word power retains the same meaning when coupled with other words; thus, a power of attorney, or letter of attorney, signifies an authority which one man gives to another to act for him: and these powers are perhaps of the most frequent occurrence, being resorted to whenever circumstances are likely to occur to prevent a party doing the act desired to be done himself; as, for instance, if it were necessary that a person should sign a deed next week, but which he could not do, being obliged to set out upon a voyage to a foreign country before that time, in this case he might authorize some other person to do it for him, and the instrument by which he would confer that authority would be a power of attorney.

Powers are otherwise arranged in the following threefold division; namely, powers simply collateral; powers not simply collateral, but being either, appendant or annexed to an estate, or in gross, not being incident to any estate.

A power simply collateral is one which is not, and has never been, annexed to an estate; all other powers are either so annexed, or having once been so have become disannexed, in which latter case they are said to be powers in gross. Where the donee of a power to appoint lands is also the fee-simple owner of the lands, he may convey the lands for any estate, either in exercise of his power or in virtue of his estate; but, having done so in either of these two ways, he cannot afterwards make any conveyance in the other way; which would be in derogation of his first conveyance, which for that reason is said to have either suspended or extinguished his power, according to the quantity of the estate which he has already created. *Brown.*

Power and authority. Where a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words power and authority, in such case, may be construed duty and obligation. County Commissioners of Anne Arundel County *v.* Duckett, 20 *Md.* 468.

Power of appointment. An authority conferred upon some person to direct, that is, appoint, the person or persons who shall receive and enjoy landed property or the income of a fund, after the existing estate or right to the income shall have determined.

Power of attorney. The instrument by which, usually, the constitution and

authority of an agent is set forth, when formal written evidence of them is desired; otherwise called letter of attorney.

Attorney, in this phrase, signifies agent; attorney in fact, not attorney at law.

PRACTICE. The course of a business; customs of an office; routine of performing duties or exercising functions; hence, particularly, the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts. *Bouvier; Burrill; Wharton.*

It may include pleading; but is usually employed as excluding both pleading and evidence, and to designate all the incidental acts and steps in the course of bringing matters pleaded to trial and proof, and procuring and enforcing judgment on them.

Practice is the procedure in a court of justice, through the various stages of any matter, civil or criminal, depending before it. Rules of pleading are distinguished from rules of practice, in that the former tell what is the most efficient form to adopt in shaping the pleadings; the latter tell in what manner the pleadings should be brought under the notice of the court, and what steps should be taken to obtain the benefit of them. *Hunt Eq.* (6th ed.) 2, 3. And see Allen *v.* Smillie, 1 *Abb. Pr.* 354.

Practice court. The name of a court attached to the court of king's (or queen's) bench, and presided over by one of the judges of that court, for the decision of points of practice and pleading. After the appointment of an additional judge to the court, under the authority of Stat. 11 Geo. IV. & 1 Wm. IV. ch. 70, § 11, which took place in Michaelmas term, 1830, Lord Tenterden, then the lord chief justice, informed the bar that, in addition to the powers already exercised by one judge, sitting apart from the others, in the bail court (or court in which the sufficiency of parties as bail, and other minor matters, are ascertained), all matters of practice would, for the future, be determined there. It thereafter became usual to move in this court, in certain cases, for new trials, and, in ordinary cases, for writs of *mandamus* and of prohibition, in addition to mere points of practice. If any doubt arises in the mind of the presiding judge as to any question brought before him, he refers the party to the full court, before which indeed cause, on rules *nisi*, is generally shown; but the decision of the single judge is of itself conclusive. The four puisne judges, by turns, preside for the space of a term. This court though frequently and properly termed the "practice court of the queen's bench," is now generally called, from its origin, the bail court. *Brown.*

PRACTICAL LOCATION. Identical in meaning with actual location. Both phrases call for mutual acquiescence in a known line, continued for a long period of time. Hubbell *v.* McCulloch, 47 *Barb.* 287.

PRÆCIPE. Command. A paper containing the particulars of a writ, filed in the office out of which the writ is to be issued, as the direction and instructions to the officer who issues the writ.

The term was also used, by abbreviation from *præcipe quod reddat*, as the name of an original writ in the alternative, commanding the defendant to do the thing required, or show the reason why he has not done it, drawn up in the form of a *præcipe*, or command, to do something, or show cause to the contrary, giving the defendant his choice to redress the injury or stand the suit.

Præcipe signifies an original writ in the alternative, commanding the defendant to do the thing required, or to show his reason for not doing it. This writ was used when something certain was demanded by the plaintiff which it was incumbent on the defendant himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, and the like. The word *præcipe* is now commonly used for a sort of abstract of a writ of summons, or *capias*, which is made out on a slip of paper, and delivered to the signer of the writs, at the time of issuing them, and from which abstract or memorandum that officer makes his entry in the book kept for that purpose. *Brown.*

Præcipe in capite. When one of the king's immediate tenants *in capite* was deforced, his writ of right was called a writ of *præcipe in capite*. *Brown.*

Præcipe quod reddat. Command that he render. The emphatic words of an original writ, in common-law practice, commanding the person named to do a certain thing, or to show cause why he has not done it. The phrase is taken for a name of the writ; or, more frequently, the writ was simply termed a *præcipe*, q. v.

PRÆDICTUS. Aforesaid. Frequently abbreviated to *præd.*, or *prædict.*

Of the three words, *idem*, *prædictus*, and *præfatus*, — all corresponding with the English said and aforesaid, — *idem* was most usually applied to plaintiffs or demandants; *prædictus* to defendants or

tenants, places, towns, or lands; and *præfatus* to persons named, not being actors or parties. (*Towns. Pl.* 15.) *Burrill.*

PRÆFATUS. Aforesaid. Sometimes abbreviated to *præfat.* and *p. fat.* See PRÆDICTUS.

PRÆMUNIRE. To forewarn; to summon. The emphatic word of a writ issued in old English law, to begin the prosecution of an offence against the king and government; afterwards taken as a name for the writ and the offence. The proceeding was designed to prevent papal usurpations in England, by making it an offence to introduce a foreign power into the kingdom, or to render to a foreign power the obedience claimed to be due to the king alone. Other offences were subsequently included in the proceedings and penalties for *præmunire.*

The statute of *præmunire* (15 Rich. II. ch. 5) was enacted to check the exorbitant power claimed and exercised by the pope in England; whence the offence of *præmunire* was the particular name of the offence of maintaining the papal power in England as an *imperium in imperio.* The statute enacts that, whoever procures at Rome or elsewhere any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use; and they shall be attached by their bodies to answer to the king and his council, or process nf *præmunire facias* shall be made out against him, as in any other case of provisors. *Brown.*

PRÆNOMEN. The first of the three names ordinarily in use among the Romans. It distinguished the individual. The initial letter only was usually written. See AGNOMEN; COGNOMEN; NOMEN.

Præsentia corporis tollit errorem nominis. The actual presence of the subject-matter removes the effect of error in the name. If the subject of a contract be present, an error in naming it does no harm. Thus, "if I give a horse to J D, he being present, and say unto him, 'J S, take this,' this is a good gift, notwithstanding I call him by a wrong name" (*Bacon Max.*); for the presence of the grantee gives a higher degree of certainty to the identity.

If the name and description do not coincide, there is no presumption, in the absence of the thing itself, in favor of the one over the other; the truth of the name will depend on the falsity of the description, or *vice versa.* Said Lord Chancellor Campbell, in Drake *v.* Drake (8 *Cl. Ho. of L. Cas.* 172, 179), "There is a maxim that the name shall prevail against an error of demonstration. But then you must first show that there is an error of demonstration; and, until you have shown that, the rule *veritas nominis tollit errorem demonstrationis* does not apply. *Bacon Max.*

Præsumptio. Presumption. An inference or deduction of the existence of a fact from the existence of another fact.

Præsumptio juris. This is such a presumption in favor of a claim or case as the law raises, but permits to be rebutted by counter proof if any is produced. Thus title is presumed from possession; but a better title than the possessor's may be proved. Between seven and fourteen criminal capacity is not presumed, but may be proved.

Præsumptio juris et de jure. A presumption which the law raises and enforces as conclusive; not permitting counter proof to prevail against it. An infant is presumed incapable of contracting, irrespective of any evidence that the individual was endowed with discretion and judgment unusual for his years. Below seven years, capacity for committing crime may not be proved. The presumption against it is conclusive.

A very important distinction exists among presumptions of law; namely, that some are absolute and conclusive, called by the common lawyers irrebuttable presumptions, and by the civilians *præsumptiones juris et de jure;* while others are conditional, inconclusive, or rebuttable, and are called by the civilians *præsumptiones juris tantum,* or simply *præsumptiones juris.* The former kind are inferences which the law makes so peremptorily, that it will not allow them to be overturned by any contrary proof, however strong. Thus, where a cause has been regularly adjudicated upon by a competent tribunal, from which there is no appeal, the whole matter assumes the form of *res judicata;* and evidence will not be admitted, in subsequent proceedings between the same

parties, to show that decision to be erroneous. An infant under the age of seven years is not only presumed incapable of committing felony, but the presumption cannot be rebutted by the clearest evidence of a mischievous discretion. So a bond or other specialty is presumed to have been executed for good consideration, and no proof can be admitted to the contrary, unless the instrument is impeached for fraud. A receipt under hand and seal is conclusive evidence of the payment of money; and in the time of the old feudal tenures it was an irrebuttable presumption of law, that a person under the age of twenty-one was incapable of performing knight service. *Best Evid.* 306.

PRAXIS. Practice.

Praxis judicum est interpres legum. The practice of the judges is the interpreter of the laws.

PRAY IN AID. In old English practice, the tenant in a real action, doubtful of his own title, might pray in aid, or call for assistance of another having a better right to help him to plead. 3 *Bl. Com.* 300.

PRAYER. A bill in equity, or a complaint under one of the codes of reformed procedure, must conclude with a specific request for the relief which the plaintiff seeks. This clause is called the prayer of the bill or complaint; the prayer for relief, &c.

Prayer of process, is a petition with which a bill in equity used to conclude, to the effect that a writ of subpœna might issue against the defendant to compel him to answer upon oath all the matters charged against him in the bill.

Prayer for other and further relief. To avoid prejudice from error or deficiency in a prayer for relief, it has been usual for a plaintiff to add to the prayer a clause asking, "or that plaintiff may have such other and further relief as to the court may seem fit," or the like. Under this clause it is considered that the court is not confined, in the decree, to granting precisely the specific relief asked.

PREAMBLE. An introductory recital in a contract, statute, &c., setting forth the facts or reasons which led to its being made or enacted.

It is not strictly an operative part of the instrument, but may be referred to, in construing it, for the better understanding of the intent.

The introducing clause or section of a statute is called the preamble. It usually recites the objects and intentions of the legislature in passing the statute, and frequently points out the evils or grievances which it was the object of the legislature to remedy. Although the preamble is generally a key to the construction, yet it does not always open or disclose all the parts of it; as sometimes the legislature, having a particular mischief in view, which was the primary object of the statute, merely state this in the preamble, and then go on in the body of the act to provide a remedy for general mischiefs of the same kind, but of different species, neither expressed in the preamble, nor perhaps then contemplated by the framer thereof. (Mann *v.* Cammel, *Lofft*, 783.) A reference to the preamble is therefore only an insufficient guide to the true interpretation of the statute. *Brown.*

PREBEND. The stipend or allowance for support granted to an ecclesiastic of a certain class connected with a cathedral, to enable him to perform his part in the church services.

The word is sometimes, but improperly, applied to the priest receiving the stipend; properly, he is the prebendary.

A simple prebend is merely a revenue; a prebend with dignity has some jurisdiction attached to it. The term prebend is generally confounded with canonicate; but there is a difference between them. The former is the stipend granted to an ecclesiastic in consideration of his officiating and serving in the church; whereas the canonicate is a mere title or spiritual quality, which may exist independently of any stipend. *Wharton.*

Prebendary. An ecclesiastic connected with a cathedral, and enjoying a fixed allowance or stipend from its revenues, in consideration of his part in the services.

By Stat. 3 & 4 Vict. ch. 113, prebendaries are such canons as have prebends or stipends for their maintenance. 2 *Steph. Com.* 674, note; 3 *Id.* 14, note.

PRECARIOUS. Revocable rights are called precarious.

A right to use a thing which the owner has given to another, to be withdrawn whenever the owner pleases, is called a precarious right. Precarious loan is a bailment which the owner may recall at will. Precarious trade is that which, by sufferance of two nations at war, a neutral may carry on between them.

The circumstances of an executor are "precarious" only when his conduct and character present such evidence of improvidence or recklessness in the management of the trust estate, or of his own, as, in the

opinion of prudent and discreet men, endangers its security. Shields *v.* Shields, 60 *Barb.* 56.

PRECARIUM. Precarious. Held by mere entreaty; held at the will of another. The word is used in the civil law as the name of a species of contract, in which the owner of a thing gives it to another person, at the request of the latter, to be used by him as long as the owner shall please.

PRECEDENT. An example which may be followed. The word is used principally, though by no means exclusively, to indicate one of the two following things:

A decision in a court of justice, cited in support of any proposition for which it is desired to contend.

A draught of a deed, will, mortgage, pleading, &c., which may serve as patterns for future draughtsmen and conveyancers.

PRECEPT. A process or warrant.

Precept is not to be confined to civil proceedings, and is not of a more restricted meaning than "process." It includes warrants and processes in criminal as well as civil proceedings. Adams *v.* Vose, 1 *Gray*, 51, 58.

Precept means a commandment in writing, sent out by a justice of the peace or other like officer, for the bringing of a person or record before him. *Cowel.*

The direction formerly issued by a sheriff to the proper returning officers of cities and boroughs within his jurisdiction for the election of members to serve in parliament. 1 *Bl. Com.* 178.

The direction by the judges or commissioners of assise to the sheriff for the summoning a sufficient number of jurors. 3 *Steph. Com.* 516; *Lush Pr.* 542, 543; *Kerr Act. Law.*

The direction issued by the clerk of the peace to the overseers of parishes for making out the jury lists. 3 *Steph. Com.* 516, note.

Precept of clare constat. A deed in the Scotch law by which a superior acknowledges the title of the heir of a deceased vassal to succeed to the lands. (*Wm. Bell; Paterson.*) Now, by Stat. 37 & 38 Vict. ch. 94, § 9, a personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed. *Brown.*

Precept of sasine. A "precept of sasine," in the Scotch law, is the order of a superior to his bailie (or agent) to give infeftment (*i.e.* feudal possession) of certain lands to his vassal. The present form of the precept of sasine is prescribed by Stat. 8 & 9 Vict. ch. 35, § 5, and schedule A. That form is as follows: "Moreover, I desire any notary-public to whom these presents may be presented, to give to the said A B, or his foresaids, sasine [or life-rent sasine, or sasine in life-rent and fee respectively, as the case may be] of the lands and others above disponed" [here are to be added any incumbrances to which the lands are liable]. *Brown.*

PRECLUDI NON. Ought not to be barred. These are the emphatic words of a clause in the commencement of a replication to a plea in bar, in Latin, by which the plaintiff alleges "that, by reason of any thing in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action," &c. This phrase is taken as the name of the clause.

PRECOGNITION. In Scotch law, an examination by a judge-ordinary or justice of the peace, where any crime has been committed, that the fact may be ascertained, and full and perfect knowledge given to the public prosecutor in carrying on the prosecution. In this examination the witnesses are not put upon oath, and they are examined separately; nor is the accused, or any person on his part, admitted to be present when the precognition is taken. Those who know any thing of the fact may be compelled to come forward, on pain of imprisonment. *Bell.*

The word is also used of the examination of witnesses by an attorney preparatory to a jury trial in a civil cause. *Paterson.*

PRE-CONTRACT. A contract, which, having been made before another attempted contract, avoids or prevents the latter. The term is used especially with reference to a contract of marriage, which, according to the ancient law, rendered void a subsequent marriage solemnized in violation of it. See *Cowel;* 1 *Bl. Com.* 435; 2 *Steph. Com.* 240.

PRECIPE. Another form of the name of the written instructions to the clerk of court; also spelled præcipe, *q. v.*

PRE-EMPTION. 1. Under this term one nation has sometimes claimed a right in behalf of its subjects to buy the goods of foreigners in transit through her jurisdiction.

2. The first buying of any thing.

It was a privilege heretofore allowed the king's purveyor, but abolished by Stat. 12 Car. II. ch. 24. *Jacob.*

The prerogative of purveyance, or pre-

emption, was a right enjoyed by the crown of buying up provisions and other necessaries by the intervention of the king's purveyors, for the use of the royal household, at an appraised valuation, in preference to all others, and even without consent of the owners; and also of forcibly impressing the carriages and horses of the subject to do the king's business on the public roads, in the conveyance of timber, baggage, and the like. This prerogative of the crown appears to have been made the occasion of much abuse in the early reigns, as one of the chief constitutional struggles of the period was for the restriction and regulation of this right. *Brown.*

3. A privilege accorded by public-land laws, particularly those of the United States, to an actual settler upon a limited portion of the public lands, to purchase that portion, at a fixed price, in preference to all other applicants.

Pre-empt: to take initial steps to secure the prior right to purchase a tract of the public lands. Pre-emptioner: one who holds a prior right to purchase certain public land.

PREFER. 1. To bring a matter before a court of justice; as in saying that A preferred a charge of assault against B.

2. To apply; to move for. Thus "to prefer for costs" is a phrase meaning to apply for costs.

3. To give advantage, priority, or privilege; to select for first payment, as to prefer one creditor over others.

Preference. A priority of payment given by a debtor to one or more creditors, over others, when he cannot pay all in full.

Preferences are allowable by the general law of debtor and creditor, but have been forbidden by statute in several of the states; and are contrary to the policy and express provisions of the bankrupt laws.

Preference, or preferential shares. New shares in a company, created as a means of raising money, and which have priority over the original shares. Such shares entitle their holders to a preferential dividend; so that a holder of them is entitled to have the whole of his dividend (or so much thereof as represents the extent to which his shares are, by the constitution of the company, to be deemed preference shares) paid before any dividend is paid to the ordinary shareholders.

Preferential assignment. A conveyance of a debtor's property for benefit of creditors, which directs that one or some shall be paid in full before others receive any thing; an assignment giving preferences.

Preferred, or preferential debt. A demand which has priority; which is payable in full before others are paid at all.

Preferred creditor. A creditor or a demand which the debtor has directed shall be paid before others.

PREJUDICE. Prejudging a matter.

When a court decides that A is entitled for his life to the income of a fund, "without prejudice" to any question between B and C, who claim adversely to each other the income of the fund after his death, the meaning is, that such question shall not be regarded as in any way determined by the decision as to A. And, generally, the expression "without prejudice" implies that the consideration of the question to which it refers is postponed to a future time. And the phrase is often used in a lawyer's letter for the purpose of guarding the writer against any thing therein contained being construed as an admission of liability.

PREJURAMENTUM. See ANTE JURAMENTUM.

PREMEDITATE. To think of an act in advance; to design, intend, or plan.

It is used particularly of crimes, and especially of murder. It implies intent before the act, but not necessarily an intent existing any extended time before the act. See AFORETHOUGHT; MURDER.

"Premeditated" implies an interval between the design and the commission of the act. Sullivan *v.* People, 1 *Park. Cr.* 347.

The words premeditated design to effect death, in a statute defining murder in the first and second degrees, merely signify an intent to kill, and do not exclude a sudden intent. Hogan *v.* State, 36 *Wis.* 226.

PREMIER. First; chief.

The prime minister in England is currently called the premier.

Premier sergeant. A sergeant-at-law, constituted premier sergeant by special

patent. The premier sergeant formerly took precedence of the attorney and solicitor general; but now, by royal mandate of Dec. 14, 1814, the attorney and solicitor general are to have place and audience before the premier sergeant. *Brown.*

PREMISES. 1. Literally, something put before; hence, matters previously stated; an antecedent or introductory part of a writing.

2. As used in equity pleading, the term designates what is otherwise called the stating part of the bill. Here is presented a narrative of all the facts upon which the plaintiff's case depends, and which he expects to prove on the hearing. These, being consecutively stated in the early part of the bill, are referred to in later portions — the charging part and the prayer, for instance — as "the premises."

A similar use is made of the word in declarations at common law, to signify foregoing statements, or previously mentioned facts. Thus, in a declaration in *indebitatus assumpsit*, the plaintiff, after alleging that the defendant was indebted to him in a given sum of money, may proceed to state that, "in consideration of the premises," *i.e.* of the facts already set out, the defendant promised to pay him the same. So, in a declaration for the diversion of water from a watercourse, the plaintiff, after stating his right to the enjoyment of the water, and his previous user of the same, and setting forth the fact and the nature of the diversion, may proceed to point out the injurious consequences which have flowed from the previously stated facts, in the following manner: "And the plaintiff, by reason of the premises, hath been deprived of the use, benefit, and advantage of the water of the said watercourse."

3. As used in conveyancing, the term premises is used in the *habendum* and covenants of a deed, mortgage, lease, &c., by way of reference to all that portion of the instrument which precedes the *habendum;* especially to the description previously given of the estate or property to be conveyed or affected. It thus prevents the need of repeating the statements made in the introductory part, by which the subject-matter of the deed is to be ascertained.

The premisea is that part in the beginning of a deed which expreases the grantor and grantee, and the land, or thing granted or conveyed. *Jacob.*

In a deed, the premisea comprise all that portion which precedea the *habendum; i.e.*, the date, the partiea' nameа and descriptions, the recitals, the consideration and the receipt thereof, the grant, the description of the things granted, and the exceptions. (4 *Cruise Dig.* 26.) *Brown.*

Premiaea, in a deed, signifies all which precedea the *habendum;* and where the limitation contained in the latter conflicts with the estate given in the premises, it must be rejected, and that in the premisea prevail. Budd *v.* Brooke, 3 *Gill*, 198; Farquharson *v.* Eichelberger, 15 *Md.* 63; Berry *v.* Billinga, 44 *Me.* 416.

The term premisea is used in common parlance to signify land, with its appurtenancea; but its usual and appropriate meaning in a conveyance is, the thing demised or granted by the deed. N. J. Zinc Co. *v.* N. J. Franklinite Co., 13 *N. J. Eq.* 322.

When the word premisea is uaed in the *habendum*, it haa a fixed meaning. The office of that part of a deed is to fix with certainty the eatate granted, and in that connection the word premisea doea mean the thing granted, as described in what precedes the *habendum*. New Jersey Zinc Co. *v.* Boaton Franklinite Co., 15 *N. J. Eq.* 418, 462.

4. Growing out of the last-mentioned meaning and use, there has arisen a perversion of the word to the sense of some distinct parcel of real property, such as deeds usually describe and convey. Thus it is common to speak of premises being in good or bad condition; of advertising premises for sale; of visiting or inspecting certain premises; of leased premises; of an intrusion or a trespass on a person's premises, — in all which and many like connections the word has no reference to any instrument, but means the corpus of some distinct portion of the realty. This use of the term has been criticised as a corruption, and so, in origin, it was; but it seems now to have the support of widespread and frequent usage.

Premisea, in the redelivery covenant of a lease of a factory building and land, does not include a portable wood-cutting machine worked by a belt attached to the factory: thia is a chattel. Holbrook *v.* Chamberlin, 116 *Mass.* 155.

Premiaes, in the covenants of a leaae, may include the buildings as well as the land. The plaintiff agreed to hire of the defendant the firat floor and basement of a building at a certain price, in consideration of

which the defendant agreed that the "premises and fixtures" should be finished in the same way as the store of B in the same street. The plaintiff claimed damages sustained by reason of leakage arising from a variation in the roof from that of B; and it was held that defendant was bound to make the roof as good as B's, and that damages for its deficiency were recoverable. Tuller *v.* Davis, 4 *Duer*, 187.

Premises, in the statute of Ohio, 1853, regulating the sale of liquors, includes both land and tenements. Bowers *v.* Pomeroy, 21 *Ohio St.* 184.

PREMIUM. A Latin word, meaning price or sum paid; which has been Anglicized to stand for the price or payment peculiar to certain transactions. Thus premium for insurance is the price or sum which the underwriter or company exacts as the consideration of undertaking the risk. Shares are said to sell at a premium, when they bring a price above their cost or nominal value.

Premium note. A promissory note which a person insured is allowed, by the practice of some insurance companies, to give for either all or part of the price of the insurance; a note for insurance premium.

Premium pudicitiæ. The price of chastity. A compensation for the loss of chastity, paid or promised to, or for the benefit of, a seduced female. Sometimes termed *premium pudoris*.

PRENDER. To take. The law-French form of the verb *prendre*.

It is said to mean the power or right of taking a thing before it is offered; hence the phrase of law, "it lies in render, but not in prender."

Prender de baron. To take a husband, was used for an exception to disable a woman from pursuing an appeal of murder against one who killed her former husband.

PREPENSE. Aforethought, *q. v.*

PREROGATIVE. In a general sense, a personal privilege, power, or right of superior character. In English law, it is especially used of the distinct authority vested in the crown; the special power, pre-eminence, or privilege which the king has, over and above other persons, in right of his crown. *Cowel.* It is but little used of any distinctive rights known in the United States, though it sometimes occurs in general expressions, as in saying that a person vested with an office is entitled to all the rights, privileges, prerogatives, &c., which belong to it.

Prerogative — from *præ* and *rogo*, to ask or demand, before or above others — is a word of large extent, including all the rights which, by law, the king hath as chief of the kingdom, and as intrusted with the execution of the laws. *Jacob.*

Prerogative court. The name of an ecclesiastical court in England, established for the trial of all testamentary causes where the deceased had left *bona notabilia* (q. v.) within two different dioceses; in which case the probate of his will belonged to the archbishop of the province. All causes relating to wills, administrations, or legacies of such persons were originally cognizable therein before a judge appointed by the archbishop, called the judge of the prerogative court. This jurisdiction was transferred to the court of probate (*q. v.*), which, by the judicature acts, 1873 and 1875, is itself merged in the supreme court of judicature.

In New Jersey, the prerogative court is the court of appeal from decrees of the orphans' courts in the several counties of the state. The court is held before the chancellor, under the title of the ordinary.

Prerogative writ. Several of the great common-law writs, particularly *mandamus*, prohibition, *quo warranto*, *habeas corpus*, and *certiorari*, have been called prerogative writs, because, as employed in England, they involved, originally, an exercise of the extraordinary powers of the crown. They differ from other writs mainly in two points: they do not issue as of mere course, nor without some probable cause being shown why the extraordinary powers of the crown should be called in to the party's assistance. They are generally directed not to a sheriff or other public officer, but to the parties themselves, whose acts are the subject of complaint. (3 *Bl. Com.* 132; 3 *Steph. Com.* 629.) So far as the expression that *mandamus* or other writ is a prerogative writ, can be used in the United States with any distinct meaning other than that of mere historical reference, the sense is, that the writ does not issue as of right, but in the exercise of

a high judicial discretion; the court is not bound to grant it, but holds the power to do so, subject to considerations of the general public welfare. But the cases proper for issue of these writs have been so largely defined by statutes, that the doctrine of judicial discretion in using them is greatly abridged.

PRESBYTER. An elder, priest, or dignitary in some denominations of the church. It is a legal dignity in the Established Church of Scotland.

Presbyterium. That part of the church where divine offices are performed; formerly applied to the choir or chancel, because it was the place appropriated to the bishop, priest, and other clergy, while the laity were confined to the body of the church. *Jacob.*

Presbytery. In the Established Church of Scotland, a presbytery for a given district (which district is technically called "the bounds of the presbytery") is composed of the parochial ministers, together with one lay elder selected from the kirk-session of each parish within the district, along with the professors of divinity (being ministers) of any university within such district. The number of parishes of which different presbyteries consist is arbitrary, and varies greatly in different instances. Each presbytery holds its meetings at stated times, which are presided over by its moderator. Presbyteries are invested with a certain secular, as well as with a spiritual, jurisdiction. They are entitled to bring actions to recover property destined for the sustentation of the ministers, or otherwise claimed on behalf of the church, and to enforce upon the heritors the statutory burden of providing manses and glebes for the parish ministers, and maintaining the same in repair. *Dunc. Parochial Eccl. Law.*

PRESCRIBE. To assert a right or title to the enjoyment of a thing, on the ground of having hitherto had the uninterrupted and immemorial enjoyment of it. Prescription: a title which a person acquires to incorporeal hereditaments by long and continued possession. This species of title is founded on the presumption — allowed, from reasons of public policy, to prevail somewhat beyond actual probabilities — that he who has had a quiet and uninterrupted possession of any thing for a long period of years had originally a just right, without which he could not have been suffered to continue in the enjoyment of it. The terms prescribe and prescription are freely used in the law of Louisiana; in many other states, the same doctrine or acquisition is more often called title by adverse possession, or by the statute of limitations. The former corresponds to the acquisitive or positive prescription of the books; the latter, to what is called negative prescription.

Prescription is a title acquired by use and time, and allowed by law; as when a man claims any thing because he, his ancestors, or they whose estate he hath, have had or used it all the time, whereof no memory is to the contrary; or it is where, for continuance of time, *ultra memoriam hominis*, a particular person hath a particular right against another.

Custom is properly a local usage, and not annexed to any person, while prescription is merely a personal usage; as that such an one and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. For example, if there is a usage in the parish of Dale that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation, this is strictly a custom; for it is applied to the place in general, and not to any particular persons; but if the tenant who is seised of the manor of Dale in fee alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in a particular close, this is properly called a prescription; for this is an usage annexed to the person of the owner of the estate. (2 *Bl. Com.* ch. 17.) The difference between prescription, custom, and usage is also thus stated: Prescription hath respect to a certain person who, by intendment, may have continuance for ever; as, for instance, he and all they whose estate he hath in such a thing, — this is a prescription; while custom is local, and always applied to a certain place, and is common to all; while usage differs from both, for it may be either to persons or places. *Jacob.*

Prescription and custom are frequently confounded, in common parlance, arising perhaps from the fact that immemorial usage was essential to both of them; but, strictly, they materially differ from one another, in that custom is properly a local, impersonal usage, such as borough-English or postremogeniture, which is annexed to a given estate; while prescription is simply personal, as that a certain man and his ancestors, or those whose estate he enjoys, have immemorially exercised a right of pasture-common in a certain parish. Again, prescription has its origin in a grant, evidenced by usage, and is allowed on account of its loss, either actual or supposed, and therefore only those things can be prescribed for which could be raised by a grant previously to Stat. 8 & 9 Vict. ch. 106, § 2; but this principle does not necessarily hold in the case of a custom. *Wharton.*

Præscriptio, in the Roman law, was an

exception written in front of the plaintiff's pleading. Afterwards, the word became applied exclusively to the *præscriptio longi temporis*, &c., or the prescription founded on length of possession. (*Sand. Just.* 47, 126.) Hence its modern meaning. It was allowed by way of equitable plea where a defendant, sued in reference to the possession of property, had complied with the main conditions of usucaption, without having acquired ownership by usucaption.

Prescription at common law, as defined by Blackstone, is where a man can show no other title to what he claims than that he, and those under whom he claims, have immemorially used and enjoyed it. The difference between prescription and custom is, that custom is a local usage, and not annexed to any person; whereas prescription is a personal usage. Prescription may, perhaps, in this sense, be called positive or acquisitive, and defined as the presumption of a grant arising from long usage. (2 *Bl. Com.* 263–266; 1 *Steph. Com.* 685–689.) But, in England, the subject of prescription is now regulated by the prescription act, 1832 (2 & 3 Wm. IV. ch. 71), which provides that a thirty years' enjoyment of rights of common, and other profits or benefits, to be taken or enjoyed upon any land, shall no longer be defeated by proof that the enjoyment commenced at a period subsequent to legal memory, and that a prescriptive claim of sixty years' enjoyment shall be absolute and indefeasible, except by proof that such enjoyment took place under some deed, or written consent or agreement. In the case of ways, easements, and watercourses, the periods are twenty and forty years respectively; in the case of lights, the period is twenty years. Thus it properly applies to incorporeal hereditaments only. (2 *Bl. Com.* 264. See *Austin Jur.* lect. 26.) For a prescription is the presumption of a grant; and, until recently, none but incorporeal hereditaments could pass by grant, though by some writers, and especially by Cowel, it is extended to any right, privilege, exemption, or immunity arising from lapse of time. *Mozley & W.*

There are two kinds of prescription, — negative, which relates to realty or corporeal hereditaments, whereby an uninterrupted possession for a given time gives the occupier a valid and unassailable title, by depriving all claimants of every stale right and deferred litigation, now mainly governed by 3 & 4 Wm. IV. ch. 27; and positive, which relates to incorporeal hereditaments, and originated at the common law from immemorial or long usage only. Positive prescription is subdivided into that which has been exercised by a person and his ancestors, or by a body corporate and their predecessors, and is a personal right; and that which has been attached to the ownership of a certain estate, and is only exercisable by those seised of the fee-simple of such estate, technically denominated a prescription in a *que* estate. Positive prescription has been greatly modified by the statutes 2 & 3 Wm. IV. ch. 71; 2 & 3 Wm. IV. ch. 100; and 4 & 5 Wm. IV. ch. 88. *Wharton.*

PRESCRIBED. The words "prescribed by law" mean governed by actual legislation upon the subject, and in no just sense can be extended to a permission given to the courts to declare rules. Exline *v.* Smith, 5 *Cal.* 112.

PRESENCE. A question to a witness as to what was said "in the presence" of a person is not objectionable on the ground that explicit proof that it was said in his hearing is necessary. What is said in a person's presence may be presumed to have been in his hearing. Hochreiter *v.* People, 1 *Keyes*, 66.

When obscene and vulgar language is used in the hearing of a female, the words are used in the "presence" of a female, within the meaning of a statute punishing the use of obscene and vulgar language in the presence of a female, without provocation. Brady *v.* State, 48 *Ga.* 311.

PRESENT, *adj.* A bequest in a will to testator's present attendant physician imports a bequest to the physician attending the testator at the date of the will. Everett *v.* Carr, 59 *Me.* 325.

Present use. A use of land which may be enjoyed now, as opposed to a future use. *Mozley & W.*

PRESENT, *v.* 1. In ecclesiastical law, to offer a clerk to the bishop of the diocese to be instituted. Presentation: the act of a patron offering his clerk to the bishop of the diocese to be instituted in a church or benefice. Presentee: a clerk who has been presented by his patron to a bishop, in order to be instituted in a church. Presentor appears not to be in use.

Presentation is the offering a person to the ordinary, to be instituted to a benefice. It must be in writing (Stat. 29 Car. II. ch. 3), and is in the nature of letters-missive to the ordinary. The right of presentation is sometimes confounded with the right of nomination; but presentation is the offering a person to the bishop, while nomination is the offering such a person to the patron. These two rights may coexist in different persons; thus, where the advowson is vested in trustees, they have the right of presentation, while the right of nomination is in the *cestui que trust*. So, in the case of a mortgage of an advowson, the mortgagee has the right of presentation, while the mortgagor has the right of nomination. *Wharton.*

2. In criminal law, to find or represent judicially; used of the official act of a grand jury in making known, of their own motion, and without a com-

plaint from an injured party, certain offences.

Presentment was once used for presentation to a church. In its more modern and now usual sense, it signifies a denunciation of jurors, or some officers, &c. (without any information), of an offence, inquirable in the court where it is exhibited; or, in other words, an information made by the jury in a court, before a judge who hath authority to punish an offence. It is drawn up by the jury, and differs in this from an indictment, which is drawn up at large, and brought engrossed to the grand jury to find. The term sometimes includes not only presentments, properly so called, but also inquisitions of office, and indictments by a grand jury; but, properly speaking, a presentment is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king. *Tomlins.*

The term presentment has various significations. In its relation to criminal matters it signifies the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel, and the like, upon which the officer of the court must afterwards frame an indictment before the party presented can be put to answer it. As used in reference to admissions to copyholds, the word signifies an information made by the homage or jury of a court baron to the lord, by way of instruction, to give the lord notice of the surrender and of what has been transacted out of court. (5 *Cruise Dig.* 502.) But the necessity of the latter presentment has been abolished by Stat. 4 & 5 Vict. ch. 35. *Brown.*

In its limited sense, a presentment is a statement by the grand jury of an offence from their own knowledge, without any bill of indictment laid before them, setting forth the name of the party, place of abode, and the offence committed, informally, upon which the officer of the court afterwards frames an indictment. Collins *v.* State, 13 *Fla.* 651, 663.

Presentment of a bill of exchange. The offering of a bill to the drawee, for acceptance, or to the acceptor, for payment.

PRESENTLY. Immediately; now; at once. A word applicable to a right which may be exercised at once, as opposed to one in reversion or remainder.

PRESENTS. A word in a deed signifying the deed itself, which is expressed by the phrase "these presents." It is especially used in a deed-poll, which cannot be described as "this indenture." Burrill explains that it is taken immediately from the Latin *præsentes*, which was used with *literæ*, as formal words of description in the old conveyances. *Omnibus ad quos* præsentes literæ *pervenerint*, *salutem*, — to all to whom the present letters shall come, greeting. The word *literæ* was sometimes suppressed; thus, *pateat universis per* præsentes. This led to the use of *præsentes* as a substantive, and ultimately to the English word presents, in its plural form: "know all men by these presents."

PRESIDE. A constitutional provision, prescribing that in a certain court a specified judge shall "preside," does not absolutely require associates to act with the presiding justice in holding courts of oyer and terminer, but leaves the legislature free to change the constitution of the court as deemed expedient, with the single limitation that such a justice shall preside. A judge may "preside," whether sitting as a sole judge or as one of several judges. Smith *v.* People, 47 *N. Y.* 330.

PRESIDENT. A usual title of the chief officer of an assembly, board, corporation, or other collective body.

The powers and duties of such officer vary with the law governing the organization of the body over which he presides, and are not definitely indicated by the name.

President of the United States of America. The official title of the chief executive officer of the Federal government in the United States.

PRESS. As to liberty of the press, see LIBERTY.

PREST. A duty in money that was to be paid by the sheriff on his account, in the exchequer, or for money left or remaining in his hands. *Wharton.*

Prest-money. A payment which binds those who receive it to be ready at all times appointed, being meant especially of soldiers. *Cowel*

Prestation-money. A sum of money paid by archdeacons yearly to their bishop; also purveyance. *Wharton.*

Prestimony, or præstimonia. A fund or revenue appropriated by the founder for the subsistence of a priest, without being erected into any title or benefice, chapel, prebend, or priory, and which is not subject to the ordinary, but of which the patron, and those who have a right from him, are the collators. *Canon Law.*

PRESUME. To presume, in the judicial sense, seems to mean to determine a question as to which conclusive evidence is not produced, either by the

probabilities inferred from such evidence as is exhibited, or by some rule of public policy or positive law. Presumption is an act of deciding, or a rule for deciding, a question which the direct evidence leaves doubtful, by consideration of the probabilities, or in obedience to a rule of law deemed best adapted to determine questions of that nature.

It is unfortunate that there are not two distinct names in use for what are known as presumptions *of law* and presumptions *of fact;* for the difference in their nature and grounds is marked and important. The latter class are founded on actual probability. Some evidence having been introduced, it is found, on consideration, to be feeble and inconclusive; nevertheless, it raises a probability, the mind inclines to infer from it a certain fact; hence, if nothing to the contrary can be proved, the controversy may often (in civil cases more particularly) be decided by assuming the probable fact to be true. Presumptions of this class have only a *prima facie* operation; they may be, in general, rebutted by counter-evidence of facts establishing a different probability.

But it is impossible to sustain the doctrine of presumptions of law on the theory that they rest on a probability of fact. The presumption of title founded on twenty years' adverse possession; the presumption of payment of a simple-contract debt more than six years old; the presumption of incapacity to commit crime, in an infant under seven years; and numerous similar rules, — do not rest on a mere probability in each case that the fact is as the rule would have it, but are peremptory rules of law, resting on authority, judicial or legislative, established for the sake of securing peace and quieting litigation, and just as applicable and controlling when the circumstances of the case indicate a counter-probability.

Presume and intend, presumption and intendment, are nearly interchangeable terms.

A presumption is that which is presumed or believed in the absence of any direct evidence to the contrary. Legitimate presumptions have been denominated violent or probable, according to the amount of weight which attaches to them. Such presumptions as are drawn from inadequate grounds are termed light or rash presumptions. *Brown.*

Presumptions are divided into *præsumptiones juris et de jure*, otherwise called irrebuttable presumptions (often, but not necessarily, fictitious), which the law will not suffer to be rebutted by any counter-evidence; as, that an infant under seven years is not responsible for his actions; *præsumptiones juris tantum*, which hold good in the absence of counter-evidence, but against which counter-evidence may be admitted; and *præsumptiones hominis*, which are not necessarily conclusive, though no proof to the contrary be adduced. (*Aust. Jur.* lect. 26; 3 *Steph. Com.* 545, note; *Pow. Evid.* 4th ed. 70.) *Mozley & W.*

The principle of the law, that every man (including a prisoner brought up for trial) is to be presumed innocent till his guilt is established, cannot, of course, mean that we are to take for granted he is innocent; for, if that were the case, he would be entitled to immediate liberation: nor does it mean that it is antecedently more likely than not that he is innocent, or that the majority of those brought to trial are so. According to the most correct use of the term, a presumption in favor of any supposition means not a preponderance of probability in its favor, but such a preoccupation of the ground as implies that the rule presumed must stand good till some sufficient reason is adduced against it. It evidently means only that the burden of proof lies with the accusers; that the accused is not to be called on to prove his innocence, or to be dealt with as a criminal, till they have done so; but that they are to bring their charges against him, which, if he can repel, he stands acquitted. *Wharton*, citing *Whately Rhet.* Pt. I. ch. 3, § 2.

Presumptions are consequences which the law or judge draws from a fact known to a fact unknown. Presumptions not established by law are left to the judgment and discretion of the judge. Cronau *v.* New Orleans, 16 *La. Ann.* 374.

A presumption is an inference as to the existence of a fact not known, arising from its connection with the facts that are known, and founded upon a knowledge of human nature and the motives which are known to influence human conduct. Jackson *v.* Warford, 7 *Wend.* 62.

Presumptive evidence. Evidence which inclines but does not control belief; probable but not conclusive proof; evidence which, although believed, is not necessarily conclusive as to the fact in issue, but from which, according to the ordinary course of human affairs, the existence of that fact might be presumed.

PRETENCE. See FALSE PRETENCE.

Pretences. Allegations sometimes

made in a bill in chancery for the purpose of negativing an anticipated defence. *Hunt Eq.* Pt. I. ch. 1.

Pretended or pretensed right or title. A right or title to land set up by one who is out of possession against the person in possession. *Cowel.* The Stat. 32 Hen. VIII. ch. 9, forbids the sale of a pretended right or title to land, unless the vendor has received the profits for one whole year before the grant, or has been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. 4 *Bl. Com.* 136; 4 *Steph. Com.* 237. Similar statutes prevail in most of the states.

PRETIUM. Price.

In the civil law, it signified the price of a thing sold, and properly consisted in counted money.

Pretium affectionis. The price of affection. A price or value placed upon a thing or estate by the owner, beyond the just value, on account of his affection for it.

Pretium periculi. The price of the risk; the payment in consideration of which the risk is undertaken. Such is the premium paid on a policy of insurance, either on a life or against fire, which varies in amount according to the nature of the risk. So, also, the interest paid in money advanced on bottomry or *respondentia* partakes more of the character of a *pretium periculi*, or premium, than mere interest for the loan of money, because, if the ship on which it is advanced is lost, the lender loses his right to claim the capital sum lent. *Trayn. Max.*

Pretium succedit in locum rei. The price succeeds in place of the thing; *i.e.*, of the subject-matter sold.

PREVAIL. To be a prevailing party, within the meaning of a statute entitling such party to costs on appeal, does not depend on the amount recovered. A railroad corporation, appealing from commissioner's assessment of location damages, is the losing party, if any damages at all are returned by the jury. Bangor, &c. R. R. Co. *v.* Chamberlain, 60 *Me.* 285.

"Prevailing party," in statutes awarding costs, applies to a plaintiff mortgagor who obtains not the judgment claimed, but an order requiring a credit to be entered by the defendant mortgagee, which had not been previously allowed. Hawkins *v.* Nowland, 53 *Mo.* 328.

A city obtaining a verdict of condemnation, that the value of the ground was just equal to the benefits to the owner, is the "prevailing party" entitled to costs. The constitutional right to just compensation for private property taken for public use is like all other constitutional rights which may sometimes require expenditure to secure their enforcement. Rogers *v.* City of St. Charles, 54 *Mo.* 229.

The term includes a creditor recovering any sum on appeal from an allowance of his claim by commissioners of insolvency, though less than the original amount. Henry *v.* Miller, 61 *Me.* 105.

It applies to a complainant who has prevailed on the main issue, though not to the full extent of his claim, yet to a greater extent than admitted by the defendant; as, for instance, upon the proportions of water of a mill privilege to which the parties were respectively entitled. Weston *v.* Cushing, 45 *Vt.* 531.

PREVENT. To deter from happening; to make impossible; to preclude.

Prevention: the act or precaution of making something impossible, or precluding its occurrence. Preventive: that which aids or tends to prevent.

Prevention of crimes act. The Stat. 34 & 35 Vict. ch. 112, passed for the purpose of securing a better supervision over habitual criminals. This act provides that a person who is for a second time convicted of crime, may, on his second conviction, be subjected to police supervision for a period of seven years after the expiration of the punishment awarded him. Penalties are imposed on lodging-house keepers, &c, for harboring thieves or reputed thieves. There are also provisions relating to receivers in stolen property, and dealers in old metals who purchase the same in small quantities. This act repeals the habitual criminals act of 1869 (32 & 33 Vict. ch. 99). *Brown.*

Preventive justice, is that portion of law which has reference to the direct prevention of offences. It generally consists in obliging those persons, whom there is probable ground to suspect of future misbehavior, to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities to keep the peace, or for their good behavior. See 4 *Bl. Com.* 251; 4 *Steph. Com.* 290; *Oke Mag. Syn.* 1473–1477.

Preventive service. A name applied to a branch of the customs service in England charged with active measures

to frustrate or preclude the plans and devices of smugglers.

PREVIOUS QUESTION. There are several motions which give rise to questions previous in their nature to other questions to which they relate; but the term "previous" has been applied exclusively to a motion denominated the previous question, which has for its object the suppression of a principal motion or question. This motion was introduced into the house of commons of England more than two centuries ago, for the purpose of suppressing subjects of a delicate nature relating to high personages, or the discussion of which might call forth observations of an injurious tendency. When first made use of, the form of the motion was: *shall the main question be put?* And the effect of a decision of it in the negative was to suppress the main question for the whole session. The form was afterwards changed to that which it has at present; viz., *shall the main question be now put?* And the effect of a negative decision of it, now, is to suppress the main question for the residue of the day only.

But the previous question may be decided in the affirmative as well as the negative; that is, that the main question shall now be put, — in which case that question is to be put immediately, without any further debate, and in the form in which it then exists. This operation of the previous question (when ordered) has led to a use of it for the purpose of suppressing debate on a principal question, and coming to a vote upon it immediately; and this is ordinarily the only object of the previous question, as made use of in the legislative assemblies of the United States. The operation of a negative decision is different in different assemblies: in some, it disposes of the main question by suppressing it, or removing it from before the house for the day; in others, it leaves the main question under debate, to be disposed of in some other manner.

In England, the previous question is used only for suppressing a main question. The object of the mover is to obtain a decision of it in the negative; and the effect of such a decision is practically to dispose of the subject altogether. In this country, the previous question is used chiefly for suppressing debate on a main question. The object of the mover is to obtain a decision of it in the affirmative; and the effect of a negative decision is, in general, merely to suspend the taking of the question (not the debate) for that day. The operation of an affirmative decision is the same in both countries; viz., the putting of the main question immediately, and without further debate, delay, or consideration. See *Cushing's Man.*

When upon any question in parliament there is no debate, or after a debate is closed, the speaker ordinarily puts the question, as a matter of course, without any direction from the house; but, by a motion for the previous question, this act of the speaker may be intercepted and forbidden. The question, whether the original question be put, is called the previous question; because, if once moved, it is put before the main question can be put. In the commons, the words of the motion are that the main question he now put; and those who propose it vote against their own motion, in order to avoid the putting of the main question. If the previous question be put and resolved in the affirmative, then the main question must be put at once to the vote. *Mozley & W.*

PRICE. Does not necessarily imply a sale for money. It is true that "price" generally means the sum of money which an article is sold for; but this is simply because property is generally sold for money, not because the word has necessarily such a restricted meaning. It may mean the equivalent or compensation, in whatever form received, for property sold. The Latin word from which price is derived sometimes means "reward," "value," "estimation," "equivalent;" and Webster shows that "price" is sometimes used in the same sense. Hudson Iron Co. *v.* Alger, 54 *N. Y.* 173.

PRICKING FOR SHERIFFS. The name of an old method of electing the sheriffs of the different counties of England. Originally, the sheriffs were chosen by the people in their folkmote or county court; but these popular elections growing tumultuous, and the crown also seeking to augment its influence in parliament, they were put an end to by 9 Edw. II. st. 2, and it was enacted that the sheriffs should be assigned by the chancellor, treasurer, barons of the exchequer, and by the justices, and, in the absence of the chancellor, by the others, without him; and since the time of Henry VI. it became the custom for these or some of these distinguished and learned persons to meet in the exchequer chamber on the morrow of All Souls, yearly (which day

was latterly altered to the morrow of St. Martin, by the act for abbreviating Michaelmas term, 24 Geo. II. ch. 48, § 12), and then and there to propose three persons to the king (or queen), who afterwards appointed one of them to be the sheriff, and this was done by marking each name with the prick of a pin; and for that reason this particular election was generally termed pricking for sheriffs. *Brown.*

PRICKING NOTE. Where goods intended to be exported are put direct from the station of the warehouse into a ship alongside, the exporter fills up a document to authorize the receiving the goods on board. This document is called a "pricking note," from a practice of pricking holes in the paper corresponding with the number of packages counted into the ship. *Hamel Cust.* 181.

PRIMA. First. A Latin adjective, in feminine gender, which appears in some technical phrases.

Prima facie. On the first appearance; at the first view. A phrase in common use, and of very wide application, generally in a sense easily derived from the literal meaning; most frequently applied to questions of evidence.

A litigating party is said to have a *prima facie* case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side. In some cases, the only question to be considered is whether there is a *prima facie* case or no. Thus a grand jury are bound to find a true bill of indictment, if the evidence before them creates a *prima facie* case against the accused; and for this purpose, therefore, it is not necessary for them to hear the evidence for the defence. *Mozley & W.*

Prima facie evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be accredited by the jury, unless it be rebutted, or the contrary proved; *conclusive* evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. 1 *Stark. Evid.* 544.

"*Prima facie* evidence" is evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. Emmons *v.* Westfield Bank, 97 *Mass.* 230.

Primæ impressionis. Of the first impression. This term is applied to a case which has not before occurred, or to a question of law raised for the first time.

PRIMAGE. A certain allowance paid by the shipper or consignee of goods to the mariners and master of a vessel for loading her. *Wharton; Cowel.*

A duty at the water-side, due to the master and mariners of a ship: to the master, for the use of his cables and ropes, to discharge the goods of the merchant; and to the mariners, for lading and unlading in any port or haven. It is usually about twelvepence per ton, or sixpence per pack or bale, according to custom. *Merch. Dict.; Jacob.*

A small payment made to the master of a vessel for his personal care and trouble, which he is to receive in addition to his wages or salary, to his own use, unless he has otherwise agreed with his employers. This payment is that intended in the phrase, "with primage and average accustomed." It appears to be of very ancient date; and in the old books is sometimes called "hat money," and also "*la contribution des chausses, ou pot de vin du maître.*" *Abbot Shipp. by Shee,* 404; *Maude & P. Merch. Ship.* 88; *Kay Law of Shipm.*

PRIMARY. First; chief; leading.

Primary allegation. The opening pleading in a suit in the ecclesiastical court; it is also called a "primary plea." See *Coote Eccl. Prac.*

Primary conveyances, as opposed to derivative conveyances, are conveyances which take effect by an independent vigor and operation, and not by way of enlarging, confirming, altering, or otherwise affecting other conveyances. (2 *Bl. Com.* 309; 1 *Steph. Com.* 517, 518.) The term is usually considered to include feoffments, grants, gifts, leases, exchanges, partitions.

Primary evidence. That evidence which the nature of the case or question suggests as the proper means of ascertaining the truth.

The phrase, best and secondary evidence, often used, is less accurate in its suggestion than primary and secondary. For the evidence which the party is required to produce, or account for, is not always better than other kinds; that is, more convincing. The true rule is, that the party shall adduce the natural evidence, — the evidence which the nature of the case suggests as the legitimate and proper means of proof, — or shall account for its absence, before he may resort to means which in their nature are less direct. And the reason is, not

that the less direct or secondary evidence is always inferior or feebler, or that the court is satisfied to accept inferior evidence because the better cannot be had, but that any suppression or withholding of the natural legitimate proofs throws suspicion upon the party's case, — warrants the inference that, if it were produced, it would tell against him. "Primary" is considered to express this idea more clearly than "best."

PRIMATE. A title by which some of the archbishops in the English church are distinguished.

Primate of all England. An ecclesiastical title belonging to the archbishop of Canterbury, who is styled "primate of all England and metropolitan." Anciently, indeed, he had primary jurisdiction, not only over all England, but in Ireland too; and it was from him that the Irish bishops received consecration, for Ireland had no other archbishop till the year 1152; and the archbishop of Canterbury was then denominated *orbis Britannici pontifex*. But for a long period, up to a recent date, Ireland had four archbishops, one for each of the four provinces of Armagh, Dublin, Cashel, and Tuam, all of whom were distinguished by the title of primate; but, by the recent Stats. 3 & 4 Wm. IV. ch. 37, and 4 & 5 Wm. IV. ch. 90, the number was diminished to two, the two others being reduced to the rank of bishops; and, by a still more recent act (32 & 33 Vict. ch. 42), the entire English hierarchy in Ireland has been abolished. The archbishop of York is sometimes styled primate of England. See *Burns Eccl. Law, by Phillimore*.

PRIMER. A law-French word signifying first; primary.

Primer fine. On the levying of a fine when the writ of covenant was sued out, there was due to the king, by ancient prerogative, a sum of money called primer fine, being a noble for every five marks of land sued for. It was so called because there was another fine payable afterwards, which was termed the post fine. *Brown.*

Primer seisin. During the feudal tenures, when any of the king's tenants *in capite* died seised of lands or tenements, the crown was entitled to receive of the heir, if he were of full age, a sum of money amounting to one whole year's profits of the lands, which was termed primer seisin, *i.e.* first possession. 1 *Cruise Dig.* 31; 2 *Coke Inst.* 134.

PRIMOGENITURE. Eldership; seniority; state of being the first-born; the superior title of an elder son in right of his earlier birth; the right of the eldest son to inherit his ancestor's estates to the exclusion of the younger sons.

The canon of descent, in England, is "that, where there are two or more males, in equal degree, the oldest only shall inherit." *Litt.* § 5. The law of primogeniture became generally established in England in the reign of Henry III., in which reign, also, the lineal descent of the crown to the infant issue of an elder brother, in preference to a younger brother of full age, was established. The county of Kent is deemed an exception, theoretically, to the rule of primogeniture.

PRINCIPAL. 1. In the law of agency, the employer of an agent; the person from whom an attorney receives his appointment and powers.

2. In the law of guaranty and suretyship, the principal is the person primarily liable, and for whose performance of his obligation the guarantor or surety has become bound; the original debtor.

3. In crimes, a principal is an actor in a crime, as distinguished from one who merely assists or promotes it, in a secondary capacity, and is called accessory, *q. v.* Principals in crimes are of the first degree, including any one who is actual perpetrator, and of the second degree, including those who are present aiding and abetting its commission.

A criminal offender is either a principal or an accessory. A principal is either the actor (*i.e.* the actual perpetrator of the crime), or else is present, aiding and abetting the fact to be done; an accessory is he who is not the chief actor in the offence, nor yet present at its performance, but is some way concerned therein, either before or after the fact committed. 1 *Hale P. C.* 613, 618.

4. In the law of property, principal is used to distinguish a chief or more important subject around which others are gathered, or to which they are incident or appurtenant; as in saying that the accessory passes by a grant of the principal.

5. In the law of debtor and creditor, principal is the outset sum loaned, — the original debt, — as distinguished from accretions by interest, commissions, costs of court, &c.

6. An heirloom, mortuary, or corse-present. *Wharton.*

Principal cause, or challenge. A

challenge to a juror for a cause which carries with it, *prima facie*, evident marks of suspicion, either of malice or favor, — as that a juror is of kin to either party within the ninth degree, that he has an interest in the cause, &c., — is called a principal challenge, or challenge for principal cause. See 3 *Bl. Com.* 363.

Principal obligation. 1. Where there are two obligations connected, one is sometimes so prominent, and the other so dependent upon it, that the leading one is called the principal obligation, and the other an accessory or incident.

Bouvier cites from Pothier a lucid example, that, in the sale of a horse, the principal obligation of the seller is to deliver the horse; the obligation to take care of him till delivered is an accessory engagement.

2. The indebtedness for which one becomes surety is sometimes called, in contrast to the surety's undertaking, the principal obligation.

Principia probant : non probantur. Principles prove: they are not proved. Fundamental principles do not require proof.

PRINCIPLE. In the patent law, the principle of a machine is the particular means of producing a given result by a mechanical contrivance. Parker *v.* Stiles, 5 *McLean*, 44, 63; s. c. 7 *West. Law J.* 168. The term does not mean a new mechanical power : none such have been discovered for centuries. That is a principle which applies, modifies, or combines mechanical powers to produce a certain result. Smith *v.* Pearce, 2 *McLean*, 176. Where two machines or things are made to operate substantially in the same way, so as to produce the same result, they are considered the same in principle. Thus, where any of the mechanical powers, the lever, screw, wheel, &c., are used to accomplish certain purposes, the same powers being used, the fact that they are used in a somewhat different form to do the same thing will not constitute a difference in principle. Whether the mechanical instruments be larger or smaller, whether their action be horizontal or vertical, the principle is the same. Roberts *v.* Ward, 4 *McLean*, 565.

As to what constitutes the "principle" of a machine, see also Le Roy *v.* Tatham, 22 *How.* 132, and Tatham *v.* Le Roy, 2 *Blatchf.* 474.

PRINT. The term a print, in the act of congress of Feb. 3, 1831, authorizing a print to be copyrighted, does not include a photograph. Wood *v.* Abbott, 5 *Blatchf.* 325.

Prior tempore potior jure. The earlier in time is preferred in right; priority gives precedence. He has the better title who was first in point of time. The right of property in treasure-trove, in wreck, derelicts, waifs, and estrays, being *bona vacantia*, depends on this maxim. The first occupant has the best right.

The finder of a chattel, lying apparently without an owner, may acquire a special property therein. An execution creditor who first delivers his writ of execution to the proper officer is entitled to have it first executed. The original inventor of a machine who first brings his invention into actual use is entitled to priority as patentee, so that a subsequent original inventor will be unable to avail himself of his invention; and the right of an author depends on the same principle as that of a patentee, viz., priority of invention or composition and publication. *Broom Max.* 362–364. The principle is also adopted in the various statutes in the United States, which give to a conveyance first put upon record priority over others subsequently recorded, without regard to the dates of the conveyances; and it is very generally applied in determining questions of priority between liens upon the same subject-matter.

PRIORITY. 1. A legal precedence or preference; as in saying that certain debts are paid in priority to others, or that certain incumbrances of an estate are allowed priority over others; that is, they are to be allowed to satisfy their claims out of the estate before the others can be admitted to any share therein, &c.

2. In old English law, an antiquity of tenure, in comparison with one not so ancient. *Cowel.*

PRISON. A general term for all the various buildings maintained for the

confinement of persons in judicial custody. Prisoner: a person confined in the course of the administration of justice.

As to any distinction between prison and jail, see JAIL; and for the derivation and history of the word, see *Burrill*, tit. Gaol; Prison.

Prison includes lawful places for custody of persons arrested or taken in execution for debt; persons arrested on charge of crime, and awaiting trial, or pending trial; persons sentenced to imprisonment by way of punishment for crime, or to await execution of the death penalty; persons held under charge or conviction of contempt, or for extradition; and perhaps persons detained as witnesses. See *Bouvier*. A prison may be used for other confinements, as for the protection of an individual from a mob; for temporary detention of a lunatic: but in such uses the buildings are not used as prisons. An individual may be domiciled within the building, yet not be "in prison;" as the warden or turnkey. Prisons are to be distinguished from asylums and some other places of lawful confinement, where the individual is kept in custody, but not in the course of the administration of justice; also, from any private place where persons are confined without authority of law.

The distinction between the abstract idea of confinement for purposes of justice, and the concrete notion of a building, must be still more strongly drawn in defining the word prisoner. He is not necessarily a person held in a prison, but may be one restrained of his liberty upon any judicial proceeding, civil or criminal, or upon commitment. A person deprived by legal warrant of his liberty is equally a prisoner when detained in the open field, or in the street, or in his own house, as when kept in a prison, strictly so called. See *Cowel; Termes de la Ley*. A person charged in execution, though allowed to go upon the limits, is a prisoner. Coman *v.* Storm, 1 *Robt.* 705.

Prisoner at the bar. An accused person, brought from jail before the court for his trial, is called, while the trial proceeds, the prisoner at the bar.

Prisoner of war. A member of one of two nations at war, who, while acting within belligerent rights, is captured by the forces of the other nation.

Prison breach, or breaking. Bouvier defines it as the act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody. We think it is also sometimes used as including the offence of breaking into a lawful place of confinement to rescue the persons there held.

PRIVATE. In most of the uses of this word in jurisprudence it means affecting or belonging to individuals, as distinguished from that which concerns the whole community, or is public property. The sense of concealed, secret, is not prominent; though it appears sometimes. On the distinction between "private" and "public," see also PUBLIC.

Private act, or statute. An enactment which does not affect the public at large, but bears upon individuals only; such as an act changing a person's name; an act settling the title to, or authorizing sale of, a particular parcel of lands; an act allowing a person's claim against government, and directing payment.

Statutes are generally classified as public and private. The former are universal rules, that apply to the community at large, and of which the courts of law are bound, of themselves, judicially to take notice. The latter are rather exceptions than rules, operate only upon particular persons and private concerns; and the judges need only take notice of them when expressly pleaded.

A private act of parliament has often been resorted to as a mode of transfer by matter of record, to disentangle an estate from a mass of confusion, to unfetter its owner, or to supply careless omissions with which the judicature cannot cope. An estate act, or private act of parliament, rarely, if ever, meddles with the title, but simply leaves it alone; and this is particularly exemplified in enclosure acts, which, while they change the land, do not change the title; for the title which an owner has to his lands, or a common right at the time of allotment or exchange, is communicated to the land he receives under the allotment or exchange, while, under a mere private act of exchange between individuals, each holds the land under the title which at-

tached to these lands prior to the exchange. Such a one may, therefore, be evicted, though the title to the lands he gave in exchange may be perfectly good. The characteristic of enclosure bills, acts for partition, or exchange must be understood to be to make the lands which are received upon allotment, partition, or exchange subject to the same estates and uses as the lands in respect of which the allotment, exchange, or partition was made. *Wharton.*

Private bill. In legislative parlance, is a project of a private act; the draught, as presented in the legislature, of a measure which, when passed, will affect individuals only. The expression is in general use only as respects bills in legislation: there is no distinction of public and private bills of exchange, bills in equity, &c. The mode in which parliament proceeds in passing of public and private bills well illustrates their distinctive characters. In passing public bills, parliament acts strictly in its legislative capacity; it originates the measures which appear for the public good; it conducts inquiries, when necessary, for its own information; and enacts laws according to its own wisdom and judgment. The forms in which its deliberations are conducted are established for its own convenience; and all its proceedings are independent of individual parties, who may petition, indeed, and are sometimes heard by counsel, but who have no direct participation in the conduct of the business, nor immediate influence upon the judgment of parliament. In passing private bills, the parliament still exercises its legislative functions, but its proceedings partake also of a judicial character. The persons whose private interests are to be promoted appear as suitors; while those who apprehend injury are admitted as adverse parties in the suit. All the formalities of a court of justice are maintained; various conditions are required to be observed, and their observance to be strictly proved; and if the parties do not sustain the bill in its progress, by following every regulation and form prescribed, it is not forwarded by the house in which it is pending; and if they abandon it, and no other parties undertake its support, the bill is lost, however sensible the house may be of its value. The analogy which all these circumstances bear to the proceedings of a court of justice is further supported by the payment of fees, which is required of every party supporting or opposing a private bill, or desiring or opposing any particular provisions. *May Parl. Pract.* 626.

Private bridge, building, highway, house, land, library, property, seal, or way. In these expressions, and many others of like nature, the prefix private signifies that the thing mentioned is of individual creation and ownership; it belongs to, and its enjoyment is regulated by the will of, private persons, not public authorities.

Private chapel. Chapels owned by noblemen or privileged persons, and used by themselves and their families, are called private, as opposed to public, chapels, otherwise called chapels of ease, which are built for the accommodation of particular districts within a parish, in ease of the original parish church. See 2 *Steph. Com.* 745.

Private conversation. As used in a statute, forbidding husband or wife to testify as to private conversations with each other, applies to their conversation in the presence of their children not over eleven years of age, and not shown to have paid attention thereto. Jacobs *v.* Hesler, 113 *Mass.* 157.

Private corporation. The line of division between private and public corporations depends upon the constituency of the corporation and ownership of its franchise and capital or property, not upon its uses and purposes. The uses for which a corporation is formed may be of public benefit, yet the corporation be deemed private, by reason that it is organized of individuals, who, as corporators, are owners of the property and rights. If the foundation is private, — that is to say, founded on acceptance of a charter, contribution of means and exercise of powers by individuals associating for the purpose, — then the corporation, although under the charter of the government, is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. The uses may, in a certain sense, be called public; but the corporations are private, as much so, indeed,

as if the franchises were vested in a single person. Dartmouth Coll. *v.* Woodward, 4 *Wheat.* 518, 562.

Thus, generally speaking, public corporations are towns, cities, counties, parishes, existing for purposes of government; while private corporations are such as banks, insurance companies, incorporated roads, canals, bridges, &c., where the stock is owned by individuals, though their uses may be public. And the decisions have treated the term private corporation as extending to colleges, although endowed for the benefit of the public; banks, although government owned a large part of the stock; and academies, although largely supported by the state. See *Abb. Dig. Corp.* tit. Private corporations, Public corporations. So railroad companies are deemed private corporations; although performing many important public functions, and invested with prerogative franchises, to a certain extent, so far as the construction of their works is concerned, they do not possess the same immunity from liability to make compensation for private damage caused by the construction and operation of their works as would be enjoyed by persons in the execution of a strictly public trust for the public benefit. As these companies' works are constructed by private capital for private emolument, the companies are held subject to the ordinary liability of private persons for all such acts as are not expressly or by necessary implication conceded to them, on behalf of the sovereignty, by their charter powers. Tinsman *v.* Belvidere & Delaware R. R. Co., 2 *Dutch.* 148.

A seminary, incorporated for the education of the children of a particular county, governed by trustees designated in the charter and their successors, and intended to be maintained by donations, devises, &c., from individuals as well as from the state, is a private eleemosynary corporation, within the principle that the charter of a private corporation is, in the absence of a reserved power, protected by the constitution of the United States against alteration or repeal by state legislation; while that of a public corporation is subject to a general legislative power. Edwards *v.* Jaggers, 19 *Ind.* 407.

Private examination. By the laws of most of the United States, a married woman, making a deed or mortgage, must go before an officer authorized, and make acknowledgment that she executed the deed freely, and without fear or compulsion from her husband. This must be done on an examination or inquiry by the officer, made of the wife, separate and apart from her husband. Hence it is called a private examination. Such examination and acknowledgment and a certificate thereof, by the officer on the deed, are essential to make it operative as to the wife's interest.

Private expenses. Plate, musical instruments, carriage and horses, and the whole furniture of a house, are not within a permission, granted by articles of partnership, to withdraw the funds of the house only when necessary for private expenses. Stoughton *v.* Lynch, 1 *Johns. Ch.* 467.

Private house. A boarding-house is a private house, not a public house, whether it has boarders or not. Commonwealth *v.* Cuncannon, 3 *Brews.* 344.

Private nuisance, place, purpose, use, or welfare. In these terms and some others of like nature, the idea is not that of ownership, but that the thing mentioned affects or involves individuals only, and not the general public.

Private person. An individual holding no office.

Private person, in 2 Rev. Stat. 678, § 59, relative to embezzlement, does not include a person holding moneys in an official capacity; *e.g.*, a county superintendent of poor. Coats *v.* People, 22 *N. Y.* 245.

PRIVATEER. A vessel owned and fitted out as individual property, and navigated in its owner's interest, but authorized by the sovereign power to cruise for and capture vessels of a country with whom such power is at war.

The employment of such vessels as a means of strengthening an inadequate navy was formerly very common, but has diminished in recent times; partly by the advance in views as to the proper conduct of war, and partly owing to the increased difficulty of fitting out vessels upon private means, adequate to the demands of naval warfare as now conducted.

PRIVEMENT ENCEINTE. Pregnant privately; pregnant, but not visibly so. The term is applied to a woman who is pregnant, but not yet quick with child.

PRIVILEGE. 1. The vernacular sense, and the ordinary meaning in common-law use, are nearly the same, viz. a right or immunity, held by way of exception to the general law; a peculiar or personal authority or exemption; something held in virtue of a private or individual law, as it were; that which is granted or allowed to any person, or any class of persons, either against or beyond the course of the common law.

Jacob says, and Tomlins and Wharton concur, that a privilege is either personal or real. A personal privilege is that which is granted to any person, either against or beyond the course of the common law in other cases, — as, for example, privilege of parliament. A privilege real is that which is granted to a place, as to the universities, that none of either may be called to Westminster Hall, on any contract made within their own precincts, or prosecuted in other courts; and one belonging to the court of chancery cannot be sued in any other court, certain cases excepted. We have not noticed the use of "real privilege," in this sense, in American law.

Privilege, as used in a grant conveying "the privilege of a certain highway," appropriately designates the conveyance of an easement only, as distinguished from a grant of the soil itself. Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 *Allen*, 159.

Privileges, in U. S. const. amend. 14, is comprehensive, and includes all rights pertaining to the person as a citizen of the United States. Coger *v.* North-western Union Packet Co., 37 *Iowa*, 145.

Privilege, as used in the Tennessee constitution of 1870, providing for the taxation of privileges, is a license to do any thing which is prohibited by the general law. Wiltse *v.* State, 8 *Heisk.* 544.

It means something which cannot be enjoyed without legal authority, which is generally evidenced by license. Cate *v.* State, 3 *Sneed*, 120.

The business of a wholesale grocer is a privilege. French *v.* Baker, 4 *Sneed*, 193.

The keeping of a livery stable cannot be taxed as a "privilege," until such occupation has been made a privilege by the legislature. Columbia *v.* Guest, 3 *Head*, 413.

2. In the civil law, privilege has a different and more technical meaning; corresponding nearly to "lien" or to "priority," in common-law jurisprudence. The privilege of a creditor or of a demand is the right to be paid before other demands, or, out of specific property notwithstanding other demands may remain unsatisfied.

Privilege from arrest. An exemption which the law accords to some persons from liability to be arrested. It is a permanent right of ambassadors and public ministers and their families and servants, and in England of the royal family and servants, and of peers and peeresses. It is accorded, temporarily, to members of congress, of state legislatures, and of the house of commons, — that is, during the sessions of their houses, and while going and returning, — and to some other classes, varying in different jurisdictions; but attorneys, solicitors, counsellors, parties and witnesses in attendance on the courts, generally enjoy it. The privilege is not absolute, as respects all causes of arrest; but many of the classes of persons named may be arrested for some of the higher crimes, or to require surety of the peace.

This privilege is an exemption with which the officers named are indulged, from a supposition of law that the stations they fill or the offices they are engaged in are such as require all their time and care, and that, therefore, without this indulgence it would be impracticable to execute such offices to that advantage which the public good requires. The privilege from arrest of an attorney, a witness, or a suitor in court, is a privilege of the court for the due administration of justice, and is to be determined by the court. The privilege from arrest of members of legislative bodies during the session, and for a reasonable time to go and return from the same, is a privilege of the people as well as of the representative, and of the body of which he is a member, and is properly to be judged and determined by the house to which the member belongs; unless in cases of suits in courts against members, when it becomes a proper and necessary subject for the consideration of the courts.

The members of the legislature of a territory being elected by the people, and empowered by the organic law to legislate on all rightful subjects of legislation, while assembled for the purposes of legislation, and for a reasonable time to go and return home from the seat of government, ought

to be considered in reason, and from the nature and dignity of their office, as invested with equal immunities with the members of any other representative body. Anderson *v.* Rountree, 1 *Pinn.* 119.

Privilege of parliament. The privileges of parliament are of three kinds: 1. The privileges which appertain to members individually. 2. Those which belong to either house in its collective capacity. 3. Those of both houses jointly. From well-known precedents, it appears that the lords and commons, acting concurrently, can assume the supreme power whenever the throne is vacant, or the sovereign incapable of exercising the royal functions, as happened at the revolution in 1688; in 1788, when the sovereign authority was offered to the Prince of Wales, though George III. recovered so speedily that a regency became unnecessary; in 1812, when a restricted regency was appointed; and, subsequently, when the restrictions were removed. The separate privileges of either house are extensive, but they are at the same time uncertain and indefinite. Amongst those privileges are, the power of committing individuals to prison; the power of publishing matters which, if not issuing from such high authority, might become the subject of proceedings in a court of law; the power of directing the attorney-general to prosecute persons accused of offences against the law, or affecting the privilege of parliament; and, finally, a power vested in each house respectively, of doing any thing not directly contravening an act of parliament, which may be necessary for the vindication or protection of itself in the exercise of its own constitutional functions. In the daily proceedings of parliament, questions of privilege take precedence of all other business. The privileges of individual members of parliament are, freedom of speech and person, including freedom from legal arrest and seizures, under process from the courts of law or equity; this, however, does not extend to indictable offences, to actual contempts of the courts of justice, or to proceedings in bankruptcy. Members of parliament are exempt from serving the office of sheriff, from obeying subpœnas, and serving on juries. Every member can introduce one person to the strangers' gallery. "Privilege of parliament" continues to peers at all times, and to commoners for a "convenient" time after prorogation and dissolution. Peers are entitled to be present at the coronation of the sovereign; but places were never provided for the commons at that ceremonial, until the reign of William IV. Peers cannot be outlawed in any civil action, nor can any attachment lie against their persons; they are exempt from attending courts-leet or the *posse comitatus;* when arraigned for any criminal offence, it must be before their peers, who return a verdict, not upon oath, but upon honor; they have the privilege of sitting covered in courts of justice; they may vote in parliament by proxy. *Dod. Parl. Comp.*

Privilege of reshipping. The words privilege of reshipping, in a bill of lading, are intended for the benefit of the carrier, but are not regarded as limiting his responsibility, where he does reship. If he does not reship, where an obstacle stops his voyage, the meaning of such a clause may be shown, by parol testimony of a known and established usage to employ such phrase for the benefit of the carrier, and not creating an obligation to reship. Broadwell *v.* Butler, 6 *McLean*, 296.

Privileged communication. 1. In the law of libel and slander, means that the matter communicated, although aspersive and false, is not actionable, for the reason that the circumstances under which it was published or uttered gave the defendant a right to make it known.

The general course of decisions of the New York courts, and of some other jurisdictions, recognizes two classes of privileged communications. In those of one class the privilege is absolute. This class embraces utterances of a member of a legislature in debate, of a judge, counsel, witness, &c., in the course of a judicial proceeding, and some other cases of communications made in the performance of official or legal duty. The courts will not entertain proof of actual malice to sustain the action; but on grounds of public policy, requiring entire freedom in debate, argument, or testimony, refuse to hold the speaker responsible. In another and larger class the privilege is presumptive only. This class embraces communications made in the discharge of social duties; those properly made, where the author has a lawful interest to be promoted by making, or the recipient has one to be served by hearing, them; answers to legitimate inquiries; characters of servants; statements to sellers as to commercial credit of buyers; notices given in protection of one's rights or interests, or execution of any social or corporate duty; and many like instances. In these, the privilege amounts only to throwing on the plaintiff the burden of proving actual malice; if that existed, there is no privilege. The ground of the exemption is, that the party made the communication in good faith. The meaning of the term privileged communica-

tion, in this class of cases, is merely this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, — that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made (2 *Cromp. M. & R. Exch.* 573); or, as expressed in a New York case, "privileged" simply means that the circumstances under which it was made were such as to repel the legal inference of malice. Lewis *v.* Chapman, 16 *N. Y.* 369.

In actions for libel or slander, one of the most common defences is that of privilege, or that the words spoken or written were a privileged communication. The chief grounds of privilege are the following:

That the defendant was the master of the plaintiff, and spoke the words to him while that relation was continuing. (Somerville *v.* Hawkins, 10 *C. B.* 583.)

That the defendant spoke or wrote the words as part of a character, which he was requested to give of the plaintiff. (Fountain *v.* Boodle, 3 *Q. B.* 5, 11.)

That the words were a fair comment upon an author or speaker. (Wason *v.* Walter, *L. R* 4 *Q. B.* 73.)

That the defendant had a pecuniary interest (direct or indirect) in the business, with reference to which the words were spoken. (Coxhead *v.* Rickards, 2 *C. B.* 569.) *Brown.*

Privileged communications are of four kinds: 1. Cases where the author and publisher of the words complained of acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights and interests. 2. Any thing said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hardly they may bear on the party of whom they are used. 4. Publications made in the ordinary mode of parliamentary proceedings; *e.g.*, a petition printed and delivered to the members of a committee appointed by the house of commons to hear and examine grievances. White *v.* Nicholls, 3 *How.* 266.

There are two classes of privileged communications: one, in which the privilege is absolute, *e.g.* for words used in legislative and judicial proceedings; the other, in which defendant may be held liable upon affirmative proof of actual malice, *e.g.* where the words, although a mere private communication, are published under some duty or privilege of confidence. Thorn *v.* Blanchard, 5 *Johns.* 508; Howard *v.* Thompson, 21 *Wend.* 319; O'Donaghue *v.* McGovern, 23 *Id.* 26; Suydam *v.* Moffat, 1 *Sandf.* 459; Warner *v.* Paine, 2 *Id.* 195; Cook *v.* Hill, 3 *Id.* 341.

Words spoken or written in a judicial proceeding, by any person, attorney, or party, having a duty to discharge or an interest to protect, in respect to such proceedings, are absolutely privileged. No action will lie for speaking or writing them, however false, defamatory, or malicious they may be, provided the matter alleged was material to the issue or inquiry before the court. Where the matter is not material or pertinent to the inquiry, the author may be held to answer in damages, unless he can satisfactorily show that he spoke or wrote the words in good faith, without malice, and having reasonable and probable cause to believe they were both true and material. Marsh *v.* Elsworth, 36 *How. Pr.* 532.

There are several occasions on which words may be spoken or written that destroy the implication of malice, which would otherwise arise from the words themselves. Among these privileged occasions is a proceeding in due course of law. A complaint made to a justice of the peace, or other qualified magistrate, for the purpose of enforcing justice against an individual therein accused of crime, does not subject the person making the accusation to an action for slander or libel. Whether the charge was true or false makes no difference; or whether it was sufficient to effect its object or not; if it was made in the due course of a legal or judicial proceeding, it is privileged, and cannot be the foundation of an action for defamation. Hartsock *v.* Reddick, 6 *Blackf.* 255.

Words spoken or written in the regular course of church discipline to or of members of the church, are, among the members themselves, privileged communications, and not actionable, unless express malice in the speaker or writer be proved. But an accusation made by a member of a church, on such occasion, against a person not a member, is not, as to him, a privileged communication. Coombs *v.* Rose, 8 *Blackf.* 155.

2. In the law of evidence, a communication is often called privileged, with the meaning that the person to whom it was made cannot be compelled to disclose it, on examination as a witness in a court of justice.

Matters communicated by a client to an attorney, barrister, counsel, or solicitor have long enjoyed this privilege, and it has been deemed highly important to free administration of justice. A similar protection has been accorded in New York to communications between patient and physician.

Privileged copyhold. In English law, a species of estate having most of

the incidents of a copyhold, but in which the holding is not said to be at the will of the lord. They are otherwise called customary freeholds.

Privileged debt. Those debts which an executor or administrator, an assignee or trustee in bankruptcy or insolvency, &c., may pay in preference to others are sometimes called privileged; such as the funeral expenses, servants' wages, expenses of medical attendance incurred during the illness of the deceased, &c.

Privileged deed. In Scotch law, an instrument in the execution of which certain statutory formalities usually required may be dispensed with, either from necessity or expediency, is called privileged. *Bell; Ersk. Inst.* 3, 2, 22.

Privileged villenage. In feudal law, villein socage.

Privileged villenage is a tenure described by Bracton, in which the services were base, as in villenage, but were certain, as in free and common socage. It seems principally to have prevailed among the tenants of the king's demesnes. *Brown.*

PRIVILEGIUM. A privilege. In Roman law, an exemption conferred or burden imposed upon an individual, peculiar to himself. Also, the enactment creating the exemption or burden. See *Aust. Jur.* lect. 28.

A *privilegium*, in the Roman law, was an act of legislation by which the supreme legislature, whether senate or emperor, conferred on some single person some anomalous or irregular right, or imposed upon some single person some anomalous or irregular obligation, or inflicted on some single person some anomalous or irregular punishment. When such *privilegia* conferred anomalous rights, they were styled favorable. When they imposed anomalous obligations or inflicted anomalous punishments, they were styled odious. An act of the British parliament, giving to the inventor of a machine an exclusive right of selling it, would be styled, in the language of the Roman law, "a favorable privilege." An act of attainder would be styled "an odious privilege." Privilege, in English, denotes rather the anomalous right than the law giving the anomalous right; and, in common and loose talk, the word privilege seems to be merely synonymous with right. *Mozley & W.*

Privilegium clericale. The benefit of clergy, now abolished.

Privilegium est beneficium personale, et extinguitur cum persona. A privilege is a personal benefit, and dies with the person. 3 *Buls.* 8.

Privilegium est quasi privata lex. Privilege is, as it were, a private law. 2 *Buls.* 189.

Privilegium non valet contra rempublicam. Privilege is of no force against the commonwealth. Even necessity does not excuse, where the act to be done is against the commonwealth. *Bacon Max.*

PRIVY. 1. As an adjective (and this is its original force), means connected with; likewise affected; concerned with another; as well conversant or acquainted with something. In a secondary use, it appears as a noun, signifying a person who is connected with another in such way as to be affected as he is, by matter involving estates, rights, liabilities, &c., in which the two are concerned. Privies: persons between whom some connection exists, arising from some mutual contract entered into with each other, as between donor and donee, lessor and lessee; or persons related by blood, as ancestor and heir, &c. Privity: the connection between persons who are privies; mutual or successive relationship to the same rights of property.

The noun privy is used with various adjuncts, in order to express the nature of the privity or connection which exists between persons. Thus persons related by blood, as ancestor and heir, for instance, are denominated privies in blood; those related to a party by mere right of representation, as executors or administrators of a deceased person, are denominated privies in representation or in right; those connected with each other in respect of estate, as lessors and lessees, donors and donees, &c., are denominated privies in estate. Various more minute classifications and distinctions are drawn in the older books. Wharton makes six kinds of privies: Privies of blood, such as the heir to his ancestor; privies in representation, as executors, or administrators to their deceased testator or intestate; privies in estate, between grantor and grantee, lessor and lessee, assignor and assignee, &c.; privies in respect of contract; privies in respect of estate and contract, as where the lessee assigns his interest, but the contract between the lessor and lessee continues, the lessor

not having accepted of the assignee; privies in law, as the lord by escheat, a tenant by the curtesy, or in dower, the incumbent of a benefice, a husband suing or defending in right of his wife, &c. For other lines of distinction, see *Jacob* or *Tomlins*.

2. As an adjective, solely, privy is used in a sense partly embodying or suggesting "private," in several terms of English law.

Privy council. The council of state held by the English sovereign with councillors, to concert matters for the public service and for the honor and safety of the realm. It is summoned on a warning of forty-four hours, and never held without the presence of a secretary of state. The junior delivers his opinion first, and the sovereign, if present, last. It is dissolved six months after the demise of the crown, unless sooner determined by the successor.

The privy council has power to inquire into all offences against the government, and to commit the offenders to take their trial. It has also the judicial authority of a court of justice in colonial causes, in appeals from the ecclesiastical courts, in applications to prolong the terms of patents for new inventions, and in certain cases arising out of the copyright acts. These functions are exercised through the judicial committee. There are also other committees of the privy council charged with various matters. The judicature acts contemplate that the jurisdiction exercised by the judicial committee of the privy council upon appeals from the high court of admiralty, and from orders in lunacy made by the lord chancellor or other person having jurisdiction in lunacy, will be transferred to the court of appeal established by that act; and provision is also made by that act for the hearing of all appeals to the queen in council before the court of appeal. See 1 *Bl. Com.* 229; 2 *Steph. Com.* 457; *Jud. Act*, 1873, §§ 18, 55.

Privy councillor. A member of the privy council. Privy councillors are made such by the sovereign's nomination, without either patent or grant; and on such nomination, and after taking the prescribed oath, they become privy councillors, with the title of "right honorable" during the life of the sovereign who has chosen them, but subject to removal at his discretion. Their number is indefinite. Their duties are: to advise the sovereign according to the best of their cunning and discretion; to advise for the sovereign's honor and good of the public, without partiality through affection, love, meed, doubt, or dread; to keep the sovereign's counsel secret; to avoid corruption; to help and strengthen the execution of what shall be there resolved; to withstand all persons who would attempt the contrary; to observe, keep, and do all that a true and good councillor ought to do to his sovereign. See 2 *Steph. Com.* 469.

Privy purse. The income set apart for the personal use of the English sovereign.

Privy seal. A seal which the sovereign affixes to grants or things which pass the great seal. First, they pass the privy signet, then the privy seal, and, lastly, the great seal of England. The privy seal is also used in matters of small moment which never pass the great seal. *Cowel;* 2 *Bl. Com.* 347; 1 *Steph. Com.* 619.

Privy signet. The sovereign's privy seal; it is in the custody of one of the principal secretaries of state.

Privy tithes. Small tithes.

Privy verdict. When the judge has left or adjourned the court, and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court, this is called a privy verdict; but such verdicts are now disused. See 3 *Bl. Com.* 377.

A somewhat similar practice exists, however, known as a sealed verdict, in which the jury are allowed to write down their verdict, seal it up, and deliver it to the clerk. They are then allowed to go home, but must return next morning, when the verdict is opened and read in their hearing.

PRIZE. Vessels, cargoes, or other property captured at sea, in pursuance of the laws of war. Such property is said to be made lawful prize, or to be adjudicated or condemned as prize of war.

Prize court. A tribunal which administers the law of prize.

In the United States, the subject of prize is wholly confided to the national judiciary, and the district court, a permanent court, possesses the original jurisdiction.

In England, according to Wharton, the prize court is an international tribunal, existing only by virtue of a special commission under the great seal, during war, or until the litigations incident to war have been brought to a conclusion. It is frequently confounded with the court of admiralty, in consequence, perhaps, of the same judge usually presiding in both courts; but this is a mistake, he says, for the whole system of litigation and jurisprudence in the prize court, though exceedingly important, is peculiar to itself, and is governed by rules not applying to the instance court of the admiralty, which is a mere civil tribunal. In this court are directly decided not only questions relating to capture, prize, and booty (being prize on shore), but also questions upon the law of nations; though sometimes the latter, and even the construction of treaties, are collaterally argued and determined in other courts.

Prize goods. Goods which are taken on the high seas, *jure belli*, out of the hands of the enemy. The Adeline, 9 *Cranch*, 244, 284.

Prize law. The body of rules of jurisprudence and enactments which govern the rights acquired by captors in vessels and cargoes captured in war, the condemnation of the property, sale, distribution of proceeds, &c.; the law of maritime captures.

Prize-money. The proceeds of property captured in maritime warfare, distributable, under authority of the prize court of the nation to which the captor vessel belongs, among her officers and crew.

PRO. For. A Latin preposition, used to introduce several phrases, among which are:

Pro confesso. For confessed; as confessed. A decree upon a bill in equity, to which no answer has been interposed by the defendant, is said to be taken *pro confesso*.

Pro eo, quod. For this, that. A phrase used in common-law pleading, in Latin; said to be a phrase of affirmation, and sufficiently direct and positive for introducing a material averment. *Bouvier*.

Pro hac vice. For this turn; for this occasion.

Pro indiviso. As undivided; as an undivided part. A phrase applied to the possession or occupation of lands by tenants in common of which partition has not been made, and each holds an undivided portion.

Pro interesse suo. According to his interest; to the extent of his interest. These words are used especially of a party admitted to intervene for his own interest in a suit instituted between other parties.

Pro rata. In proportion.

An assignment for benefit of creditors, which provides that the surplus, after paying the preferred debts, shall be paid *pro rata* to all other creditors, implies that the assignees shall pay the whole amount of the unpreferred debts, if the assets are sufficient. Taylor *v.* Stevens, 7 *How. Pr.* 415.

Pro re nata. For the occasion which has arisen; for the immediate occasion; according to the circumstances at the moment. The phrase is used especially to denote an unprecedented course, adopted to serve the exigencies of a particular occasion.

Pro salute animæ. For the salvation of his soul. This phrase is applied to judgments and monitions, in the ecclesiastical courts, denoting that they are intended for the reformation of the offender, being given in respect of matters unconnected with private injuries.

Pro tanto. For so much; for as much as may be; for as much as possible. Thus, if a tenant for life make a lease for one hundred years, the lease is good *pro tanto;* that is, for such an estate or interest as the tenant for life may lawfully convey.

PROBABLE CAUSE. In the duties collection act of 1799, must mean reasonable ground of presumption that the charge is, or may be, well founded. Wood *v.* United States, 16 *Pet.* 342, 366.

It means less than "evidence which would justify condemnation:" it imports a seizure made under circumstances which warrant suspicion. Locke *v.* United States, 7 *Cranch*, 339.

Probable cause, in malicious prosecution, means the existence of such facts and cir-

cumstances as would excite the belief in a reasonable mind, acting on facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. Wheeler *v.* Nesbitt, 24 *How.* 544.

It is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused is guilty of an offence with which he is charged. Munns *v.* Dupont, 3 *Wash.* 31; Palmer *v.* Richardson, 70 *Ill.* 544; Davie *v.* Wisher, 72 *Ill.* 262; Cooper *v.* Utterbach, 37 *Md.* 282, 283; Stansbury *v.* Fogle, *Id.* 369; Mitchell *v.* Wall, 111 *Mass.* 492; Landa *v.* Obert, 45 *Tex.* 539.

It is a reasonable ground for believing a person guilty; such reasons and such circumstances as would be satisfactory and convincing to right reason. Wanser *v.* Wyckoff, 16 *N. Y. Supreme Ct.* 178.

It is such a state of facts, in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. A belief of the guilt of the accused, founded on circumstances tending to show that he has committed a criminal offence, is sufficient to show probable cause. Harpham *v.* Whitney, 77 *Ill.* 32.

Probable cause may be defined to be an apparent state of facts found to exist upon reasonable inquiry (that is, such inquiry as the given case renders convenient and proper), which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case, that a cause of action existed. Lacy *v.* Mitchell, 23 *Ind.* 67.

The mere belief that a person has been guilty of a crime is not sufficient to authorize a criminal prosecution against him. But where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief, in the mind of a person of reasonable intelligence and caution, that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent. Hays *v.* Blizzard, 30 *Ind.* 457.

It means such a state of facts and circumstances as would induce men of ordinary prudence and conscience to believe the charge to be true. Driggs *v.* Burton, 44 *Vt.* 124.

PROBARE. 1. In Saxon law, to claim a thing as one's own. *Jacob.*

2. More recently, to make proof, as in the term *onus probandi*, — the burden or duty of making proof.

PROBATE. Formal, official proof. The word is particularly applied to wills, meaning the approval of the sufficiency of the will by the proper court, or the exemplified copy (with accompanying certificates), given in attestation of this approval.

English probate is obtained by the executor, and is either in common form, which is only upon the executor's own oath before the ordinary or his surrogate, or *per testes*, in more solemn form of law, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the court; and a copy thereof on parchment is made out under its seal, and delivered to the executors, together with a certificate of its having been proved, — all which together is usually styled the probate. 2 *Steph. Com.* 202. The copy of the will, made out in parchment or due form, under the seal of the ordinary or court of probate, and usually delivered to the executor or administrator of the deceased, together with a certificate of the will's having been proved, is most properly called the probate; but the word is constantly used for the act or proceeding of proving a will.

Probate court. In many of the United States, court of probate, or probate court, is used as the title of the court having general probate jurisdiction; that is, to take proof of wills, to issue letters testamentary, letters of guardianship and of administration, to superintend the administration of estates and the accountings of representatives and trustees, and many cognate matters. The same jurisdiction is exercised in other states by orphans' or surrogates' courts. To this strictly probate jurisdiction is often added a limited jurisdiction in civil or criminal actions. Courts under the title of court of probate, or probate court, exist in Alabama, Arkansas, California, Connecticut, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, and Vermont.

In England, a court of probate was established in 1857 (under Stat. 20 & 21 Vict. ch. 77), to which court was trans-

ferred the testamentary jurisdiction of the ecclesiastical courts. 2 *Steph. Com.* 192. By the judicature acts, this tribunal is merged in the high court of justice.

Probate duty, or tax. A charge or impost laid upon decedent estates towards the support of government, and collected in the form of a payment required as a condition of admitting the will to proof; a duty or tax imposed on proof of wills.

PROBATIO. Proof. Thus *probatio viva*, or proof alive, was applied to testimony of witnesses; and *probatio mortua*, or dead proof, to documentary evidence; also, *probatio plena* and *semi plena* were technical terms, translatable by "full proof" and "half full,"—the one being proof of a public instrument by two witnesses; the other, proof of a private writing by one witness. See *Burrill.*

Probator. An approver, in the sense of one who undertakes to prove a crime upon another. Technically, the word was applied to one who, being indicted for felony, to save himself from capital punishment as principal, confessed himself guilty as accomplice, and accused any other principal or accessory. He was then held bound to make good this charge by duel or trial by the country; and, upon so doing, was pardoned as to life and members, but condemned to suffer transportation. (*Bracton; Fleta*, lib. 2, ch. 52, §§ 42, 44.) *Jacob.*

Probus et legalis homo. A good and lawful man. The designation in the law Latin of a person competent to serve as juror or testify as witness.

PROCEDENDO. For proceeding. The name of a writ by which, when a cause has been removed from an inferior to a superior court (as by *certiorari*), and the grounds of removal appear to the superior court to be insufficient, the cause may be remitted to the inferior court, to be proceeded in there to final hearing and determination.

The term was also applied, in English practice, to a writ issued out of the common-law jurisdiction of the court of chancery, when judges of any subordinate court delayed the parties, not giving judgment either on the one side or on the other when they ought so to do. In such a case, a writ of *procedendo ad judicium* was awarded, commanding the inferior court to proceed to give judgment, but without specifying any particular judgment; for that, if erroneous, might be set aside by proceedings in error, or by a writ of false judgment; and, upon further neglect or refusal, the judges of the inferior court might be punished for their contempt by writ of attachment. *Wharton.*

PROCEED. A stipulation not to proceed against a party is an agreement not to sue. To sue a man is to proceed against him. Planters' Bank of Fort Valley *v.* Houser, 57 *Ga.* 140.

In the Georgia statute, directing, by way of remedy in cases where execution has issued illegally, that a return of the execution may be made upon the person against whom it may run, making an affidavit of illegality, the word issue is considered and treated as having the sense of proceed. The cases contemplated are not merely those in which the illegality consists in the execution's having issued illegally, but where an execution is proceeding illegally, though issued legally; as in a case in which, notwithstanding that a payment has been made on the execution, the execution is proceeding as if no payment had been made on it. Robison *v.* Banks, 17 *Ga.* 211.

PROCEEDING. This term, used in the saving clause of a code of practice, declaring that the code should not affect any proceeding commenced before its enactment, does not include a judgment recovered before the passage of the code. A judgment is an entire act,—an act which cannot, in any proper sense, be said to be "commenced" before a certain day. Daily *v.* Burke, 28 *Ala.* 328.

Proceeding, when spoken with reference to actions, means any step taken by a party in the progress of an action. Wilson *v.* Allen, 3 *How. Pr.* 369; Williamson *v.* Champlin, *Clarke*, 9; Rich *v.* Husson, 1 *Duer*, 617.

Proceeding, in a statute providing for a dismissal of a suit, unless "proceedings shall be had" within one year from the entry of a certain order, applies to a service of notice by the opposite attorney that he will move to vacate the judgment. Bonesteel *v.* Orvis, 31 *Wis.* 117.

Proceedings in the cause. This phrase includes the sheriff's doings under the execution. Ward *v.* Cohen, 3 *S. C.* 338.

Proceedings in court. This expression does not include statutory steps to foreclose a mortgage: they are not had in court. Dwight *v.* Phillips, 48 *Barb.* 116, 119.

PROCEEDS. Insurance upon the proceeds of the outward cargo, effected by a valued policy on a voyage out and home, covers the value of that cargo in the return cargo, if the return cargo was procured on

the credit of the outward. Haven *v.* Gray, 12 *Mass.* 71.

In general, the expression proceeds of a cargo includes the return or substituted cargo, or property, acquired by sale or exchange of the goods originally shipped. Dow *v.* Hope Ins. Co., 1 *Hall*, 166.

But where insurance was effected on goods "out," and the "proceeds thereof home," it was held that, if the identical goods composing the outward cargo were brought home, as in the return voyage, they could not be considered as included in the words proceeds home, nor as covered by the policy. Dow *v.* Whetten, 8 *Wend.* 160.

Proceeds was held to mean the amount of money that in the future would be obtained for the property upon a disposition of it by sale, in Belmont *v.* Powvert, 35 *N. Y. Superior Ct.* 208.

PROCEDURE. This word is commonly opposed to the sum of legal principles constituting the substance of the law, and denotes the body of rules, whether of practice or of pleading, whereby rights are effectuated through the successful application of the proper remedies. It generally comprehends practice and pleading, but excludes evidence, and the law of substantive rights and wrongs, or the rules upon which the claims of parties are ultimately decided.

PROCES VERBAL. In French law, is a term applied to those acts by which public officials render attestation to any thing done in their presence. *Ferrière.*

PROCESS. 1. In practice of courts is, strictly, the mandate of the court to the officer, commanding him to do certain things or perform certain services within his official cognizance. Thus it properly signifies a writ or warrant; but it also means all the proceedings in a cause after the first step, and comprehends a rule or order made by the court in a cause; also, an execution issuing from the court. See Utica City Bank *v.* Buel, 9 *Abb. Pr.* 385; People *v.* Nevins, 1 *Hill* (*N. Y.*), 154; United States *v.* Noah, 1 *Paine*, 368.

Three kinds of process were known in old English law: original process, or that founded upon the original writ; mesne or intermediate process, which issued pending the suit, upon some collateral interlocutory matter, as to summon juries, witnesses, and the like; and final process, or process of execution.

But in course of time original writs were disused and mesne process was employed at the outset of the action; and thus mesne (*i.e.* middle) and final process are the only kinds now known.

Wharton's exhibit of the various forms of process in use in common-law actions during the middle period of the history of common-law procedure — that is, after the relinquishment of original process as a useless formality, and before the adoption of the extended changes and simplifications introduced in England by the uniformity of process and the common-law procedure acts — is worth preserving. It is as follows:

The varieties as to process in personal actions may be summed up thus: In each of the courts the proceeding against attorneys and officers — in the queen's bench and exchequer, that against prisoners also — was by bill without process; and, in other cases, their processes or modes of commencing the suits were as follows:

In the queen's bench. By original: Original writ adapted to the action. By bill: Attachment of privilege (with *ac etiam*, or bailable; not bailable); bill of Middlesex (bailable; not bailable); *latitat* (bailable; not bailable); bill and summons.

In the common pleas. By original: Original writ adapted to the action; original writ *quare clausum fregit;* common *capias* (bailable; not bailable). By bill: Attachment of privilege; bill and summons.

In the exchequer of pleas: *Venire ad respondendum; subpœna ad respondendum; quo minus capias; venire* of privilege; *capias* of privilege; bill and summons.

When writ of summons came to be the instrument employed in English practice of common-law courts, for commencing personal actions, and bringing the defendant into court, "process" was often employed as a term equivalent to summons; but in its proper and more comprehensive signification it includes not only the writ of summons, but all other writs which may be issued during the progress of an action.

The changes in procedure introduced by the judicature acts have still further disturbed the use of this word, so that Mozley and Whiteley go so far as to say,

that the word process does not seem to have any technical meaning under the judicature acts.

The codes of reformed procedure which have been introduced in about two-thirds of the United States have, in like manner, affected this term. They provide for the commencement of an action by a mere personal notice in writing, sent by plaintiff's attorney to defendant, requiring him to appear and answer the complaint. No mandate of the court is embodied; no seal or formal *teste* gives the paper even a semblance of judicial authority; no action of a sheriff or official, in making service, is called for by the instrument, or usually rendered. Yet it takes the place and answers the precise purpose of the writ by which, in modern common-law practice, the defendant was summoned to answer. Is this private and unofficial notice a process? The majority of the decisions appear to adhere to the view that process issues from or by authority of the court, and that the word, therefore, does not include the code summons. We think, in the common parlance of lawyers, and in the use of the word (perhaps inadvertent) in many of the text-books, it is treated as including the summons; or summons is spoken of as "process."

Several of the state constitutions contain provisions directing that process of the courts shall run in the name of the people of the state, or in the name of the state. These requirements have given rise to some adjudications as to what papers are "process," the chief of which are mentioned below.

Process signifies some instrument which issues forth, in order to bring a defendant into court to answer. The word does not include furnishing copies of indictments, recording and indexing court papers, and the like. Fitzpatrick *v.* New Orleans, 27 *La. Ann.* 457.

The summons authorized by the Florida code is not process, within the meaning of that clause of the constitution which requires that "the style of all process shall be 'the state of Florida.'" Gilmer *v.* Bird, 15 *Fla.* 410.

A fee-bill is a process, under an enactment requiring all process to run in the name of "the people of Illinois." Reddick *v.* Cloud, 7 *Ill.* 670.

The copy of the judgment certified to the collector, on which lands are to be sold for taxes, is not process, and therefore need not run in the name of "the people." Curry *v.* Hinman, 11 *Ill.* 420; Scarritt *v.* Chapman, *Id.* 443.

A summons is not process, within a similar enactment in the constitution of Minnesota. "Process" is nearly synonymous with "proceedings." Hanna *v.* Russell, 12 *Minn.* 80; Lowry *v.* Harris, *Id.* 255.

The constitution of Wisconsin, in requiring writs and process to run in the name of the state, contemplates only process emanating from courts of justice of the state. Sprague *v.* Birchard, 1 *Wis.* 457.

A summons under the code of the state is not a writ or process, for it need not be signed or sealed by the clerk of the court. Porter *v.* Vandercook, 11 *Wis.* 70.

A rule to show cause is not such a writ or process as is required, by Mass. Stat. 1782, ch. 9, § 3, to have a *teste*, and be under the seal of the court. Taylor *v.* Henry, 2 *Pick.* 397.

An act changing the time of holding a term of court, and providing that all process returnable to the former term shall be deemed returnable at the time newly designated, includes a guardian's notice of application to sell his ward's land. Nichols *v.* Mitchell, 70 *Ill.* 258.

The warrant of the superintendent of the streets, in the hands of a contractor, which he is required to serve, is a process, so far that he is held to the same measure of diligence in its service as an officer holding a legal process. Guerin *v.* Reese, 33 *Cal.* 292.

The summary process is a judicial process, and not a mere rule or order of court; hence it must be sealed. Hughes *v.* Phelps, 1 *Brev.* 81.

Under Iowa Stat. 1857, ch. 210, § 31, original notice in actions commenced in the Dubuque city court is process, and as such is properly served by the sheriff. Tully *v.* Beaubien, 10 *Iowa*, 187.

A *levari facias sur mortgage* is process, within the meaning of the act of 1861, staying civil process against persons enlisting in the army. Coxe *v.* Martin, 44 *Pa. St.* 322.

And so is a *scire facias* upon a mortgage. Drexel *v.* Miller, 49 *Pa. St.* 246.

2. In the law of patents, a process, according to the decision of the supreme court, is not, by that term, the subject of a patent, but is patentable under the general term useful arts. Where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called "processes." A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making waterproof cloth, vulcanizing

india-rubber, smelting ores, &c., are usually carried on by processes, as distinguished from machines. One person may discover an improvement in a process, irrespective of any particular form of machinery; and another may invent a labor-saving machine, by which the operation or process may be performed, and each may be entitled to a patent, — the first for the process, but not for a machine; the second for a machine, but not for a process. It is when the term process is used to represent some means or method of producing a result that a process is patentable; and thus used the term includes all means or methods which are not effected by mechanism or mechanical combinations.

The term process is often used, however, in a more vague sense; as when we say a board is undergoing the process of being planed, grain of being ground, iron of being hammered or cooled. In this use of the term, it represents the function of a machine, or the effect produced by it on the material subjected to its action. In this sense, a process cannot be the subject of a patent. Corning *v.* Burden, 15 *How.* 252, 268.

This decision was founded on the phraseology of the United States patent law of 1831, which specified four classes of inventions which may be the subjects of patents: an art, a machine, a manufacture, and a composition of matter. In Great Britain, letters-patent are allowed in the letter of the law only to the inventors of a "new manufacture;" but the courts, in defining the meaning of the term manufacture, have construed it as coextensive in signification with the four classes of inventions specifically recognized by our law: an art or process, or machine, or a composition of matter, is regarded there as a manufacture. Thus there is no important practical difference between the patentability of a new process in the two countries.

Process of law. See DUE PROCESS OF LAW.

PROCHEIN. In law French, nearest, next.

Prochein ami. Next friend. The person by whom an infant or a married woman may prosecute a suit, or who, though not appointed guardian, may do other acts on behalf of an infant, such as are authorized by law.

Prochein avoidance. A power to present a minister to a church when it shall next become void. *Tomlins; Wharton.*

PROCLAIM. 1. In affairs of state, to proclaim is to give official public notice, emanating from the sovereign power, of any of its doings or edicts, or of the occurrence of any fact important to be promulgated. Proclamation: the act of giving such a notice; also, the document by which it is given.

In England, proclamations have been long and frequently used by the successive sovereigns. In ecclesiastical matters, they had the force of law, by Stat. 31 Hen. VIII. ch. 8; and, independent of statute, they were operative as far as they were an exercise of legitimate royal prerogative; and, in proportion as the prerogative was in earlier times more extensive and potent, proclamations were of greater legal force. It seems to have been the view of Lord Coke that proclamations, when grounded on the laws of the realm, were of great force; and of Blackstone, that proclamations were binding on the subject when they did not contradict the laws of the land, or tend to establish new ones; and they appear, in fact, to be a proper mode, if not of signifying, at any rate of enforcing, the law, and, as such, to be a necessary part of the executive, in proper cases. See *Brown.*

In the United States, proclamations have been frequently made by the successive presidents to give solemn, public notice of any appropriate fact or occurrence. They do not operate in themselves as laws; for the president, alone, has no law-making power. But when an act of congress is passed to take effect upon the executive ascertaining and making known some matter of fact, the proclamation gives the law validity, and sets it in operation. Thus an act declaring that the subjects of any foreign nation shall have in this country reciprocal privileges to those accorded to our citizens abroad, would naturally contemplate and depend upon a proclamation from the executive, declaring what foreign laws on the subject had been enacted. So it has been usual to give

notice by proclamation requiring insurgents to lay down arms in a limited time, or be dispersed; and other notices of intended executive action have been given in the same manner. Advisory communications from the executive to the people are thus made; such as a recommendation to observe a day of fasting or of thanksgiving.

Governors of the states may, and customarily do, issue proclamations; and the same is true of mayors of cities; and these proclamations have, within the officer's sphere of authority as chief executive magistrate, like nature and effect with those emanating from the president in matters of national concern.

2. In practice of courts, these words — particularly proclamation — are used of the announcement or outcry made by the crier or ministerial officer designated therefor, in the beginning or calling of a court, and at the discharge or adjourning thereof, for the attendance of persons and despatch of business.

Proclamation is made in courts-baron for persons to come in and claim vacant copyholds of which the tenants died seised since the last courts. *Tomlins.*

Proclamation of an exigent. In the old practice of outlawry, on awarding an exigent in order to outlawry, a writ of proclamation issued to the sheriff of the county where the party resided, requiring that officer to make three proclamations for the defendant to yield himself, or be outlawed. See *Jacob.*

Proclamation of a fine. The proclamation of a fine was a notice, openly and solemnly given at all the assises held in the county where the lands lay. It was made within one year after engrossing the fine; and anciently consisted in the fine as engrossed being openly read in court sixteen times, — four times in the term in which it was made, and four times in each of the three succeeding terms. This, however, was afterwards reduced to one reading in each term. These proclamations were upon transcripts of the fine, sent by the justices of the common pleas to the justices of assise and the justices of the peace. See *Cowel;* 2 *Bl. Com.* 352; 1 *Steph. Com.* 562–566.

Proclamation of rebellion. According to Cowel and Jacob, this term was applied to a public notice formerly incident to a suit in chancery, declaring that a man not appearing upon a subpœna or an attachment in chancery should be reputed a rebel, unless he would render himself up by a day assigned in the writ. This is to be distinguished from any political proclamation from the sovereign power, declaring existence of a rebellion, and commanding rebels to disperse. It was a step in judicial practice only. No such proceeding is now in use. The spirit of modern equity practice is to give defendant personal service of notice of commencement of suit, and, if he will not appear, simply to proceed against him as in default; instead of resorting to all the compulsory measures to force a technical appearance, formerly deemed important.

Proclamation of recusants. A proclamation whereby recusants were formerly convicted, on non-appearance at the assises. *Jacob.*

PROCTOR. 1. Originally and properly, one who manages business for another, by his order; an agent, procurator, or proxy. But the word has been long and extensively used for the agent or officer who makes it his business to promote suits in the courts of admiralty, ecclesiastical, and probate jurisdiction, corresponding to an attorney or solicitor in common-law and equity courts.

In England, the proctor was the active practitioner in the ecclesiastical courts and the court of probate, whose duties corresponded with those of an attorney in the common-law courts. An attorney, prosecuting proceedings in the court of probate for a client, was considered to act as proctor.

But by the judicature act, all the officers of this nature in England are now admitted and practise as solicitors of the supreme court of judicature, in whatever division of the court their cause belongs.

2. An ecclesiastic, chosen to represent a cathedral or collegiate church, or the clergy of a diocese in the lower house of convocation, seems also to have been styled proctor; and the term also

designates a class of executive officers in the universities. See *Cowel;* 4 *Steph. Com.* 326, note.

PROCURACY. The writing or instrument which authorizes a procurator to act. *Cowel; Termes de la Ley.*

PROCURATION. The acting of one person in the affairs of another, by the latter's authority or request; agency. Also, the authority of one person to act for another, derived from the latter; power of attorney.

Procurator: an agent; a person authorized and employed to manage the affairs of a principal; a proxy. Other old senses of the word are given; such as, a proxy of a lord in parliament; one who collected the fruits of a benefice for the incumbent; an employed advocate or collecting agent of a religious house, or of a parish church; a proctor. See *Burrill.*

Bouvier defines procuration somewhat differently from the sense assigned to it above, which is, however, supported by the other modern dictionaries. He states it to mean the act by which one person gives power to another to act in his place. In other words, he makes the appointing the agent, *i.e.* the power as conferred, to be the procuration, instead of the undertaking the agency, or the power as received. If this were so, procurator should be, it would seem, the person conferring the power, or the principal, which is not its meaning. To harmonize the inflexions of the word, procuration must stand for the power as received, — the agency as possessed and exercised; and such is, we think, its accepted use and meaning. It is quite true that in one meaning of procuration it is well rendered by power of attorney; but it is the power considered as being held and exercised by the agent, not in its aspect of an authority issuing from the principal.

Procuration fee. The fee which a scrivener or broker was allowed to take for making a bond. 4 *Bl. Com.* 157.

Procurations, in ecclesiastical law, were a species of payment made by parish priests to bishops and archdeacons, to secure or recompense their visits. According to Jacob, the visitor formerly demanded a proportion of meat and drink for his refreshment, when he came abroad to do his duty, and examine the state of the church; afterwards, these were turned into annual payments of a certain sum, which is called a procuration, — being so much given to the visitor *ad procurandum cibum et potum.*

Procuration, in this sense, is defined by Vallensis, writing in 1290, to be the furnishing of the necessary expenses, which is due from the church or monastery to him upon whom is incumbent, by virtue of his office, the right and the burden of visitation, whether he be bishop, or archdeacon, or dean, or legate of the most high pontiff. Thus we read that "on Wednesday, on the feast of St. Luke the Evangelist, the lord bishop took his procuration in meat and drink at Bordesley, and passed the night there." *Cowel.*

Procurator-fiscal. In Scotland, the title of the public prosecutor for each district, — corresponding somewhat to the *procureur du roi* in France, or to the county or district attorney in the United States. He institutes the preliminary inquiry into crime within his district, acting generally under the instructions of the lord advocate. *Wharton; Mozley & W.*

Procurator litis. The prosecutor or manager of one's cause; the designation, in the Roman civil law, of an official analogous to attorney-at-law in common-law courts. Special distinctions were, however, made, according to which this title particularly designated one who managed a plaintiff's cause in his absence. See *Burrill.*

Procurator negotiorum. A title in the civil law, corresponding to our attorney in fact; a manager of business affairs for another person.

Procurator in rem suam. Proctor in his own affair. A term of the Scotch law, importing that one is acting as attorney as to his own property. When an assignment of a thing is made, and a procuration or power of attorney is given to the assignee to take it into possession, he is called procurator *in rem suam.* See *Bouvier.*

Procuratorium; procuratory. The name of the usual instrument by which any religious person or community used to constitute or delegate their procurator or agent to represent them in any court or cause. *Jacob; Wharton.*

Procuratory of resignation. A mandate or commission whereby a tenant of land in Scotland empowers a person whose name is left blank to appear in presence of the superior lord, and resign the lands to him, either that the lands may remain the property of the superior, in which case it is said to be a resignation *ad remanentiam*, or for the purpose of the superior's giving out the feu (*i.e.* making a fresh grant of the land) to a new vassal, or to the former vassal and a new series of heirs, which is said to be a resignation *in favorem*. *Bell.*

Thus a procuratory of resignation corresponds to the surrender of an English copyhold. *Paterson.*

PROCURE. In a statute making it an offence to "procure a female to have illicit carnal connection with any man," does not cover the offence of seduction. The natural meaning of the word procure is, that the illicit intercourse is with some person other than the one who commits the offence of procuring, &c. People *v.* Roderigas, 49 *Cal.* 9.

There is a clearly recognized legal distinction between procuring an act to be done, and suffering it to be done. Matter of Black, 2 *Ben.* 196.

PROCUREUR. The French term corresponding to an attorney; one who has received a commission from another to act on his behalf. There were in France two classes of *procureurs*, corresponding to the two kinds of attorneys.

Procureurs ad negotia, appointed by an individual to act for him in the administration of his affairs, resembled attorneys in fact, or persons invested with a power of attorney to transact ordinary business.

Procureurs ad lites were persons appointed and officially authorized to act for a party in a court of justice. These corresponded to attorneys-at-law (now called, in England, solicitors of the supreme court). The order of *procureurs* was abolished in 1791, and that of *avoués* established in their place. See *Ferrière.*

Procureur général, ou impérial. An officer of the French imperial court, who, either personally or by his deputy, prosecutes every one who is accused of a crime, according to the forms of French law. His functions appear to be confined to preparing the case for trial at the assises, assisting in that trial, demanding the sentence in case of a conviction, and being present at the delivery of the sentence. He has a general superintendence over the officers of police and of the *juges d'instruction*, and he requires from the *procureur du roi* a general report once in every three months. His functions correspond in general character to those of the attorney-general of a state.

Procureur du roi. In French law, is a public prosecutor, with whom rests the initiation of all criminal proceedings. In the exercise of his office (which appears to include the apprehension of offenders), he is entitled to call to his assistance the public force (*posse comitatus*); and the officers of police are auxiliary to him. His functions correspond in general character to those of a county or district attorney.

PRODUCE. Under a bequest of the "produce" of a fund, directly, or in trust without any limitation as to continuance, the principal will be regarded as bequeathed also. Craft *v.* Snook, 13 *N. J. Eq.* 121. S. P. Peale *v.* White, 7 *La. Ann.* 449; Arnauld *v.* Delachaise, 4 *Id.* 109.

The phrase "produce of a farm" does not include beef raised and killed on it. Beef is the produce of the slaughter-house and the shambles; the ox is the produce of the farm. Beef is manufactured by the professional skill of an artisan, whose business is as distinct from that of a farmer as is that of a flax-dresser or a woolcomber. Mayor *v.* Davis, 6 *Watts & S.* 269, 279.

Produce broker. As used in the internal revenue law, includes a person who sells produce in public market, although such produce is raised by him upon his own farm. United States *v.* Simons, 1 *Abb. U. S.* 470.

PROFERT. He produces or proffers.

When pleadings were in Latin, a plaintiff was wont to express his readiness to produce for inspection an instrument on which he brought suit, by the phrase *profert in curia*, or *profert in curiam*, — he produces in court, or he brings into court, the writing alleged.

The term has continued in use down to modern times. In the old practice, a party actually produced in court a deed or other instrument upon which he relied in pleading; and the clause to that effect, — *profert in curia*, — inserted in the declaration, had literal truth. In modern practice, however, the actual production in court was dispensed with, and the allegation merely that the in-

strument was produced made in the declaration, upon which the writing was deemed to be and remain constructively in the possession of the court, and the party was said to have made *profert* of the deed. See OYER.

PROFIT. 1. Advantage realized in money by sale of property at a price exceeding the cost; or receipts of any enterprise or business, exceeding the expenses incident to it.

2. The advantage which land procures to the owner, by way of compensation for its use. The phrase "rents, issues, and profits of lands" does not import that the land has been sold, and an advance in price realized.

Offices of profit are necessarily offices of trust, and the latter term includes the former. Doty *v.* State, 6 *Blackf.* 529.

A mutual benefit society formed by several persons, being partners or shareholders, who subscribe money, and carry on business substantially for the benefit of the individual members among themselves, and not for the benefit of the society as such, is not a partnership or company established "for any purpose of profit," within the meaning of section 2 of Stat. 7 & 8 Vict. ch. 110, so as to require registration. Bear *v.* Bromley, 11 *Eng. Law & E.* 414; 16 *Jur.* 450.

The usual, ordinary, and correct meaning of the word profits is the excess of receipts over expenditures; that is, net earnings. Connolly *v.* Davidson, 15 *Minn.* 519.

The expression, profits of a business, means the receipts, deducting current expenses, and is equivalent to net receipts. Depreciation of buildings in which the business is carried on, though they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the profits. Eyster *v.* Centennial Board of Finance, 94 *U. S.* 500.

Moneys used by a railroad company to replace an old and worn-out bridge by another of like materials and dimension are not liable to internal revenue tax, as being "profits used for construction." Hartford, &c. R. R. Co. *v.* Grant, 9 *Blatchf.* 542.

Where a wooden bridge is replaced by a much more costly stone bridge, the earnings adequate to pay for the latter, beyond the expense of building anew a like wooden bridge, are to be deemed "profits used for construction." But if the cost of such stone bridge is charged to the expense account of the company, and the whole amount of such account for the year, including such cost, is not more than a proper percentage of the gross receipts of the company to cover all proper ordinary current expenses, and the depreciation of its entire property, such cost is not to be deemed "profits used for construction." *Ib.*

Profits à prendre. These, which are also called rights of common, are rights exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof, as rights of pasture, or of digging sand. *Profits à prendre* differ from easements, in that the former are rights of profit, and the latter are mere rights of convenience without profit. *Gale Easem.* 1; *Hall Profits à Prendre*, 1.

PROHIBITION. The name of a writ issuing to forbid any court to proceed in any cause there depending, on the suggestion that the cognizance thereof belongs not to such court; a writ which commands the person or tribunal to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. United States *v.* Hoffman, 4 *Wall.* 158. It is a remedy provided by the common law against the encroachment of jurisdiction.

This writ is of English origin, being one of the great common-law prerogative writs long in use. It is known and recognized as a judicial remedy in most of the states, yet is but little regulated, so far as we are aware, by statute, the English precedents and practice being very generally followed in this country.

In early times, in England, the chief use of prohibitions is said to have been to restrain the ecclesiastical courts from interfering in matters which were properly subject to the jurisdiction of the courts of common law; and the clergy complained earnestly that the common-law courts extended their interference with the spiritual courts by means of their prohibitions too far. (See Case of Prohibitions, 12 *Coke*, 59.) Power to issue it was vested not only in the king's bench, but also in the courts of chancery, exchequer, and common pleas; and it might issue to any inferior court of common law, or to the courts of the counties palatine, to the county courts or courts baron, or to the courts christian or ecclesiastical, the university courts, the court of chivalry or the court of admiralty, when they were about to act in any matter not within their jurisdiction, or were to transgress the bounds prescribed to them by the laws of the realm. In more modern times, the uses of writs

of prohibition have been chiefly the following:

To commissioners, justices, and inferior courts generally, whether civil or criminal, for assuming unwarranted jurisdiction.

To courts of appeal, not excepting even the judicial committee of the privy council. (Darby *v.* Cosens, 1 *Durnf. & E.* 552; *Exp.* Smyth, 3 *Ad. & E.* 719.)

Prohibition differs from injunction, in that prohibition is directed to a court as well as to the opposite party; whereas an injunction is directed to the party alone.

By the English practice, as prescribed by Stat. 1 Wm. IV. ch. 21, an application for a writ of prohibition is made by motion, supported by affidavits. But if the point is too nice and doubtful to be decided upon motion, then the party applying for the prohibition is directed to declare in prohibition, — that is, to deliver a concise statement of the proceedings in respect of which he applies for a prohibition, and praying that a writ of prohibition may issue. The "declaration in prohibition" was formerly based on the fiction that the party against whom the declaration was filed had proceeded in the suit, notwithstanding the writ of prohibition. 3 *Bl. Com.* 113, 114; 3 *Steph. Com.* 635–638.

No prohibition will issue after sentence, unless the want of jurisdiction below appears on the face of the proceedings. Buggin *v.* Bennett, 4 *Burr.* 2035.

Under the judicature act, 1873, § 24, subd. 5, no cause or proceeding at any time pending in the high court of justice, or before the court of appeal, shall be restrained by prohibition or injunction.

PROJECT; PROJET. These words, English and French, are often applied to the draught, plan, or scheme of a law or treaty, considered as put forward for consideration and adoption.

PROLES. Issue; offspring; progeny. It may mean any children; but is frequently used, according to Bouvier and Burrill, in the stricter sense of issue of a lawful marriage.

PROLOCUTOR. The foreman or speaker of a convocation; the title of an officer chosen by ecclesiastical persons publicly assembled in convocation by virtue of the sovereign's writ.

At every parliament there are two prolocutors, — one of the higher house of convocation, the other of the lower house; the latter of whom is chosen by the lower house, and presented to the bishops of the higher house as their prolocutor, — that is, the person by whom the lower house of convocation intend to deliver their resolutions to the lower house, and have their own house especially ordered and governed. His office is to cause the clerk to call the names of such as are of that house, when he sees cause; to read all things propounded, gather suffrages, &c. *Wharton.*

PROMISE. A declaration by which one person engages to another to do or forbear to do some act; an assurance (oral or written) given by one that some future event within his control shall be as described, for the benefit of another. Promisee: the person to whom a promise is made. Promisor: the person who makes a promise. Promissory: in the nature of a promise; yet to be performed; executory.

Promise is to be distinguished, on the one hand, from a mere declaration of intention involving no engagement or assurance as to the future; and, on the other, from agreement, which is an obligation arising upon reciprocal promises, or upon a promise founded on a consideration. See AGREE. When a promise is founded on some good or valuable consideration, it is called a binding, legal, or valid promise, and gives the promisee a right to demand and judicially compel its fulfilment, or enforce compensation for the breach. A promise destitute of consideration is not, in general, of legal obligation, and is called a mere or naked promise, or nude pact. The word promise, standing alone, properly embraces both classes.

Promissory note. The name of a written instrument common among bankers and merchants, and in ordinary transactions involving money, whereby the subscriber promises to pay a definite sum of money at a specified time.

Such notes generally express a promise to pay the sum named to a designated person "or order," meaning or to any one whom he may, by indorsement, appoint; or they may express a promise to pay "to bearer," or may designate

a fictitious or nominal person or bearer. Thus bank of England notes were drawn payable to Abraham Newland or bearer; and a note may be framed as a promise to pay to 1878 or bearer, or to pay to goods bought or bearer. In these cases, the instrument inures in favor of any rightful owner.

The kinds above described are what are distinguished as negotiable promissory notes. And the expression is sometimes met in the decision, that such and such an instrument is or is not a promissory note, — meaning it is or is not negotiable. But "promissory note" is not, in a proper sense, limited to negotiable instruments. A promise to pay a specific sum to a living person, designated strictly, or without adding "or order" or "or bearer," is a promissory note, according to the general use of the term, though it is not a negotiable note, *i.e.* it is subject, in the hands of any transferee, to any equities available against the payee named.

With respect to instruments which may be drawn so as to allow of discharge in values other than money, the line is difficult to be drawn, and the decisions are not perfectly consistent; but we take the test to be, that the paper is properly called a promissory note (not necessarily a negotiable one), if the primary legal obligation it imports is unconditional payment of a specific sum of money; if otherwise, it is not. Thus, "I promise to pay one hundred dollars, payable in calfskins," would be deemed a note; while "I promise to deliver calfskins to the value of one hundred dollars" would be regarded as a simple contract for delivery of the goods specified. But the importance of the distinction between notes and simple contracts, where negotiability is not concerned, is much diminished at the present day by the extension of the right of an assignee of a contract to sue in his own name, assimilation of modes of declaring or complaining on notes and contracts, and relaxation of rules as to variance, applicable to cases when an instrument alleged as a note or contract might, on production, appear to the court to have been wrongly named. In any question as to what writing is a promissory note, the practitioner must carefully observe whether the real question is negotiability, right of holder to sue in his own name, or variance between description in pleading and instrument as produced. Non-negotiable, as well as negotiable, notes are recognized. The term does not of necessity import negotiability. A suit by holder of a writing might be defeated in one state, on the ground that the paper was not a promissory note, and must be sued in the name of the original promisee; while it would be sustained in another, where the liberty of an assignee to sue was broader. A defendant indicted for forgery or larceny of a promissory note might be acquitted on the ground that the writing produced in evidence was not a promissory note, and was erroneously so alleged in the indictment; when a civil suit, on a similar paper, might be sustained, although the complaint or declaration described the contract as a promissory note, on the ground that more liberal rules of pleading, in civil actions, justified disregarding the variance. Much attention to these different aspects of the question is necessary in reconciling the decisions.

To bring an instrument within the designation promissory note, the promise must be unconditional; and, as to amount and time of payment, it must be certain. But this certainty is attained if the sum due and day when it is payable can be unquestionably ascertained from the terms of the paper, taken in connection with their recognized legal effect, though they are not expressed. Thus, "I promise to pay one hundred dollars in sixty days from date, with interest," would be sufficiently certain, because the day of payment can be computed by reckoning sixty days following the day of date (and adding three days for grace); and the sum is ascertainable by adding interest cast at the rate allowed by the law of the state, which is the legal effect of a promise to pay interest, naming no rate.

The term promissory note signifies written engagement by one person to pay, absolutely and unconditionally, to another person therein named, or to his order, or to the bearer, a certain sum of money at a specified time, or on demand, or at sight. Hall *v.* Farmer, 5 *Den.* 484.

A promissory note must be for the payment of money only. Wallace *v.* Dyson, 1 *Spears*, 127.

To constitute a promissory note, it must be payable in money absolutely and unconditionally. Bunker *v.* Athearn, 35 *Me.* 364.

The term promissory note includes a writing otherwise a note, notwithstanding it does not give the name of a payee. Harding *v.* State, 54 *Ind.* 359.

If a person draws a bill directly on himself, it is his promissory note, and he may be sued on it as such. Wardens, &c. of St. James Church *v.* Moore, 1 *Ind.* 289; Marion & Mississinewa R. R. Co. *v.* Dillon, 7 *Ind.* 404.

Instruments of doubtful character, but frequent occurrence, have been held to be embraced in the designation promissory notes, in the following cases:

United States treasury notes. United States *v.* Hardyman, 13 *Pet.* 176.

Certificates of deposit, drawn for a sum certain, payable at a future date, with interest, to the order of the person named, upon the return of the certificate. Miller *v.* Austen, 13 *How.* 218; 5 *McLean*, 153; Poorman *v.* Mills, 35 *Cal.* 118; Carey *v.* McDougald, 7 *Ga.* 84; Laughlin *v.* Marshall, 19 *Ill.* 390; Hunt *v.* Divine, 37 *Id.* 137; Drake *v.* Markle, 21 *Ind.* 433; Blood *v.* Northup, 1 *Kan.* 28.

A written acknowledgment of indebtedness in a certain sum to a certain person, with a statement of the consideration. Fleming *v.* Burge, 6 *Ala.* 373.

A written promise to pay a sum certain, absolutely and unconditionally, at a time specified on its face, although a memorandum at the foot of it states a different mode in which it may be discharged. Pool *v.* McCrary, 1 *Ga.* 319.

A note made payable when W H H should be elected president of the United States; but, in an action on such note, it must be averred and proved that the contingent event has happened. Williams *v.* Smith, 4 *Ill.* 524.

An instrument of writing, in the form of an ordinary bond issued by corporations, payable to A or bearer, for a certain sum, payable at a certain place, with interest coupons attached. Aurora *v.* West, 22 *Ind.* 88.

A note for a sum certain, payable in cotton at a fixed price. Rankin *v.* Sanders, 7 *Miss.* 52.

A written promise to pay a sum certain in "notes of the banks of Mississippi, payable and negotiable in any bank" in that state. Besancon *v.* Shirley, 17 *Miss.* 457.

A bill of a bank in another state. Commonwealth *v.* Woods, 10 *Gray*, 477; Commonwealth *v.* Thomas, *Id.* 483; Commonwealth *v.* Paulus, 11 *Id.* 305.

A writing, promising to pay $55 four months after date, "or in goods on demand." Hosstatter *v.* Wilson, 36 *Barb.* 307.

For many other instances of what are or are not promissory notes, see *U. S. Dig.* tit. Bills and Notes.

PROMOTER. 1. In English practice, those persons who, in popular and penal actions, prosecute offenders in their names and the crown's, and are entitled to part of the fines and penalties for their pains, are called promoters.

2. In reference to corporations, those who unite in a scheme for forming a corporation, who join in organizing the plan, in securing the necessary preliminary subscriptions, and in prosecuting the application for a charter, are called the promoters.

3. The term is also applied to a party who puts in motion an ecclesiastical tribunal, for the purpose of correcting the manners of any person who has violated the laws ecclesiastical; and one who takes such a course is said to "promote the office of the judge." See *Mozley & W.*; also, OFFICE OF JUDGE.

PROMULGARE. Burrill explains that the original meaning of this Latin word was to make the public proposal of a law known, in order that every one might be able to take it into consideration, before it was voted upon in the *comitia* (1 *Mackeld. Civ. Law*, 3, § 5.), but that by the time of Justinian it had acquired the sense of to publish or make known a law, after its enactment (*Proœm. Inst.* § 1); in which meaning it has continued to be used in the civil law.

PROMULGATE. To announce officially; to make known formally; to make public as important or obligatory.

It is used of edicts of government, laws enacted, state papers, treaties, &c.

Promulge seems to have been an old form of the word: it is given by Cowel and Jacob; but it is not often used at the present day.

PROMUTUUM. A quasi contract, known in the civil law, by which he who receives a certain sum of money, or a certain quantity of fungible things, which have been paid to him through mistake, contracts toward the payer the obligation of restoring him as much. It resembles the contract of *mutuum*, (q. v.), because in both a sum of money or some fungible things are required; there must be a transfer of the property in the thing; and the same amount or quantity of the thing which was re-

ceived must be returned. There are, however, some important differences. See *Bouvier*.

PROOF. 1. Evidence, considered as sufficient to convince.

2. Convincing effect of evidence; establishment of a fact to the satisfaction of the mind, by documents or testimony of witnesses.

Judge Greenleaf very judiciously advises that "evidence" should be used for the various means of producing conviction, and "proof" reserved for the result of evidence. (1 *Greenl. Ev.* § 1.) But in many connections, proof, as used not only in current parlance, but in statutes and decisions, appears as equivalent of evidence, or rather of convincing, satisfactory evidence.

Proofs (*plu.*) often appears as the aggregate or mass of the evidence adduced in a cause; thus it may be said that a cause was noticed for hearing on the pleadings and proofs, that on all the proofs the plaintiff was held not entitled to recover, and the like.

A statute requiring proof calls for competent legal evidence. It excludes testimony of an incompetent witness. Hill *v.* Hunt, 20 *N. J. L.* 476; Stanley *v.* Horner, 24 *Id.* 511; Brown *v.* Hinchman, 9 *Johns.* 75.

By the "satisfactory proof" required by a statute, in order to authorize a justice of the peace to issue an attachment, is meant legal evidence, and not the creditor's oath. Van Steenbergh *v.* Kortz, 10 *Johns.* 167.

Proof, in Scotch law, corresponds to evidence in English law; and to lead proof is to produce evidence. *Paterson.*

Proof of debt. The formal establishment, by a creditor, of a debt due to him from an insolvent estate, usually under the bankrupt laws; but also against a deceased person or a partnership or company in liquidation.

Proof of deed. This phrase has, in the United States, a technical sense different from that naturally suggested, of any satisfactory evidence of the existence of the instrument. By what are known as recording acts (in probably all the states), deeds, mortgages, &c., which are not recorded are subject to rights of a subsequent purchaser or incumbrancer in good faith and without notice; and to entitle an instrument to be placed upon the record, so as to give notice to all persons of the grantee's rights, the execution of it must be formally certified by an authorized officer, either on a personal acknowledgment by the grantor, or on testimony of a subscribing witness. The phrase, proof of a deed, when used with relation to this proceeding, imports that, instead of the grantor's acknowledging the execution in person, the subscribing witness attended before the commissioner, justice, or notary, and testified to the authenticity and sufficiency of the execution. It may mean either the testimony thus given, or the certificate which, by custom, the officer indorses on the deed, showing that its genuineness and right to be recorded was thus established.

Proof of will. This signifies the formal establishment before the court or officer having charge of estates of the genuineness of the will; or sometimes his certificate admitting the will to operation. It is used interchangeably with probate, *q. v.*

PROPER. 1. That which conforms to the standard by which the thing mentioned ought to be judged; fit; suitable; sufficient; well adapted. The constitution, in declaring that congress shall have power to make all laws necessary and proper for executing the express powers conferred, uses the word in this sense.

2. Individually appropriate; peculiarly one's own. The expressions, a proper name, one's proper goods and chattels, are examples of this sense.

Proper books of account. It is an objection, under the bankrupt law, to an application for a discharge, that the applicant, being a trader, is shown not to have kept proper books of account. But the fact that a trader's books of account are not entirely accurate does not defeat his right to a discharge in bankruptcy. Keeping proper books of account, within the requirement of the bankrupt law, may be said to be keeping an intelligent record of the merchant's or trader's business affairs, with that reasonable degree of accuracy and care which is to be expected from a man in that business. Intentional omissions may be conclusive that proper books have not been kept; accidental ones are not, unless so numerous as to show gross carelessness, and

impair the value of the books as a record of the business. See *Re* Winsor, 16 *Bankr. Reg.* 152.

PROPERTY. 1. Exclusive legal right to control and enjoy a thing; ownership; title.

2. Any thing which a person owns; the various subjects in which an individual may by law have exclusive dominion and enjoyment.

These two senses — an abstract and a concrete one of the word — are quite distinct, yet are established and well recognized. The distinction is important, though somewhat subtle. The first or abstract meaning is more appropriate to jurisprudence; the second or concrete sense is more common in vernacular use.

Austin enumerates five applications of the word as legitimate and distinct, viz.:

A right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration. In this sense, it is the highest right a person can have in a thing; and is distinguished from a life-interest or an interest for years, on the one hand, and from a servitude or easement, on the other.

The subject of such a right; as when one says, that horse or that field is my property.

A right indefinite in point of user, but limited in duration; as, for instance, a life-interest.

Right as opposed to possession.

A right availing against the world at large, as opposed to rights arising out of contract or quasi contract. *Lect.* 47.

Blackstone's definitions favor confining the use of "property" in jurisprudence to the abstract sense. He says: Things are regarded in law not as property, but as the objects of property. The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land. 1 *Bl. Com.* 138; 2 *Id.* 2, 15.

Our observation of what is practically needed and convenient tends in the other direction, — in favor of using "property," "real property," "personal property," for the things owned; the subjects of enjoyment; and employing the terms estate, interest, ownership, title, or right, for the abstract idea. Some general term for all the subjects of ownership is needed, and there is none other than property; while the abstract idea is well expressed in most connections by "estate," and in others by one of the other four terms mentioned.

The term property, when spoken of ownership in lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory as well as those which are executed. Delassus *v.* United States, 9 *Pet.* 117, 133; Smith *v.* United States, 10 *Id.* 326, 329; Soulard *v.* United States, 4 *Id.* 511; Figg *v.* Snook, 9 *Ind.* 202.

Article 10 of the bill of rights, assuring compensation for private property taken for public use, is not confined to lands held in fee, but includes every valuable interest which can be recognized and enjoyed as property. Old Colony & Fall River R. R. Co. *v.* County of Plymouth, 14 *Gray*, 155.

"Property" includes not only the right to use the subject-matter, but also to dispose of it by exchange or otherwise. Sherman *v.* Elder, 24 *N. Y.* 381.

A statute that no female shall be arrested except for wilful injury to person or property does not mean by property the interest or estate, but the thing owned; and the concealment of a chattel is not a wilful injury to property such as renders a female liable to arrest. Tracy *v.* Leland, 2 *Sandf.* 729.

Used alone, "property" may well be understood as embracing both real and personal property. Owen *v.* Smith, 31 *Barb.* 641, 646: 2 *N. Y. Rev. Stat.* 703, § 34; *N. Y. Code of Pro.* § 464.

Power given by the legislature to purchase "any property" for a designated purpose, includes real as well as personal property. DeWitt *v.* San Francisco, 2 *Cal.* 289.

In constitutional provisions regulating taxation, "property" includes personal property as well as real. Primm *v.* City of Belleville, 59 *Ill.* 142.

"Property," used alone, includes lands, tenements, hereditaments, and commodities, whatever can be appraised or estimated in money. People *v.* Mayor, &c. of Brooklyn, 9 *Barb.* 535.

It is a word of very extensive signification, and may reasonably and fairly be understood to embrace articles not included in the phrase goods and merchandise. Chamberlain *v.* Western Transportation Co., 45 *Barb.* 218.

A bequest or devise of "property" may well be construed to include both real and

personal property. Monroe *v.* Jones, 8 *R. I.* 526; Den *v.* Payne, 5 *Hayw.* 104.

It includes testator's real property. Morris *v.* Henderson, 37 *Miss.* 492; Rossetter *v.* Simmons, 6 *Serg. & R.* 452.

Though a devise by a testator of "that portion of my property remaining" would generally be sufficient to pass the real estate of the testator, the word property may be so restrained by the context, or the provisions of the will be of such a nature, as to require that such language shall be interpreted as including only personal property. Wheeler *v.* Dunlap, 13 *B. Mon.* 291.

"Property," in a bequest or devise, includes every thing which may be the subject of ownership; as money and securities. Pell *v.* Ball, *Spears Ch.* 48.

It includes stock in corporations owned by testator. Adams *v.* Jones, 6 *Jones Eq.* 221.

It does not include rights in action held by testator. In the legal sense, the term does not include choses in action; but, when used with reference to personalty, is confined to "goods," which embraces thiogs inanimate, as furniture, &c., and to "chattels," which embraces living things, as horses, &c. Pippin *v.* Ellison, 12 *Ired. L.* 61.

Rights in action belonging to a testator may pass under the term property, used comprehensively, in a bequest. M'Lemore *v.* Goode, 1 *Harp. Eq.* 272.

The words any property, in an act requiring a wife to file a certificate of her separate business, &c., in order to exemption from execution, relate only to personal property. Bancroft *v.* Curtis, 108 *Mass.* 47.

"Property," as used in a statute providing for the securing of a married woman's property to her separate use, means every thing that is susceptible of ownership. Barclay *v.* Plant, 50 *Ala.* 509, 516.

So used, it includes money. Mitchell *v.* Mitchell, 35 *Miss.* 108.

A statute that if any person shall feloniously steal the property of another in any other state or country, and shall bring the same into this state, he shall be guilty of larceny, includes money under the word property. People *v.* Williams, 24 *Mich.* 156.

"Property," in a policy of marine insurance upon "the property on board," &c., includes money carried for the purchase of a return cargo, although in the form of bank-notes, not specie. Whiton *v.* Old Colony Ins. Co., 2 *Metc.* (*Mass.*) 1.

"Property," in a marine policy, will cover whatever the insured has a *bona fide* equitable interest in, though the legal title be in another. Locke *v.* North American Ins. Co., 13 *Mass.* 61; Tyler *v.* Ætna Ins. Co., 12 *Wend.* 507; 16 *Id.* 385.

It may embrace commissions accruing to the insured, the master. Holbrook *v.* Brown, 2 *Mass.* 280.

That it should not be extended to freight, see Wiggin *v.* Mercantile Ins. Co., 7 *Pick.* 271.

Demands in favor of a debtor, rights in action belonging to him, are within the operation of laws authorizing attachment or garnishment of "his property," "his property and effects," &c. Cross *v.* Haldeman, 15 *Ark.* 200; Fling *v.* Goodall, 40 *N. H.* 208; Crone *v.* Braun, 23 *Minn.* 239.

A right of action for damages for a malicious prosecution, prior to the rendition of judgment, is not an item of "property," within a statute exempting property from execution. Hopkins *v.* Fogler, 60 *Me.* 266.

"Property," when used generally in laws authorizing taxation, does not include credits, or rights in action for money due. People *v.* Hibernia Savings & Loan Soc., 51 *Cal.* 243.

When used with reference to taxation, "property" does properly include credits. People *v.* Worthington, 21 *Ill.* 171.

In the Pennsylvania statute of 1851, conferring upon boroughs certain taxing powers, the words "all property" should be construed as meaning property subject to manual occupation; hence moneys, stocks, and bonds are not taxable for borough purposes. Mifflintown *v.* Jacobs, 69 *Pa. St.* 151.

A debt due to an American citizen from a foreign government is as much property as houses and lands, and, when taken by government for public use, is to be paid for in the same manner. Meade *v.* United States, 2 *Ct. of Cl.* 224.

"Property," in a law authorizing taxes, does not include the franchise of a corporation. State *v.* Philadelphia, &c. R. R. Co., 45 *Md.* 361, 379, 385.

The authority or power of city authorities to authorize a gas company to lay pipes in city streets, is not property of the corporation, within restrictions upon the power of the municipal authorities to dispose of the city property. Smith *v.* Metropolitan Gas Light Co., 12 *How. Pr.* 187.

A charter power authorizing a company to convey all such property as may be necessary and convenient to carry into effect the objects of incorporation, will not be deemed to extend to the franchise. Coe *v.* Columbus, &c. R. R. Co., 10 *Ohio St.* 372, 377.

Provisions of a railroad charter, prescribing a general mode for assessing compensation for land taken by the company, may be applied to the interest of a turnpike company in land covered by their road, and in the road itself, as being a species of tangible property. White River Turnpike Co. *v.* Vermont Central R. R. Co., 21 *Vt.* 590.

The imposition of a tax upon the occupation of wholesale liquor-selling is not a tax upon "property," within the meaning of that word as used in the Arkansas constitution. Straub *v.* Gordon, 27 *Ark.* 625.

A constitutional restriction upon taxation of property does not apply to taxes upon a profession or business, such as the

business done by an insurance company. Home Ins. Co. *v.* City Council of Augusta, 50 *Ga.* 530, 543.

A gift of the use of the testator's "property" in a certain baking business was held to comprehend the services of the testator's servants employed therein, in Foxall *v.* McKenney, 3 *Cranch C. Ct.* 206.

Under a statute which made corporators individually liable on the return of "no property or estate" found of the corporation, a return of "no property found" was held to be sufficient, for "property" comprehends estate. Stanley *v.* Stanley, 26 *Me.* 191.

PROPONE; PROPOUND. In ecclesiastical and probate law, to bring forward for adjudication; to exhibit as basis of a claim; to proffer for judicial action.

Proponent, or propounder: one who puts forward an instrument asking the action of the court in enforcement of it; the person who, as executor under a will, or claiming administration with a will annexed, proposes it as genuine in the court of probate, or other court having jurisdiction for the purpose; the person who prefers allegations or articles of complaint.

PROPOSITUS. Put forward; placed forth; proposed.

In computing descents, the individual (real or imaginary) from whom descent is considered to be reckoned is called the *propositus*.

PROPRIA. See PROPRIUS.

PROPRIETARY, *n.* Owner. Originally, a mere equivalent to proprietor; but it has been much used to denote proprietors of estates under large royal grants, or of great colonial estates. Grantees on whom great tracts of land in new countries have been conferred with partial powers of government, as a means of promoting emigration to and colonization of the lands, have been called proprietaries.

In ecclesiastical law, it was chiefly used for him who had the fruits of a benefice to himself, his heirs and successors, as abbots and priors had to them and their successors. *Tomlins.*

PROPRIETARY, *adj.* Belonging to an individual; private; considered as property; owned.

Proprietary articles. In the United States internal revenue laws, are goods manufactured under some exclusive individual right to make and sell them.

Proprietary chapel. A chapel or place of worship built and maintained by a private person and as private property; not, however, for his individual use or that of his family, but for public assemblies; yet not freely dedicated to public use, but conducted for the owner's profit. See *Brown;* also *Wharton.*

Proprietary governments. This expression is used by Blackstone to denote governments granted out by the crown to individuals, in the nature of feudatory principalities, with inferior regalities and subordinate powers of legislation, such as formerly belonged to the owners of counties palatine. 1 *Bl. Com.* 109.

PROPRIETATE PROBANDA. A writ which, in English practice, used to be directed to the sheriff, requiring him to inquire by inquest whether goods distrained were the property of the plaintiff, or of the person claiming them. This writ issued when to a writ of replevin the sheriff returned as his reason for not executing it that the distrainor or other person claimed a property in the goods distrained. 2 *Arch. Pr.* 827. The same object is now obtained by means of a summons to interplead

PROPRIÉTÉ. The French law term corresponding to our propriety in the sense of property; or the right of enjoying and of disposing of things in the most absolute manner, subject only to the laws.

PROPRIETOR. Owner.

A penalty imposed upon "the proprietor or proprietors" of any railroad, &c., for negligence causing the death of a passenger, may be enforced against a corporation owning and operating a railroad. Commonwealth *v.* Boston & Worcester R. R. Corp., 11 *Cush.* 512.

A widow occupying the lands of her husband, with his children, the heirs at law, before the assignment of dower, is not a "tenant" or "proprietor," within the statute, and is not liable for the taxes; and a purchase by her, at a sale for taxes, under the statute, will not be set aside in favor of creditors of her deceased husband. Branson *v.* Yancy, 1 *Dev. Eq.* 77.

PROPRIETY. In Mass. colonial ordinance of 1741 is nearly, if not precisely, equivalent to property. Commonwealth *v.* Alger, 7 *Cush.* 53, 70.

PROPRIUS. One's own.

Propria persona. In his own person.

A term applied to an appearance or pleading interposed by a party personally, as distinguished from a like proceeding by attorney. Thus an early rule of pleading at common law was, that pleas to the jurisdiction of the court must be pleaded *in propria persona*, because if pleaded by attorney they admitted the jurisdiction; an attorney, being an officer of the court, was presumed to plead after having obtained leave, which admits the jurisdiction.

Proprio vigore. By its own force; by its intrinsic meaning. This expression is used in construction, as expressing that certain terms have an intrinsic force and meaning, without any addition or qualification.

PROPTER. On account of; for. This Latin preposition introduces several phrases; among which are:

Propter affectum. On account of affection; for bias; for favorable inclination. This phrase expresses a ground of challenge to a juror, such as relationship to the party.

Propter defectum. On account of defect; for incompetency. Grounds of challenge to a juryman *propter defectum* are, that he is an alien, a minor, &c.

Propter delictum. On account of crime. A juror may be challenged *propter delictum* who has been convicted of an infamous crime.

PROROGATED JURISDICTION. In Scotch law, a power conferred by consent of the parties upon a judge who would not otherwise be competent. It is analogous to the authority which, by laws of some of the western states, parties may, by agreement, confer upon an individual member of the bar, to try their cause, as judge; in the case, for example, of absence or sickness of the official judge.

PROROGUE. To direct suspension of proceedings of parliament; to terminate a session.

Prorogation: the act or mandate of the English sovereign terminating a session of parliament. Prorogation is to be distinguished from adjournment, which takes place by vote, and continues the proceedings over to another day in the same session; and from dissolution, which extinguishes the powers of that parliament, and calls for election of new members before there can be another meeting.

PROSECUTE. To carry forward, maintain, or wage a judicial proceeding.

Prosecution: the act of conducting or waging a proceeding in court; also, the proceeding itself. Prosecutor: one who carries forward, maintains, or wages a judicial proceeding. Prosecutee, the correlative, is not in use.

Prosecution, in the sense of a proceeding carried forward, is almost always, prosecutor is generally, and to prosecute is sometimes, spoken specially of criminal proceedings. Prosecution, in the sense of conducting or waging a suit, seems equally applicable to civil and to criminal suits.

Prosecution sometimes signifies the party and counsel by whom a criminal proceeding is conducted; as in the expression, no evidence was produced by the prosecution.

Prosecution, in the New Jersey law limiting proceedings on sheriffs' bonds, does not mean an action or a suit. It is the following or carrying on of an action or suit already commenced, — as by assessing damages, taking out execution, and levying money for the benefit of one claiming after a judgment had been previously entered for the penalty. State *v.* Hardenburgh, 2 *N. J. L.* 355 (257).

That prosecution includes civil actions, see Dolloway *v.* Turrill, 26 *Wend.* 383, 399.

The word prosecution, in the Pennsylvania limitation act of 1860, is synonymous with indictment. Commonwealth *v.* Haas, 57 *Pa. St.* 443.

Prosecutor, in a statute giving half a penalty to the state and the other half to the prosecutor, should be construed as meaning the informer, or any person who will proceed against the offender, and not restricted to the individual aggrieved by the offence. Phillips *v.* Bevans, 23 *N. J. L.* 373.

PROSTITUTION. In its most general sense, the setting of one's self to sale, or of devoting to infamous purposes what is in one's power. In the more restricted sense (very common), it is the act or practice of a woman offering her body to an indiscriminate intercourse with men; the lewdness of a woman with men generally for hire. It involves the idea of intercourse with more men than one. See Carpenter *v.* People, 8 *Barb.* 603, 611.

The offence of abducting a woman for the purpose of prostitution is not completed by abducting her for the purpose of having illicit sexual intercourse with her one's self. Osborn *v.* State, 52 *Ind.* 526.

The defendant, by false representations, induced an unmarried female to accompany him, and, having got her intoxicated, had repeated sexual intercourse with her. Held, that an indictment for enticing her away "for the purpose of prostitution" could not be sustained. State *v.* Stoyell, 54 *Me.* 24.

PROTECTIO. Protection; defence.

Protectio trahit subjectionem, et subjectio protectionem. Protection implies subjection, and subjection protection. The protection of an individual by government is on condition of his submission to the laws; and such submission, on the other hand, entitles the individual to the protection of the government.

PROTECTION. Besides its vernacular meaning of shelter from injury, a protection is used in law in the special sense of a certificate or writing showing a personal immunity. Thus it sometimes means a writ which the king, in virtue of his prerogative, might grant to a person named to be free from suits at law for a certain time, and for some reasonable cause: and these protections might issue for him who was going beyond sea in the king's service; or for him who was already abroad in the king's service, as an ambassador, &c.; or for the king's debtor, that he should not be sued till the king's debt should be satisfied. A protection might also be granted to a spiritual corporation, that their goods or chattels be not taken by the officer of the king for the king's service. *Jacob.* Brown says that this prerogative, however, is seldom exercised. It was formerly the subject of much abuse, whence the frequent complaints regarding it in the early constitutional period.

While impressment of seamen to serve in the English navy was common, a certificate issued to a mariner to show that he was exempt from the press was called a protection.

Protection order. This is a species of order grantable by the divorce court, or by a magistrate, under the divorce act of 1857, to a wife whose husband has deserted her without reasonable cause, for the protection of her property. The protection order entitled her, during the continuance of such order, to enjoy her own property, and to bring actions as if unmarried. The occasions for such an order are much fewer since the passing of the married women's property act, 1870 (33 & 34 Vict. ch. 93), as that declares that the wages and earnings of a wife, and any money or property acquired by her through the exercise of any literary, scientific, or artistic skill, shall be deemed her separate property. 2 *Steph. Com.* 267.

PROTECTOR OF SETTLEMENT. The person or persons whose consent, under the fines and recoveries abolition act, 1833 (3 & 4 Wm. IV. ch. 74), is necessary to enable a tenant in tail in remainder to bar the subsequent estates in remainder or reversion. The protector is generally the prior tenant for life; but the author of the settlement may, in lieu of such prior tenant, appoint any number of persons, not exceeding three, to be together protector of the settlement. A protector is under no restraint in giving or withholding his consent. (1 *Steph. Com.* 251; *Wms. R. P.* Pt. I. ch. 2; *Hunt Eq.* Pt. III. cb. 3, § 1, subd. 3.) *Mozley & W.*

PROTEST. 1. In the most general sense, signifies any formal or officially authenticated declaration; conveying, however, usually, the idea of an adversary declaration; an objection.

Burrill defines it exceedingly well, as being a solemn declaration against an act about to be done, or already done, expressive of disapprobation or dissent, or made with the view of preserving some right which, but for such declaration, might be taken to be relinquished, or of exonerating the party protesting from some liability which might otherwise attach to him.

2. In the parlance of deliberative and legislative bodies, of corporate and public meetings, a protest is a formal notice which one or more members sometimes make, and ask to have incorporated in the minutes, of their objection to some act or vote of the majority.

3. In a very frequent and important use relating to bills of exchange, protest, in legal strictness, means the formal declaration drawn up and signed by the notary, that he presented the bill for acceptance, or for payment, and that it was refused. In this sense, the word does not apply to inland bills or promis-

sory notes; for, as to these, no presentment by notary, acting officially, is, by the general mercantile law, necessary. Any one may make the necessary demand; though, under statutes allowing the notary's certificate to be read in evidence of demand and refusal, the employment of one is usual and convenient. But "protest," in the broader and looser sense in which it is generally employed among merchants, signifies dishonor of mercantile paper. One's commercial obligations are said to go to protest when they are not paid at maturity, the observance of necessary steps to charge indorsers being rather taken for granted than necessarily implied; and in this use "protest" may well be understood as applying to notes as well as bills. It may also embrace all the steps needed to charge indorsers, as well as mere presentment and official declaration of dishonor.

A promise to "waive protest" of a note ought to be construed as binding the promisor to waive proof of demand and of notice to indorsers, and not as confined to mere dispensing with presentment by a notary. Coddington *v.* Davis, 1 *N. Y.* 186; 3 *Den.* 16.

Protest, applied to commercial paper, means a demand of payment in proper form, and at a proper time; and, in case of nonpayment, due and reasonable notice to the indorsers by any suitable person. This is the usual and popular meaning of the term, as used even among merchants, and the sole meaning as used by non-commercial and unlearned men. Ayrault *v.* Pacific Bank, 47 *N. Y.* 570.

Protest, in a technical sense, means only the formal declaration drawn up and signed by the notary; yet, as used by commercial men, the word includes all the steps necessary to charge an indorser. Townsend *v.* Lorain Bank, 2 *Ohio St.* 345.

The admission of a party to a note, that he knew the note had not been "protested." is for the jury to construe whether he intended the word to be taken in its technical sense, or in its popular sense, including demand and notice. Brannon *v.* Hursell, 112 *Mass.* 63.

4. In maritime law, a declaration made on oath before a magistrate, consul, or notary-public, in any distant port, of the damage likely to ensue from a ship's delay, is termed a protest; and so is a solemn account, authenticated before a notary, of the vessel and her cargo, or of any important event affecting the voyage, — such as stranding of the vessel, reasons compelling the master to make sale of the ship abroad, or the like.

5. Under the acts of congress regulating the collection of duties, whenever an importer, charged with what he deems an excessive duty on particular goods, desires to pay it for the purpose of withdrawing the goods from custom-house, but to reserve his right to bring an action to test the question and recover back the excess from the collector, he must, at the time of paying the duties, serve upon the collector a written notice of his objection. This is called his protest.

6. The objection of a person making a payment that he disputes the obligation or the amount, stated for the purpose of reserving a right of reclamation, is called a protest. As far as form is concerned, almost any which is distinct and certain, and gives the creditor or claimant means of reducing the demand to limits within which it can be sustained, is sufficient; though we do not understand that making a protest against a demand by an ordinary creditor, or even by an official collector, gives a right to sue to recover back the money paid, unless the payment was made under compulsion, or to avoid or release some duress. But the expression making payment "under protest" means only "under objection," under notice that it will be reclaimed, and does not import any official authentication of the objection or notice.

PROTESTANT. One who accepts the Christian religion, but denies the authority of the Pope of Rome; Christians in this country and in western Europe being divided into Roman Catholic and Protestant. Neither the term Roman Catholic nor Protestant is broad enough to include any who do not, nominally at least, assent to the truth of Christianity as a distinct system of religion. A Mohammedan, a Jew, a pagan, or an infidel cannot properly be called either a Catholic or a Protestant, not being a Christian. When the children of Protestant parents, or those born in a Protestant country, renounce that religion, and voluntarily elect and adopt and profess some other religion,

they cannot any longer be reckoned or assumed to be of the Protestant religion; and so of all the denominations of Christians, and all other systems of religion. See Hale *v.* Everett, 53 *N. H.* 9.

PROTESTATION. The name of a particular formula formerly used in common-law pleading, when it was expedient for a party to plead in such a manner as to avoid any implied admission of a fact which could not with propriety or safety be positively affirmed or denied. This might be done by the party interposing an oblique allegation or denial of some fact, protesting that such a matter did or did not exist, and at the same time avoiding a direct affirmation or denial. This was technically termed a protestation. Such practice has, however, by a late rule of court (Hil. T. 4 Wm. IV.), been disallowed.

Coke defines a protestation to be an exclusion of a conclusion. For the use of it is to save the party from being concluded with respect to some fact or circumstance which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Protestation is said to be of two kinds: 1. When a man pleads any thing which he dare not directly affirm or cannot plead, for fear of making his plea double; as if in conveying to himself by his plea a title, he ought to plead divers descents by divers persons, and he dare not affirm that they were all seised at the time of their death, or, although he could do it, yet it will be double to plead two descents, of both which each one by itself may be a good har, then the defendant ought to plead and allege the matter, introducing the word *protestando*, — as to say (by protestation) that such a one died seised. &c., and that the adverse party cannot traverse. 2. When one is to answer two matters, and yet by law he ought to plead but to one, then in the beginning of his plea he may say *protestando et non cognoscendo* such part of the matter to be true (and then making his plea further), *sed pro placito in hac parte*, &c., and so he may take issue on the other part of the matter; and then he is not concluded by any of the rest of the matter which he hath by protestation so denied. In other words, the use of a protestation in pleading seems to have been this: when one party alleged or pleaded several matters, and the other party could only offer or take issue on one of them, he protested against the others, — in such case, should the issue, on trial, be found against the latter party, the record would not be evidence against him in another suit as to those matters. *Jacob.*

PROTHONOTARY, or PROTONOTARY. The style or title of an officer who, in some courts, officiates as principal clerk.

There were formerly three such officers in the court of common pleas, and one in the court of king's bench. He of the king's bench recorded all civil actions in that court. Those of the common pleas entered all declarations, &c., and made out judicial writs. *Cowel.*

These officers were abolished in 1837, by Stat. 7 Wm. IV. & 1 Vict. ch. 30. *Mozley & W.*

PROTOCOL. 1. A Byzantine term applied to the first sheet pasted on a manuscript roll, stating by whom it was written, &c. *Wedgwood.*

2. The first or original copy of any thing. *Tomlins.*

3. The entry of any written instrument in the book of a notary or public officer, which, in case of the loss of the instrument, may be admitted as evidence of its contents. *Tomlins.*

4. A document serving as the preliminary to, or opening of, any diplomatic transaction. *Latham.*

Prout patet per recordum. As appears by the record. Words of reference to a record, used in Latin forms of pleadings, &c. A record having been once set forth in full, it might be referred to by this formula.

PROVE. 1. To establish by evidence.

2. To establish a debt due from an insolvent estate, and to receive a dividend thereon.

To prove a debt differs, on the one hand, from receiving the full benefit thereof, as may be allowed where a debtor of a bankrupt is allowed to set off a counterclaim of his own, or an execution creditor is allowed the benefit of the judgment; and, on the other hand, from being deprived of all benefit thereof.

3. To submit a will with testimony of witnesses as to execution, to a court of probate jurisdiction, and obtain its approval of the sufficiency of the instrument, and its authority to carry the dispositions into effect.

To prove a will in chancery is a proceeding allowed where lands are devised by will away from the heir; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will verbatim therein, suggesting that the heir is induced to dispute its validity. Then, the defendant having answered, the

parties proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. 3 *Bl. Com.* 450.

PROVER. Another form of the words approver or probator, *q. v.*

PROVIDED. The words usually employed to create a condition are "on condition." But the phrases "provided," "so that," "if it shall happen," are of the same import. "Provided always" may constitute a condition, limitation, or covenant, according to circumstances. Heaston *v.* Commissioners of Randolph County, 20 *Ind.* 398.

PROVINCE. 1. In ecclesiastical law, the circuit of an archbishop's jurisdiction. Sometimes a county; and more generally an out-country governed by a deputy or lieutenant.

2. The word is also sometimes used figuratively to signify power or authority; as in saying that it is the province of the court to judge of the law, that of the jury to decide on the facts.

Provincial constitutions. The decrees of provincial synods held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry III., to Henry Chichele, in the reign of Henry V., and adopted also by the province of York in the reign of Henry VI., — are so called. *Lynd. Provinciale.*

Provincial courts. The several archiepiscopal courts in the two ecclesiastical provinces of England. *Wharton.*

PROVISIONAL. Temporary.

Provisional assignees. Assignees to whom, under former bankrupt laws, the property of a bankrupt was assigned until the regular or permanent assignees were appointed by the creditors. Their place is now supplied, under the English bankrupt law, by the official assignee.

Provisional committee. One appointed for a temporary occasion.

Provisional court. When, during the late civil war, portions of the insurgent territory were occupied by the federal forces, the president, as commander-in-chief, as a measure of government of such territory, had power legally to establish therein courts for the determination of controversies and the administration of justice. Therefore the United States provisional court for the state of Louisiana, organized under an order of the president, was authorized to exercise the jurisdiction conferred by that order. And when congress enacted that "all judgments, orders, decrees, and decisions" of a court in cases which would ordinarily have been properly cognizable by the circuit court of the United States should be transferred to "and become the judgments, orders, decrees, and decisions" of that court, a decree in admiralty of the provisional court became a decree of the circuit court, appealable to the supreme court. The Grapeshot, 9 *Wall.* 129. Compare Edwards *v.* Tanneret, 12 *Wall.* 446.

Provisional remedy. This term has been prominently employed in the New York and other codes of reformed procedure to designate a class of remedies allowed for the purpose of giving plaintiff in a civil action a temporary security, while he prosecutes his action. They are such as arrest, attachment, claim and delivery, injunction, receiver.

The phrase provisional remedy does not include the approval of a plaintiff's undertaking in an action of claim and delivery. Nosser *v.* Corwin, 36 *How. Pr.* 540.

Provisional seizure. A remedy known under the law of Louisiana, and substantially the same in general nature as attachment of property in other states.

PROVISIONS. Fat cattle are provisions, or munitions of war, within the true intent and meaning of the act of congress of July 6, 1812, prohibiting trade with the enemies of the United States. United States *v.* Barber, 9 *Cranch*, 243; United States *v.* Sheldon, 2 *Wheat.* 119.

Corn may be deemed embraced by a statute exempting "provisions on hand for family use" from execution. Atkinson *v.* Gatcher, 23 *Ark.* 101.

The provisions furnished a ship, strictly considered, are confined to such articles as enter into the food or subsistence for hands and passengers; while stores is a more general term, and may embrace wood and coal. Crooke *v.* Slack, 20 *Wend.* 177.

A bequest of "corn, fodder, meat, and other provisions on hand," includes wine and brandy which the testator had laid in and provided for his own use. Mooney *v.* Evans, 6 *Ired. Eq.* 363.

The nominations to benefices by the pope were called provisions, and those who were so nominated were termed provisors. Various statutes were passed in the reign of Edward III., forbidding all ecclesiastical persons from purchasing these provisions: see, in particular, the Stats. 25 Edw. III. st. 6, and 27 Edw. III. st. 1, which are preeminently called the statutes of provisors. *Brown.*

PROVISO. A conditional clause often inserted in deeds or statutes, and on the performance or non-performance of which the validity of the deed

or operative force of the statute frequently depends; it usually begins with the word provided.

The word proviso is generally taken for a condition: but it differs from it in several respects; for a condition is usually created by the grantor or lessor, but a proviso by the grantee or lessee. *Jacob.*

A proviso also differs from an exception, in this, that an exception exempts, absolutely, from the operation of an engagement or an enactment; while a proviso defeats their operation, conditionally: an exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; while a proviso avoids them, by way of defeasance or excuse. See *Bouvier.*

A proviso in a statute is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause. Wayman *v.* Southard, 10 *Wheat.* 1, 30.

A proviso in deeds or laws is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. Voorhees *v.* Bank of the United States, 10 *Pet.* 449.

PROVISOR. A purveyor. *Cowel.* Also, one who sued to the court of Rome for a provision. *Jacob.*

PROXIMATE. Immediate; nearest; next in order.

It has become a maxim in insurance law that a loss is to be attributed to the proximate cause, and not to the remote cause. So it is a fundamental rule in the law of damages, that they are to be allowed, in general, only for the proximate consequences of the wrong.

PROXINETA. The civil-law name of a kind of broker or agent making a business of promoting marriages.

All contracts and agreements respecting marriage (commonly called marriage-brokage contracts), by which a party engages to give another a compensation, if he will negotiate an advantageous marriage for him, are void, as being injurious to or subversive of the public interest. But the civil law does not seem to have held contracts of this sort in such severe rebuke; for it allowed *proxinetæ*, or match-makers, to receive a reward for their services to a limited extent. And the period is comparatively modern in which a different doctrine was engrafted into the common law, and received the high sanction of the house of lords. Now all marriage-brokage contracts are utterly void as against public policy, so much so, that they are deemed incapable of confirmation, and even money paid under them may be recovered back in a court of equity. 1 *Story Eq. Jur.* 260.

PROXY. 1. A person appointed in the stead of another, to represent him. A peer can vote by proxy, but a member of the house of commons cannot. In corporations where the right to vote is founded on ownership of capital stock, as property, voting by proxy is generally allowed.

2. The authority or power given to one person to vote for another is also called a proxy.

Annual payments made by the parochial clergy to the bishop, &c., on visitation, have been, according to Wharton, termed proxies.

PUBLIC, *adj.* 1. Generally known; open to view; unconcealed.

2. Belonging to the community at large; common to enjoyment of all persons; open to use by any one desiring.

3. Affecting or concerning the community at large.

A distinction has been made between the terms public and general: they are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large, portion of the community. 1 *Greenl. Ev.* § 128.

Public accounts. The accounts kept by officers of the nation, state, or kingdom, of the receipt and expenditure of the revenues of the government. They are not necessarily open to inspection by any one desiring.

Public act, law, or statute. An enactment or statute which affects the community generally, although perhaps operative only within a limited territory, as distinguished from a private act, which bears upon designated individuals only. The distinction is important, in view of the rule that the courts of the jurisdiction will take judicial notice of the public laws, and they need not be distinctly pleaded or proved; but private acts must be alleged and proved as matter of fact.

In classifying acts of parliament in recent years, statutes which, although passed and operative as public acts, apply within a limited territory only, have been placed, in order to diminish the bulk of the volume of the general stat-

utes, among the local and personal acts, and are called public local acts.

Acts creating public corporations are public statutes. Portsmouth Livery Co. *v.* Watson, 10 *Mass.* 91.

Acts in relation to banks are to be classed as public statutes. The bank-bills are a legal tender unless objected to, and their charters concern the currency of the country. Bank of Utica *v.* Smedes, 3 *Cow.* 662.

An act for the survey of timber in a particular county is a public statute. Pierce *v.* Kimball, 9 *Greenl.* 54.

An act relating to the preservation of a single species of fish in a particular river is a public act. Burnham *v.* Webster, 5 *Mass.* 266, 268.

Public law, in one sense, is a designation given to international law, as distinguished from the laws of a particular nation or state. In another sense, a law or statute that applies to the people generally of the nation or state adopting or enacting it, is denominated a public law, as contradistinguished from a private law, affecting only an individual or a small number of persons. Morgan *v.* Cree, 46 *Vt.* 773.

A statute making it felony to steal the notes of a particular incorporated bank was held to make the statute by which such bank was incorporated a public statute. United States *v.* Porte, 1 *Cranch C. Ct.* 369.

The tendency of modern decisions in the United States has been to enlarge the class of laws deemed public; and, in particular, a village charter, being obligatory on all persons who are or may become residents of the village, should be deemed a public act, of which the courts of the state enacting it will take notice without its being pleaded. Village of Winooski *v.* Gokey, 49 *Vt.* 282.

Public appointments. Offices or stations under government, to which individuals may be appointed under authority of law.

Public blockade. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification. A public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while, in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation. The Circassian, 2 *Wall.* 135.

Public bridge, common, highway, park, square, or **way.** One maintained by the community for the free use of all persons who desire to avail themselves of it, subject only to regulations of general application.

Public building. In a statute prohibiting the pulling down "public buildings" to alter highways, does not include an engine-house, owned and occupied by an engine-company, but situated on land belonging to a private individual. State *v.* Troth, 34 *N. J. L.* 377.

Public carriage, conveyance, or **vehicle.** These are such as are licensed for general use by all persons desiring to employ them. They are not public in the sense of being owned or maintained by the government, but in that of being at the service of whomsoever wishes them.

Public chapel. The chapels of ease, designed for the benefit of particular districts within a parish, and open to the public, are called public chapels. They are opposed to private chapels, which are erected for the use of persons of rank, to whom the privilege has been conceded by the proper authorities; also to proprietary chapels, which are the property of private persons, and are erected with a view to profit or otherwise. See 2 *Steph. Com.* 745–747.

Public company. Is the English term for a kind of organization corresponding in general nature and purposes with private business corporations, as they exist very generally under the laws of the states authorizing incorporation with an individual liability of stockholders.

When, in the two countries, the endeavor became common to procure charters for various business adventures, with a view to secure exemption of the persons concerned from liability as partners, it was, of course, soon found that some checks and guards were needful to protect creditors from losses by insolvency of corporations. The general policy and spirit of English legislation seems to have been to refuse full, formal incorporation to the great majority of associations formed to prosecute ordinary business enterprises on aggregations of private capital, but to allow the movers in such plans to register themselves as having formed a company, and to permit them, if they conform to the regulations prescribed, to pursue their plan under the privilege that the liability of members for debts, in case of insolvency, shall be limited. Public company is one of the terms for an organization of this general character. The word public has no very

distinct or peculiar force in this connection.

"Joint-stock company" and "limited company" are also used, without apparent intent, that our reading has disclosed, to distinguish between the three as different kinds of companies, on any grounds that can be of interest to the American reader. We judge joint-stock company to be the preferable statutory name, and public company and limited company to be convenient substitutes, rather than distinct terms. See JOINT-STOCK COMPANY.

Public corporation. This term includes the quasi corporations created for political purposes, or to exercise some of the functions and powers of government within a particular territory; such as cities, towns, counties, parishes, and villages: also some others founded for public, though not for political or municipal, purposes, if the whole interest in them belongs to the government; not if there are other and private owners of stock in them. Dartmouth College *v.* Woodward, 4 *Wheat.* 518, 668; Rundle *v.* Delaware, &c. Canal, 1 *Wall. C. Ct.* 275; Ten Eyck *v.* Delaware, &c. Canal Co., 18 *N. J. L.* 200; Tinsman *v.* Belvidere, &c. R. R. Co., 2 *Dutch.* 148; People *v.* Morris, 13 *Wend.* 325, 334. A corporation composed exclusively of officers of the government, they having no personal interest in it or its concerns, and only acting as the organs of the state in effecting a great public improvement, may properly be called a public corporation. Sayre *v.* North-western Turnpike Co., 10 *Leigh*, 454. But the mere fact that the government creating a corporation is the proprietor of all the capital stock, does not, if none of the incidents of sovereignty are conferred upon it, render it a public one. Bank of Alabama *v.* Gibson, 6 *Ala.* 814; State Bank *v.* Gibbs, 3 *McCord*, 377; Mahony *v.* Bank of Arkansas, 4 *Ark.* 620; State Bank *v.* Clark, 1 *Hawks*, 36.

Thus a bank created by congress as an instrument for carrying on the fiscal operations of the government, such as the old United States Bank, is a public corporation. Osborn *v.* Bank of United States, 9 *Wheat.* 738. But if the stock of a banking corporation is owned by private individuals, the bank is not a public but a private corporation, although the public, by the legislature, may exercise over it a supervisory power, and can annul its charter for cause. Nor is the character of such a corporation altered, from the fact that the state or the United States own a portion of its stock. Miners' Bank of Dubuque *v.* United States, 1 *Greene*, 553; United States Bank *v.* Planters' Bank, 9 *Wheat.* 904; Turnpike Co. *v.* Wallace, 8 *Watts*, 316.

A canal company is, in general, a private corporation; for a corporation is not public because it may be for the public benefit merely. Ten Eyck *v.* Delaware & Raritan Canal, 18 *N. J. L.* 200.

So a county is a public corporation, created by the mere will of the legislature for the public good; and, in this regard, it differs from private corporations, where the legislature and parties interested contract for certain privileges, on performing certain acts for the public good. Counties may be divided, and their boundaries changed, at the pleasure of the legislature, whereas private corporations cannot be altered but by consent of both parties. Mills *v.* Williams, 11 *Ired.* 558.

Trustees of public schools are public corporations, to be controlled and regulated by the legislature. Bush *v.* Shipman, 5 *Ill.* 186; Trustees of Schools *v.* Tatman, 13 *Id.* 27. But colleges are not in general public corporations, but are private. Dartmouth College *v.* Woodward, 4 *Wheat.* 518; Allen *v.* McKeen, 1 *Sumn.* 276. And so of an incorporated academy, although it may derive a part of its support from the government. Cleaveland *v.* Stewart, 3 *Ga.* 283.

Railroad companies are not public corporations, within the meaning of a statute providing that members of such corporations shall be competent witnesses in cases affecting the interests of such corporations. Dearborn *v.* Boston & Montreal R. R. Co., 4 *Fost.* 179.

A levee district, organized under the laws of California, to construct works for preventing portions of the territory from overflow, and clothed with powers for this general purpose to issue bonds, levy and collect assessments, construct and repair highways,

open canals, &c., is a public corporation. Dean *v.* Davis, 51 *Cal.* 406.

A corporation formed by a territorial legislature, for the purpose of receiving and administering a donation of land made by the government of the United States for the establishment of a seminary of learning, is not a public corporation. Vincennes University *v.* Indiana, 14 *How.* 268.

A turnpike company, in which the state held stock, was held, in Pennsylvania, not to be such a public corporation as was exempt from the operation of a legislative act giving jurisdiction to the courts, upon the application of a creditor, to sequester the profits and tolls of a corporation for the payment of its debts. Turnpike Co. *v.* Wallace, 8 *Watts*, 316.

The university of North Carolina is a public institution and body politic, and, therefore, subject to the legislative control. The fact that private donations have been made to the university does not alter the nature of the foundation nor the character of the corporation. University of North Carolina *v.* Maultsby, 8 *Ired. Eq.* 257.

S. P. of the university of Alabama. Trustees *v.* Winston, 5 *Stew. & P.* 17.

Public debt; public securities. The funded indebtedness of the government, and the evidences or obligations by which the rights of individuals to be paid portions of it are made known. See NATIONAL DEBT.

The terms public debt and public securities, used in legislation, are terms generally applied to national or state obligations and dues, and would rarely if ever be construed to include town debts or obligations; nor would the term public revenue ordinarily be applied to funds arising from town taxes. Morgan *v.* Cree, 46 *Vt.* 773.

Public document. The deposit, by the author, of his work in a public office, as a chart in the navy department, does not make such chart a public document, which any one may copy. Blunt *v.* Patten, 2 *Paine*, 393.

Public dues. The expression may be construed to include taxes levied by a county court, to pay a county subscription in aid of a railroad. Anderson *v.* Thompson, 10 *Bush*, 132.

Public enemy. A power at war with the nation.

Carriers are, at common law, excused for losses caused by act of a public enemy, as the rule is phrased, in this country, or according to the old English expression, "of the king's enemies." The meaning is violence exercised by some military force, acting in war against the United States, — not by mere private robbers.

Public faith. The expression pledging the public faith is sometimes used in legislative acts: it imports a solemn assurance and promise by the legislature, on behalf of the state, nation, or kingdom, and is well adapted to enlist the strong and steadfast effort of the whole people to perform the agreement or redeem the pledge. But such an engagement is, generally speaking, above enforcement by the courts; hence the term cannot be said to have distinct force in jurisprudence.

Public funds. This term may well mean the moneys on deposit or in the government treasury, — the property of the state, nation, or kingdom. It is, however, also much used, especially in England, to denote the funded national debt, — the capital which Great Britain has, at various times, borrowed and invested in operations of government, and for which she is indebted to various creditors.

The form of the security held by the public creditors in respect of the funded debt is that of annuities granted by parliament to those who originally advanced the money. The annuitants have no right to call for payment of the principal; but, on the other hand, the public has a right to insist on making that payment, and thereby redeeming the annuities. These annuities are called the public funds, and are not only transferable by the holder, but pass by law to his representatives. (1 *Bl. Com.* 328, 329; 2 *Steph. Com.* 574–576.) *Mozley & W.*

Public health. The sound and wholesome sanitary condition of the community at large; the exemption of a municipality or region from any prevailing and unusual disease or mortality; distinguished from individual freedom from sickness, is called the public health. Laws to secure it are termed public-health laws; and the local officers charged with administering them are called the public-health board, or public-health officers, or, more briefly, the health board or officers. "Public," in these phrases, has no very definite technical meaning: general health, health of the people, is the meaning.

Public house. A public house, in the sense of the law of inns, is one kept for the entertainment of all who come lawfully and pay regularly. The term does not include a boarding-house kept for the accommodation only of those who are accepted as guests by the proprietor. Such

an establishment is as much a private house as if there were no boarders. Commonwealth *v.* Cuncannon, 3 *Brews.* 344. See INN; HOTEL.

Section 3243 of Ala. code contains special prohibitions against gaming in any public house, public place, out-house where people resort, &c. With reference to the meaning of public house in this connection, the courts have held that a store-house in the country is a public house; and that if such house consists of two rooms, one over the other, and the owner controls both, and uses the lower room as his store, the upper room is within the prohibition of said section, unless affirmative proof is made that it is not used as an appendage to the store, but is occupied for some justifiable private purpose entirely disconnected from the business of the store or the convenience of its customers. Brown *v.* State, 27 *Ala.* 47.

So, also, is a store-house in the country, where the house consists of two rooms, the one in front being used as a dry-goods store, the other being a shed attached thereto, and communicating with the store-room by a door, and both rooms are under the control of the same person, unless it affirmatively appears that the separate rooms of such a house are so disconnected, by being appropriated to separate and distinct uses, that they are, in fact, two distinct houses. Huffman *v.* State, 29 *Ala.* 40.

So is also a barber's shop; and where a two-storied house, in a city or town, is rented or controlled by a barber who uses the two rooms on the ground floor as his shop, the back room on the second floor is also within the prohibition of the statute, although accessible only by a flight of steps on the outside of the house, and used by the barber only in trying experiments in the daguerrian art, or as a depository for his broken apparatus and chemicals. Moore *v.* State, 30 *Ala.* 550.

The office of a justice of the peace is a public house, within the meaning of the statute against gaming; and where the house consists of two rooms, front and back, with an open space intended for a door between them, and the front room is used as a magistrate's office, the back room is also within the prohibition of the statute, although only used by partners of a dissolved firm, for the occasional settlement of their outstanding accounts. Burnett *v.* State, 30 *Ala.* 19.

S. P. of a country store, where the back room was used only as a bedroom by one of the proprietors, an unmarried man, and not for the purposes of the store. Huffman *v.* State, 30 *Ala.* 532.

S. P. of a broker's office, where such office consisted of two rooms, front and back, connected by a door, and the front room was used for the transaction of the broker's business, and contained all his books, papers, and money, and the back room was used and occupied as a sleeping-room by a member of his family, who paid no rent. Wilson *v.* State, 31 *Ala.* 371.

S. P. of a saddler's shop, including a back room in the second story. Bentley *v.* State, 32 *Ala.* 596.

Where a physician and a few friends, present by invitation, played cards or dice at night, with closed doors, in his office, where he exhibited his medicines, received professional calls at all times, and (being unmarried) ate and slept, it was held that the office was not within the statute. Clarke *v.* State, 12 *Ala.* 492. S. P. Sherrod *v.* State, 25 *Ala.* 78.

A back room, occupied by the register in chancery as a bedroom, adjoining the front room, which was his office, and communicating with it by a door, was held not to be within the statute, where proof was made that the house was surrounded, in the rear, by a high fence; that the playing took place at night, when the doors were locked and the windows closed; that the persons present, about eight in number, came by invitation from the occupier of the room; and that they entered through a back door, and not through the public office. Roquemore *v.* State, 19 *Ala.* 528.

The assemblage of eight or ten persons, by invitation, at a private house or room, to which the public have not the right to go, for the purpose of playing cards, or participating in social amusements, does not bring such house or room within the statute. Coleman *v.* State, 20 *Ala.* 51.

A room on the second floor of a two-storied house, rented and occupied by the defendant as a sleeping apartment, is not brought within the statute by the mere fact that the lower story is used by another person for the sale of spirituous liquors. Dale *v.* State, 27 *Ala.* 31.

A house was occupied by the keeper of a public toll-bridge, consisting of two rooms, separated by a partition, in which there was a door connecting them; and it was held, that, if the house was merely the private residence of the toll-keeper, it was not a public place, within the prohibition of the statute, although occasional settlements for toll were made therein; but if the front room was the apartment or office appropriated to the transaction of the business of the bridge, such as keeping the books in relation to tolls, &c., and to which, by the very nature of the business to which it was appropriated, persons desiring to pay what they owed for toll, or to make contracts about toll, were licensed to go, and was occupied and held by the keeper, subject to such appropriation, business, or use, then it was a public house, within the law. Arnold *v.* State, 29 *Ala.* 46.

A privy belonging to and in the same enclosure with a school-house is not, in vacation, within the law. McDaniel *v.* State, 35 *Ala.* 390.

A store-house in which dry-goods only are sold is a public house, within the law; although the playing is by night, when the

doors and windows are closed, and no person other than the players is present. Skinner *v.* State, 30 *Ala.* 524.

For cases on the force of the term public place, in this and similar statutes, see *infra.*

The term public may be applied to a house, either on account of the proprietorship, as in the case of a court-house, which belongs to the county, or on account of the purposes for which it is used, as in the case of a tavern, store-house, house for retailing spirituous liquors, &c. The Texas statute against gaming has particularly in view houses that are public on account of the uses to which they are put. Whether any specified house is public in the sense of the statute is a question of law, although the general question whether a place is public may be a question of fact. Shihagan *v.* State, 9 *Tex.* 430.

A room to which persons generally are permitted to resort, to play at games with cards, for money, is a public gambling-house, within the meaning of the Texas statute, although it is not so kept that every person who desires has access to it. Lockhart *v.* State, 10 *Tex.* 275; Rice *v.* State, *Id.* 545.

Public indecency. This phrase has no fixed legal meaning, is vague and indefinite, and cannot, in itself, imply a definite offence. The courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster, — acts which have a direct bearing on public morals, and affect the body of society. The Indiana statute punishing public indecency, without defining it, can be construed only as that term is used at common law, where it is limited to indecencies in conduct, and does not extend to indecent words. McJunkins *v.* State, 10 *Ind.* 140.

For want of a proper definition of any offence, the term public indecency, employed in 2 Ind. Rev. Stat. 1852, §§ 22, 433, do not make criminal any act. Jennings *v.* State, 16 *Ind.* 335; State *v.* Huey, *Id.* 338.

Public lamp-post. Under a contract for lighting public lamp-posts, all posts are included which are intended and understood by both parties to be public, and have been accepted and recognized as such by the city council, whether owned by the city or not. Davenport, &c. Co. *v.* Davenport, 13 *Iowa*, 229.

Public lands. Such lands as are subject to sale or other disposal under general laws are public lands. Newhall *v.* Sanger, 92 *U. S.* 761.

"Public" is used in act of congress of July 4, 1866, as applicable to all the unsurveyed lands, whether the same had been previously granted or not, and to distinguish the unsurveyed from the surveyed and segregated lands, where the right of private proprietorship has attached. Heydenfeldt *v.* Daney G. & S. Min. Co., 10 *Nev.* 290.

Public law. International law; the law of nations. See also PUBLIC ACT, *supra.*

Public library. Does not include an incorporated library the ownership of which is in the corporation, and the privilege of using which is confined to its stockholders, their immediate families, and their licensees. Providence Athenæum *v.* Tripp, 9 *R. I.* 559.

Public minister. An attaché to a foreign legation is a public minister, within the act of congress protecting foreign ministers from arrest. United States *v.* Benner, *Baldw.* 234.

Public money. As used in the statutes of the United States, ordinarily means the money of the (federal) government received from the public revenues, or intrusted to its fiscal officers, wherever it may be. It does not include the money of states, counties, cities, and towns, although, with reference to those governments and municipalities, such funds, in other connections, would be deemed public moneys. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by them to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust funds held for individual litigants, and not for the public as represented by the government. Branch *v.* United States, 12 *Ct. of Cl.* 281, 290.

Public nuisance. A nuisance (*q. v.*) which affects the people of the locality generally, as distinguished from one which injures only an individual resident, with perhaps his family and servants. "Public" here does not in any way involve the government, or the whole community of the state or municipality, only the people of some local neighborhood.

Public officer. An officer under government, as distinguished from an officer of a corporation, or from a private person holding what is sometimes called an office, such as an executor or guardian.

The term public officer has also a technical use, under English joint-stock banking companies' acts, to designate the person appointed by such a company to sue and defend in its behalf.

The provision made by Ala. Rev. Code, § 183, for the discharge of sureties "upon the official bond of any public officer," does not apply to the bond of a county administrator. Mitchell *v.* Nelson, 49 *Ala.* 88.

Public place. Section 3243 of Ala. code contains special prohibitions against gaming in any public house, public place, out-house where people resort, &c. With reference to the meaning of the term public place in the statute, the courts have held that it does not include any of the places thereinbefore specially mentioned, but embraces all other public places, whether they are public *per se*, or become public merely by force of circumstances; and, therefore, that if the evidence shows that the defendants played cards at a "public house," they cannot be convicted of playing at a "public place." Windham *v.* State, 26 *Ala.* 69.

For cases on the force of the term public house in this and similar laws, see *supra*.

Any house to which all who wish can go, night or day, and indulge in gaming, is a "public place," within the statute. The fact that it is used as a bedroom, kept locked so that no one can enter but by permission, and after surveillance from the inside, and otherwise invested with privacy, will not prevent the characteristic of a "public place" attaching to it, if it is frequented by all who wish to engage in the sports which the occupant there carries on, and for the indulgence of which he furnishes the appliances. Smith *v.* State, 52 *Ala.* 384.

A steamboat is a public place, within the meaning of the statute. Coleman *v.* State, 13 *Ala.* 602.

So is any place which for the time is made public by the assemblage of people. Campbell *v.* State, 17 *Ala.* 369.

So is an infirmary. Flake *v.* State, 19 *Ala.* 551.

A neighborhood road was held a public place, within the statute, it being shown that the playing took place near an assemblage of persons, some of whom were looking on at the playing, and others passing about at the time. Mills *v.* State, 20 *Ala.* 86.

A place in the woods is not a public place, within the meaning of the statute prohibiting gaming in a public place, when it cannot be seen from any road or house, and it is not shown to be a place of resort, and no circumstances are found to give it the character of a public place. Bythwood *v.* State, 20 *Ala.* 47; Bledsoe *v.* State, 21 *Tex.* 223.

A lawyer's office, though a "public house," within the statute against gaming, is not a "public place." McCauley *v.* State, 26 *Ala.* 135; Smith *v.* State, 37 *Id.* 472; 1 *Ala. Sel. Cas.* 84.

Under the Texas statute (Pasch. Code, § 409), the courts have held that the term public place does not mean a place devoted solely to the uses of the public; but public in fact, as distinguished from private,—a place visited by many persons, and usually accessible to the neighboring public. Parker *v.* State, 26 *Tex.* 204.

A jury-room of a court-house, occupied by permission of the sheriff and one of the county commissioners as a sleeping-room, is not thereby devested of its character as a "public place," within the law. Wilcox *v.* State, 26 *Tex.* 145.

Under the Virginia law against gaming at any public place, the courts have held that persons concealed in bushes and briers on land owned by a county for supporting its poor, and there gaming, will not be liable to indictment for gaming in a public place. Commonwealth *v.* Vandine, 6 *Gratt.* 689.

A store-house in a village, late at night, after persons cease to come to the store to purchase goods, and the door is locked, is not a public place, within that statute. Feazle's Case, 8 *Gratt.* 585.

A licensed eating-house is within the law. Neal's case, 22 *Gratt.* 917.

As to what is a public place, within the meaning of the Virginia law, see also Walker *v.* Commonwealth, 2 *Va. Cas.* 515; Farmer's Case, 8 *Leigh*, 741; Purcell's Case, 14 *Gratt.* 679.

Affray being understood to be a fight in some public place, it is held that a field surrounded by a forest, and situated one mile from any highway or other public place, does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together, though willingly, guilty of an affray. Taylor *v.* State, 22 *Ala.* 15.

The streets in an incorporated town being *per sese* public places, a lot, although enclosed so near the street, and so situated that what occurs upon it is plainly visible from the street, is also a public place; and a fight in such lot is in a public place, within the rules as to affrays. Carwile *v.* State, 35 *Ala.* 392.

A highway is not necessarily a public place, within the meaning of the statute defining affrays. State *v.* Weekly, 29 *Ind.* 206.

A statute authorizing proceedings against any person found intoxicated in any public place does not apply to a person found in a state of intoxication at a social party held at the residence of another. State *v.* Sowers, 52 *Ind.* 311. See also State *v.* Waggoner, *Id.* 481.

Such a statute applies to the streets, alleys, or other public places in the compact part of a city or village, and not to the common highways of the country. State *v.* Stevens, 36 *N. H.* 59.

"Public place" is a relative term. What is a public place for one purpose is not for another. That is a public place, and a proper place for setting up notices of sale, which is likely to give information to those interested, and who may probably become bidders at the sale. Cummins *v.* Little, 16 *N. J. Eq.* 48.

A private dwelling-house may be a public place, within the meaning of a statute requiring notice of sale of land for taxes to

be posted in some public place in the neighborhood. The term public, as applied to place, is not an absolute, but a relative, term; and, in such a statute, means no more than a place comparatively public, — a place not essentially and peculiarly less public than others. It is used in contradistinction to "private," and to prevent fraudulent or negligent concealment of the notice, by posting it in some place not open to inspection by all interested. Cahoon *v.* Coe, 57 *N. H.* 556.

Public place, in a provision in a trust-deed for notice of sale, applies to the side of a public square. Carter *v.* Abshire, 48 *Mo.* 300.

Under a statute punishing indecent exposure of the person in any public place, it has been held that where six women made an indecent exposure of their persons for hire, in the presence of five men, in a room in the rear of the second story of a house of prostitution, the doors, windows, and shutters being closed, the room where it occurred was a "public place," and that the women were properly convicted. Lee *v.* Bixby, 4 *Hun*, 636.

An indictment for making an indecent exhibition of the person, which charges the act to have been done "in a public place, to wit, a public road," is bad; the publicity contemplated by the statute has reference to persons who may witness the act, rather than to locality. Moffit *v.* State, 43 *Tex.* 346.

That a billiard-room is not deemed a "public place of amusement," unless licensed, see Commonwealth *v.* Sylvester, 13 *Allen*, 247.

Public printing. Means such as is directly ordered by the legislature, or performed by the agents of the government authorized to procure it to be done. Ellis *v.* State, 4 *Ind.* 1.

Public property. In a proper and useful sense, means matters and things which belong to government, either of the state or nation, or of a municipality. It is, however, often used in a vague way of that which is not property at all, which any one may take into possession and enjoy at will.

Public prosecutor. A general term for the various officers, such as the attorney-general, the solicitor-general, the county or district attorney, &c., charged by law with conducting proceedings of a criminal nature. It is not a technical title of any office, but a general, popular designation of the nature of the function.

Wharton says that the term signifies the queen, in whose name criminals are prosecuted. In this country, certainly, the term is used in the sense we have above assigned to it; and we think it is generally used by English writers as designating the officer conducting the prosecution, and that the royal authority for instituting it is generally spoken of as the crown.

Public purpose. Money borrowed by a municipal corporation to construct a plank road, if the road leads from, extends to, or passes through the limits of the corporation, is borrowed for a public purpose, within the meaning of a provision in its charter authorizing it to borrow money "for any public purpose." Mitchell *v.* Burlington, 4 *Wall.* 270.

So a charter-power "to borrow money for any public purpose" gives authority to a municipal corporation to borrow money to aid a railroad company making its road as a way for public travel and transportation. Rogers *v.* Burlington, 3 *Wall.* 654.

Public revenue. The revenue of the government of the state, nation, or kingdom; sometimes, perhaps, that of a municipality. Public, in this phrase, means the government, not merely the community at large.

Public river, stream, or waters. A course or body of waters which, being navigable, is legally open as a highway of commerce to all who wish to traverse it.

Actual navigability for useful purposes of commerce is the general test throughout the United States of the right of the public to make use of streams and other waters as highways, though some of the states adhere to the ebb and flow of tides as determining whether the soil under a stream is the property of riparian owners or of the state; and the public right of navigation may be subject, as respects landings, to rights of riparian owners and to municipal regulations.

Public school. In the United States, this term designates one of the schools established by law, maintained at the expense of the state, county, or other local organization, and open to the children of the inhabitants at large, free of individual charge for tuition.

They are to be distinguished from schools established by private enterprise, in which pupils must be supported by private liberality, or by payments for the various pupils, and which pupils become entitled to enter only by private contract. The public-school laws of any state are the laws

establishing and regulating these schools, and any high schools, normal schools, or colleges incidental to the system.

In England, certain schools seem to be designated by this term; they are, as it seems, Eton, Winchester, Westminster, Charter-house, St. Paul's school in the city of London, Merchant Taylors', Harrow, Rugby, Shrewsbury.

The public-schools acts are various acts passed from 1864 to 1872, inclusive, regulating the government of these schools.

Public square. As used in Indiana statutes (as well as in its popular import), refers almost exclusively to grounds occupied by the court-house and owned by the county. Westfall *v.* Hunt, 8 *Ind.* 174; City of Logansport *v.* Dunn, *Id.* 378.

Public store. A warehouse or storehouse, maintained by government for purposes connected with administration of the laws. Such are buildings where government supplies are kept; also, buildings where imported goods are allowed to be housed until the importer is ready to pay duties, and more commonly called, in the United States, bonded warehouses.

The plural, public stores, may also mean the munitions, provisions, and supplies of various goods likely to be required for use in different branches of government service, as kept in stock, awaiting occasion to use them.

Public tax. Those taxes, rates, and assessments are called public which are levied and taken out of the property of the person assessed, for some general use or purpose, in which he has no direct, immediate, and peculiar interest, but which are for the welfare of the community. Charges and impositions laid directly upon the property in a circumscribed locality, to effect some work of local convenience, of peculiar advantage and importance to the property especially assessed for the expense of it, are not "public." Buffalo City Cemetery *v.* Buffalo, 46 *N. Y.* 506.

"Public," as applied to taxes, has not such a fixed and settled meaning as that an exemption of lands in a town from "public taxes" necessarily protects them from town taxes. The word public is used variously, depending for its meaning on the subjects to which it is applied. Morgan *v.* Cree, 46 *Vt.* 773.

The term public taxes, where used in public grants or legislative proceedings, would clearly include a tax levied by the legislature of the state for the general purposes of the state, embracing the people of the state at large. A town tax, in one view, seems to partake somewhat of the same character; its purpose being to defray the expense of the town organization, and to enable it to perform its duties and discharge its obligations, imposed upon it as a municipality constituting a part of the polity of the state. On the other hand, it differs materially from a state tax; it is levied by the town, or assessed by its officers; its purpose is not the direct benefit of the people of the state generally, but local in its use and purpose, affecting directly the property and people of a small municipality. Whether a charter provision exempting lands from public taxes should be deemed to include town taxes is a question of construction, depending largely on history of the charter, contemporaneous construction, &c. *Ib.*

Public use. In constitutional provisions restricting exercise of the right to take private property in virtue of eminent domain, means a use concerning the whole community as distinguished from particular individuals. But each and every member of society need not be equally interested in such use, or be personally and directly affected by it: if the object is to satisfy a great public want or exigency, that is sufficient. Gilmer *v.* Lime Point, 18 *Cal.* 229.

The use must be for the people at large, must be compulsory, at the will of the public, and not optional with the corporation. A public convenience is not such a necessity as authorizes the exercise of this power. Thus the purposes of a company incorporated for the purpose of carrying on the business of loading and unloading freight, with right to build railroads for hauling freight, were held not to be such a public use. Memphis Freight Co. *v.* Memphis, 4 *Coldw.* 419.

See, also, on what is a public use, *Sedgw. Const. & Stat.* 446.

Public welfare. Embraces both public health and convenience. Sessions *v.* Crunkilton, 20 *Ohio St.* 349.

Land taken for a township road is appropriated for the public welfare. Shaver *v.* Starrett, 4 *Ohio St.* 494.

Public work. Constructions, erections, and structures, such as aqueducts, dock-yards, extensive and important buildings, parks, and the like, undertaken by the government of the country, or even of a municipality, either for use in the administration of government or for supplying the wants or promoting the health or pleasure of the people at large, are often designated by the term public works. It is not technical, and has no settled distinct extension.

See the meaning of the term public works, as used in Fla. Const. art. 5, § 16,

authorizing expenditures for public works, explained in Matter of Public Works, 13 *Fla.* 699.

Public worship. This term may mean the worship of God conducted and observed under public authority; or it may mean worship in an open or public place, without privacy or concealment; or it may mean the performance of religious exercises, under a provision for an equal right in the whole public to participate in its benefits; or it may be used in contradistinction to worship in the family or the closet. In this country, what is called "public worship" is commonly conducted by voluntary societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious services such persons, and upon such terms and subject to such regulations, as they may choose to designate and establish. A church absolutely belonging to the public, and in which all persons without restriction have equal rights, such as the public enjoy in highways or public landings, is certainly a very rare institution. Attorney-General *v.* Merrimack Manuf. Co., 14 *Gray*, 586.

Public worship regulation act. This is the brief but inappropriate title of the Stat. 37 & 38 Vict. ch. 55. From this, one might infer that the act was one prescribing the details of public worship; instead of being, as is properly expressed in its longer title, "an act for the better administration of the laws respecting the regulation of public worship." *Mozley & W.*

Public wrong. Another term for crime or offence; wrongs having been divided by Blackstone and other text-writers into private, or those which are judicially redressed only so far as they affect individuals complaining; and public, or those which receive prosecution and punishment chiefly in view of their general tendency to hurt society.

PUBLICATION; PUBLISH. These words have some technical uses, all of which, however, involve more or less distinctly the vernacular meaning of making known to the community; exposing to general hearing or view.

1. As applied to laws, publication should be distinguished from promulgation (*q. v.*), which conveys the abstract idea of making known as a part of the inception of the edict or law; while publication is rather the putting forth of laws in printed form, in newspapers or bound volumes, according to literary usage, and for the purpose of making them conveniently accessible to the common people. Yet the two terms are in part the same.

2. In equity practice, publication is used of depositions of witnesses in a cause in chancery, taken in order to the hearing; it signifies the showing the depositions openly, and giving out copies of them, &c., pursuant to the rules of the court. This formal opening of depositions for the inspection of the parties seems to have been disused in England since the year 1852; and in American practice, either in courts of chancery organization or in procedure under codes, publication probably means no more than that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties or by the rules or orders of the court, to show the depositions openly, and to give out copies of them.

3. In respect to wills, publication is the formal declaration by the testator, in the presence of witnesses, that the writing which he has subscribed is intended by him for his last will and testament. To publish, when spoken of a will, is to proclaim or make known, in the presence of the witnesses, the nature of the instrument then executed. It is required principally to make manifest that the testator knows what he has been executing. This publication may be made either wholly by the testator, or by the scrivener or other agent asking the question as stated by some of the witnesses, and the testator expressing his assent by words, or even by signs; which plainly indicate his understanding of and acquiescence in such publication. See Compton *v.* Mitton, 12 *N. J. L.* 70. In England, by wills act, 1837 (7 Wm. IV. & 1 Vict. ch. 26, § 13), no publication is necessary beyond the execution attested by two witnesses, as required by sect. 9 of that act. 1 *Steph. Com.* 596, 599. In other jurisdictions, the older and stricter requirements are maintained.

4. In the law of libel and slander, publication is the act of disseminating the aspersion, printing the article, exhibiting the picture, making the sign, singing the song, or uttering the words complained of. It is evidently essential

to the inception of the wrong; without publishing, there is no complete defamation.

To publish is to proclaim, to make known generally. There is scarcely a word in our language which more definitely conveys the idea requisite in law to support an action for speaking slanderous words. Watts *v.* Greenlee, 2 *Dev. L.* 115.

5. The practice laws of most of the states allow publication of a summons to be resorted to as a means of making known to defendant that a suit has been commenced, and he is expected to appear and defend. In this connection, publication means the insertion of the summons in newspapers, as an advertisement, in the manner and to the extent prescribed by the statute of the jurisdiction.

PUIS. In law French, afterwards; since.

Puis darrein continuance. Since last continuance. This phrase was applied, in the common-law system of pleading, to designate a plea which the defendant was allowed to put in after issue joined, for the purpose of setting up some new matter of defence which had arisen, or some matter which had first come to his knowledge after joinder of issue. Such a plea was termed a plea *puis darrein continuance*, in reference to the practice of entering continuances of the cause on record at each step in the proceeding; the new matter being alleged to have arisen or been discovered since the last continuance. The term continued in use after the entry of continuances was abolished in English practice, and pleas of this nature were more properly designated pleas to the further maintenance of the action. The object of such a plea is accomplished, under many American codes of procedure and practice acts, by a supplemental pleading. Under the English judicature acts, a ground of defence arising after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence. And any ground of defence arising after the defendant has delivered his statement of defence, or after the time limited for his doing so has expired, may be pleaded within eight days after such ground of defence has arisen. See act of 1875, sched. 1, order 20, rules 1, 2.

PUISNE. In law French, junior; younger.

In English courts, the judges, other than the chief judge, have long been termed puisne judges. Thus this judicial title corresponds to associate justice in American courts, while "associate," in English courts, is a title of different and inferior meaning. See ASSOCIATE.

PUNISHABLE. Liable to punishment, whether absolutely, or in the exercise of a judicial discretion. In a statute concerning murder perpetrated in the commission of any crime punishable with imprisonment for life, the word is not restricted to offences which must in all cases be so punished, but includes offences for which the court is authorized to sentence to imprisonment for life, or for a term of years. Commonwealth *v.* Pemberton, 118 *Mass.* 36. See also FELONY.

PUNITIVE. That which punishes; vindicatory.

The only technical use of the word, of importance, is in connection with damages, when it signifies the same as exemplary (*q. v.*) or vindictive. Damages which the jury are allowed by the rules of law in most of the states to award in cases of aggravated wrongs are said to be called punitive damages, by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual (Hendrickson *v.* Kingsbury, 21 *Iowa*, 379; S. P. Fry *v.* Bennett, 1 *Abb. Pr.* 304), or because, although intended to operate as compensation, they are likely to be felt by defendant as a punishment (Bixby *v.* Dunlap, 56 *N. H.* 456); and not to import that they are intended as a punishment for the public offence which may be involved in the tort for which defendant is sued.

The term punitive damages does not exclude the idea of damages for compensation; the damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages, on account of the nature of the injury. Chiles *v.* Drake, 2 *Metc.* (*Ky.*) 146.

Exemplary and punitive, applied to damages, are synonymous. Roth *v.* Eppy, 80 *Ill.* 283.

Punitive, vindictive, and exemplary damages are, in legal contemplation, synonymous terms. Chiles *v.* Drake, 2 *Metc.* (*Ky.*) 146.

PUR. In law French, for.

Pur autre vie. For the life of another. See AUTRE VIE.

PURCHASE. The proper meaning of this term, in the law of real property, is much more extensive than the vernacular sense: it includes all modes of personal acquisition except hereditary descent; so that the words descent and purchase denote the only modes by which a person can acquire title to realty.

Title by devise, by voluntary gift, by extent, &c., are unquestionably all embraced in the proper common-law meaning of "to purchase," or "title by purchase." See Greer *v.* Blanchar, 40 *Cal.* 194; Ramsey *v.* Ramsey, 7 *Ind.* 607; McCartee *v.* Orphan Asylum Soc., 9 *Cow.* 437; James *v.* Morey, 2 *Id.* 246; Hoyt *v.* Van Alstyne, 15 *Barb.* 568.

Instances constantly occur, however, in which "to purchase" and its inflexions are used, as evidently appears by the context or the general intent, in the vernacular sense of acquired by payment of a price or value; and, as respects modern law literature, in which much discussion is given to rights of purchasers for value, it may be said that this employment of the words is the rule, and the old common-law use is the exception.

The word purchase is used in law in contradistinction to descent, and is any other mode of acquiring real property than by the common course of inheritance. So that the word is not merely used in its popular sense, viz. that of buying for a sum of money, but implies any mode of acquiring property except by descent. Thus, if a person acquires real property by gift, grant, or by devise, or by any other mode (excepting descent), and which does not even subject him to the payment of any sum of money for such property, he is still in legal language said to acquire such property by purchase. The difference between the acquisition of an estate by descent and by purchase consists principally in two points: that by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general; that an estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent will. (2 *Cruise Dig.* 451, 452.) *Brown.*

The Kentucky statute of 1824, to revive and amend the champerty and maintenance law, extends to voluntary conveyances, as well as to such as are founded on a valuable consideration. The word purchase, in the statute, is used technically. Clay *v.* Wyatt, 6 *J. J. Marsh.* 584.

To purchase sometimes means to purchase by deed, only. Durando *v.* Durando, 23 *N. Y.* 331.

As used in a charter-authority to a corporation to take by purchase, acquisition by devise is excluded. McCartee *v.* Orphan Asylum Soc., 9 *Cow.* 437.

Purchase, in a law exempting from taxation "the property of all Indians who are not citizens, except lands held by them by purchase," means an acquisition of land for a valuable consideration, and does not include a patent to an Indian of land reserved by treaty with his tribe. Farrington *v.* Wilson, 29 *Wis.* 383.

Power conferred on a corporation to purchase includes power to take a mortgage. Commercial Bank of Manchester *v.* Nolan, 8 *Miss.* 508.

And a power to give a mortgage. Gordon *v.* Preston, 1 *Watts*, 385.

And (under circumstances) a power to sell and convey, including power to mortgage. Jackson *v.* Brown, 5 *Wend.* 590.

A conveyance to trustees in trust to sell land, and apply so much of the proceeds as may be needful to pay a debt, is not a purchase of the land by the creditor. Neilson *v.* Lagow, 12 *How.* 98.

"Purchased" means bought or acquired by paying a price. Curtis *v.* Burdick, 48 *Vt.* 166.

Notes pledged are not purchased. Smith *v.* Spies, 2 *Hall*, 477.

Purchaser. In the construction of registry acts, the term purchaser is usually taken in its technical legal sense. It means a complete purchaser, or, in other words, one clothed with the legal title. Steele *v.* Spencer, 1 *Pet.* 552, 559.

A buyer at a judicial sale is a purchaser, within the recording acts of Illinois, enacting that unrecorded deeds shall take effect as to "subsequent purchasers" without notice, after the time for filing the same for record, and not before. McNitt *v.* Turner, 16 *Wall.* 352.

The word purchaser, as used in such statutes, has a well-defined technical signification, and embraces every holder of the legal title to real or personal property, where such title has been acquired by deed. It includes a mortgagee. Halbert *v.* McCulloch, 3 *Metc.* (*Ky.*) 456. S. P. Porter *v.* Green, 4 *Iowa*, 571; Seevers *v.* Delashmutt, 11 *Id.* 174.

A mortgagee is a purchaser, within the intent of Stat. 27 Eliz. ch. 4. Lancaster *v.* Dolan, 1 *Rawle*, 231.

A mortgagee is a purchaser in form, although he has no estate in the land mortgaged, and the transaction is governed by different principles from those which apply to a chose in action. Wethrill's Appeal, 3 *Grant Cas.* 281.

A tenant in common, whose interest becomes severed by partition, is a purchaser of the interests of his co-tenants in the lands set apart to him. Campau *v.* Barnard, 25 *Mich.* 381.

A statute declaring judgments confessed without a specification to be void as against purchasers, ought not to be extended by construction to assignees in trust. Seaving *v.* Brinkerhoff, 5 *Johns. Ch.* 329.

Purchaser does not embrace a judgment creditor. Schmidt *v.* Hoyt, 1 *Edw.* 652.

Purchaser in good faith. The mere knowledge of rival equities does not prevent a purchaser from being a purchaser in good faith. Whether one buys in good faith depends not on his having notice of liens, but on the motive or purpose with which he buys. Thornton *v.* Bledsoe, 46 *Ala.* 73.

A statute providing that an instrument not recorded shall be inoperative against a *bona fide* purchaser, creditor, or surety, without notice, means some person who has purchased, given credit, or become surety, relying in good faith on the property sought to be affected by the instrument. To be a *bona fide* creditor, one must have given credit upon the belief that he could resort to the property in question for payment. Cloud *v.* Dupree, 28 *Ga.* 170.

A *bona fide* purchaser is one who, neither committing nor participating in a fraud, pays a full price for property which he continuously and openly holds in possession. Sanders *v.* McAffee, 42 *Ga.* 250.

The words "subsequent purchaser for valuable consideration," were held equivalent to "*bona fide* purchaser," in Van Rensselaer *v.* Clark, 17 *Wend.* 25.

Purchase-money. The money agreed to be paid by a purchaser, for property. Hoyt *v.* Van Alstyne, 15 *Barb.* 568.

The Ill. statute, declaring that the homestead right shall not be claimed against a debt due for purchase-money, means the debt created by the purchase, and not a debt due another than the vendor for money loaned wherewith to pay for the purchase. Eyster *v.* Hatheway, 50 *Ill.* 521.

Purchase-money means money stipulated to be paid by a purchaser to his vendor, and does not include money the purchaser may have borrowed to complete his purchase. Purchase-money, as between vendor and vendee only, is contemplated; as between purchaser and lender, the money is "borrowed money." Henisler *v.* Nickum, 38 *Md.* 270.

The word purchase-money, in the New York statute of 1842, respecting property exempt from levy of execution, should be construed as meaning the original demand for the property sold, as distinguished from the demand on the security given for the payment of the purchase price. Davis *v.* Peabody, 10 *Barb.* 91.

PURGE. To clear one's self of a charge of crime by one's own oath. Purgation: a clearing of one's self from a charge of crime, formerly allowed in England. It was either canonical, which was prescribed by the canon law, the form whereof, used in the spiritual court, is, that the person suspected take his oath that he is clear of the facts objected against him, and bring his honest neighbors with him to make oath that they believe he swears truly; or vulgar, which was by fire or water ordeal, or by combat. These are all abolished. See *Jacob; Wharton.*

Purging is still allowed, however, in proceedings for contempt; that is, when a man is charged with a contempt of court, he may purge himself of such contempt by swearing that in doing the act charged he did not intend to commit a contempt.

PURPARTY. A part in a division; a share.

The part or share of an estate held by coparceners, which is by partition allotted to them. *Cowel.*

PURPORT. Has a signification different from tenor. It means the substance as it appears on the face of the instrument. Tenor imports an exact copy. State *v.* Atkins, 5 *Blackf.* 458; Commonwealth *v.* Wright, 1 *Cush.* 46.

PURPOSELY. The meaning of the word purposely, as used in the statutory definition of murder, may be fully expressed in an indictment by the words "with intent," or by "feloniously." Carder *v.* State, 17 *Ind.* 307.

As used in the statute defining murder of the second degree, "purposely" means intentionally and designedly. To constitute murder in the second degree, the intention, design, or purpose to perpetrate it must be formed before the act is committed. Fahnestock *v.* State, 23 *Ind.* 231, 262.

PURPRESTURE. A taking wholly away. The act of a private individual in enclosing or building upon part of a common or public domain, and thus taking it away from the public.

Purpresture in a forest signified any encroachment upon the king's forest, whether by building, enclosing, or using any liberty without a lawful warrant to do so. *Termes de la Ley.*

A purpresture may be defined as an enclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large. It is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public

to any inconvenience whatever. Attorney-General *v.* Evart Booming Co., 34 *Mich.* 462.

PURVIEW. That part of an act which commences with the words *be it enacted*, and ends before the repealing act; the body or substantive part of a statute; hence (and this is its more frequent use) the effect, purpose, or scope of a law.

PUT. A "put," in the language of the grain or stock market, is a privilege of delivering or not delivering the subject-matter of the sale; and a "call" is a privilege of calling or not calling for it. Pixley *v.* Boynton, 79 *Ill.* 351.

A "put" is the privilege for a nominal consideration of delivering a large quantity (of grain) within a certain time, at a specified price; and such privileges, when taken by persons who are endeavoring to effect what is technically called a corner in the grain market, are wager contracts, and void, both as against public policy, and because in contravention of the Illinois gaming act. *Re* Chandler, 9 *Bankr. Reg.* 514; *Exp.* Young, 6 *Biss.* 53.

PUTATIVE. Believed; reputed.

A man who has been adjudged in proceedings in bastardy to be the father of a bastard is called the putative father. A marriage which has been contracted in good faith by parties who were ignorant of an impediment, which, however, existed, and should have prevented the marriage, is called, in the civil law, a putative marriage. See *Bouvier.*

Q.

QUADRIENNIUM UTILE. The useful or available four years. The period of four years allowed by the law of Scotland to a minor after attaining his majority within which "he may pursue for reduction of any deed to his prejudice granted during his minority;" within this period he may take legal proceedings to set aside any deed executed during his minority to his injury. Within this period, also, he must bring his action for damages against his tutors and curators for any misconduct in their office. *Bell.*

QUADRIPARTITE. Of four parts. Applied to an indenture executed between four parties; hence made in four counterparts or copies.

QUADROON. Progeny of a white person and a mulatto; a person of one-fourth negro blood.

QUÆ. For expressions commencing with this feminine of the Latin pronouns, see the nominative masculine, QUI, QUIS.

QUÆRE. Question; query. A word used by reporters in their syllabi of cases to indicate that a point or question arising in the case is not decided, and is deemed doubtful. The word is also generally used as a memorandum that an inquiry ought to be made of a doubtful matter; and such a matter, as well as the memorandum itself, is called a query.

QUÆRENS. Plaintiff; complainant. *Actor* (q. v.) is more frequently used in this sense.

Quærens non invenit plegium. The plaintiff did not find security. This phrase is the form and also the name of the return made by a sheriff to a writ requiring him to take security of a plaintiff to prosecute his cause, where security is not given.

QUALE JUS. What sort of right.

The name of an old English writ which lay where an ecclesiastical person had recovered judgment for lands, but had not issued execution, to inquire by what right he was thus proceeding. The object was to search out any collusion between the parties by which, according to Jacob, the lord might be defrauded, or, according to Burrill, the statute of mortmain might be evaded.

QUALIFY. 1. To adapt; to make fit; to prepare.

In a special sense of the word, it means to take the oath and give the bond required by law from an administrator, executor, public officer or the like, before he may enter on the discharge of his duties. One who takes these steps to fit or prepare himself for his appointment is said to qualify; which is, ap-

parently, an elision of "to qualify himself."

2. To limit; to modify; to restrict. Thus it is said that one section of a statute qualifies another.

Qualified, *adj.* 1. Adapted; entitled; fitted; prepared. Thus an elector is called qualified to vote. Also, limited; restricted; as a qualified fee. Qualification: a necessary element of fitness; something which one must possess before he can act in a particular capacity. Thus citizenship may be one of the qualifications of a jury; possession of a certain amount of property may be one of the qualifications of an elector. Also, the act or step of making oath or giving bond, when required as a condition of entering upon an office or trust. Also, a limitation or restriction; a modification of meaning; and, generally, one tending in abatement or diminution of what has been said.

2. In old ecclesiastical law, qualified applied to a person enabled to hold two benefices. *Jacob.*

Qualified elector. Means a person who is legally qualified to vote, while a "legal voter" means a qualified elector who does in fact vote. Sanford *v.* Prentice, 28 *Wis.* 358.

Qualified fee. A base fee; that is, one which has a qualification subjoined thereto, and which must terminate whenever the qualification annexed to it is at an end. See 2 *Bl. Com.* 109; 1 *Steph. Com.* 239.

Qualified indorsement. An indorsement of a bill of exchange or promissory note is called qualified, which restrains, limits, or enlarges the liability of the indorser in a manner different from that which the law generally imports as his true liability, deducible from the nature of the instrument. A familiar example is that of an indorsement "without recourse."

Qualified property. A limited right of ownership; a temporary or special interest in a thing, liable to be totally devested on the happening of some particular event. Instances are: such right as a man has in animals *feræ naturæ*, which he has reclaimed; the right of a bailee in the chattel transferred to him by the bailment, or of a sheriff in goods seised on execution. See 2 *Kent Com.* 347; 2 *Bl. Com.* 391, 452.

Qualification. Qualification for office is "endowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities suitable for the purpose." State *v.* Seay, 64 *Mo.* 89.

Qualification, as used in act of congress of July 20, 1840, prescribing that jurors in federal courts shall have the like qualification, &c., as jurors in state courts, refers to general qualifications as to age, citizenship, &c., and not to personal objections which, at the instance of a party, may, at his election, amount to a disqualification to sit in the particular case, but do not exclude the juror from the panel. United States *v.* Williams, 1 *Dill.* 485.

QUAMDIU. So long as; as long as.

Quamdiu se bene gesserit. As long as he shall conduct himself well; during good behavior. A phrase used to express the tenure of judicial and other offices. See DURANTE BENE PLACITO.

QUANDO. When. The initial word of several Latin phrases and maxims.

Quando acciderint. When they shall come in; when they shall come to hand. A judgment against an executor or administrator, directed to be satisfied out of assets when they shall afterwards come to his hands, is termed a judgment *quando acciderint.* Such a judgment is proper if the defendant has pleaded *plene administravit*, and admits that the defendant has fully administered up to that time.

Judgment of assets *quando acciderint* is a judgment which is sometimes signed against an executor, and which empowers the party so signing it to have the benefit of assets which may at any time afterwards come to the hands of the executor, or whenever they may happen. The plaintiff, having obtained a judgment of this sort, may afterwards, upon the assets having come to the defendant's hands, proceed against him by *sci. fa.* to obtain payment of his debt. *Brown.*

Quando aliquid conceditur, conceditur id sine quo illud fieri non possit. When any thing is granted, that also is granted without which it cannot have effect. A form of the maxim, *cuicunque aliquis quid concedit, conceder videtur et id sine quo res ipsa esse non potuit*, q. v. The same principle is stated in several forms, slightly varied from the maxim above given; sometimes limited to particular classes of grants, as in the maxim, *quando lex aliquid alicui concedit*, &c., *q. v.*

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. When any thing is commanded, every thing by which it can be accomplished is also commanded. When the law directs a thing to be done, it authorizes the doing of every thing necessary to accomplish what is commanded.

Quando aliquid prohibetur fieri ex directo prohibetur et per obliquum. When any thing is prohibited from being done directly, it is prohibited also indirectly. What the law forbids to be done directly must not be done indirectly.

Quando aliquid prohibitur, prohibetur et omne per quod devenitur ad illud. When any thing is prohibited, every thing by which it may be done is also prohibited. The prohibition by law of any act implies the prohibition of using the means to such act.

Quando jus domini regis et subditi concurrunt jus regis præferri debet. When the right of the sovereign and of the subject concur, the right of the sovereign ought to be preferred. This maxim depends upon considerations similar to the grounds of the more familiar principle, *nullum tempus occurrit regi.*

This prerogative is said to depend upon the principle that no laches can be imputed to the king, who is supposed by law to be so engrossed by public business as not to be able to take care of every private matter relating to the revenue, and because the king is in reality to be understood as the nation at large, to whose interest that of any private individual ought to give way. His prerogative, until restrained by recent statutes, extended to prevent the other creditors of a person indebted to the crown from suing him, and to prevent such debtor from making any will of his personal effects without the sanction of the crown. *Whart. Max.*

Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest. When the law grants any thing to any one, it is deemed to grant also that without which the thing itself cannot exist. A legal grant carries with it whatever is essential to constitute the subject-matter, and its necessary incidents. Thus it would be a paradox that in any case the law should render the performance of a thing obligatory, and yet deny the power to do it. Fenton *v.* Hampton, 11 *Moore P. C.* 347, 360. Under this maxim, railway companies receive statutory authority to do all things necessary to construct their roads; and the same rule applies in the case of individuals: as, where a man grants a piece of land or a house, he impliedly grants that without which the land or the house would be useless, as a right of road, &c.; or in the case of mines, the right of entry to dig for and carry away the minerals. *Whart. Max.*

It is a legal incident to every corporation to have the power of making by-laws, regulations, and ordinances relative to the purposes for which such corporation was instituted. When the crown creates a corporation, it grants to it, by implication, all powers that are necessary for carrying into effect the objects for which it was created, upon the maxim, *que concedit aliquid concedere videtur et id sine quo res ipsa esse non potest. Whart. Max.*

Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. When more is done than ought to be done, that which was properly to be done is deemed as done. Where, under a power, more is done than is authorized, the part for which there was authority is valid, and the act is void as to the excess only. Thus, if a man has power to lease for ten years, and he leases for twenty years, the lease for the twenty years will, in equity, be good for ten years of the twenty. *Broom Max.* 177.

QUANTUS. How much; as much. The initial word of several Latin phrases.

Quantum damnificatus. How much is he damnified. The name applied to an issue directed by a court of equity to be tried in a court of law, to ascertain the amount of damages resulting from the non-performance of an undertaking.

Quantum meruit. As much as he has deserved. These were the emphatic words in the Latin form of the common count in actions of assumpsit for work and labor, founded on an implied promise of the defendant to pay the plaintiff as much as he reasonably deserved for his labor. Such a count was called a *quantum meruit;* and the plaintiff was said to sue, and, if suc-

cessful, to recover upon a *quantum meruit*.

Quantum valebat. As much as it was worth. This phrase is formed from the emphatic words of the Latin form of the common count in actions of assumpsit for goods sold and delivered, founded on an implied promise of the defendant to pay the plaintiff as much as the article sold was reasonably worth, and was used in like manner with the phrase *quantum meruit*, q. v.

These words are thus explained by Blackstone: "If I employ a person to transact my business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved; and, if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied assumpsit or promise, — wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved." And this action on the case is thence termed an action of assumpsit on a *quantum meruit*; that is, an action for breach of my promise to pay him as much as he deserves. There is also an action of assumpsit on a *quantum valebat* (*i.e.* as much as it was worth), which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There, the law concludes that both parties did intentionally agree that the real value of the goods should be paid; and, therefore, an action may be brought for the breach of the implied promise to pay as much for the goods as they were worth.

Quanti minoris. Of how much less; how much deduction. The name of a peculiar form of action in the civil law, adopted in Louisiana, brought to obtain a reduction in the price of a thing sold, because of defects found to exist in it after the sale.

QUARANTINE. Originally, a period of forty days.

1. The space of forty days after the death of a husband seised of land, during which his widow was entitled to remain in her husband's capital mansion-house, and during which time her dower was to be assigned (*Cowel;* 2 *Bl. Com.* 135; 1 *Steph. Com.* 271), was in English law called quarantine; also, this right of the widow was called her quarantine. The right, in substance, exists in most of the states, though in most of them the period has been lengthened, or has become indefinite; hence the old term is less used.

2. The maritime regulation by which all communication with individuals, ships, or goods arriving from places infected with the plague or other contagious disease, or supposed to be peculiarly liable to such infection, is interdicted for a certain definite period, is also called quarantine, because formerly a period of forty days was the one usually prescribed. This restriction is still a common one, and generally known by this name; but, under modern practice, the period of seclusion required is lessened, varying with the exigencies of the case.

QUARE. Wherefore; for what reason; on what account. Used in the Latin form of several common-law writs, as illustrated below.

Quare clausum fregit. Wherefore he broke the close. The emphatic words of the Latin writ formerly used to begin an action of trespass for an unlawful entry upon land. The defendant was summoned to show wherefore he broke the plaintiff's close. The particular form of action derived its name from this clause, which, in common use, is often abbreviated to *qu. cl. fr.*

Quare ejecit infra terminum. Wherefore he ejected within the term. A writ which lay for a lessee when he was cast out or ejected from his farm before the expiration of his term, against the lessor or feoffee who so ejected him, to recover the residue of his term, and also damages for being so ejected. *Cowel; Termes de la Ley.*

Quare impedit. Wherefore he hinders. The emphatic words of the Latin writ, issued, in English practice, for a patron whose right of presentation has been disturbed; the disturber being summoned to answer why he hinders the plaintiff. The phrase was adopted as the name both of the writ and of the action.

The action of *quare impedit* was the remedy by which a party whose right to a benefice was obstructed recovered the presentation, and was the form of action constantly adopted to try a disputed title to an advowson. But by the common-law procedure act, 1860, § 26, no *quare impedit* shall be brought after the commencement of that act, but the action may be commenced by the ordinary writ of summons,

with an indorsement thereon that the plaintiff intends to declare in *quare impedit*. *Brown.*

Quare incumbravit. Wherefore he incumbered. The name of a writ against a bishop, after judgment in an action of *quare impedit*, where he had incumbered the church with a clerk pending the action.

Quare non admisit. Wherefore he did not admit. The name of a writ against a bishop for refusing to present the clerk of the prevailing party in an action of *quare impedit*, after being directed to do so by the writ of *ad admittendum clericum*, q. v.

QUARREL. When used in a release, is said to extend not only to real and personal actions, but also to the causes of actions and suits; so that by the release of all quarrels, not only actions pending, but also causes of action and suit, are released; and quarrels, controversies, and debates are in law considered to have one and the same signification. *Termes de la Ley.*

QUARTER. One-fourth part; also specially used to designate the fourth part of a year.

By statute in New York (1 *Rev. Stat.* 606, § 3), as well as by old common-law authorities (*Co. Litt.* 135 *b*; 2 *Rolle Abr.* 521), a quarter of a year is reckoned as composed of ninety-one days, the surplus six hours being disregarded.

Quarter-day. The four days in the year upon which, by law or custom, moneys payable in quarter-yearly instalments are collectible, are called quarter-days. They differ in different jurisdictions. In New York city, as between landlord and tenant, they are the first days of May, August, November, and February. In matters influenced by United States statutes, under which the fiscal year commences July 1, they should be, it seems, the first days of October, January, April, and July. According to Mozley & Whiteley, they are, in England, the 25th of March, being the Feast of the Annunciation of the Blessed Virgin Mary, commonly called Lady Day; the 24th of June, being the Feast of St. John the Baptist, otherwise called Midsummer Day; the 29th of September, being the Feast of St. Michael and All Angels, commonly called Michaelmas Day; the 25th of December, being the Feast of the Nativity of Christ, commonly called Christmas Day. And in Scotland, the 2d of February, being the Feast of the Purification of the Blessed Virgin Mary, otherwise called Candlemas Day; the 15th of May, called for this purpose Whitsunday; the 1st of August, otherwise called Lammas Day; the 11th of November, otherwise called St. Martin's Day, or Martinmas.

Quarter sessions. The courts of general sessions of the peace, in England, held in each quarter year before the justices of the peace in counties, and before the recorder in boroughs.

Quarterly court. The name of certain courts in Kentucky of very limited jurisdiction, which includes, however, appeals from justices of the peace.

QUARTUS. Fourth.

Quarto die post. On the fourth day after. Appearance day, in the former English practice, the defendant being allowed four days inclusive, from the return of the writ, to make his appearance.

QUATUOR. Four. A Latin numeral, to which *quartus* (fourth) is the corresponding ordinal.

Quatuor pedibus currit. It runs upon four feet; it runs upon all-fours. A phrase which is used, in making comparisons of two cases, to denote a precise resemblance; an exact correspondence of the facts. See ALL-FOURS.

QUASI. As if; as though; as if it were. This word is used, often by way of prefix to another word, to denote a resemblance, with some difference, between two subjects. It is applied to persons, things, acts, proceedings, &c., which are of the same general nature with others, but differing somewhat, the qualification usually implying inferiority.

Quasi contract. This expression is employed where, although there is no contract by consent of parties exchanged or imputed, yet an obligation has arisen, by some act or event, as if from a contract, — *quasi ex contractu.* Thus, for instance, an executor or administrator is bound to satisfy the liabilities of the deceased to the extent of his assets received, as if he had con-

tracted to do so. The case of an heir, bound to make a conveyance to a purchaser under a contract of sale entered into by the deceased, is a better illustration; for the obligation incumbent on the executor or administrator has been voluntarily undertaken, and therefore involves somewhat the nature of an actual contract: but the heir has the obligation thrown upon him by an event wholly independent of his own will, namely, the death of the deceased intestate.

Wharton and Brown define the term as including implied contracts; but we do not understand it to be as broad as this. Implied contracts are fully contracts; the assent being imputed (instead of proved as matter of fact) from circumstances which, looking to a general rule, fairly establish it, or render a denial of it unjust or fraudulent. Quasi contracts are not contracts; no exchange of consents is supposed or imputed; but the analogy of contracts is resorted to in explaining the nature of the obligation and determining its extent.

The term is used somewhat more technically and strictly in the civil law than in our ordinary jurisprudence; as to which see *Bouvier*.

Quasi corporation. Certain persons, officers, or bodies, who, without being fully incorporated, are yet vested with some of the attributes and powers of corporations, so that they act, in some respects or partially, in a corporate capacity, are called quasi corporations. Examples are: inhabitants of a school district in Massachusetts, Rumford *v.* Wood, 13 *Mass.* 193; commissioners of a county in Pennsylvania, Van Kirk *v.* Clark, 16 *Serg. & R.* 286; supervisors of a county in New York, Jackson *v.* Hartwell, 8 *Johns.* 422; commissioners of roads in South Carolina, Commissioners of Roads *v.* McPherson, 1 *Spears*, 218; the governor of the state in Tennessee, Governor *v.* Allen, 8 *Humph.* 176.

A public official body charged with the administration of the ministerial and financial duties of a county, such as highways, the poor, and the taxes, and having capacity to make contracts in reference to such matters, and raise money therefor, and having perpetual succession, if not a corporation in the full sense of the term, is a quasi corporation; and can sue and be sued in regard to any matter in which by law it has rights to be enforced or is under obligations which it refuses to fulfil. Levy Court *v.* Coroner, 2 *Wall.* 501.

The inhabitants of a school district, although, like towns and other municipal societies, they are deficient in many of the powers incident to the general character of corporations, yet may be considered, under our institutions, as quasi corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage; and they have sufficient corporate powers to maintain an action on a contract to build a school-house, and to make a lease of land to them. Inhabitants of Rumford *v.* Wood, 13 *Mass.* 193.

In respect to liability to action for neglect of corporate duties, a distinction exists between aggregate corporations, properly so called, and the inhabitants of any district who are by statute invested with particular powers without their consent, such as quasi corporations. Although the latter are liable to information or indictment for a neglect of a public duty imposed on them by law, yet no private action can be maintained against them for a breach of their corporate duty, unless such action is given by statute; for without a corporate fund, and the means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation, and this burden the common law will not impose but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations which have, or are supposed to have, a corporate fund, this reason does not apply. Riddle *v.* Merrimack River Locks, &c., 7 *Mass.* 169.

Quasi derelict. When a part of the crew of a vessel at sea are dead, and all the rest are physically and mentally incapable of providing for their own safety, this is not what is known as "derelict," but "quasi derelict." Sturtevant *v.* The George Nicholaus, 1 *Newb.* 449.

Quasi entail. An estate *pur autre vie* may be granted not only to a man and his heirs, but to a man and the heirs of his body, which is termed a quasi entail; the interest so granted not being properly an estate tail (for the statute *de donis* applies only where the subject of the entail is an estate of inheritance), but yet so far in the nature of an estate tail that it will go to the heir of the body as special occupant during the life of *cestui que vie*, in the same manner as an estate of inheritance would descend, if limited to the grantee and the heirs of his body. *Wharton.*

Quasi personalty. Things which are movable in point of law, though fixed to things real, either actually, as emblements (*fructus industriales*), fixtures, &c.; or fictitiously, as chattels real, leases for years, &c. *Wharton.*

Quasi realty. Things which are fixed

in contemplation of law to realty, but are movable in themselves, as heirlooms, title-deeds, court-rolls, &c. *Wharton.*

Quasi trustee. A person who, having attempted to reap benefit from a breach of trust, is held answerable as if a trustee, is sometimes so called. See *Lewin Trusts*, 846.

QUAY. The popular and commercial signification of the word quay involves the notion of a space of ground appropriated to the public use; such use as the convenience of commerce requires. Mayor, &c. of New Orleans *v.* United States, 10 *Pet.* 662, 715.

QUASH. To annul, overthrow, or vacate by judicial decision; as to quash an indictment.

Que est le meame. The law-French expression equivalent to the Latin *quæ est eadem*, — which is the same thing. The words were formerly used in pleas of justification for trespass, to indicate that the thing justified was the same thing as that of which the plaintiff complained.

QUE ESTATE. An expression in pleading, now obsolete, used to avoid prolixity in setting forth the chain of title alleged by a party claiming a prescriptive right.

QUEEN. The female sovereign of a country under a monarchical form of government.

A queen *regent*, regnant, or sovereign, is one who holds the crown in her own right. A queen *consort* is the wife of a reigning king. A queen *dowager* is the widow of a deceased king. See 1 *Bl. Com.* 219–225.

The queen regent or regnant is one who wears the crown in her own right and by hereditary descent; and she has the same powers, prerogatives, rights, dignities, and duties as if she were a king. Thus (as Wharton explains) the queen regent of England is, in the domestic affairs of the kingdom, like the king, a constituent part of the supreme legislative power, has (in theory) a negative upon all new laws, and is bound by no statute unless specially named therein. She is also considered as the general of the kingdom, and may raise fleets and armies, build forts, appoint havens, erect beacons, prohibit the exportation of arms and ammunition, and confine her subjects within the realm, or recall them from foreign parts. She is also the fountain of justice and general conservator of the peace, and therefore may erect courts (wherein she has a legal ubiquity), prosecute offenders, pardon crimes, and issue proclamations. She is likewise the fountain of honor, office, and privilege. She is also the arbiter of domestic commerce; but not of foreign, which is regulated by the law of merchants. She is, therefore, entitled to the erection of public marts, the regulation of weights and measures, and the coinage or legitimation of money. She is also the supreme head of the church, and as such convenes, regulates, and dissolves synods, nominates bishops, and receives appeals in all ecclesiastical causes.

Queen's advocate. An advocate of the civil-law bar, appointed by the crown to maintain its interests, and to advise it in all matters in which the learning of the civil law is involved. Those matters include important questions of international law, upon which (as in framing treaties with foreign nations) the counsel of the queen's advocate is frequently taken by the government. In the legal profession, this officer holds a distinguished place. He now ranks next in dignity to the attorney and solicitor generals, and formerly, indeed, the queen's advocate took precedence even of them. The queen's advocate used to practise in the ecclesiastical courts at doctors' commons, and at the present day confines his practice, as a rule, to the courts of probate, divorce, and admiralty. *Brown.*

Queen Anne's bounty. See BOUNTY OF QUEEN ANNE.

Queen's bench. See COURT OF QUEEN'S BENCH.

Queen's coroner and attorney. An officer of the court of queen's bench, usually called "the master of the crown office," whose duty it is to file informations at the suit of a private subject by direction of the court. 4 *Bl. Com.* 308, 309; 4 *Steph. Com.* 374, 378.

Queen's counsel. The title, during a woman's reign, of barristers selected on account of their superior learning and talent to be her majesty's counsel; the only outward distinction between these and other barristers is, that they wear silk gowns and take precedence in court. The two principal of these counsel are called the attorney and solicitor general; and none of these counsel can plead publicly in court for a prisoner or a defendant in a criminal prosecution, without a license obtained for that purpose from the crown. *Brown.*

Queen's counsel is a name given to barristers and sergeants appointed by letters-

patent to be her majesty's counsel learned in the law. Their selection and removal rests in practice with the lord chancellor. (3 *Bl. Com.* 27; 3 *Steph. Com.* 273.) A queen's counsel has various privileges. He is generally made a bencher of his inn. He may not, except by license from the crown, take a brief against the crown in any civil or criminal case; but such license will generally be given on payment of the usual fee. A queen's counsel, in taking that rank, renounces the preparation of written pleadings, and other chamber practice. *Mozley & W.*

Queen's or king's evidence. When it is said that an accused person turns queen's evidence, we mean that he confesses his guilt, and proffers himself as a witness against his accomplices. His admission, however, in that capacity requires the sanction of the justices of jail delivery; and, unless his statements are corroborated in some material part by unimpeachable evidence, the jury are usually advised by the judge to acquit the prisoner notwithstanding. (4 *Steph. Com.* 395.) *Mozley & W.*

Queen's proctor. A proctor or solicitor representing the crown in the former practice of the courts of probate and divorce. In petitions for dissolution of marriage, or for declarations of nullity of marriage, the queen's proctor may, under the direction of the attorney-general, and by leave of the court, intervene in the suit for the purpose of proving collusion between the parties. (*Stat.* 23 & 24 *Vict.* ch. 144, § 7; *Stat.* 36 & 37 *Vict.* ch. 31.) *Mozley & W.*

QUERELA. A controversy or quarrel; hence a complaint or judicial action, as in the expression *audita querela*, — the proceeding of complaint heard.

QUI; QUIS. Who; he who; which; that which; what. These, being the ordinary Latin relative and interrogative pronouns, introduce many maxims and phrases in that language, some of which are here given. Inflections of *qui*, beginning with a different letter, as *cujus*, *cui*, and compounds of *qui* or *quis*, as *aliquis*, *quisquis*, *quicumque*, *quilibet*, and their inflections, may be found in the appropriate alphabetic place.

Qui approbat non reprobat. He who approbates does not reprobate. One cannot both accept and reject the same thing.

A person is said to approbate and reprobate a deed when he seeks to take an advantage or benefit conferred upon him by one portion of it, while he seeks to disregard or dispute the validity of another portion which imposes some restrictions upon the benefit, or burdens it with a condition. This is not permitted by our law, which requires that any person taking benefit under a deed must take it with the conditions or burdens which the deed attaches to the benefit. *Trayn. Max.*

The principal, when informed of the unauthorized acts of his agent with respect to property, must, within a reasonable time, elect to approve or disaffirm them. If he does not disaffirm them, and so inform the agent, the latter may presume that his conduct has been affirmed. Silence will be equivalent to approval. Meyer *v.* Morgan, 51 *Miss.* 21; Hawkins *v.* Langs, 22 *Minn.* 557.

Mere failure to disavow an agent's acts instantly on being apprised thereof is not, *ipso facto*, a ratification. Miller *v.* Excelsior Stone Co., 1 *Ill. App.* 273.

Qui facit per alium facit per se. He who acts by another, acts himself. The acts of an agent are, in law, imputed to the principal, and considered and treated as the acts of the latter.

This principle operates in both directions: the principal is entitled to claim the benefit of the agent's acts, done in his behalf, and may also be largely liable civilly, and to a considerable extent criminally, for what his agent has done within the authority given; and this is upon the theory of imputing the authorized acts of the agent to the principal. Thus, as a general rule, in all cases where a person is, actively or constructively, agent for another, all profits and advantages made by him in the business of the agency, beyond his proper compensation, will belong to the principal. Lafferty *v.* Jelley, 22 *Ind.* 471; Denson *v.* Stewart, 15 *La. Ann.* 456. Possession of personal property, or of an evidence of debt by an agent, is possession by the principal. Cutter *v.* Copeland, 18 *Me.* 127; Gillett *v.* Ball, 9 *Pa. St.* 13. A master is entitled to the benefit of his servant's contracts, in the same manner as he is liable upon them, in relation to matters within the authority. Damon *v.* Osborn, 1 *Pick.* 476. Upon the other hand, the acts of the agent are constantly imputed to the principal, as a ground of holding the latter liable upon contracts entered into by the agent, as if they had been made by the principal in person. And even as respects torts and crimes the same ground of liability is recognized. An employer is liable to the penalty for liquor sold or a gaming-table kept by his clerk or servant, in

violation of law; and a principal is liable to third persons for frauds, torts, and negligences of his agent, even though the conduct of the agent is without his participation and consent, provided the act complained of is in the course of the employment. But for an act done from mere wantonness or malice, and beyond the authority, the principal is not liable. *U. S. Dig.* tit. Principal and Agent, III.

Many nice distinctions arise in practice under this maxim, in applying it to the characters of principal and agent, and in considering the various rights and liabilities of principal and agent with reference to third parties; and also in applying the character of principal and agent to the relation of master and servant, husband and wife, parent and child, attorney and client, to bankers, auctioneers, partners, &c. The acts of the agent are the acts of the principal, as to every thing done within the scope of his authority. The agent's receipt for money will charge his principal; his payment will discharge his principal. A tender to him of money, or goods on sale, or a tender by him as agent for another, is good. So a tender of money to a clerk or servant having a general authority to receive money for his employers, is a good tender to the latter. A tender to an executor who has not then proved the will, if he afterwards prove, is a good tender to him as executor. And a tender of a debt to an attorney authorized to receive it, or to any one in his office, on a day named, on a demand by him by letter, is a good tender to the creditor. This maxim does not, however, apply to the acts of an agent of an agent, in which case the maxim *delegatus non potest delegare* applies. *Whart. Max.* 165.

Qui hæret in litera, hæret in cortice. He who stops in the letter, stops in the bark. He who does not go beyond the mere letter of an instrument, does not reach its meaning and substance.

With respect to instruments emanating from individuals, particularly such as are often draughted by the parties themselves, who may be unskilful in the employment of words in their exact senses, the law allows considerable freedom in reading the whole of an instrument together, and in considering the extrinsic circumstances of the transaction, to ascertain and enforce the intention of the party as expressed in what he has written; and single words or isolated phrases will often be construed quite differently from their ordinary meaning, in order to effectuate the intent, as gathered from the paper as a whole, and the attendant facts.

With regard to statutes, the civil law seems to have accorded to the judiciary a broad power to disregard the letter, in order, in a given case, to attain justice. This power was termed *æquitas*. It was referred to in early common-law cases as justifying a court, when necessary, to construe a statute in direct contravention of the letter of its language. There are, undoubtedly, many instances of such construction in the reports; yet the view of modern authorities is strongly in favor of restricting the power to depart from the language. Mr. Sedgwick states the true rule to be that the intention of the legislator is to be learned primarily from the language used; and that, if the language is devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judiciary are not at liberty, on considerations of policy or hardship, to depart from the words of the statute. *Sedgw. Const. Laws*, 253.

All old law writers — who are, in fact, the makers of law maxims — say that reason is law, and that without reason there is no law; and that that which is contrary to reason is contrary to law. So the meaning of this maxim is, that to understand the letter of the law, the reason of it must be known; and to judge of the letter only of a document, without knowing the reason of it, is but to have a superficial knowledge of its meaning; and in all cases where it can, without infringing upon other more important rules, this rule will be applied. *Whart. Max.*

The law rather regards the substance of deeds than the mere words in which they are expressed; and accordingly the leading inquiry in cases of construction arising from ambiguity or dubiety is, what did the parties intend, or what did they do, rather than what did they say. In many cases, no doubt, the words used are of the last importance; but this arises from the fact that it is only from the words of the instrument that the intention and purpose of the grantor can be ascertained: it is not permitted to go outside of the deed to ascertain this. *Trayn. Max.*

A rigid and literal reading would, in many cases, defeat the very object of the statute, and would exemplify the maxim, that "the letter killeth while the spirit keepeth alive." Every statute ought to be expounded, not according to the letter, but according to the meaning; *qui hæret in*

litera, hæret in cortice. And the intention is to govern, although such construction may not, in all respects, agree with the letter of the statute. The reason and object of a statute are a clue to its meaning, and the spirit of the law, and the intentions of its makers are diligently to be sought after, and the letter must bend to these. Tracy *v.* Troy, &c. R. R. Co., 38 *N. Y.* 433.

It is an ancient maxim of the law, that "he who sticks to the letter, sticks in the bark." He gets the shell without the kernel; the form without the substance. The subject-matter must be taken into consideration. Booth *v.* Williams, 2 *Ga.* 252.

Qui jure suo utitur, nemini facit injuriam. He who uses his own right does injury to no one. The proper exercise of one's legal right, although loss or damage may thereby be caused to another, works no injury to that other for which the law gives a remedy. Such loss or damage, without wrongful act or neglect, does not constitute *injuria*, but mere *damnum absque injuria*, q. v. But compare the maxim, *sic utere tuo ut alienum non lædas.*

Qui jusau judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est. He who does any thing by command of a judge will not be supposed to have acted from an improper motive, because it was necessary to obey. An improper motive for the performance of an act is not attributed to any one who performs the act, not voluntarily, but upon the order of a judge, to which he is bound to render obedience. If, however, an officer or person executing a judicial order exceeds the authority it confers upon him, he may be deemed to have acted from an improper motive in the beginning, and be held liable as a trespasser *ab initio.* The maxim therefore expresses merely a presumption in favor of those executing judicial process, which may be rebutted.

It is under this rule that an officer is protected in the execution of any process issuing from a court or judge of competent jurisdiction. But it may be stated that, where the court or judge has not jurisdiction, or the matter adjudicated upon is not within such jurisdiction, in that case the officer is not so protected. And if a ministerial officer of a court take upon himself the exercise of judicial functions, as to issue a judicial order, he is liable for all the consequences resulting from the carrying of such order into effect; for the judicial authority cannot be delegated. But if such order is *prima facie* issued with proper judicial authority, the mere ministerial officer who *bona fide* receives the warrant to execute, and does so execute it, is not responsible for what is done under it. *Whart. Max.*

Qui non habet, ille non dat. He who does not own cannot give. A person cannot be deemed to convey what is not his, to another. In modern law, cases are recognized in which buyer can hold title though vendor had none.

Qui non negat fatetur. He who does not deny, admits. This is a rule applied in pleading, where a statement not denied is held to be admitted, if opportunity of answering the statement has been given.

Qui non obstat quod obatare potest facere videtur. He who does not hinder what he can hinder is supposed as doing it. Any one who knows of an act, or who sees it performed, which he can prevent, and does not prevent, is regarded as if he did the act himself. One standing by and seeing a crime permitted, which he could prevent but does not, may incur the penalties which attach to the commission of the crime. But the rule expressed by the maxim does not admit of very general application. A person may know that another is trespassing on his property or otherwise invading his right without preventing him, and yet may afterwards object to the act, and claim relief from its consequences, or damages for the wrong done. *Trayn. Max.*

Qui non prohibet quod prohibere potest assentire videtur. He who does not prevent what he can prevent is regarded as assenting. Another form of the preceding maxim.

Qui potest et debet vetare, jubet si non vetat. He who can and ought to forbid, commands, if he does not forbid. This maxim differs from the two immediately preceding maxims in this very important particular, — it introduces the duty of the person having power to forbid or prohibit to exercise that power. In the cases to which the two preceding maxims have application, the exercise of the power is in the option of the person possessing it. This maxim deals with the case where there is no

option, but where the possessor of the power is under obligation to exercise it. In this latter case, one who can and ought to prohibit a certain thing, and fails in his duty by not prohibiting, is clearly in the same position, as regards the consequences of the act, as if he had given the order for doing the thing himself. *Trayn. Max.*

Qui prior est tempore, potior est jure. He who is earlier in time, is stronger in right. Priority in time gives preference in law. This maxim is often briefly expressed, *prior tempore, potior jure.* The principle of priority which it expresses is of very frequent and extensive application, in law as well as in equity. The more important applications of the maxim, which fully illustrate its meaning, are well stated by Wharton (*Maxims*, lxvi.), as follows:

This maxim relates to property, and is used in determining the rights of parties thereto. Generally, it may be said to apply to the first occupant of land, or the first possessor of a chattel lost or abandoned; to the heir who takes by descent; the inventor of something new, &c. Its particular application in practice, however, is with respect to real property, between legal and equitable claims of several incumbrancers and purchasers, as to who has the prior right, and consequently the better title.

The maxim is also well illustrated by all those cases in which one creditor, by using diligence, obtains a satisfaction of his claim in priority to another of equal right; a simple instance of which is, where two writs of *fi. fa.* are delivered to the sheriff, the one first delivered must be first satisfied.

The law is said to prefer a sure and constant right, though it be little, to a great estate by wrong, and defeasible; and therefore the first and more ancient is the more sure and worthy title.

The law of descents, whereby the eldest amongst males of equal degrees of consanguinity, as being first in time and more worthy, are preferred to the younger, is regulated by this maxim. So is the law of escheat; as where the owner of land dies intestate, and without heir, such land vests either in the crown or in the lord by escheat; and so as to undisposed-of personal property, the intestate leaving no next of kin, which vests in the crown. For all estates being supposed to have been granted by the lord paramount, in the absence of title in any other claimant, the property vests in the lord paramount as in his first estate.

The equitable rule as to the priority of incumbrancers upon real or personal property may be properly referred to as illustrating the maxim under consideration; as, where there have been several assignments of a reversionary interest in the same stock, the one first in point of time and notice will be entitled to the fund. So where there are several mortgagees of one estate, and the legal estate outstanding, the first in point of time is to be preferred; but where one of them has the legal estate, he is preferred. Where, therefore, there are three mortgagees of one estate, the first having the legal estate, and the third in point of time pays off the first, and thereby acquires the legal estate, he obtains priority for both first and third mortgages over the second; for where the equities are equal the law will prevail.

Qui semel est malus, semper præsumitur esse malus in eodem genere. One proved to have been wicked on one occasion is presumed to be wickedly disposed in that way. Within limits, proof of an act of adultery, cruelty, fraud, or the like may raise a presumption of a bad inclination towards such conduct which may heighten circumstantial evidence of other like acts.

Qui sentit commodum, sentire debet et onus. He who experiences the benefit should also bear the burden. Any one who acquires a right or privilege must take upon himself the corresponding obligation or disadvantages; as where one claiming enjoyment of lands is required to bear or discharge incumbrances upon it; where one who would be entitled to share in profits of a business, if successful, is held, for that reason, to be chargeable for losses; where an incumbent of an office is held bound by an increase of its duties, unless he will relinquish it and its compensation. So a principal cannot take advantage of a transaction by his agent without subjecting

himself to its burdens. *Story Agency*, § 389.

Where privileges are directly conferred by the law, or by the sovereign, a corresponding responsibility is imposed. Such is the liability of a railway company to provide sufficient accommodation for passenger and goods traffic, and to indemnify against loss or damage by negligence, in return for the exclusive right of way and tolls thereupon; also, all other instances where rights are conferred upon individuals or bodies of persons as against the public — such as companies, attorneys, surveyors, innkeepers, pawnbrokers, &c. — come within the meaning of the maxim.

Familiar illustrations of this maxim are found in the rights and liabilities arising out of the relation of lessor and lessee, landlord and tenant, husband and wife, master and servant, principal and agent, executor, devisee, &c., — in all which cases to the privileges conferred by the law the law attaches corresponding liability.

Real property is a leading object in the consideration of this maxim, it being a common rule that all land, in passing from one owner to another, takes with it the burdens which the previous owners have thought fit to lay upon it, and the conditions to which it was, in passing from their hands, subject, whether or not they are implied covenants, running with the land, or express, binding the covenantor and his assigns. *Whart. Max.*

Qui sentit onus, sentire debet et commodum. He who feels the burden ought to experience the benefit. This maxim is the converse of the preceding one, and is founded on the same principle. The law will impose no burden without allowing some benefit which will counterbalance the burden.

Qui tacet, consentire videtur. He who is silent is deemed to consent; silence implies consent.

It is a rule of equity, of quite general application, that a person who has maintained silence when he ought to have spoken will not be permitted afterwards to speak, to the prejudice of others, when good conscience should debar him. Hall *v.* Fisher, 9 *Barb.* 17. A familiar example of the application of this principle is found in cases where an owner of property stands by and allows it to be sold by one who has no right to sell it. If a purchaser has been misled by this silence to buy, and pay the price, the law will not allow the original owner afterwards to impeach the sale. *U. S. Dig.* tit. Estoppel, IV. But, to render the rule applicable, the owner must have been aware of what was going on, and of the facts requiring him to make objection to the sale; and the purchaser must have been misled by the owner's silence. Odlin *v.* Gove, 41 *N. H.* 465; Whitaker *v.* Williams, 20 *Conn.* 98.

The maxim has application also in the law of evidence, where proof is admitted of charges or statements made in the presence of a party, which he did not at the time deny, and as to which his silence is deemed an admission of their truth; he is deemed to assent to the truth of such statements by silent acquiescence.

Qui tam. Who as well. These are the emphatic words in the Latin form of the declaration in an action by an informer who receives but a part of the penalty sued for, of the clause describing the plaintiff, — who as well for the king (or otherwise) as for himself, &c. Such actions have received the name of *qui tam* actions; the distinctive feature being that the penalty is recoverable, part for the informer and part for the king, the people, or commonwealth, or some corporation or society, &c.

The action *qui tam* was originally one given to the people at large, or rather the forfeitures and penalties prescribed by acts of parliament were permitted to be sued for by any informer; the act, however, reserving a portion to the king, the poor, or some public use, and hence the name. A suit begun by the informer gave him an exclusive right, and was therefore a bar to other suits. This led offenders to procure their friends to begin this popular action, in order to forestall or prevent other actions. This abuse of the suit producing so much collusion caused the enactment of Stat. 4 Hen. VII. ch. 20. After this enactment, suits to recover penalties and forfeitures were brought most usually in the name of the king, upon the relation of the informer, and not otherwise, unless by statutory provision. Such being the law as it existed in England up to 1776, such an action cannot be brought and prosecuted in the United States in the name of an informer, unless the right thus to sue is distinctly given by statute. O'Kelly *v.* Athens Manuf. Co., 36 *Ga.* 51.

Qui tardius solvit, minus solvit. He who pays too slowly pays too little.

Qui totum dicit nihil excipit. He who says all excepts nothing. If provisions, either of statute or of agreement, are expressed in terms general or universal in their language, exceptions are not presumed.

If a statute makes a general provision one cannot maintain that this general provision does not embrace some particular case, on the ground of an implied exception; the general provision will be held applicable to all cases, if no exceptions are provided. *Trayn. Max.*

Qui vult decipi, decipiatur. He who is willing to be deceived let him be deceived. The general rule, that deceit, whether by misrepresentation or improper concealment, will render void a contract procured thereby, does not apply where the intended deception was at the time known to the party claiming to have been deceived; or where the duty was upon himself to ascertain the real state of facts before making the contract. If he fails to take the measures he is bound to adopt to discover the deception, the law regards him as willing to be deceived, and will not aid him.

Quæ est eadem. Which is the same. These were formal words used in pleas in actions of trespass, introducing a clause alleging that the trespass described in the plea is the same as that laid in the declaration. The phrase is taken to designate the entire clause.

Quæ non fieri debent, facta valent. Things which ought not to be done, when done, may be valid. Some acts prohibited by law are, by virtue of such prohibition, essentially null and void, and never can be made valid by agreement of the parties interested. On the other hand, some acts prohibited by the law are regarded as valid and binding after their actual performance. This maxim applies to all legal prohibitions, where the sanction is the punishment of the doer, and not the nullity of the act done.

Quæ non valeant singula, juncta juvant. Things which have no force singly may have effect if united. The wording of an instrument is to be construed as a whole. Where any obscurity arises in a deed, one provision is to be determined by the bearing it will have upon another. Galley *v.* Barrington, 2 *Bing.* 387, 391.

Intended meaning of a doubtful word may often be ascertained from adjoining words; for *quæ non valeant singula, juncta juvant*, words which are ineffective when taken singly operate when taken conjointly; one provision of a deed, or other instrument, must be construed by the bearing it will have upon another. *Broom Max.* 588.

Quid pro quo. What for what. That which is done or given in exchange or in consideration for another thing. The consideration of a contract.

Quod ab initio non valet, tractu temporis non convalescet. What from the beginning is of no effect does not gain force by lapse of time. Mere lapse of time cannot render valid that which has always been absolutely void. The presumption of validity may be stronger according to the time that an act remains unquestioned; but, if invalid originally, it is incapable of confirmation by any subsequent act.

When the consideration for a deed is illegal, no lapse of time can cure the defect. In nullities in pleadings, also, and in transactions founded upon fraud, it may be stated generally that lapse of time will not avail to cure the defect. But there are cases under the statutes of limitations where a defeasible title may become indefeasible by lapse of time, and to which this rule cannot be said strictly to apply. Lapse of time, and the altered state of circumstances consequent upon it, and which are the natural result of the act done, will frequently make that legal which before was not so; and this sacrifice society often demands at the hands of the law. *Whart. Max.*

Quod approbo non reprobo. What I accept I do not reject. A form of the maxim, *qui approbat non reprobat*, q v.

Quod fieri debet, facile præsumitur. What ought to be done is easily presumed. The law presumes that an act, performance of which is required by law, has been effectually performed.

Quod fieri non debet, factum valet. What ought not to be done, if done, may be valid. See *Fieri non debet, sed factum valet.*

Quod fuit concessum. Which was granted. A phrase found in the reports, signifying that an argument or point made was conceded, acquiesced in, or approved by the court.

Quod non apparet, non est. What does not appear, is not. See *De non apparentibus et de non existentibus, eadem est ratio.*

Quod nullius est fit domini regis. What is the property of no one becomes the property of the sovereign. This maxim expresses the doctrine of escheat, applicable chiefly to real property. In that aspect it is founded upon the feudal principle that all rights in realty are vested in the sovereign, who can only be devested of those rights while they are specially vested in another. But the rule has also been applied to personal property abandoned by the owner; to treasures hid in the ground, the owner of which is not known, &c. Compare the following maxim.

Quod nullius est, id ratione naturali occupanti conceditur. What is the property of no one is, by natural reason, given to the occupant. A maxim of the civil law, adopted by the common law; sometimes more briefly expressed *quod nullius est fit occupantis*, — what is the property of no one becomes the property of the occupant. The principle is, that he who first declares an intention of appropriating to his own use that which before belonged to nobody, and, in pursuance of such intention, actually takes it into possession, shall thereby gain the absolute property in it. 2 *Bl. Com.* 258. Strictly, this rule applies to those things which have never previously been occupied or held in possession. Thus wild animals become the property of the hunter who takes or kills them; and this even though the pursuit of them may have been an unlawful trespass, or may have constituted an offence, as poaching. But the principle has been extended so far as to declare money found on the road the property of the finder, where the former owner cannot be discovered.

Quod remedio destituitur ipsa re valet si culpa absit. What is without remedy avails of itself, if there be no fault. Where the law provides no remedy, it allows the party to avail himself of his own act, if he acts without fault. The maxim is thus analyzed by Burrill. The mere act of a party (*ipsa res*), if no fault attach to it (*si culpa absit*), will sometimes avail (*valet*) to give him a right for which the law has provided no express remedy (*quod remedio destituitur*). A familiar example of the principle is the right of a creditor, appointed executor by the will of his debtor, to retain out of the assets enough to pay the debt before any other debts of equal degree. This is a remedy by the mere act of the party himself, founded on the reason that one who is executor cannot bring an action against himself in his representative capacity to recover that which is due him in his individual capacity. *Broom Max.*

Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem. What is granted or reserved under a certain form is not to be made the subject of valuation or compensation. This maxim of Lord Bacon's (*Max.* 26, *reg.* 4) is thus illustrated by him: "The law permitteth every man to part with his own interest and to qualify his own grant as it pleaseth himself, and therefore doth not admit any allowance or recompense, if the thing be not taken as it is granted. So, in all profits *a prender*, if I grant common for ten beasts, or ten loads of wood out of my copse, or ten loads of hay out of my meadows, to be taken for three years, he shall not have common for thirty beasts or thirty loads of wood or hay the third year, if he forbear for the space of two years; here the time is certain and precise. So, if the place be limited, as if I grant estovers to be spent in such a house, or stone towards the reparation of such a castle, although the grantee do burn of his fuel, and repair of his own charge, yet he can demand no allowance for that he took it not."

The reason of the rule seems to be that the law gives to the grantor the right to qualify his grant as he sees fit, and therefore no allowance or recompense can be given to the grantee, where the thing is not taken as it is granted. But the rule does not apply where the contract conflicts with public policy, or is immoral. Thus, a grantor in fee cannot bind his grantee not to alien, nor can a grantor in tail annex a condition against barring the entail.

Quo animo. With what intention; with what motive. This expression is often used in a substantive sense, as the *quo animo* with which a thing was done or words spoken; equivalent to *animus*, q. v.

Quo jure. By what right. The name of a writ in old English practice requiring a defendant to show by what right he claimed common of pasture in land which the plaintiff claimed to hold in fee.

Quo minus. By which less. These words were contained in the Latin form of a suggestion by the plaintiff that he was the king's debtor, and that the defendant had done him the injury sued for, by which he was less able to pay his debt to the king. Such a suggestion was for a long time the mode of giving jurisdiction of ordinary suits to the English court of exchequer, and became the process for bringing suits in that court, taking its name as a writ from these words.

Also the name of a writ which formerly lay for one who had a grant of house-bote and hay-bote in another man's woods against the grantor for making such waste as interfered with the grantee's enjoyment of his grant. *Cowel.*

Quo warranto. By what authority. This expression, as the name of a writ, has become so far Anglicized that it is also mentioned in its strict alphabetic place. See p. 374

QUIA. Because. In the Latin forms of conveyances, *quia* was used as the apt word to introduce the consideration; in the same manner as *si*, to introduce a condition, and *ut*, the *modus* of the grant.

Quia emptores. Because purchasers. The initial words of the statute of Westminster 3 (18 Edw. I. ch. 1), regulating sales of lands and tenements; which is hence called the statute *quia emptores*.

The statute 18 Edw. I. ch. 1, called the statute *quia emptores*, took from the tenants of common lords the feudal liberty they claimed of disposing of part of their lands to hold of themselves, and instead of it gave them a general liberty to sell all or any part, to hold of the next superior lord, which they could not have done before without consent. (*Wright's Ten.* 161; 4 *Cruise*, 6.) The effect of the statute was twofold: to facilitate the alienation of fee-simple estates; and to put an end to the creation of any new manors, *i.e.* tenancies in fee-simple of a subject. *Brown.*

Quia timet. Because he fears. The technical name of a bill in equity. See BILL QUIA TIMET.

QUICQUID. Whatever.

Quicquid plantatur solo, solo cedit. Whatever is planted in the soil belongs to the soil. Every thing annexed to the soil in a permanent manner goes with the soil; the owner of the soil is the owner of every thing planted in or permanently affixed to it. By an extension of the signification of the word *plantatur*, this maxim is applied to cases where one builds, plants, sows, &c., upon the land of another; in which cases, *prima facie*, and without any evidence of consent or agreement to the contrary, the buildings erected, trees planted, seed sown, &c., become at once the property of the owner of the land. But many exceptions to the application of the maxim are found in the law of fixtures. When the principle was first adopted, fixtures, as now understood, were not known, and the maxim was applicable to all things affixed to the freehold indiscriminately; now, however, it is in strictness applicable only to those particular things which, after they have once been annexed to the soil, may not of right be severed from the freehold. Compare FIXTURES.

Quicquid solvitur, solvitur secundum modum solventis; quicquid recepitur, recipitur secundum modum recipientis. Whatever is paid, is paid according to the intention of the payer; whatever is received, is received according to the intention of the receiver. He who pays, may at the time appropriate his payment to any of his debts or obligations to the creditor paid; if he does not so appropriate his payment, the creditor receiving it may, at or after the receipt of it, make such appropriation himself. This is the settled rule as to the right of application of payments.

Upon payment of money, the debtor may direct in what manner the money must be appropriated, and the creditor cannot alter this appropriation without the consent of the debtor. And this appropriation by the debtor may be implied; as where, a particular debt of a precise sum being de-

manded, he pays it, though others be due at the same time. But, in the absence of any appropriation by the debtor, the creditor may make such appropriation as may suit him; as if A owe B two sums of money, one barred by the statute of limitations and the other not, or one in dispute and the other not, or one on covenant and the other on simple contract, — if no appropriation be made by the debtor at the time of payment, the creditor can apply the money in discharge of the debt barred by the statute, or in dispute, or of the simple-contract debt; but not in discharge of an unlawful debt, so as to enable him to sue for the lawful. If, however, neither party make an appropriation, the law appropriates the payment to the oldest debt; or, in case of one part of the claim being barred by the statute of limitations, to the debts generally, as the circumstances of the case may seem to require. The debtor, moreover, is required to direct the appropriation at the time of payment, but the creditor may do it at any time afterwards, before the appropriation be questioned. *Whart. Max.*

QUIET ENJOYMENT. The name of one of the covenants in conveyances and leases of lands, engaging that the grantee or lessee shall be permitted to occupy and use the lands undisturbed. It is not broken by mere defect of title: only by some eviction of the grantee from or disturbance in his possession.

QUIETUS. Quit; acquitted; freed; discharged; an acquittance; a discharge.

A word which was commonly used by the clerk of the pipe and auditors in the exchequer in their acquittances or discharges given to accountants, signifying to be freed, acquitted, or discharged. *Cowel.*

Quieta non movere. See *Non quieta movere*, and *Stare decisis*.

QUILIBET. Whoever will; any one who will. Any person without distinction.

Quilibet potest renunciare juri pro se introducto. Any one may renounce a right introduced for his own benefit. Any one may, at his pleasure, renounce the benefit of that which the law would introduce for his benefit. Thus a person may renounce a constitutional provision made for his own benefit; or a defence which at law would bar the plaintiff's demand, such as bankruptcy, infancy, the statute of limitations, usury, and the like. So a person entitled to administer upon an estate may renounce such right. A tenant for life, having the right to sublet for twenty-one years for his own benefit, might, at common law, renounce a part of such right, and demise the land for a shorter term. The acceptor of a bill or indorser of a note may waive notice of protest or non-payment. But the above rule must be applied with this general qualification, that a private agreement cannot be permitted to infringe upon the rights of third parties; thus partners cannot renounce their relationship as such, to the injury of creditors.

In New York, it has been held that a defendant in a criminal case cannot waive the right of trial by twelve jurymen; and where by the prisoner's express desire a juror was excused from sitting, and the remaining eleven convicted the defendant, the court of appeals reversed the judgment and granted a new trial. People *v.* Cancemi, 7 *Abb. Pr.* 271.

This maxim must be understood as applicable to the party himself having the right, and not to third parties; for no one will be permitted to renounce a right in which others are interested to their prejudice; *e.g.*, the waiver of notice of dishonor of a bill by one indorser will not prejudice the right to notice of the subsequent indorsers. But he may renounce a right given to him alone, whether by act of law or of parties; as to waive his defence to a claim under plea of infancy or the statute of limitations; or to give up any private rights or privileges he may have, either for the benefit of individuals or of the public, — as by giving up his right to compel the specific performance of a contract, or to give the public a right of way over his lands. He may, however, in certain cases, refuse to take advantage of the right the law gives to him, even to the prejudice of others; as in the case of an executor refusing to take advantage of the statute of limitations, to the prejudice of the legatees. *Whart. Max.*

QUINQUE; QUINTUS. Latin numerals, cardinal and ordinal; *quinque* meaning five, and *quintus* fifth.

Quinto exactus. Called the fifth time. The form and the name of a return by the sheriff, importing, in proceedings for outlawry, that a defendant had been proclaimed and called in five county courts successively, and failed to appear; upon which he was outlawed.

QUISQUE. Every; every one.

Quisque utitur jure auctoris. Every one exercises the right of him from whom the right is derived. A common mode

of stating the principle of the maxim, *nemo plus juris ad alium transferre potest quam ipse habet*, q. v.

QUISQUIS. Whoever; whatever; every one who; all that.

QUIT. Clear; discharged; free; also, spoken of persons absolved or acquitted of a charge.

Quit, in a deed, is tantamount to "sell" or "release," and will pass the land. Gordon *v.* Haywood, 2 *N. H.* 402.

Quitclaim. A release or acquittance given to one man by another, in respect of any action that he has or might have against him. Also, acquitting or giving up one's claim or title. *Termes de la Ley; Cowel.*

Quitclaim deed. A deed purporting to convey only such title or interest as the grantor may have, without engaging that the title is valid, or to protect the grantee against paramount or adverse titles. This description of deed is in common use in many of the states, and corresponds to release at common law.

Quit-rent. Certain established rents of the freeholders and ancient copyholders of manors are denominated quit-rents, because thereby the tenant goes quit and free of all other services. 3 *Cruise Dig.* 314.

QUIVIS. Any; any one; every one.

Quivis præsumitur bonus donec probetur contrarium. Every one is presumed innocent until the contrary is proved. A familiar principle of common law, called "the golden rule of lawyers."

QUO; QUOD. For maxims commencing with these inflections of the Latin pronouns *qui* and *quis*, see QUI; QUIS.

QUO WARRANTO. The name of a writ by which the question, by what authority persons claiming or usurping any office, franchise, or liberty are acting, is litigated. In old English practice, the writ was in the nature of a writ of right on behalf of the crown, to inquire by what authority the defendant claimed to exercise the office or franchise in question, and then to determine the sufficiency of the authority shown. It commanded the sheriff to summon the defendant to appear before the court, to show by what authority he claimed.

In England, and in most or all of the United States, the writ of *quo warranto* was superseded by an information in the nature of a *quo warranto*, which, under different forms, affords a similar remedy. The proceedings vary in different jurisdictions, but in all are quite anomalous, as compared with ordinary civil proceedings. Thus, in civil actions generally, the plaintiff is called upon to make out a case against the defendant. But in *quo warranto* proceedings the defendant is called upon to show that he has a right to the office or franchise which he claims; and, on his failing to show sufficient authority, judgment must be given against him. In cases involving right to office, judgment against the defendant is judgment of ouster. In cases involving the right to exercise a franchise, judgment against the defendant is for ouster and seizure of the franchise.

QUOAD. As to; concerning; in respect of.

A prohibition *quoad* is a prohibition as to certain things amongst others. Thus where a party was complained against in the ecclesiastical court for matters cognizable in the temporal courts, a prohibition *quoad* these matters issued; *i.e.*, as to such matters the party was prohibited prosecuting his suit in the ecclesiastical court. The word is also frequently applied to other matters than to prohibitions. (See 2 *Roll. Abr.* 315, *b.* 10; *Vin. Abr.* tit. Prohib. E a. 7.) *Brown.*

Quoad hoc. As to this; with respect to this; so far as the thing named is concerned. The phrase is used in law reports to signify that, as to this matter, the law is as stated. *Tomlins.*

QUOD. That; for that; for the reason that; because. Several Latin phrases introduced by this conjunction are given below. Phrases and maxims commencing with the inflections, similar in form, of the pronoun *qui* or *quis*, are placed under *qui*, q. v.

Quod computet. That he account. A term used in the action of account as the name of an interlocutory judgment, requiring the defendant to account before auditors. The same name is applied to a decree for a like purpose in creditors' suits against executors and administrators.

Quod cum. That whereas; for that whereas. Technical words of pleading in Latin declarations at common law, used to introduce matter of inducement in actions in which such matter was allowable. The clause is literally translated in the English forms.

Pleadings must not be by way of recitals, but must be positive in their form. For example, if a declaration in trespass for assault and battery make the charge in the following form: "And thereupon the said A B, by ——, his attorney, complains, for that whereas the said C D, heretofore, to wit, &c., made an assault," it is bad, for nothing is positively affirmed. But in trespass on the case the "whereas" is unobjectionable, being used only as introductory to some subsequent, positive allegation. *Steph. Plead.* 388, and *note.*

Quod ei deforceat. That he deforces him. The name of a writ, in old English practice, issued on behalf of a tenant in tail, tenant in dower, or tenant for life, who had lost his lands by default, against him who recovered them, or against his heir. *Reg. Orig.* 171. The writ was authorized by the statute of Westminster 2d (13 Edw. I. ch. 4), and was intended to restore to one barred by a recovery against him, upon his default in a possessory action, the right of which he had thus been deforced.

Quod permittat. That he permit. The name of a writ, in old English practice, issued on behalf of the heir of him who was disseised of a common of pasture, against the heir of the disseisor. *Cowel.* According to Blackstone, the writ lay for any one entitled to common of pasture against any person, whether the owner of the land or a stranger, who disturbed the right. 3 *Bl. Com.* 240.

Quod permittat prosternere. That he permit to demolish; that he give leave to abate. The name of a writ, in old English practice, commanding the defendant to permit the plaintiff to abate a nuisance of which complaint was made, or to appear in court and show cause why he will not. On proof of the facts, the plaintiff was entitled to have judgment to abate the nuisance and for damages. The proceeding has become obsolete.

Quod recuperet. That he recover. The ordinary form of judgment for the plaintiff in an action at law was in these words, in the Latin form; hence such a judgment is frequently called a judgment *quod recuperet.*

QUORUM. Of whom. This, the genitive plural of *qui*, is used as an English substantive.

Thus employed, it signifies the number of persons belonging to a legislative, corporate, or other body, whose presence is necessary for the transaction of business by such body. The number in each case is usually fixed by some constitution, statute, or rule.

Among the justices of the peace appointed by the king's commission there were usually some designated as more eminent for their skill and discretion than others, one or some of whom, on special occasions, the commission expressly required should be present, and without his or their presence the others could not act. These were hence termed justices of the quorum, from the language of the commission, which ran thus: "*quorum aliquem vestrum* A B, C D, &c., *unum esse volumus*" (*i.e.*, of whom we wish some one of you, A B, C D, &c., to be present). The word is used in a similar sense in the following passage: "By charter 2 Edw. IV., the mayor, recorder, and aldermen that have been mayors, shall be conservators of the peace within the city; and they, or four of them, *quorum* the mayor to be one, shall be justices of oyer and terminer there." *Brown.*

Where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, although a majority may then decide. Withnell *v.* Gartham, 6 *Durnf. & E.* 388; Grindley *v.* Barker, 1 *Bos. & P.* 229.

Quorum, as used in the Ohio township act of 1853, means a majority of the township trustees. State *v.* Wilkesville, 20 *Ohio St.* 288.

QUOTUS. How many; what number; what part; what proportion. The feminine form of this Latin interrogative, *quota*, is used as a substantive in English. And the adverb derived from it, *quoties*, introduces the maxim explained below.

Quota. The proportion of a total amount which is to be borne by one of several upon whom a charge falls or is imposed; as where a certain sum is assessed upon a number of individuals, or a conscription for military service is levied upon several communities, the proportion of such sum of money to be contributed by any individual, or the

number of men to be furnished by any particular community, is the quota of that person, or of such community.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est. So long as there is no ambiguity in the language of an instrument, no interpretation contrary to the language is allowed. Where the words of any written instrument are free from ambiguity in themselves, and no external circumstances create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which it relates, such instrument will always be construed by the courts according to the strict, plain, common meaning of the words themselves; and in such a case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties thereto, is utterly inadmissible. But where there is doubt or difficulty as to the true sense and meaning of the words themselves, or their application under the surrounding circumstances, extrinsic evidence may be resorted to for the purpose of ascertaining the intention of the parties to the instrument; for by no other means can that intention be ascertained. Thus, an instrument being written in a foreign language, persons skilled in that language may be examined as to the meaning of the words; or if the instrument is a mercantile contract, or if it contains technical terms of art, the acceptation of the terms, among merchants, in the one case, and, in the other, among persons skilled in the particular art, may be considered.

This rule of construction applies to all written instruments, including statutes, treaties, wills, &c. But it is never allowed to prevail so as to defeat the manifest intent and object of the parties to an instrument, where it is clearly discernible on the face of the instrument, and the ignorance or mistake of the parties has prevented them from expressing it in the appropriate language. Compare the maxim, *ambiguitas verborum latens verificatione suppletur.*

QUOUSQUE. How long; as long as; until. In the latter sense, the word is used as a word of limitation in old conveyances.

Quousque is a word implying a temporary state of things. Thus the lord of a manor, after making due proclamation at three consecutive courts of the manor for a person to come in as heir or devisee of a deceased tenant, is entitled to seize the lands *quousque*, that is, until some person claims admittance. So a prohibition *quousque* is a prohibition which is to take effect until some act be performed, or event happen, or time be elapsed, according as is specified in the prohibition. See 1 *Steph. Com.* 637; *Wms. R. P.* Pt. III. ch. 2.

QUUM. When. This Latin adverb is sometimes spelled *cum.*

Quum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est. When two things repugnant to each other are found in a will, the last shall stand.

If two clauses or dispositions found in a will are totally irreconcilable, so that they cannot possibly stand together, the clause or disposition which is the later in local position shall prevail, it being considered that the subsequent words indicate a subsequent intention. Thus if the testator, in one part of his will, give to a person an estate of inheritance in land, or an absolute interest in personalty, but in subsequent clauses shows unequivocally that he means the devisee or legatee to take a life-interest only, the prior gift is restricted accordingly. But the maxim is to be understood as wholly subservient to and restricted by that general principle in the construction of wills which requires that the intention of the testator shall, if possible, be ascertained and carried into effect. *Broom Max.* 252.

It may be taken as clearly established that this rule must not be acted on so as to clash with another paramount rule, which is, that before all things we must look for the intention of the testator as we find it expressed or clearly implied in the general tenor of the will; and when we have found that, on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last, indifferently. And this rests upon good reason; for although, when there are repugnant dispositions, and nothing leads clearly to a preference of one or rejection of the other, convenience is strongly in favor of some rule, however arbitrary, yet the foundation of this rule, as of every other established for the interpretation of wills, obviously is, that it was

supposed to be the safest guide, under the circumstances, to the last intention of the testator. Morrall *v.* Sutton, 1 *Ph.* 533, 545.

Where two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention, and prevail. *Ib.*

Quum principalis causa non consistit, ne ea quidem quæ sequuntur locum habent. When the principal subject-matter no longer exists, those things which follow it have no longer any place. This maxim is an expression of one form of the general doctrine that the incident follows, or falls with, its principal. See the maxim, *accessorium non ducit, sed sequitur, suum principale.*

R.

RAILROAD. The question has been mooted whether the general term railroad includes horse or street railroads, or is confined to those run by steam. The decisions differ; and the rule seems to be that, in this respect, the meaning depends on the context and general intent. The word itself may have either meaning. A statute making "the proprietors of any railroad" liable for injuries from negligence of the servants, &c., has been held to include horse-railways. Johnson *v.* Louisville City R. Co., 10 *Bush*, 231. And an act giving certain powers to "railroads" was held to embrace horse-railways, in Chicago *v.* Evans, 24 *Ill.* 52. But where the legislature enacted that no other railroad than that of such corporation should be constructed between certain prescribed limits, and that any railroad which might be constructed in a direction named should connect with the road of such corporation on reasonable terms, it was held that the term railroad did not comprise street-railways, and that an injunction could not be granted restraining the constructing of street-railways, or requiring the connection of such a railway with the road in question. Louisville, &c. R. R. Co. *v.* Louisville, &c. R. R. Co., 2 *Duv.* 175.

It was at one time held in New York that the provision of the internal revenue act of congress which authorized railroad companies to add the revenue tax to their fares included street-railroads, and empowered them to make such increase. Moneypenny *v.* Sixth Av. R. R. Co., 4 *Abb. Pr.* N. S. 357.

The word may fairly be understood as including sidings and branches; but does not necessarily include the rolling-stock. Yet a power to a company to mortgage its road implies power to mortgage the franchise and the rolling-stock.

In an act of incorporation of a railroad from a coal district to a navigable river, the word railroad, *ex vi termini*, includes sidings, branches to wharves, &c. Black *v.* Philadelphia, &c. R. R. Co., 58 *Pa. St.* 249.

A provision in a legislative grant of land for a railroad, that said railroad shall be a public highway for the use of the government, free of toll, for the transportation of property or troops, secures to the government the free use of the roadway and track, but not the right to use the rolling-stock. Lake Superior, &c. R. R. Co. *v.* United States, 93 *U. S.* 442.

A power given by statute "to pledge the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof," authorizes a mortgage of the road itself, and of the franchise or right to operate the road. It also necessarily authorizes a transfer of rolling-stock and equipments afterwards to be acquired, as this is necessary to the security which a mortgage of the right to operate the road is intended to afford. Coe *v.* Columbus, &c. R. R. Co., 10 *Ohio St.* 372.

A railroad is a public highway *sub modo* only, and to be used in a special way,—that of transporting passengers and freight along the road in cars. It is not a highway in the sense of being free for all the people of the state to pass and repass over it, on foot, on horseback, and in carriages and wagons. State *v.* Johnson, *Phill. L.* 140.

RAISE. Has some peculiar uses, generally importing the idea of calling or bringing any thing into existence, or of inferring the existence of any thing from the proper construction of a legal document.

Raising an action. In Scotland, is the institution of an action or suit.

Raising money. To raise money is to realize a sum of money, either by subscription or by loan.

Raising portions. When a landed estate is settled on an eldest son, it is generally burdened with the payment of specific sums of money in favor of his brothers and sisters. A direction to this effect is called a direction for "raising portions for younger children;" and, for this purpose, it is usual to demise or lease the estate to trustees for a term of years, upon trust to raise the required portions by a sale or mortgage of the same.

Raising a promise. When it is said that the law "raises a promise," or "raises an assumpsit," upon any given transaction, it is meant that a promise, for breach of which an action may be brought, is legally involved in, or to be inferred from, the transaction in question.

Raising a use. Creating, establishing, or calling a use into existence. When it is said that equity raises a use, the meaning is that the existence of a use is to be inferred by proper construction from the words of a written instrument. Thus, if a man conveyed land to another in fee, without any consideration, equity would presume that he meant it to the use of himself, and would therefore raise an implied use for his benefit. See *Brown.*

RANGE. In public-land laws and surveys, is used as a guide in finding a given township; the townships of a certain row or tier, as they appear on the map, are said to lie in range No. so and so.

RANGER. In old English law, a sworn officer of the royal forests, whose duties were to walk daily through the territory in his charge; to inquire of trespasses and trespassers within his jurisdiction; to drive beasts of the forest out of the disafforested into the forested lands; and to present all trespasses of the forest at the next court holden for the forest. See *Termes de la Ley; Cowel.*

RANK, *v.* To arrange in an order of precedence. Rank, *n.*: arrangement in order of precedence; also, one's degree or place in such order.

Ranking of creditors, is the Scotch term for the arrangement of the property of a debtor according to the claims of the creditors, in consequence of the nature of their respective securities. *Bell.* The corresponding process in England is the marshalling of securities in a suit or action for redemption or foreclosure. *Paterson.*

RANK MODUS. Every *modus* of tithes is presumably based on a composition on fairly equitable terms, by which the *modus* is substituted for the payment of tithe. See MODUS. If then, a *modus* be so large that it, beyond dispute, exceeds the value of the tithes in the time of Richard I. (the date of legal memory), it is called a rank *modus,* and will not be accepted as a legal *modus;* for, as it would be destroyed by any direct evidence proving its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later origin. 2 *Bl. Com.* 30, 31; 2 *Steph. Com.* 729.

RANSOM. 1. In old English law, a sum of money paid for the pardoning of some great offence, or to redeem the person from captivity or imprisonment, or property from seizure; a fine, particularly an excessive or severe one. The distinction made between ransom and amerciament is said to be that a ransom is the redemption of a corporal punishment; while an amerciament is a fine by way of penalty for an offence committed. *Cowel.*

2. In international law, the redemption, also the sum or other consideration, agreed to be paid for the redemption of captured property, or the liberty of a captive.

A ransom, strictly speaking, is not a recapture of the captured property: it is rather a purchase of the right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit which the captors might acquire or consummate in the property, by a regular adjudication of a prize tribunal, whether it be an interest *in rem,* a lien, or a mere title to expenses. In this respect, there seems to be no difference between the case of a ransom of an enemy or a neutral. Maisonnaire *v.* Keating, 2 *Gall.* 325.

Ransom bill. The writing embodying a contract of ransom; a security given by the master of a captured vessel to the captor for the surrender of the vessel or any goods therein.

RAPE. 1. The general notion ex-

pressed by this term in criminal law is that of carnal knowledge of a female, obtained without her competent consent. But it is not easy to express all the refinements of modern decisions, in one definition; especially as statutory definitions differ, and peculiar cases may be stated which are punishable as rape in some jurisdictions, while they are not so in others.

Respecting the question, what is sufficient carnal knowledge to constitute the offence, opinions have differed; apparently, according as the gravamen of the crime has been thought to consist altogether in the outrage and indignity to the feelings of the woman, or partly in the possibility of pregnancy. Taking the first-mentioned view, penetration may well be said to complete and constitute the crime; taking the latter, emission might be deemed an essential element, but still there would be warrant, considering the peculiar difficulties of the question, for considering penetration to be either presumptive evidence, from the probability, or conclusive by positive rule, of the fact of emission. By the current of authorities, and by several of the statutes, proof of penetration is all that is required to establish the offence, though it is not so clear that emission is not involved in the meaning of the word.

If the woman is of age and capacity to give consent, her consent actually given, although procured by a fraudulent device, as where the man personated the woman's husband, will relieve the act of the character of rape. But actual violence is not, by the modern decisions, necessary; if the act was committed without consent, as where she is stupefied by drugs or liquor given for the purpose; or deceived by the offender as to the nature of his act; or overcome by duress or sufficient threats of murder, — the case may be rape, although there was not actual, continued resistance.

If the victim is under the age of ten years, no question of consent arises; she is not competent to give consent. The same rule seems to apply where, though of full age, she is disqualified by insanity from giving consent; though whether this disability must be known to defendant is not so clear.

Marriage is considered to give permanent, irrevocable consent; so that a husband cannot be convicted of a rape upon his wife, in view of marital intercourse. In the famous Lord Audley's case, 1 *Harg. St. Tr.* 388, a husband was held to be a principal in the second degree of a rape committed upon his wife, where he held her while his servant committed the rape.

The term rape imports not only force and violence on the part of the man, but resistance on the part of the woman. Mills *v.* State, 52 *Ind.* 187.

The expression, without her consent, used in reference to rape, includes cases where the defendant acts with knowledge that the woman is insensible and incapable of consenting. Commonwealth *v.* Burke, 105 *Mass.* 376.

At common law, an indictment for rape must charge that the accused "did ravish;" the use of the noun "rape," instead of the verb "ravish," is insufficient. But in case of carnal knowledge, with or without consent, of a female under ten years of age, the allegations of force and want of consent are immaterial, and mere surplusage, and if alleged in the indictment need not be proved. Davis *v.* State, 42 *Tex.* 226; People *v.* Quin, 50 *Barb.* 128.

2. In old English law, rape signifies a political division of territory; also, the term is used generally of violent trespasses and seizures.

A rape is part of a county, being in a manner the same with a hundred. The county of Sussex is divided into six rapes: those of Chichester, Arundel, Bramber, Lewes, Pevensey, and Hastings; each of which, besides their hundreds, hath a castle, river, and forest belonging to it. *Termes de la Ley; Cowel;* 1 *Bl. Com.* 117.

They seem to have been military governments in the time of the conqueror. 1 *Steph. Com.* 127, note.

RAPINA; RAPINE. The Latin and English terms for the violent, felonious taking of personal property; robbery.

RASURE. The removing of letters or words of an instrument by scraping off the ink and fibres of paper to which it adheres; erasure. It is a species of alteration of instruments.

RATABLE VALUE. By the phrase ratable value, as used in the Connecticut statute against evasive transfers of bank stock, is not meant the percentage at which the stock goes into the grand levy, that is, six per cent of its value, but the whole amount of the stock at its actual value. Darrow *v.* Langdon, 20 *Conn.* 288.

RATE. Frequently appears in jurisprudence, but usually without material

variation from the vernacular meaning. Rate or rates of fare means the price or amount which passengers may be required to pay. Rate or rating of vessels means their estimation with regard to insurable qualities.

The words "rate" and "rates" are often used as interchangeable with "tax" and "taxes." This is particularly noticeable in English books, where "rates" is considered to signify local taxes, chiefly the county rate, the borough rate, and the poor rate. The *county* rate is levied by the justices assembled at general or quarter sessions, who are authorized and empowered by law to assess and tax every parish, township, and other place, whether parochial or extra-parochial, within the respective limits of their commissions, according to the annual value of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor therein. The *borough* rate is levied by the town council. The *poor* rate is levied by the church-wardens and overseers within each parish.

The expression "rates, taxes, and duties," in a lease of city property, includes an assessment under the betterment acts, although local and special. Curtis *v.* Pierce, 115 *Mass.* 186.

Rate, in connection with the provision of a statute prescribing a land tax in any rate "not exceeding four dollars to the quarter section," denotes that 160 acres being taken as the unit of quantity, whatever may be the ratio between that and the tax, the same relative proportion must be observed as to any other given quantity of land, more or less, that falls within the apportionment. Burlington, &c. R. R. Co. *v.* Lancaster Co., 4 *Neb.* 293.

Rate of exchange. The price at which a bill drawn in one place or country upon another can be bought or sold where drawn. See *Story Bills*, § 31; *Wharton;* also PAR OF EXCHANGE.

RATIFICATION. Acceptance of or assent to an act performed by another; confirmation by a constituent or principal of what has been done by a representative or an agent without original authority.

Ratification is particularly used for the confirmation of a clerk in a prebend, &c., formerly conferred on him by the bishop, where the right of patronage is doubted, or supposed to be in the king. (*Reg. Oriy.* 304.) *Jacob.*

Ratihabitio mandato æquiparatur. Ratification is equivalent to express command. An abbreviated form of the maxim, *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, q. v.

RATIO. Reason. Also, an account; a cause.

Ratio legis est anima legis. The reason of the law is the soul of the law. This principle is more commonly expressed by the maxim, *cessante ratione legis, cessat ipsa lex*, q. v.

RAVISH. The verb corresponding to the noun rape, *q. v.*

Ravishment: abduction; marriage of an infant ward without guardian's consent. Also, rape.

Ravish, or ravished, is indispensably necessary in an indictment for a rape. No other word or circumlocution will take its place, — not even the noun rape. Davis *v.* State, 42 *Tex.* 226; People *v.* Quin, 50 *Barb.* 128.

That ravish, *per se*, imports the sexual act, see Harper *v.* Delp, 3 *Ind.* 225.

RE. In the affair or matter of. A term of frequent use in designating judicial proceedings, in which there is only one party or petitioner. Thus Re Vivian signifies In the matter of Vivian, or in Vivian's Case.

READER. 1. In the Middle Temple those persons are called readers who are appointed to deliver lectures or readings at certain periods during the term.

2. The clerks in holy orders who read prayers and assist in the performance of divine service in the chapels of the several inns of court are also so termed. *Mozley & W.*

READING IN. In English ecclesiastical law, a new incumbent of a benefice is required to read, within two months of actual possession, the morning and evening prayers, and declare his unfeigned assent and consent thereto publicly in the church, before the congregation. He is also to read the thirty-nine articles in the church in the time of common prayer, and to declare his unfeigned assent thereunto, within two months after induction; and to read in his church, within three months after institution or collation, the declaration appointed by the act of uniformity, and also the certificate of his having subscribed it before the bishop. The observance of the above forms by a new incumbent constitutes what is termed "reading in." See *Reg. Ecc. Law; Burns Ecc. Law.*

READY-MADE. On a note payable in ready-made clothing, the payee has no right to demand a garment which has been made for a customer at a stipulated price. Vance *v.* Bloomer, 20 *Wend.* 196.

Ready-made. 37 N.Y. 65, > 36

REAL. In common-law jurisprudence, generally signifies landed; having the attributes of permanency and immobility which distinguish the soil; connected with or relating to land, or estate in land. In the civil law, the meaning is more comprehensive, corresponding with the derivation from *res*. It distinguishes things, movable or immovable, from persons, and means connected with or relating to things. Thus a real injury is any tort to lands or chattels, not to the person; a real statute is one which relates to things, not to persons.

Real action. In common-law language, an action specifically involving or brought for the recovery of real property.

The expression did not include such remedies as ejectment, which involved the recovery not only of possession of land, but also of damages for its detention, and hence was called a mixed action (*q. v.*); and the forms of action to which it was properly applicable have now been generally disused, and the learning respecting them is well-nigh obsolete for purposes of the American practitioner. Consult the treatise of Stearns or of Booth on real actions.

Among the civilians, real actions, otherwise called vindications, are those in which a man demanded something that was his own, and which were founded on dominion, or *jus in re*. The real actions of the Roman law were not, like the real actions of the common law, confined to real estate, but they included personal as well as real property. But the same distinction as to classes of remedies and actions equally pervades the common law as it does the civil law. Thus there are in the common law the distinct classes of real actions, personal actions, and mixed actions. The first embracing those which concern real estate where the proceeding is purely *in rem*, the next embracing all suits *in personam* for contracts and torts, and the last embracing those mixed suits where the person is liable by reason of and in connection with property. (*Story Confl. Laws*, 781.) *Wharton.*

Real assets. When some portion of the assets of a bankrupt, insolvent, or decedent estate consists in landed property, that portion is called real assets.

Real burden. In Scotch law, a condition imposed on an estate which is effectual against creditors and heirs. The power of imposing such a real burden is exercised by the person granting a heritable bond. *Tomlins.*

Real contract. So far as this term has any distinct use in common-law jurisprudence, it means a contract specifically involving landed property. In the civil law, it has the broader sense of a contract involving property, not mere personal act or consent; contracts calling for delivery of a thing.

Real covenant. A covenant specifically involving or affecting landed property or interests; and, in a more precise use, a covenant creating or imposing an obligation to pass something real. The authorities conflict as to the sense most properly assignable to the term. See *Bouvier.*

Real estate; real property. These terms are used indifferently for interest or ownership in land; immovable things, and things of the nature of land, or for the land and things themselves, considered as subjects of property.

Either is, in general, coextensive with "lands, tenements, and hereditaments" (Cook *v.* Hammond, 4 *Mas.* 467, 490; Pelletreau *v.* Smith, 30 *Barb.* 494; 1 *N. Y. Rev. Stat.* 750, § 10; *Code of Pro.* § 462); includes the land itself, all buildings, &c., trees, &c., and mines, minerals, &c. (1 *N. Y. Rev. Stat.* 387, § 2); includes every estate, &c., legal and equitable, in lands, &c., except such as are determined by the death of an intestate, and except leases for years, and estates for the life of another (*Id.* 754, § 27); all estates or interests in such real property which are held for life or some greater estate, but does not embrace terms for years and other chattel interests in land (Westervelt *v.* People, 20 *Wend.* 416); every possible interest in lands, except a mere chattel interest (Jackson *v.* Parker, 9 *Cow.* 73). Neither is limited to the land; but all improvements of a permanent character placed upon real estate are regarded as part of the land. Where a stranger constructs a building upon the land of another without his consent, it becomes a part of the land, and he would become a trespasser by removing it. Mathes *v.* Dobschuetz, 72 *Ill.* 438.

The division of real and personal property is substantially coincident with that into lands, tenements, and hereditaments, on the one hand, and goods and chattels on the other. In the case of

each division, the principle underlying the division is feudal. It is directly so in the case of the division into lands and chattels, and indirectly so in the case of the division into real and personal property; for as law and society progressed, it became more and more apparent that the essential difference between lands and goods was to be found in the remedies for the deprivation of either; that as to the one, the land itself could be recovered, while, as to the other, proceedings could be had against the person only. The two great classes of property accordingly began to acquire two other names that were characteristic of this difference; and, with reference to the remedies for the recovery of each, were called respectively real and personal property. See *Williams R. P.*

In another aspect of the distinction, by real property, or real estate, are understood such interests in land as, on the death of their owner, intestate, descend to his heir at law; or, if the land be copyhold or customary freehold, to the heir or heirs pointed out by the custom; while personal property and personal estate denote such property as, on the owner's death, devolves on his executor or administrator, to be distributed (in so far as it is not required for creditors, or as the owner has not made any disposition by will) among his next of kin, according to the statutes of distributions. The term real property is not precisely synonymous with property in land; nor is personal property exactly synonymous with movable property. Thus a title of honor, though annexed to the person of its owner, is real property, because in ancient times such titles were annexed to the ownership of various lands. On the other hand, shares in English canals and railways are in general made personal property by the different acts of parliament under the authority of which they have originated; and many similar laws exist in the United States. And a lease for years is personal property, because, in ancient times, an ejected lessee could not recover his lease by real action; but he could bring a personal action for damages against his landlord, who was bound to warrant him possession.

The term real estate is generally applied to landed property, and includes all estates and interests in lands which are held for life or for some greater estate, and whether such lands be of freehold or copyhold tenure. *Tomlins.*

The track of a railroad and the land on which it is constructed are not real estate, for the purposes of taxation. Portland, &c. R. R. Co. *v.* Saco, 60 *Me.* 196.

A mortgage executed by an individual member of a firm, upon land the legal title to which is vested in him, but which is in fact owned and used by the firm as partnership property, is real-estate security, within the meaning of a clause in the will directing such security to be taken for money loaned. Miller *v.* Proctor, 20 *Ohio St.* 442.

Real-estate agent. Any person whose business it is to sell, or offer for sale, real estate for others, or to rent houses, stores, or other buildings, or real estate, or to collect rent for others. Act of July 13, 1866, 49, 14 *Stat. at L.* 118.

Real law, or statute. A civil-law expression for a law which relates specifically to property, not to persons.

Laws purely real are those which directly and indirectly regulate property, and the rights of property, without intermeddling with or changing the state of the person. *Wharton.*

Real representative. He who represents or stands in the place of another, with respect to his real property, is so termed, in contradistinction to him who stands in the place of another, with regard to his personal property, and who is termed the personal representative. Thus the heir is the real representative of his deceased ancestor.

Real right. The right of property or *jus in re*, the person having which may sue for the subject itself. A personal right or *jus ad rem* entitles the party only to an action for performance of the obligation. *Wharton.*

Real things. Things substantial and immovable, and the rights and profits annexed to or issuing out of them. *Wharton.*

REALIZE. Where the plaintiff was to be paid "out of the first money and government scrip realized" by the defendant from the sale of certain lands, it was held that an executory contract for the sale of such lands did not make the defendant liable upon his contract. Stanford *v.* Greene County, 18 *Iowa*, 218.

Where an owner of land agreed to pay a stipulated percentage in the event he should realize a specified sum for the land, and he received a *bona fide* offer for more than that sum, he was held bound to pay the percentage, receiving an offer of $3,500 or more in good faith from a responsible party, notwithstanding he did not choose to

sell at that price then, and afterwards could not do so. Lorillard *v.* Silver, 35 *Barb.* 132.

REALTY. A brief term for real property, also for any thing which partakes of the nature of real property.

REAR. The phrase, in the rear of, in a devise of a messuage and "the two stable lots in the rear thereof," does not necessarily mean directly behind. Read *v.* Clarke, 109 *Mass.* 82.

REASONABLE. Occurs in several phrases which have a technical meaning.

Reasonable aid. A duty claimed by the lord of the fee, of his tenants holding by knight-service, to marry his daughter, &c. *Tomlins; Wharton.*

Reasonable care, or diligence. Such attention or pains as is fit and proper under the circumstances; such as ought to be taken, having regard to the nature of the duty or act involved. What care is reasonable is a mixed question of law and fact.

Reasonable care and skill. "Reasonable care and skill" is a relative phrase, and in its application as a rule or measure of duty will vary in its requirements, according to the circumstances under which the care and skill are to be exerted. Cunningham *v.* Hall, 4 *Allen*, 268.

Reasonable cause. The "reasonable cause to decree a dissolution" of a corporation, required by Mass. Gen. Stat. ch. 68, § 35, imports more than a mere vague apprehension of some future mischief. *Re* Franklin Telegraph Co., 119 *Mass.* 447.

The reasonable cause which will justify husband or wife in abandoning each other, within the meaning of the Pennsylvania act defining desertion, is that, and only that, which would entitle the party so separating himself or herself to a divorce. Butler *v.* Butler, 4 *Pa. L. J. R.* 284.

Reasonable and probable cause, is a phrase often used in connection with the usual ground of defence to an action for false imprisonment, that the defendant had reasonable and probable cause for arresting the plaintiff. The question of reasonable and probable cause is, in England, a question for the judge, but, in Scotland, for the jury. *Mozley & W.*

Reasonable doubt, is a term often used, probably pretty well understood, but not easily defined. It does not mean a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Per Shaw, C. J., *Trial of Webster.* Approved as the best definition to be found, after a careful search of treatises and reports of trials. Donnelly *v.* State, 26 *N. J. L.* 601, 615. S. P. State *v.* Van Winkle, 6 *Nev.* 340.

A reasonable doubt is deemed to exist, within the rule that the jury should not convict beyond a reasonable doubt, when the evidence is not sufficient to satisfy the judgment of the truth of a proposition with such certainty that a prudent man would feel safe in acting upon it in his own important affairs. Arnold *v.* State, 23 *Ind.* 170.

As it is impossible precisely to define in a few words what a reasonable doubt is, courts instructing juries would better make no such attempt, but merely follow the language of the statute. Mickey *v.* Commonwealth, 9 *Bush*, 593.

The expression is so simple, that it is best used alone, with no attempt at explanation. State *v.* Reed, 62 *Me.* 129, 142.

Reasonable notice. Such information of a fact as ought, in the opinion of a jury, to have been communicated; fit or proper notice, under the circumstances.

Reasonable part. In old English law, the shares to which the wife and children of a deceased person were entitled were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them. *Fitz. Nat. Brev.* 122.

Reasonable rate. As to what is the criterion of reasonableness in the freight and passenger tariff of a railroad, in discriminating between different points in its line, see Chicago, &c. R. R. Co. *v.* People, 67 *Ill.* 11.

That a railroad company should fix a greater sum for a less distance than thirty miles than the maximum allowed for full thirty miles, is unreasonable, as a matter of law. Campbell *v.* Marietta, &c. R. R. Co., 23 *Ohio St.* 168.

Reasonable time. Such time as is fit and proper, under the circumstances of the case, having regard to the nature of the act or duty drawn in question. Thus, when it is said that abandonment of insured property must be made within a reasonable time after the loss, the meaning is within such period as the jury, under proper instructions from the court, shall say was proper to be allowed or taken, under the circumstances, — the location of the wreck, the residence of the parties, &c.

What is a reasonable time for a carrier of goods for hire to deliver them, depends on the peculiar circumstances of the case. Broadwell *v.* Butler, 6 *McLean*, 296; 1 *Newb.* 171.

Reasonable time for passengers, after they have been made aware of their ar-

rival at the place of destination, to get off the train, after which the company is no longer held to carrier's liability, is the time within which persons of ordinary prudence, in like circumstances, get off the cars. Imhoff *v.* Chicago, &c. R. Co., 20 *Wis.* 344.

Reasonable time does not begin to run until some one interested in the matter calls for something to be done respecting it. Cameron *v.* Wells, 30 *Vt.* 633.

REASSURANCE. See REINSURANCE.

REATTACHMENT. A second attachment, or an attachment of a person who has been previously attached, and has been dismissed the court without day, from the happening of some casual circumstance. *Cowel.*

REBEL. 1. In modern public and criminal law, one who engages in war, or rises in armed resistance against his government; one who forcibly resists the execution of the laws, or of lawful process.

Rebellion: deliberate, organized resistance, by force and arms, to the laws or operations of the government, committed by a subject.

2. In old English law, rebellion also signified disobedience to a writ of attachment, issued under the practice of the court of chancery; and if a defendant was summoned, upon his allegiance, personally to appear and answer, and he neglected to do so, a "commission of rebellion" was awarded against him, for not obeying the king's proclamation, according to his allegiance. 3 *Bl. Com.* 444. Disobedience to "letters of horning," in Scotland, is called by the same name. *Bell.*

REBUT. To contradict, meet, or oppose allegations, charges, or evidence; to adduce counter-proofs.

Rebutter: the name, in the system of common-law pleading, of the answer interposed by defendant to plaintiff's surrejoinder. Rebutting: that which contradicts or disproves. Thus, rebutting evidence is evidence introduced by one party to meet and overcome the effect of what has already been adduced by the other.

Rebutting evidence is evidence adduced to rebut a presumption of fact or law; that is, to avoid its effect. But the word is also used, in a larger sense, to include any evidence adduced to destroy the effect of prior evidence, — not only in explaining it away, while admitting its truth, but also by direct denial, or by an attack upon the character of the witness who has given it. 3 *Steph. Com.* 539.

Rebutter is also where a man, by deed or fine, grants to warranty any land or hereditament to another, and the person making the warranty, or his heirs, sues him to whom the warranty is made, or his heir or assignee, for the same thing. If he who is so sued plead the deed or fine with warranty, and pray judgment if the plaintiff shall be received to demand the thing which he ought to warrant to the party against the warranty in the deed, &c., this is called a rebutter (*Termes de la Ley*); and if I grant to a tenant to hold without impeachment of waste, and afterwards implead him for waste done, he may debar me of this action, by showing my grant, which is rebutter (*Co. Entr.* 284; *Co. Litt.* 365). *Jacob.*

RECAPTION. Taking a second time; applied to an arrest of a person who has been before arrested for the same cause, but has escaped.

Recaption, or reprisal, is a species of remedy by the mere act of the party injured, and is resorted to when any one has deprived another of his property in goods or personal chattels, or wrongfully detains one's wife, child, or servant; in which case, the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so that it be not in a riotous manner, or attended with a breach of the peace, which retaking is termed "recaption." There is also a writ of recaption to recover damages against a person who (pending a replevin for a former distress) distrains a man again for the same rent or service. *Brown.*

Recaption signifies: 1. The taking a second distress of one formerly distrained during the plea grounded on the former distress.

2. A writ to recover damages for him whose goods, being distrained for rent in service, &c., are distrained again for the same cause, pending the plea in the county court, or before the justice. (*Fitzh. Nat. Brev.* 71.)

3. A species of remedy by the mere act of the party injured, when any one has deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant, and the owner, husband, parent, or master, retakes them. *Wharton.*

RECAPTURE. The taking from an enemy, by a friendly force, a vessel previously taken for prize by such enemy.

RECEIPT. 1. The act or transaction of accepting or taking any thing delivered; and, in the plural, moneys which one has taken.

The term receipts, as employed in Ala.

Code, § 1825, relating to the compensation of administrators, therein used, means pecuniary assets, and does not embrace assets which are not money or currency. Wright *v.* Wilkerson, 41 *Ala.* 267.

2. A written acknowledgment of the payment of money or delivery of chattels; the certificate of the party receiving a delivery that it has been made.

What is called a *simple* receipt, merely acknowledges delivery. A receipt *on account* or *in full* contains clauses stipulating that the payment shall be applied to a specified demand, or that it is accepted in discharge of the demand. Properly, a receipt is the written acknowledgment of the receipt of money, or a thing of value, without containing any affirmative obligation upon either party to it, — a mere admission of a fact in writing; but, when a receipt contains stipulations which amount to a contract, it becomes a contract, and must be governed by the law of contracts, and can be avoided only by fraud, mistake, failure of consideration, rescission, or some way known to the law.

A receipt may be defined to be such a written acknowledgment by one person of his having received money from another as will be *prima facie* evidence of that fact in a court of law. An indorsement on a note in the handwriting of the maker, without any signature, but made in the presence, with the concurrence, and by the direction of the payee, is a receipt. Kegg *v.* State, 10 *Ohio*, 75.

RECEIPTOR. Originally, one who gives a receipt. But the term has a special sense, in the practice established in many of the states, relative to goods seized on attachment. The officer, instead of retaining them in actual custody, delivers them to some person friendly to the debtor, who gives a receipt for them, thereby engaging that they shall be forthcoming to answer any final judgment and execution which plaintiff may recover. The correlative, receiptee, is not in use.

RECEIVE. It may apply to the obtaining real property, as well as personal. Harlow *v.* Tufts, 4 *Cush.* 448, 453.

RECEIVER. 1. In equity practice, a person appointed by a court to take charge of funds or property while *sub judice*, make sales, collect proceeds or increase, and render account.

This has been for many years a usual mode, in chancery practice, of preserving the property involved in a suit until its termination; also of making judicial sales, in a class of cases. Thus, in a suit to dissolve partnership or to foreclose a railway mortgage, it has been common for the complainant — either because of apprehension that the property might be lost or dissipated, if left in defendant's care during the litigation, or because of some advantage or necessity as to making sale of the property — to move for and obtain appointment of a receiver. The same remedy is in frequent use under codes of reformed procedure, where it is treated as a provisional remedy, ancillary to the civil action in which the plaintiff is seeking the ultimate relief. The receiver is not a permanent stated officer of the court, but a person appointed for the particular cause. He is, however, regarded as an officer, in the discharge of his trust, and has most of the privileges and protection of an officer of chancery, so far as appropriate; gives bonds, as may be required by the court, and then comes into possession and charge of the property in question, and cares for it or disposes of it as its nature requires, and the orders and decrees of the court from time to time may command.

2. Receiver is also a generic term for various officers, — more numerous in England than in America, — the chief classes of which are mentioned below.

3. In criminal law, receiver is used briefly for receiver of stolen goods. To receive such goods, with guilty knowledge and intent, is a punishable offence by statute, throughout England and the United States. In England, receiving any chattel, money, valuable security, or other property whatsoever, obtained by felony, knowing the same to have been so feloniously obtained, is a felony, for which the receiver may be indicted and convicted, either as an accessory after the fact to the principal felony or as for a substantive felony, and, in the latter case, whether or not the principal felon shall have been previously convicted. The offence is punishable with penal servitude for any period between five and fourteen years, or with imprisonment for two years or under, with or without hard

labor, and with or without solitary confinement, and (if a male under the age of sixteen years) with or without whipping. (24 & 25 *Vict.* ch. 96, § 91.) *Brown.* In the United States, the mode of proof and measure of punishment vary somewhat under the local statutes.

Receiver of fines. An English officer who receives the money from persons who compound with the crown on original writs sued out of chancery. *Wharton.*

Receiver of petitions. The form and contents of petitions to parliament are governed by much more precise and exacting rules than obtain in American legislatures (see PETITION); and, in former years, a distinct class of officers was attached to parliament whose duty it was to receive, and scrutinize in the first instance, all petitions preferred to that body. The mode of receiving and trying such petitions is said to have been formerly judicial rather than legislative; but the functions of the triers have now given way to the authority of the parliament at large. By the house of lords, indeed, receivers and triers of petitions are still appointed at the opening of every session, as in ancient times. But petitions are, by both houses, considered now in the first instance, and only referred to triers or committees in certain cases. See *May Parl. Pr.*

Receiver of wrecks. The title of a class of English officers appointed by the treasury in different districts to summon as many men as may be necessary, to demand help from any ship near at hand, or to press into their service any wagons, carts, or horses, for the purpose of preserving or assisting any stranded or distressed vessel, or her cargo, or for the saving of human life. 2 *Steph. Com.* 544.

Receiver-general. The receiver-general of the public revenue; an English officer appointed in every county to receive the taxes granted by parliament, and remit the money to the treasury. *Wharton.*

The receiver-general of the duchy of Lancaster is an officer belonging to the duchy court, who gathers in all the revenues and fines of the lands belonging to that duchy, and all forfeitures and assessments belonging to the same. *Brown.*

RECITE. To state in a written instrument facts connected with its inception, or reasons for its being made. Recital: the formal statement or setting forth of some matter of fact in any deed or writing, in order to explain the reasons upon which the transaction is founded; the rehearsal or making mention in a deed or writing of something which has been done before.

Recitals in conveyancing correspond in general nature with preambles in statutes, and with inducement in pleading. They are not essential parts of a contract or deed, and are not obligatory or operative in the same manner as the contracting or granting words. They are introduced at the option of parties to aid in construing and applying the operative parts of the instrument, should controversy arise, by preserving the knowledge of the facts and motives which led to the making the instrument. Thus they are, generally (unless connected with subsequent occurrences — such as a reliance upon them by a person to his prejudice — warranting application of the doctrine of estoppel), operative only by way of admission or evidence, and are open, in a proper case, to explanation and proof of mistake. The recital usually made in a deed acknowledging payment of the purchase-money is a familiar instance of the limit placed upon the effect of recitals. The grantor is allowed to disprove it, if his purpose is to recover the money; and he may, while the grantee's situation remains unchanged, show that the recital is erroneous, and in fact the money was not paid, and may recover it. But he is not allowed to contradict the recital for the purpose of defeating the conveyance, or recovering back the land; nor would he be allowed to contradict the recital, to the prejudice of a third person to whom the grantee had exhibited it, and who on the faith of it had made advances or settled accounts. Recitals are usually introduced in the introductory parts of the instrument, and may be in any forms of language appropriate and lucid.

RECLAIM. 1. Spoken of pecuniary claims, means to demand back again what one has before parted with. Thus, if one pays for goods, and they are not delivered, and he sues to recover back the price, he is said to reclaim it.

2. Spoken of animals, it means to tame them, — to bring them back, as it were, from the wild state. Individuals

of a species naturally wild, which are, by care or effort, domesticated, are called reclaimed, and may be subjects of qualified property.

3. In the feudal law, it was sometimes used of the action of a lord pursuing, prosecuting, and recalling his vassal, who had gone to live in another place, without his permission (see *Wharton*); and it would be equally appropriate of a master pursuing a fugitive apprentice or slave.

4. In international law, it has nearly the same sense as the last mentioned, being used of the demanding of a thing or person to be delivered up or surrendered to the government or state to which either properly belongs, when by an irregular means it has come into the possession of another. See *Wharton.*

5. In Scotch law practice, to reclaim is to appeal. The reclaiming days in Scotland are the days allowed to a party dissatisfied with the judgment of the lord ordinary to appeal therefrom to the inner house; and the petition of appeal is called the reclaiming *bill*, *note*, or *petition*. This recites the judgment against which the party appeals, and concludes with a short prayer, craving the alteration desired. *Bell.*

RECOGNITOR. A name formerly applied to a jury impanelled on an assise in a real action; because, says Jacob, they acknowledge a disseisin by their verdict.

The word is sometimes met in modern books, as meaning the person who enters into a recognizance, being thus another form of recognizor.

RECOGNIZANCE. An obligation of record, which a man enters into before some court of record, or magistrate duly authorized, binding himself under a penalty to do some particular act, — as to appear at the assises, to keep the peace, to pay a debt, or the like. Recognizee: the person in whose favor a recognizance is made. Recognizor: one who executes a recognizance.

A recognizance is, in some respects, very similar to a bond. There are, however, important differences. A bond is the creation of a new debt; while a recognizance is merely an acknowledgment upon record of a debt which was previously due. A recognizance is entered upon the records of some court, or on the magistrate's docket, and appears by reference to the record, instead of being made by the seal of the party bound, and delivered to the one benefited.

In American practice, recognizances are chiefly used to secure the attendance of the party at court to answer some charge or suit against him. A person who might otherwise be kept in custody until the time for trial of the cause is allowed to go at large in the mean time, upon giving a recognizance, with sureties, that he will appear at the court designated. This is the same thing, in substance, as putting in bail, the different expressions being in use in various states, without very substantial difference in meaning, though the forms of the instruments may be unlike. When a person is arrested on a criminal charge, which appears to the magistrate to be trivial or slightly supported by evidence, sureties for his appearance are dispensed with, and he signs the recognizance alone. In these cases, he is said to be "discharged on his own recognizance." Hence the expression has come to indicate that the case is not a strong one against the accused.

Recognizances are of two sorts: At common law, which is an obligation, acknowledged and enrolled in a court of law, with a condition to be void on the performance of a thing stipulated; it differs from a bond, in that the latter is a creation of a new debt, while a recognizance is an acknowledgment upon record of a former debt, owing to our sovereign lady the queen. And by statute, which are the statute-merchant, created by 11 Edw. I., and the statute-staple, created by 27 Edw. III. st. 2; but these are both obsolete. *Wharton.*

At common law, a recognizance was defined as "an obligation of record, founded upon an acknowledgment of an existing indebtedness by the person to be bound," and was something more than a "contract." But under the statutes of Kansas a recognizance may be held and treated as a contract. State *v.* Weatherwax, 12 *Kan.* 463.

RECORD, *v.* To enter in writing, for preservation; to make memorial in official books; to transcribe in permanent form, for future reference; to write out as authentic evidence. Record, *n.*: an authentic writing preserved as evidence; an entry of a document, for pres-

ervation of its contents; a memorial in official books of what has been done; a transcript in form, for permanent use.

Judicial records are those kept of proceedings of courts. There are many others, such as the record of deeds, and the records kept in various public offices of their official transactions; these are designated by the general expression, official or public records, and each is known by the designation appropriate to the subject-matter. To register and registry (*q. v.*) are terms nearly equivalent to the verb and noun record, except that, if registry is employed in the statute directing the making and keeping the transcripts in question, it is the more appropriate name within that jurisdiction, and *vice versa*. The difference between the employment of the two words seems more a matter of local usage than of any distinction of meaning.

English definitions have generally made writing upon parchment essential to the definition of a judicial record. This is founded on long usage, in that kingdom, of making judicial records on that material. See Burrill, for an interesting historical sketch of English practice in recording judicial transactions. No general practice of employing parchment is understood to obtain within the United States. Records are usually kept in bound paper books, and parchment does not enter into the definition, according to American usage.

With respect more particularly to judicial records and their proper contents, the term has a special use in reference to proceedings of courts of error or appeal: their decisions constantly speak of the "contents of the record;" "what must appear by the record;" "defects in the record;" "diminution of the record;" "the appellant must show error by the record," &c. Strictly, if these expressions are construed in a concrete sense, as designating any distinct documentary entity, they must be considered as used by elision for copy of the record. The document corporally before the court is an officially authenticated copy or transcript of the proceedings which are matter of record in the court below. In an abstract sense, however, the reference is to the various judicial steps in the cause as they have been recorded. Taken in this sense, the unity of the record is theoretic rather than actual; there is not necessarily any one book in which all the proceedings in a cause necessary to a review are continuously transcribed. The successive papers as draughted and served or used may exist in files; but they exist as matter of record. And the meaning of the expressions quoted is, that the appellate court requires from the appellant and proceeds upon a complete authentic copy or transcript of the proceedings as they have been recorded. Thus the expression "the record," in connection with review, imports a history of the cause from its commencement; from the issuing of process to final judgment. It embraces the successive judicial steps which have been taken and are necessary to show jurisdiction and regularity of procedure: the process, writ, or summons, with proof of service; the pleadings, minutes of trial, and verdict, if a jury cause; exhibits and proofs, if an equity cause; and judgment or decree; also, ancillary and interlocutory proceedings, entering into and supporting the action to be revised. But testimony of witnesses, documentary evidence offered on trial, arguments of counsel, and opinions of judges are not proper parts of the record: they must be brought before an appellate court, when drawn in question, by other and additional means.

There are three kinds of records; viz., judicial, as an attainder; ministerial, on oath, as an office or inquisition found; by way of conveyance, as a deed enrolled. *Wharton.*

Record of nisi prius. In the practice of English common-law courts, is an official transcript or copy of the proceedings in an action, entered on parchment, sealed, and passed, as it is termed, at the proper office. It serves as a warrant to the judge to try the cause, and is the only document at which he can judicially look for information as to the nature of the proceedings, and the issues joined between the parties.

Record and writ clerk. Four officers of the court of chancery were designated by this title, whose duty it was to file bills brought to them for that purpose. Business was distributed among them according

to the initial letter of the surname of the first plaintiff in a suit. *Hunt Eq.*

These officers are now transferred to the high court of justice under the judicature acts.

Record commission. The style or title of a board of officers charged with searching out and restoring, publishing, and indexing public records.

Recording acts. The name by which the statutes are designated which in any state govern the placing of conveyances, mortgages, &c., on public record, and the effect of such records as constructive notice. The theory and purpose of these acts is to make known the chain of title to landed property within the state, and enable persons proposing to buy or lend upon lands, to learn of any adverse titles or claims. The general operation of the recording acts is, that in each county of the state a public office is maintained for the record of instruments transferring or incumbering lands within the county. To entitle an instrument to be recorded, it must be acknowledged or proved by a subscribing witness; and, this requirement being complied with, the grantee or incumbrancer has the right to have it transcribed at length upon the books of the office. This being done, gives constructive notice, by the provisions of the recording acts, to all the world, of the existence and contents of the instrument as recorded. Any person to whom the lands may be afterwards offered for sale, or as security for a loan, is chargeable with the duty of examining the record, where he may find the prior deed or mortgage; and, if he omits this precaution, he runs the risk of third persons having rights in the land which will be adjudged superior to his own, by reason of his neglect to examine. Conversely, a grantee or mortgagee who neglects to place his deed or mortgage upon the record is liable to lose the property in favor of a subsequent purchaser for value or lender, who bought or loaned in ignorance of the unrecorded grant or charge. Actual notice of an instrument, or reason to suspect its existence, will in general operate to charge the subsequent purchaser or lender with all the prior rights, the same as if the instrument had been recorded.

For the nature and operation of these laws, their varying provisions in the different states, and the decisions under them, see *U. S. Dig.* tit. Deed.

RECORDER. 1. The title of a class of judicial officers, having generally original criminal jurisdiction within a locality, together with statutory authority over various special proceedings.

A recorder is so called, as Stephen explains, because to recite or testify on recollection what had previously passed in court was the duty of the judges and other principal persons who presided at the *placitum*, and thence in Norman phrase they were called *recordeurs*. The duties and powers of any judge of this class vary with the statute.

In England, especially, a recorder is the principal legal officer of a city or borough. He is often a barrister or other person learned in the law, whom the mayor or other magistrate of any city or corporate town (having a jurisdiction, or a court of record within his precincts) does by the king's grant associate to him, for his better direction in the judicial proceedings of such court. *Cowel.*

Thus the recorder of the city of London is practically the judge in the lord mayor's court of the city, although in theory the lord mayor and aldermen are the judges therein. He is appointed by the lord mayor and aldermen. Besides being judge of the lord mayor's court, he is one of the commissioners of the central criminal court.

In some other cities and boroughs a recorder is appointed by the crown, under section 103 of the municipal corporations act (Stat. 5 & 6 Wm. IV. ch. 76, § 103), and is usually the judge of the court of quarter sessions, and of the borough court of record. See *Brown; Mozley & W.*

2. A person, generally a public officer, charged with making and keeping official written memorials and transcripts of transactions; a register.

Recordari facias loquelam. That you cause the plaint to be recorded. The emphatic words of the Latin form

of a writ to remove a replevin suit from an English county court to one of the superior courts, commanding the sheriff to cause the plaint to be recorded, and to have the record before the superior court. The name of the writ was adopted from this phrase.

RECOUP, or RECOUPE. To deduct or keep back; to withhold part of a demand, from equitable reasons. Recoupment, or recoupement: discount; abatement or reduction of a demand.

These words are nearly synonymous with defalk or defalcation, in their innocent sense, and not as implying embezzlement or breach of trust. They imply that something is to be taken off from a demand, on the ground of equities growing out of the whole transaction, which warrant a reduction. Recoup is a term of French origin, and signifies cutting again, or cutting back; and, in application to matter of defence in a suit, a defence means the cutting back on the plaintiff's claim by the defendant. Like reduction, it is of necessity limited to diminishing the amount of the plaintiff's claim, and does not give defendant a right to an affirmative judgment for a surplus. It is properly applicable to a case where the same contract imposes mutual duties and obligations on the two parties, and one seeks a remedy for the breach of duty by the second, and the second meets the demand by a claim for the breach of duty by the first. Davenport *v.* Hubbard, 46 *Vt.* 200.

There is an important distinction between recoupment and set-off or counter-claim. Recoupment applies to equities growing out of the very affair from which the principal demand arises, set-off to cross-demands which may be independent in origin. The case of an employer sued for the agreed price of work done for him, who claims an abatement from the contract sum by reason of damages he has sustained through the unskilful or unfaithful performance of the work, is an example of recoupment; for the demand and the deduction have their foundations in the same transaction. The case of independent judgments held by two persons against each other, and of which the smaller may be adjudged a satisfaction, as far as its amount admits, of the larger, is an example of set-off. Counter-claim (*q. v.*) is the name of the way by which, under codes of reformed procedure, a right of set-off or recoupment may, in a proper case, be set up; it is a term relating to the remedy, not to the substance of the right.

RECOURSE. The general mercantile law allows that when a payee or indorsee of a negotiable instrument desires to transfer his property in it, without at the same time assuming the responsibility of an indorser, he may do so by what is called a qualified or restricted indorsement. The form in common use is for him to write above the indorsement of his name the words "without recourse;" and this mode of indorsing is known as an indorsement without recourse.

Such an indorsement transfers the property in the bill or note, and does not affect its negotiability in the hands of the new indorsee. The instrument passes with all its negotiable qualities. Epler *v.* Funk, 8 *Pa. St.* 468. But the indorsement does not expose the indorser to liability for the maker's solvency, or to respond for non-acceptance or non-payment. Rice *v.* Stearns, 3 *Mass.* 225; Upham *v.* Prince, 12 *Id.* 14; Fitchburg Bank *v.* Greenwood, 2 *Allen*, 434.

The liability of an indorser of a note without recourse is the same as that of a transferrer by delivery merely, of a note payable to bearer; *i.e.*, he warrants that the note is genuine, that it is of the kind or description that it purports to be, that the parties are capable of contracting, and that it has not been paid; and, where he knew that it was of no value, he may be compelled to repay the consideration that he has received for it from a *bona fide* purchaser not aware of the facts. But the indorsee cannot sue upon the indorsement itself: his action is for the original consideration or its value, or for the fraud practised. Watson *v.* Chesire, 18 *Iowa*, 202.

The indorsement of a note "without recourse" transfers the whole interest therein, and merely rebuts the indorser's liability to the indorsee and subse-

quent holders; yet such indorsement, with other circumstances, may tend to show that the note was not indorsed for value, so as to prevent the promisor from making the same defence in an action by the indorsee which he might make in an action by the promisee. Richardson *v.* Lincoln, 5 *Metc.* (*Mass.*) 201.

RECOVER. 1. To obtain by means of judicial proceedings. Recovered: established to be one's right, or obtained by judicial proceedings. Recovery: obtaining by judicial proceedings; also, the award or judgment made in a party's favor is sometimes called the recovery.

Recovered, in its general sense, imports a payment compelled by adversary proceedings. Money received by a collector of duties, upon compromising a prosecution for smuggling, instead of prosecuting it to judgment, is not "recovered in pursuance of information given," within the duties collection act of congress of 1799, ch. 22, § 91, providing that of penalties, fines, and forfeitures recovered in pursuance of information given to a collector by any person other than the naval officer or surveyor of the district, the one half of a moiety shall be given to such informer," and the other half to the officers of the revenue. Lapham *v.* Almy, 13 *Allen*, 301. But in a peculiar agreement, presented in a New York case, which contemplated adjustment by reference to the results of litigation, the word was held not to be confined to recovery by judgment alone, but to include moneys repaid by a party submitting to the judicial declaration of the principle adjudged as the proper one to govern such case. Ogden *v.* Des Arts, 4 *Duer*, 275. In like manner, "recovery" in its general use means recovery by process and course of law. Jones *v.* Walker, 2 *Paine*, 688. But in a special case it was held to mean "collect" or "obtain," as opposed to a recovery by a suit at law. Douglass *v.* Reynolds, 7 *Pet.* 113, 126.

Whether the words imply actual payment, *i.e.* collection in money of the fruits of the suit or obtaining possession of the *res;* or whether they are satisfied by the award of a judgment or decree, merely, establishing the parties' right,— depends on the context and circumstances. A person may be said to recover on a note when he obtains judgment in his favor, though the amount is not paid.

2. Recovery, or more fully common recovery, otherwise known as feigned recovery, was a method formerly much used in England of transferring title to lands by means of a fictitious suit for them against the owner desiring to convey, who made no defence, so that judgment passed, awarding them to the intended grantee. See COMMON RECOVERY; FINE. The following is an English account of this cumbrous system, which has been formally abolished in England, and generally disused in the United States.

Let us suppose Daniel Edwards, tenant in tail in possession of land, to be desirous of suffering a common recovery for the purpose of conveying the land to Francis Golding in fee-simple. Golding then sued out a writ against him, called a *præcipe quod reddat*, — command that he restore, — alleging that Edwards had no legal title to the land. The tenant Golding then appeared, and called on one Jacob Morland, who was supposed to have warranted the title to the tenant; and thereupon the tenant prayed that Jacob Morland might be called in to defend the title which he had so warranted. This was called vouching to warranty, and Morland was called the vouchee. Morland appeared and defended the title, whereupon Golding desired leave of the court to imparl or confer with the vouchee in private, which was allowed him; but the vouchee disappeared, and made default, whereupon judgment was given for the demandant Golding, and the tenant Edwards had judgment to recover from Jacob Morland lands of equal value in recompense for the land warranted by him, and lost by his default; which was called the recompense or recovery in value. But this recompense was only nominal, as Jacob Morland was a person having no land of his own, being usually the crier of the court. The land was then, by judgment of law, vested in the recoveror, Golding, in fee-simple.

In later times, it was usual to have a recovery with double voucher, by first conveying an estate of freehold to any indifferent person against whom the *præcipe* was brought (which was called making a tenant to the *præcipe*); and then the tenant in *præcipe* vouched the tenant in tail, who vouched over the common vouchee.

RECRUITING EXPENSES. This term, in Mass. Stat. 1863, ch. 38, confirming acts of towns in agreeing to pay "bounties and recruiting expenses" for soldiers already furnished by them, can only be applied to costs and charges which had been incurred in procuring or enlisting troops for future service, and could have no reference to expenditures for or on account of those who had previously enlisted and were already in the army. Fowler *v.* Selectmen of Danvers, 8 *Allen*, 80.

RECTIFIER. Any person, firm, or corporation who rectifies, purifies, or refines distilled spirits or wine by any process, or who, by mixing distilled spirits or wine with any materials, manufactures any spurious imitation, or compounds liquors for sale, under the name of whiskey, brandy, gin, rum, wine, spirits, or wine bitters, or any other name. Act of July 13, 1866, § 9, 14 *Stat. at L.* 117.

Rectifier, as used in the internal revenue laws, is not confined to a person who runs spirits through charcoal; but any one who rectifies or purifies spirits in any manner whatever, or who makes any mixture of spirits with any thing else, and sells it under any name, is a rectifier. Quantity of Distilled Spirits, 3 *Ben.* 70; 2 *Am. L. T. U. S. Cts.* 23.

RECTO. A writ of right, in various cases. The following are particularly mentioned:

Recto de advocatione ecclesiæ. Writ of right of advowson. This was a writ of right which lay for a man who, having a right of advowson, had allowed a stranger to usurp the presentation, without bringing an action of *quare impedit* or *darrein presentment* within six months. *Cowel.* It was abolished in 1833 by Stat. 3 & 4 Wm. IV. ch. 27, § 36.

Recto de dote, or, more briefly, *dote*, was a writ of right of dower, which lay for a widow who had received part of her dower, but was deprived of the residue, lying in the same town, by the wrong of the same tenant. *Cowel;* 3 *Bl. Com.* 182, 183; 3 *Steph. Com.* 397, 605, note. For this writ a personal action was substituted, by the common-law procedure act, 1860. *Cowel.* See UNDE NIHIL HABET.

Recto sur disclaimer A writ that lay where a tenant disclaimed to hold of his lord; that is to say, denied the title of his lord as lord to the land held by him (the tenant); then the lord had this writ; and if he proved that the land was holden of him, he recovered back the land from the tenant for ever. *Cowel;* 3 *Bl. Com.* 233. It was abolished in 1833 by Stat. 3 & 4 Wm. IV. ch. 27, § 36.

RECTOR. In ecclesiastical law, the incumbent in full possession of the rights of a parochial church. Rectory: the house and grounds belonging to the parish church, and appropriated to the residence of the incumbent.

As opposed to a vicar, a rector is an incumbent of an unappropriated church. A rector (or parson) has for the most part the whole right to all the ecclesiastical dues in his parish; whereas, in theory of law, a vicar has an appropriator over him, entitled to the best part of the profits, to whom the vicar is, as it were, a perpetual curate, with a standing salary. *Cowel;* 1 *Bl. Com.* 384–386; 2 *Steph. Com.* 677–683.

RECTUS IN CURIA. Right in court; free from any charge or impeachment. The condition of a person who stands at the bar, against whom there is no charge or objection; or a person who has cleared himself of a charge, as by reversing an outlawry, and is restored to his former standing.

RECRIMINATE. To answer one accusation by a counter-charge. Thus, for defendant in a divorce suit, founded on allegations of adultery, to charge the plaintiff with adultery, is to recriminate. Counter-charges thus preferred are called recriminatory charges; and interposing them is recrimination.

RECUSANT. A word of English use, connected with the law relating to the church, and which, as employed in the statutes, is understood to mean one of those persons who separate from the church as established by the laws of the realm. *Termes de la Ley.* Numerous laws against recusants were passed in the persecuting times of Charles II., in which reign these recusants were chiefly non-conformists. The term does not, in fact, appear to have been applied to Roman Catholics or Jews, but only to Protestant dissenters.

RED-BOOK. The red-book of the exchequer is an ancient record, being a manuscript volume of several miscellaneous treatises, kept in an office in the exchequer. It contains some things (as the number of the hides of lands in many of our counties) relating to the times before the Conquest. *Jacob.*

REDDENDUM. Rendering; yielding. The initial word in the Latin

form, used as the name of a clause in a conveyance, by which the grantor creates or reserves some new thing to himself out of what he had granted; as a yearly rent. The clause in the English forms usually begins, "yielding and paying."

In every good reservation these things must always concur: It must be by certain and apt words. Thus, a lease for years, reserving rent "after the rate" of £18 a year, is void for uncertainty. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing. It must be of such thing whereunto the grantor may have resort to distrain. It must be made to one of the grantors, and not to a stranger to the deed. *Woodf. Land. & Ten.* 85.

Reddendo singula singulis. Referring particular things to particular persons; construing distributively. This phrase expresses a mode of construing a written instrument, — as a deed or will, — by so separating and distributing the several things mentioned in an enumeration in such instrument among the several persons also enumerated therein, that the intention of the parties may have its effect, notwithstanding a difficulty arising from the arrangement and grouping together of the words.

REDDITION. A surrendering or restoring; being also a judicial acknowledgment that the thing in demand belongs to the demandant, and not to the person so surrendering. *Tomlins.*

REDDITUS, or **REDITUS.** Something given back, and particularly a rent.

Redditus siccus, or dry rent, was a term of old English law applied to rents for which the landlord in former times had no right to distrain. It was otherwise called rent-seck. *Brown.*

REDEEM. To buy back; to repurchase. Redeemable: that which one has the right to buy back. Redeemed: bought back; repurchased. Redemption: the buying back or repurchasing something which one previously owned and parted with.

These words have been particularly applied to the mortgagor's paying the mortgage debt, and obtaining the mortgaged property back again, free and clear of the incumbrance. This use grew naturally out of the former views of the nature of mortgage (*q. v.*), and out of that system which gave the legal estate, defeasibly before default, and absolutely afterwards, to the mortgagee; and they were very appropriately and properly descriptive of the mortgagor's right to go into equity to redeem a forfeited estate, and demand a reconveyance; for this was really a repurchase, — a buying of the lands back again. These descriptive words yet survive, and are in general use, although the ideas they once represented have become obsolete in most of the states. Kortright *v.* Cady, 21 *N. Y.* 343, 365. Mortgage is not generally treated at the present day as a conveyance of the fee, but is regarded as an incumbrance or security only. But the change has made no difference in the use of "redeem" and its inflections.

Analogously, the words are frequently used of the transaction by which a pledgor pays his debt and takes back the pawn. To do this is to redeem the thing pledged.

"Redeemable" and "redemption" were held equivalent to "payable" and "payment," when used in a contract pledging stocks for security of a debt, in Swasey *v.* N. C. R. R. Co., 1 *Hugh.* 17.

REDHIBITIO, or **REDHIBITION.** The civil-law name for buyer's rescission of the contract of sale; the returning a thing purchased for defects, and annulling the sale.

Redhibitory action. A suit to annul a sale for defect of the thing as delivered.

Redhibitory defect, fault, or **vice.** One which entitles the buyer to return the thing bought, and rescind the sale.

REDISSEISIN. A disseisin made by a person who had once before been adjudged to have disseised the same man of his lands or tenements, for which there lay a special writ, termed a writ of redisseisin. *Reg. Orig.* 204; *Cowel.*

REDUCE. To diminish. Reduction: abatement, diminution, or making smaller a demand.

Reduce to possession. To change a mere right in action into actual custody and enjoyment. When a person takes money out of a bank, at which he has a balance, or procures the payment of a debt due, he may be said to reduce the fund to possession. The phrase is used especially with reference to a husband's taking lawful possession of his wife's choses in action; as at common

law he thereupon makes them his own property to all intents and purposes, so that if he dies they go to his representatives; whereas the wife's choses in action not reduced into possession come back to her on her husband's death.

Reduction. In French law, seems to be used of legacies in a sense corresponding to our "abatement of legacies." When a person gives or bequeathes more than his portion disponible (*q. v.*), the donee or legatee is liable to have his gift reduced in proportion.

In Scotch law, reduction is a rescissory action by which deeds, services, decrees, or illegal acts by any body corporate may be rendered void. It results in rendering the deed called for, and not produced, incapable of receiving any effect until produced.

Reduction ex capite lecti. A species of challenge of a deed or disposition affecting heritage or land in Scotland, which formerly might be made by the heir, if the grantor or testator was, at the time of making the disposition, on his death-bed. This presumption of "death-bed" might be rebutted by showing that he lived sixty days afterwards, or subsequently went to kirk or market unsupported. But the doctrine of *reduction ex capite lecti* is now abolished by Stat. 34 & 35 Vict. ch. 81, passed in 1871. *Brown.*

Reduction-improbation. In addition to the Scotch action of reduction (see *supra*), there is an action of improbation, which is founded on actual forgery, and results in rendering the deed called for, and not produced, for ever void and null. The junction of these two actions forms what is called the reduction-improbation, confers on the simple reduction all the efficacy of the improbation, and secures the person who uses it from all future trouble from the deed called for, if it be not produced in the action. See *Bell.*

The action of reduction-improbation proceeds on the fictitious allegation that the deed is false and forged, or else the defendant would produce it. On this ground it was formerly necessary that the lord-advocate should concur in it. This necessity is abolished by Stat. 31 & 32 Vict. ch. 100, § 17, passed in 1868. *Brown.*

REDUNDANCY. A fault in the draughting of writings, consisting in the introduction of matters foreign to the scope of the instrument. Needless, irrelevant matters are stigmatized as redundant.

The words are chiefly used of excess or superfluities in pleadings; but this is not because their meaning is not as well applicable to other writings, but because the occasions for raising the objection are more frequent in regard to pleadings; and the rules as to what is relevant matter are more distinct and strict.

RE-ENTER. To resume possession. Re-entry: the entering again into or resuming possession of lands.

Usually in leases there is a proviso, that upon the tenant not paying the rent, or not performing the covenants contained in the lease, the landlord may re-enter; and by virtue of such proviso the lessor may take the lands or buildings into his own possession again, if the rent is not paid or the covenants are not observed by the lessee. This taking possession again is termed re-entry.

RE-EXTENT. A second extent made on lands and tenements, on complaint being made that the former extent was only partially performed. *Cowel.*

REEVE. An old word signifying officer. It is differently defined in the books which attempt to say what sort of an officer it imported; apparently because it was applied to many officers of different rank and powers. As a separate word, it is not in frequent use now-a-days; but appears in some compounds, such as sheriff, a corruption of shire-reeve; port-reeve; hog-reeve.

REFER. 1. Is used in a technical sense, as meaning to send an issue or question arising in a cause to be tried or examined by a person or persons specially designated for that duty. Referee: a person to whom an issue or question arising in a cause has been specially sent for trial or examination. Reference: referring; sending an issue or question to be tried or examined by a selected person instead of by judge or jury; and any matter so sent out of court-room for decision is said to be referred.

Taking these words in their strict, technical use, they relate to a mode of determining questions which is distin-

guished from arbitration, in that the latter word imports submission of a controversy without any lawsuit having been brought, while reference imports a lawsuit pending, and an issue framed or question raised which (and not the controversy itself) is sent out. Thus, arbitration is resorted to instead of any judicial proceeding; while reference is one mode of decision employed in the course of a judicial proceeding. And reference is distinguished from hearing or trial, in that these are the ordinary modes of deciding issues and questions in and by the courts, with aid of juries when proper; while reference is an employment of non-judicial persons — individuals not integral parts of the court — for the decision of particular matters inconvenient to be heard in actual court.

Reference has been long and extensively in use in the proceedings in a suit in equity, for a great variety of matters which frequently arise, and would take up too much of the time of the court, if brought before it for decision; and such matters are, therefore, referred to the masters of the respective courts, or to special referees, to be inquired into by them. This use of the system was more common in respect to incidental questions, examination of witnesses, taking accounts, computing sums due, and the like, than to the determination of the issue or main question as to the rights of the parties.

In modern practice of the common-law courts, this system has been gradually but widely brought into use; and when a cause or action involves matters of account, or other intricate details, which require minute examination, and for that reason are not convenient to be brought before a jury, it is not unusual to refer these to the decision of an individual, or sometimes three individuals, believed to be disinterested, and to be specially qualified, who may investigate them, and report either a decision or the proofs, and an opinion upon them, to the court; and, in such a case, the cause is said to be referred.

By the codes of reformed procedure which prevail in many of the states, the system of referring causes has been extended beyond the equity practice of referring questions to obtain information or an advisory opinion from the master, and embraces a submission of the whole issue for a decision. As a general rule, under these codes, the issue may, by consent of parties, or when it will involve the examination of a long account (this class of issues not being deemed within the constitutional right to jury trial), be referred; and the referee decides both questions of law and of fact, and upon his report judgment is entered directly, without need of a confirmation; and this judgment is appealable much as is the judgment of the court upon a verdict. The rulings of the referee on questions of evidence, and his findings on matters of law, are revised, on exceptions, very much as those of the judge made on a jury trial may be; and his findings of fact stand, in the court of appellate jurisdiction, very much as the verdict of a jury.

In many jurisdictions, referees are selected for each cause as it comes up on motion for reference, by the agreement of parties or by the judge granting the order. In some, — as in the English courts, — individuals are designated to serve as referees, as the masters in chancery were, under equity practice, appointed. These are called official or standing referees. For their duties and powers under the judicature acts, see act of 1875, sched. 1, ord. 36, rules 30–34.

2. In conveyancing, pleading, &c., to refer is to insert words directing the reader's attention to another part of the instrument, or to some other writing or book; and a reference is a clause or phrase introduced for this purpose.

REFORM. To correct; to make anew; to rectify. Reformation: reforming; the making a thing to be what it ought.

The chief technical use of these terms is with reference to judicial correction of contracts, deeds, and other instruments between parties. When, by accident or mistake, an instrument does not express the intent of parties, a suit may be maintained to procure a decree establishing it according to the actual

intent, and the justice of the case in view of that intent. The differences in meaning between "reform" and "amend" seem to he two. One is, that reform presents more strongly the ideas of an intention or standard which was not expressed or reached by the original instrument, and of a making the instrument anew (forming it again), to conform it to the true design; while "amend" may suggest the idea of improving the instrument from and beyond its original inception; not stigmatizing it as defective at the outset so much as implying that it is capable of improvement. Again, "amend" is more appropriate to judicial proceedings; reform, to instruments *inter partes*. See AMEND.

Etymologically, reform seems to mean to construct or make anew; but its technical sense is hardly as strong as this. The decisions generally disavow that the courts will, in the exercise of the power to reform instruments, make new contracts for parties: the power is confined to the correction of defects; to making the instrument correspond to the actual contract as proved. If it may be said to mean make anew, it must, in this sense, be confined to the document or paper, not extended to the transaction embodied.

Reform act. A name bestowed on the Stat. 2 Wm. IV. ch. 45, passed to amend the representation of the people in England and Wales; which introduced extended amendments into the system of electing members of the house of commons.

Reform school; reformatory. These names have been adopted for institutions where juvenile delinquents are confined and taught, partly by way of punishment and partly in hope of their improvement. Thus, in England, under the Stat. 29 & 30 Vict. ch. 117, § 14, where a juvenile (*i.e.* a person, to appearance, under sixteen years of age) is convicted, whether on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the period of ten days or longer, he may be sent to a reformatory school of his own religious persuasion for between two and five years.

REFRESHER. In the parlance of English courts, a fee paid to barristers, in cases of prolonged attendance and service. According to Brown's explanation, it frequently happens that, after the briefs in a cause have been delivered to counsel, the cause, from a press of business or some other reason, is adjourned, or allowed to stand over from one term or sittings to another, which imposes upon counsel the necessity of reperusing their briefs, in order to refresh their memory upon the various points of the cause; in consideration of which, it is usual for the attorney to mark on the briefs which have been so delivered a small additional fee, thence termed a refresher fee. We think the term is sometimes met in connections where it does not seem to imply any adjournment of a cause, but rather to mean a fee paid because the trial or proceeding was unexpectedly lengthy and laborious, — where the fee appears paid to refresh the spirits and revive the recipient's enthusiasm, rather than for the service of his refreshing his knowledge of the briefs.

REFRESHING THE MEMORY. Is spoken of the act of a witness who, having forgotten details of the matter as to which he is testifying, consults his documents, memoranda, or books to bring the facts more distinctly to his recollection. This is allowable, within limits; provided the witness, after examination of the record, can swear from memory, — not merely by restating the record.

REGALIA. Besides the popular use of this word in the sense of emblems of royalty, indicia of sovereignty, it is used in old law for the king's royal rights, his prerogative: considered to comprise power of judicature; power of life and death; power of war and peace; masterless goods; assessments; minting of money.

REGARD. In old English law, inspection; supervision. Also, a reward, fee, or perquisite.

Regard had a special use in matters pertaining to the forest. The regarder was an officer charged with the inspection and supervision of the forest, and with bringing trespassers to justice; and the

court of regard was an official survey of dogs, holden every third year, for the lawing or expeditation of mastiffs, — that is, cutting off the claws and ball of the forefeet, to prevent them from running after the deer. *Cowel;* 3 *Bl. Com.* 71, 72.

Regardant. Was applied, in feudal law, to a villein annexed to a manor, and having charge to do all base services within the same, and to see the same freed from all things that might annoy his lord. Such a villein *regardant* was thus opposed to a villein *en gros*, who was transferable by deed from one owner to another. *Cowel;* 2 *Bl. Com.* 93.

REGENT. A person appointed to conduct the affairs of state in a monarchy, in lieu of the reigning sovereign, during the absence, disability, or minority of the latter. Regency: the condition of government under a regent; the authority and rule of a regent.

REGIAM MAJESTATEM. A collection of ancient Scottish law, supposed to have been compiled by order of David I., king of Scotland. *Bell.*

It is so similar to the treatise on English law, written by Glanvil, in the reign of Henry II., that one of them is plainly copied from the other. Mr. Sergeant Stephen considers that Glanvil's is the original work. 1 *Steph. Com.* 86, note.

REGICIDE. A slayer of a king; also, the killing of a king.

RÉGIME. A French word for a system of regulations or rules.

Régime dotal. In French law, the *dot*, being the property which the wife brings to the husband as her contribution to the support of the burdens of the marriage, and which may either extend as well to future as to present property, or be expressly confined to the present property of the wife, is subject to certain regulations, which are summarized in the phrase *régime dotal.* The husband has the entire administration during the marriage; but as a rule, where the *dot* consists of immovables, neither the husband nor the wife, nor both of them together, can either sell or mortgage it. The *dot* is returnable upon the dissolution of the marriage, whether by death or otherwise. *Brown.*

Régime en communauté. The community of interests between husband and wife which, under French law, arises upon their marriage. It is either (1) legal or (2) conventional; the former existing in the absence of any agreement properly so called, and arising from a mere declaration of community, the latter arising from an agreement properly so called. Legal community extends to all the movable and immovable property of both parties (and the profits thereof) at the time of and during the marriage, and also to all the debts with which either spouse is burdened at the date of the marriage, or which the husband or the wife (with his consent) contracts during the marriage. Under such a community, the husband has the sole management and disposal of the property; but he cannot give them away for nothing, unless it should be for the advancement of the children of the marriage. This community is destroyed by a judicial separation *de corps et de biens*, and the wife recovers the free administration of her goods. Conventional community may be as diverse as the parties choose by their conventions to make it; these conventions most commonly regulating the amount of property which shall be held in common, excluding the after-acquired property from it, or making other such restrictive regulations. *Brown.*

REGINA. The queen. As the queen is the source of authority in English criminal prosecutions, the proceedings in them are entitled in her name; and criminal cases during a woman's reign are reported under the caption, Regina *v.* So and So.

REGISTER, *v.* To enter in official permanent books or form; to record. Register, *n.*: a record. Register, *n.*; Registrar: one whose office it is to enter documents, occurrences, and transactions in the books appropriated for the purpose; a recorder, in the sense of a keeper of records. Registration: recording; inserting in an official register. Registry: the system of official books or records in which transactions of a given class are by law entered; also, the office in which these books are written and kept. Registry is also used as equivalent to registration; but this is not to be approved.

Register, is a book wherein things are registered, for the preservation of the same; thus a parish register is that book wherein the baptisms, marriages, and burials are registered in the respective parishes; there is also a book wherein are entered the various forms of original and judicial writs, which is termed the register of writs. *Co. Litt.* 159; *Cowel.*

Register of patents. A book of patents, directed by Stat. 15 & 16 Vict. ch. 83, § 34, passed in 1852, to be kept at the specification office, for public use. 2 *Steph. Com.* 29, note (*t*).

Register of vessels. By the shipping laws of congress, vessels of our merchant service must be registered by the collector of customs for the district comprising the port to which she belongs.

This register must show the ownership of the vessel and other material facts, and is evidence of her commercial rights and privileges as an American vessel. A certificate issued by the collector, setting forth the contents of this register, as respects any particular vessel, and carried with the ship on her voyage, or used as a muniment of title in selling the vessel, is often, perhaps not quite properly, called the vessel's register.

Registrar. The English term for an officer corresponding in nature of his duties to what is generally called in this country a register (*q. v.*); an officer who has the keeping of a registry. There are several officers of this name connected with the administration of English jurisprudence. The principal are the registrars of the courts of chancery and bankruptcy, and the registrars of births, deaths, and marriages. The registrar of the court of chancery is an officer with whom, in certain cases, the defendants are compelled to enter their appearances; and by him the decrees of the court are drawn up, signed, and passed. Analogous duties are imposed upon the registrars of the court of bankruptcy, by the bankruptcy act. The registrars of births, deaths, and marriages are officers appointed under the 6 & 7 Wm. IV. ch. 86, 7 Wm. IV. & 1 Vict. ch. 22, and 3 & 4 Vict. ch. 92, for the purpose of keeping in their respective districts an exact register of every birth, death, and marriage which may take place therein. The registrars of each union are subjected to the supervision of their superintendent registrar, and these again are subject to the authority of a superior officer appointed under the great seal, and holding office during the pleasure of the crown, called the "registrar-general of births, deaths, and marriages in England."

There are also the registrar of attorneys and solicitors (or, as he is called since the judicature acts, the registrar of solicitors), whose duty it is to keep an alphabetical list or roll of attorneys and solicitors, and to issue certificates to persons who have been duly admitted and enrolled; the registrar of joint-stock companies (an officer appointed by the board of trade), whose business it is to certify when a company is incorporated, &c.; the registrar of a county court, who is an officer appointed by the judge, subject to the approval of the lord chancellor; the deputy-registrar of a county court, who is an officer appointed by the registrar, subject to the approval of the judge; the registrar of friendly societies, an officer whose duty it is to examine the rules of friendly societies, and, if he find them conformable to law, to certify them as being so; the registrar of the privy council, whose duty it is to summon the members of the judicial committee when their attendance is required, and to transact other business relating to the privy council; the registrar-general of shipping and seamen; and probably others. See *Steph. Com.; Brown.*

Registrar's book. A book containing an authentic copy of every decree made by the English court of chancery. It is generally cited as Reg. Lib. Up to the year 1833, every decree was prefaced by a recital of the pleadings; and the whole formed, accordingly, a report of the case, to which appeal may be made when a doubt arises on the accuracy of the report cited from a printed volume. Since that date, the entry shows nothing but what order was made, and on what evidence it was founded. At the beginning of every Michaelmas term (or sittings), two books are provided for the entry of the decrees to be pronounced during the year then commencing, — one to contain those to be pronounced in causes where the first letter of the surname of the first plaintiff is found in the earlier half of the alphabet, and the other to contain those belonging to the other half. Any particular decree is quoted by the folio of the book in which it is found; thus, an order made in the case of Powell *v.* Matthews is found in Reg. Lib. 1854, f. 1423, that is to say, upon the 1423d folio of the second volume of the annual book, commencing in November, 1854. *Hunt Eq.* Pt. I. ch. 6, § 2.

Registration. Recording; inserting in an official register.

The uses of the word vary a little in shade of meaning. Registration of matters of fact or occurrences is the entry of them in the official books, such as the registry of births, marriages, or deaths. Registration of documents is generally understood to mean transcribing it in the official record; but may, in special sense or use, signify only receiving it officially; noting the date of its being proffered for record, — in other

words, a system of registration might be framed on the plan of putting the original on file instead of transcribing it, without making a copy of it, yet do no violence to the meaning of the term. Registration of a vessel means noting the facts of her character and ownership. Registration of companies, under English law, is putting a newly formed company on the official list of joint-stock or public companies, so as to secure the privileges and immunities which the law allows to such companies; and corresponds to the American expression of incorporating under a general act.

Registry, consists of an entry in a book kept by the proper public authority. United States *v.* Castillero, 2 *Black*, 17.

Registry of deeds. The system or organized mode of keeping a public record of deeds, mortgages, and other instruments affecting title to real property. See RECORDING ACTS.

By certain acts of parliament, all deeds and conveyances (with some exceptions) which affect lands in the counties of Middlesex and York are required to be registered; that is, an abstract of their substance is required to be entered in a register kept for that purpose. It has been proposed to make the registration of titles to land universal. *Brown.*

Registry laws. An expression equivalent to "recording acts," *q. v.*

REGNAL YEARS. Acts of parliament are generally designated by the year of the reign in which they were enacted, rather than by the year of our Lord. The following table is a convenient aid in determining approximately the date A.D. of any act:

Sovereign.	Accession.	Length of reign.
William I.	Oct. 14, 1066	21
William II.	Sept. 26, 1087	13
Henry I.	Aug. 5, 1100	36
Stephen	Dec. 26, 1135	19
Henry II.	Dec. 19, 1154	35
Richard I.	Sept. 23, 1189	10
John	May 27, 1199	18
Henry III.	Oct. 28, 1216	57
Edward I.	Nov. 20, 1272	35
Edward II.	July 8, 1307	20
Edward III.	Jan. 25, 1326	51
Richard II.	June 22, 1377	23
Henry IV.	Sept. 30, 1399	14
Henry V.	March 21, 1413	10
Henry VI.	Sept. 1, 1422	39
Edward IV.	March 4, 1461	23
Edward V.	April 9, 1483	..
Richard III.	June 26, 1483	3
Henry VII.	Aug. 22, 1485	24
Henry VIII.	April 22, 1509	38
Edward VI.	Jan. 28, 1547	7
Mary (1)	July 6, 1553	6
Elizabeth	Nov. 17, 1558	45
James I.	March 24, 1603	23
Charles I.	March 27, 1625	24
The Commonwealth	Jan. 30, 1649	11
Charles II. (2)	May 29, 1660	37
James II.	Feb. 6, 1685	4
William and Mary	Feb. 13, 1689	14
Anne	March 8, 1702	13
George I.	Aug. 1, 1714	13
George II.	June 11, 1727	34
George III.	Oct 25, 1760	60
George IV.	Jan. 29, 1820	11
William IV.	June 26, 1830	7
Victoria	June 20, 1837	..

[1] Mary, in 1554, married Philip of Spain; hence the subsequent statutes of her reign are referred to as those of Philip and Mary.

[2] Although Charles II. did not ascend the throne until 29th May, 1660, his regnal years were computed from the death of Charles I., Jan. 30, 1649, so that the year of his restoration is styled the twelfth of his reign. This is upon the theory that, as heir to the crown, he began to reign immediately on his father's death, though temporarily hindered in possession and political action by the usurpation of the protectorate. Hence, for example, the statute for the abolition of military tenures, passed in 1660, is called 12 Car. II. ch. 24; the statute of frauds, passed in 1677, is called 29 Car. II. ch. 3, &c., although, at their dates, Charles II. had been but a short time actually on the throne.

Since 1830, or the accession of William IV., the practice of mentioning the year of our Lord in connection with the date of a British statute has been growing more and more frequent in English books. The parallelism between the regnal years and the years of grace during this period is as follows; that is to say, the year 1831 tallies with the last half of the first year of William IV., and the first half of his second year, and so on.

1831	1 & 2 Wm. IV.
1832	2 & 3 "
1833	3 & 4 "
1834	4 & 5 "
1835	5 & 6 "
1836	6 & 7 "
1837	7 Wm. IV. & 1 Vict.
1838	1 & 2 Vict.
1839	2 & 3 "
1840	3 & 4 "
1841	4 & 5 "
1841	5 "
1842	5 & 6 "
1843	6 & 7 "
1844	7 & 8 "
1845	8 & 9 "
1846	9 & 10 "
1847	10 & 11 "
1848	11 & 12 "
1849	12 & 13 "
1850	13 & 14 "
1851	14 & 15 "
1852	15 & 16 "
1853	16 & 17 "
1854	17 & 18 "
1855	18 & 19 "
1856	19 & 20 "
1857	20 "

1857	. . . .	20 & 21 Vict.
1858	. . . .	21 & 22 ,,
1859	. . . .	22 ,,
1859	. . . .	22 & 23 ,,
1860	. . . .	23 & 24 ,,
1861	. . . .	24 & 25 ,,
1862	. . . .	25 & 26 ,,
1863	. . . .	26 & 27 ,,
1864	. . . .	27 & 28 ,,
1865	. . . .	28 & 29 ,,
1866	. . . .	29 & 30 ,,
1867	. . . .	30 & 31 ,,
1868	. . . .	31 & 32 ,,
1869	. . . .	32 & 33 ,,
1870	. . . .	33 & 34 ,,
1871	. . . .	34 & 35 ,,
1872	. . . .	35 & 36 ,,
1873	. . . .	36 & 37 ,,
1874	. . . .	37 & 38 ,,
1875	. . . .	38 & 39 ,,
1876	. . . .	39 & 40 ,,
1877	. . . .	40 & 41 ,,
1878	. . . .	41 & 42 ,,

REGRATING. In old English law, the offence (no longer considered one) of buying or getting into one's hands at a fair or market any provisions, corn, or other dead victual, with the intention of selling the same again in the same fair or market, or in some other within four miles thereof, at a higher price. The offender was termed a regrator.

REGULÆ GENERALES. General rules. The rules issued from time to time by the authority of the English judges for the regulation of procedure in the court. The term corresponds to the expression, rules of court.

REGULAR. According to rule. And this may be in two senses: that of according to rule, in distinction from contrary to or regardless of rule, in which sense it is opposed to irregular; and according to rule, in distinction from exceptional, or not subject to the general rule, in which sense it is opposed to special.

A regular deposit is one in which the specific thing must be returned; a strict deposit.

On the distinction between "regular" and "special," see Myers *v.* Rasback, 4 *How. Pr.* 83; People *v.* Wilson, 72 *N. C.* 155.

When applied to elections, the terms "regular" and "general" have been used interchangeably and synonymously. State *v.* Conrades, 45 *Mo.* 45.

Regular session, as used in a statute regulating sessions of county commissioners, may apply to a session held by adjournment from a regular session. Bethel *v.* County Comm'rs of Oxford County, 60 *Me.* 535.

Regularly, in a statute requiring evidence that a debt has been "regularly given in for taxes," means given in according to rule; conformably to the law applicable to taxation of rights in action; not necessarily given in each successive year. Macon, &c. R. R. Co. *v.* Little, 45 *Ga.* 370, 372.

REGULATE. The power to regulate ferries, conferred upon the common council of a city, was held not to include the power to prohibit them without a license being first obtained for them. Duckwall *v.* City of New Albany, 25 *Ind.* 283.

An act to regulate the sale of liquor may embrace entire prohibition of sales to a certain class of persons, such as minors. Williams *v.* State, 48 *Ind.* 306.

Under a statute giving power to cities to regulate sales by auctioneers and transient merchants, a city has no power to pass an ordinance making a resident merchant employed in selling goods at retail pay a tax of a certain per cent of the amount of sales of a portion of his merchandise, which he employs an auctioneer to sell. Oskaloosa *v.* Tullis, 25 *Iowa*, 440.

Regulate, in the provision of the St. Louis city charter of 1870, permitting an ordinance "to regulate bawdy-houses," certainly implies the continued existence of the matter to be regulated. State *v.* Clarke, 54 *Mo.* 17.

A charter power "to erect, repair, and regulate public wharves and docks," imports a power to alter by extension or diminution. City of Hannibal *v.* Winchell, 54 *Mo.* 172.

REGULATION. The phrase, regulations of a department, in acts of congress, should be understood as meaning general rules relating to the subject upon which a department acts, made by the head of a department under some act of congress conferring power to make such regulations, and thereby giving to them the force of law. It does not include a mere order of the president or of a secretary. Harvey *v.* United States, 3 *Ct. of Cl.* 38.

Rehabere facias seisinam. That you cause to regain seisin. The name of a writ commanding a sheriff to restore seisin of an excess, where, in the execution of a writ of *habere facias seisinam*, he had delivered seisin of more than he should.

REHEARING. A second hearing; repetition of the judicial consideration of a cause.

Hearing is applied to the consideration by an equity judge of the merits of the cause; to the consideration by an appellate court of an appeal or writ of error; and to the consideration by a judge or magistrate on a motion, petition, or special proceeding. A rehearing is giving such cause or matter a second consideration, in order to

correct errors that may have occurred before, or do justice better.

When a party seeks to have a decree of the court of chancery reversed or altered, he may petition for a rehearing; that is, for the cause to be heard again. Such rehearing is usually had before the same judge that previously heard the case. It is obtained upon a petition to the lord chancellor, accompanied with the certificate of two counsel, one of whom, at least, must have been engaged on the occasion of the former hearing; and the usual ground of it is that there has been an oversight on the part of the judge, resulting in a miscarriage of justice. The certificate is, however, in the most general form, merely stating that the cause is a proper one to be reheard. In case the rehearing is that of an order made on motion, then no certificate of counsel is required, and neither is any petition of appeal necessary, but counsel merely moves the court of appeal on motion with notice. *Brown.*

A rehearing is a hearing again of a matter which has been decided by a judge in chancery; either by the same judge or his successor, or by the lord chancellor or the lords justices. In the latter case, the hearing is spoken of as a hearing on appeal; but in strictness it is a rehearing, being a hearing in the same court of chancery. (3 *Bl. Com.* 453; 3 *Steph. Com.* 603; *Goldsmith Eq.* Pt. III. ch. 17; *Hunt Eq.* Pt. II. ch. 9.) By the judicature act, 1875, sched. 1, ord. 56, rule 2, all appeals to the court of appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way; and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. *Mozley & W.*

REIMBURSE. In the absence of any stipulations to the contrary, the primary meaning, to pay back, must be imputed to the word reimburse in a contract. Philadelphia Trust, &c. Ins. Co. *v.* Audenreid, 83 *Pa. St.* 257.

REINSURANCE. Signifies insurance effected by an underwriter (or insurance company) upon the risk he has assumed by the policy he has made.

Reinsurance does not mean merely insurance again; and it must not be confounded with double insurance, or second or other insurance, which expressions are used to denote that a person already insured by one company obtains from another a second policy or further policy upon the same property. As any practices of this sort promote frauds upon companies, by making the total insurance money which may be gained by a wreck or a fire more than the value of the property lost, they are strenuously discouraged by the rules of the companies and the conditions of the policies in use. But these are not contemplated by the expression reinsurance. That relates to a mode of protecting an insurer by an insurance in his behalf. There may be various reasons why a company is unwilling to continue subject to the full risk it has assumed by any or all of its policies. The risk may, by later information, appear greater than was supposed when the policy was granted; or the company may wish to discontinue or change the character of its business; or its capital may have become impaired, so that it would not be able to respond in case of loss, unless entitled to some indemnity over. In any such case, the practice exists of the company's applying to another company to make a policy upon the risk which the first has assumed; and by this policy, if a loss under the original policy occurs, and the first company has to pay, the reinsuring company will be liable either in full or in the sum named by the policy of reinsurance, to reimburse its payment. Thus reinsurance of a risk does not enter into the original contract of insurance, or affect it, as between company and insured, at all, but raises a new contract between that company and another. Upon the decision of a company to relinquish business, it is very common to take out reinsurance upon all its risks; and this arrangement, if lawful, and safely and soundly made, practically transfers its responsibilities to the reinsuring corporation.

REJOINDER. The name, in common-law pleading, of the answer made by defendant to the plaintiff's replication. It is, therefore, the fourth in order of the pleadings which may be interposed in a common-law action. No such pleading is in use in equity, or under the reformed codes.

REJOINING GRATIS. Signifies rejoining without a notice from the opposite party to do so. Before the common-law procedure act, 1852, if a defendant delayed his rejoinder, the plaintiff might apply for a rule requiring him to rejoin in four days; and the condition of rejoining gratis meant rejoining without the usual four-day rule. By section 53 of that act, rules to rejoin were abolished, and a notice to rejoin within four days was substituted. Rejoin-

ing gratis, therefore, came to mean rejoining without notice from the plaintiff to do so. To do so is one of the conditions which the common-law courts have been accustomed to impose upon a defendant who asks for further time to plead. *Lush Pract.* 450, 451; *Smith Act. Law*, ch. 4.

A rejoinder, though not expressly mentioned in the judicature acts, is implicitly recognized in order 19, rule 21, and in order 24, rule 2. By the last-cited rule, no pleading subsequent to reply, other than a joinder of issue, can be pleaded without leave of the court or a judge. A party, therefore, who wishes to "rejoin" otherwise than by "joining issue," must obtain the leave of the court or a judge for the purpose. *Mozley & W.*

RELATION. 1. A connection or tie between two subjects; the bearing or effect of one thing upon another; the association or union of two persons for some purpose of domestic life, or in some social status, as the relation of guardian and ward.

2. Special reasons sometimes exist why effect should be given to an act or transaction as if it had taken place at an earlier date than that of its actual occurrence; and, when this fiction is applied, the act or transaction is said to operate by relation, or to relate back. Thus it is common to say that assignment in bankruptcy operates by relation to transfer the bankrupt's title as it existed at the date of filing the petition.

3. An account of occurrences; a narrative; information given, as in the form of entitling suits by *quo warranto*, — the people, upon the relation of J S.

4. Relation is constantly used for a person considered as socially or legally connected with another. For this, however, relative is the better word. "Relation" might better be confined to the connection or tie; and "relative" employed to designate either of the persons involved. Such expressions as bequest to relations, blood relations, poor relations, would be better formed by substituting "relative."

Relation, in its widest extent, embraces persons of every degree of consanguinity, and extends to all persons who are descended from the same common ancestors. Thus a granddaughter of a sister of the father of a testator is a relation of the testator. Huling *v.* Fenner, 9 *R. I.* 410.

Where the word relations is used in a will, the court has no other rule to go by but the statute of distributions; otherwise, the devise would be void, from the uncertainty and generality of the term. Crossly *v.* Clare, 1 *Amb.* 397.

Relation does not include a wife. Esty *v.* Clark, 101 *Mass.* 36.

Relation does not include a step-son of a testator. Kimball *v.* Story, 108 *Mass.* 382.

If a power is given in a will to "apportion to the relations" of the deceased, the appointment must be confined to the next of kin, according to the statute of distributions, — especially if, by using the word relations in that restricted sense, in another part of the will, the testator appears so to have intended it. Varrell *v.* Wendell, 20 *N. H.* 431.

Relation, in Wis. Rev. Stat. ch. 97, § 29, providing that "when a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given," includes only relations by consanguinity. Cleaver *v.* Cleaver, 39 *Wis.* 96.

RELATIVE. See RELATION.

Under a bequest to "relatives," the next of kin, according to the statute of distributions, are entitled to take, there being nothing in the will to the contrary. Drew *v.* Wakefield, 54 *Me.* 291.

A bequest to relatives, generally, will be construed as referring to persons connected by blood, and not by marriage. Ordinarily, the statute of distributions may be consulted to show who these are; but, in a case where the testator described and specified certain of his "nearest" relatives, the description was applied independently of the statute. Ennis *v.* Pentz, 3 *Bradf.* 382.

RELATOR. One who gives information. Technically, the person upon information or complaint from whom the proceeding known as information (*q. v.*) or the writ of *quo warranto* is instituted, and who is, in a subordinate sense, the plaintiff, as it were, in the suit.

RELEASE. Is both verb and noun. It may be, and often is, used in the general sense of discharge or surrender. Thus, when it is said that acts of a creditor are an implied release, or that a person is released by operation of law, no instrument is implied, but the abstract idea of abandonment or extinguishing some right is the one presented.

So release is the operative verb in the instrument known as "a release," and presents the same idea.

But, more technically, release is used as the name of several written instruments, apparently different, and

usually so considered; yet all of which, when closely examined, are seen to involve the notion of a surrender by one person of some claim or estate to another.

In the law of debtor and creditor, the word is used with this sense evident. Release is a formal, solemn instrument whereby the creditor surrenders or relinquishes to his creditor whatever claim is designated. It imports voluntary discharge of the debt, — discharge, not by payment of the demand, but by an abandonment of it; for, even if there is a consideration passed for the release, or if the release is given upon a part payment, this is presented not in the aspect of a part payment, as in accord and satisfaction, but in that of a price paid to induce the creditor to forego his claim. Consideration is, however, not necessary: the release, being under seal, is sufficient, if it forgives and relinquishes the indebtedness. It may embrace a single demand only, or may extend to and discharge all claims and demands of the party giving it. A release of this latter character is known as a "release in full of all demands;" and an exchange of such releases is a common mode of closing complicated accounts or business relations.

Subsidiary to this employment of the word are two uses deserving of distinct mention. One is the release of interest of a witness. Under the common-law rule, that a person interested in the event of a suit is incompetent to testify on the trial, it has been very usual to restore the competency of a disqualified person whose testimony in a given case was necessary, by giving to him, or inducing him to make, a release of that interest, whatever it might be. Another is the release commonly given by a *cestui que trust* — such as a ward on settling with a guardian; a beneficiary of an estate or fund, temporarily held in trust, on closing the trust — to his trustee, discharging the latter from further claim or liability. Under circumstances of various cases, instruments of these kinds may present peculiar features; but, in general nature, they are like the creditor's release of his debtor.

In English conveyancing, the term release, as the name of an instrument, is applied to several forms of deeds, all which, however, involve the ideas that two persons have each an interest in the property in question, and that the one who has only a right abandons or surrenders his interest to the other one, who has the possession. Blackstone classes the release among the secondary or derivative sort of conveyances, and defines it as a discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession.

Other definitions have been given; as by Burton: The relinquishment of some right or benefit to a person who has already some interest in the tenement, and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished. By Cruise: A discharge or conveyance of a man's right in lands or tenements to another who already has an estate in possession; as if A has a lease of lands for a term of years, and B has the remainder or reversion in fee, — here the fee-simple of the lands may become vested in A, by B executing a release of them to A. By Mozley and Whiteley: A discharge or conveyance by one who has a right or interest in lands, but not the possession, whereby he extinguishes his right for the benefit of the person in possession. By the New Abridgment: The conveyance of a man's interest or right which he hath to a thing, to another who hath possession thereof, or some estate therein. By Stephen: A conveyance of an ulterior interest in lands or tenements to a particular tenant, or of an undivided share therein to a co-tenant (the releasee being in either case in privity of estate with the releasor), or of the right to such land or tenements to a person wrongfully in possession thereof. By Watkins: The relinquishment of a right or interest in lands or tenements to another who has an estate in possession in the same lands or tenements. By the Touchstone: The conveyance of a man's interest or right which he hath unto a thing, to another that hath the possession thereof, or some estate therein.

A conveyance of the general nature

described in these definitions may operate in either of five somewhat different modes:

1. By passing an estate; as where a joint-tenant or coparcener conveys his estate to his co-joint-tenant or coparcener. In consequence of the privity between such parties, a fee-simple will pass, without any words of limitation; and tenants in common cannot thus release to one another, since they have distinct interests in the property.

2. By passing a right; as in the case of a disseisee surrendering his right to a disseisor, his heir, or grantee. Here words of limitation are not necessary, since the subject of transfer is a simple right, which, once discharged, is for ever extinguished, and not an estate, which may be qualified or restricted. The difference between this and the previous mode is, that the former passes an estate where a privity exists between the parties: this passes only a right, and therefore privity is not necessary.

3. By extinguishment; as when the lord releases his seigniorial rights to his tenant, or when a life-tenant having conveyed a greater estate than he owns, the expectant releases his right to the tenant's grantee.

4. By enlarging a particular estate into an estate commensurate with that of the person releasing. In these cases, a privity of estate must at the time exist between the releasor and the releasee, who must have an estate actually vested in him susceptible of enlargement.

5. By entry and feoffment; as where a disseisee releases to one of two disseisors, who then becomes as solely seised as if the disseisee had entered upon the property, put an end to the disseisin, and then enfeoffed such disseisor.

The form of conveyance known in English law as lease and release appears to be a device to bring the ordinary case of a conveyance of land within the conditions indicated by the fourth category above. Under those conditions, an owner of the fee could not convey by release to a stranger, for want of any estate in the latter. Accordingly, he first executed and delivered to the latter a lease of the land, for a nominal term, say for one year. This vested an estate in the latter capable of enlargement, and created a privity of estate enabling a release to operate; the proposed purchaser held a term in the land, and the former owner held a reversion. This being accomplished, the former owner executed a release of his reversion to his tenant. The two instruments operated as a complete conveyance of the fee.

We believe, however, that these forms have not been much in use in the United States. There is, however, a release of common use in American conveyancing, where mortgagor and mortgagee desire to set some portion of the mortgaged premises free from the lien of the mortgage, without discharging the debt. Thus, if a mortgagor has opportunity to make sale of one of several lots embraced in one mortgage, but cannot do so unless he can pass title free of the mortgage, he may arrange with the mortgagee, on any terms and consideration satisfactory to the parties, for a release of that lot. This being duly made and recorded, the particular lot designated is set free, while the mortgage remains in force as an incumbrance on the residue of the premises which it describes.

Within the meaning of the common law, a paper purporting to be a receipt by a seaman to the master of his vessel for twenty-five cents, "for assault and battery, in full of all dues and demands," having a witness's name, and two wafer seals, neither of which are proved to be the seaman's, is not a release. Mitchell *v.* Pratt, *Taney*, 448.

That a release is a species of conveyance, see Palmer *v.* Bates, 22 *Minn.* 532.

That the verb release may be operative to convey, where an intent to convey appears, although the party to whom the instrument containing it is given is not in possession, see Jackson *v.* Fish, 10 *Johns.* 456; Lynch *v.* Livingston, 6 *N. Y.* 422.

Release to uses. The conveyance by a deed of release to one party to the use of another is so termed. Thus, when a conveyance of lands was effected, by those instruments of assurance termed a lease and release, from A to B and his heirs, to the use of C and his heirs, in such case C at once took the whole fee-simple in such lands; B, by the operation of the statute of uses, being made a mere conduit-pipe for conveying the estate to C. *Brown.*

RELEASEE; RELEASOR. The person to whom a release is given, and the one by whom it is made, respectively.

RELICTA VERIFICATIONE. Having abandoned his plea. The name of a species of confession of judgment made by a defendant after pleading, by withdrawing or abandoning his plea.

RELIEF. 1. In the practice of courts, relief is the general term for the advantage, benefit, or help which a complainant asks from the tribunal; the judicial enforcement of a right or redress of a wrong, invoked in a suit.

The term is of very common use in practice in equity, and under the codes of procedure, where various kinds of redress, either damages, or injunction, or specific performance, or judgment annulling an instrument or removing a cloud on title, or restoration to possession of property, are sought in substantially one form of suit. In strict common-law practice, where the redress obtainable was nearly confined to judgments for possession or for damages, there has been less need of any general term of this kind, and it is not often met.

2. In feudal law, a relief was a tribute exacted by the lord from an incoming tenant who succeeded to an estate, upon the idea of compensating the lord; because, the estate having fallen by the death of the ancestor, it was necessary for the lord to lift it (*relever*), for the benefit of the heir. This idea lost all foundation when feuds became hereditary; but the exaction was long continued, notwithstanding. Wharton says, it has been "abolished with other feudal grievances;" Brown (citing Williams), that "it seems that a relief is still payable, if demanded."

Relief is a French word, from the Latin *relevare*, to relieve, or take up that which is fallen; for it is given by the tenant or vassal who is of perfect age, after the expiring of the wardship, to his superior lord, of whom he held his lands by knight-service, that is, by ward and relief; for by payment thereof he relieves, and, as it were, raiseth up again his lands, after they were fallen down into his superior's hands, by reason of wardship, &c. Relief is otherwise thus explained; viz., a feudatory or beneficiary estate in lands was at first granted only for life; and after death of the vassal it returned to the chief lord, for which reason it was called *feudum caducum*, viz. fallen to the lord by the death of the tenant; afterwards, these feudatory estates being turned into an inheritance, by the connivance and assent of the chief lord, when the possessor of such an estate died, it was called *hereditas caduca*, *i.e.* it was fallen to the chief lord; to whom the heir having paid a certain sum of money, he did then *relevare hæreditatem caducam* out of his hands, and the money thus paid was called a relief. This must be understood after the conquest; for in the time of the Saxons there were no reliefs, but heriots paid to the lord at the death of his tenant, which in those days were horses, arms, &c.; and such tributes could not be exacted by the English immediately after the conquest, for they were deprived of both by the Normans; and instead thereof, in many places, the payment of certain sums of money was substituted, which they called a relief, and which continues to this day. *Jacob.*

3. In the administration of the English poor-laws, the word relief is used somewhat technically to signify the authorized assistance, in the supply of necessaries and medical attendance, extended by parochial officers to paupers. It is more fully known as parochial or workhouse relief, and is either *in-door* relief, the condition of which is that the party relieved shall reside in the workhouse; or *out-door* relief, to which no such condition is attached.

Relieving officer is the style or title of an overseer or other officer charged with the duty of administering immediate relief to paupers who apply for it.

The word relief has the following meanings in the law of Scotland:

Casualty of relief. This is in the nature of the feudal relief.

Relief of cautioners. This is the right of contribution between co-sureties.

Relief betwixt heir and executor. This is a marshalling of assets in favor of an heir who has paid a personal debt (that is, a debt payable out of the personal property), or of an executor who has paid a heritable debt (that is, a debt primarily chargeable on the assets descended to the heir). *Bell.*

RELIGION. As used in Ohio Const. art. 1, § 7, declaring "religion, morality, and knowledge" to be essential to good government, means the religion of mankind, and not the religion of any class of men. Religion is not within the purview of human government. There is no such thing as "religion of state." Board of Education of Cincinnati *v.* Minor, 23 *Ohio St.* 211.

The constitutional provision for "free exercise of religious profession and worship, without discrimination," does not interdict all legislation connected with religion; much less does it avoid legislation tending to promote religion, or even to advance the interests of a sect or class of religionists. *Exp.* Andrews, 18 *Cal.* 678.

REMAINDER. An estate limited to take effect and be enjoyed after another estate is determined. Thus, if an owner of lands in fee-simple grants them to A for twenty years, and after the determination of that term to B and his heirs for ever, — in this case, the estate, being what remains of the fee after the term of twenty years is taken out, is called a remainder.

In order to constitute or to create a remainder, it is a rule that there must be some "particular estate" to support it; that is to say, at the time of creating a remainder there must be some estate in the same lands created, to precede the remainder; and this preceding estate is termed the particular estate. Thus, in the example above given, the estate of A is termed the particular estate, because it is only a small part, or *particule*, of the inheritance, the residue or remainder of which is granted over to B. The necessity of creating this preceding particular estate, in order to make a good remainder, corresponds with the term remainder, which obviously implies that some part of the thing is previously disposed of.

Remainders are said to be either vested or contingent. A vested remainder (or remainder executed) is one on the creation of which a present interest passes to the party, though its enjoyment is postponed to a future time, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent; or, as otherwise expressed, a vested remainder is one which is always ready, from its creation to its close, to come into possession the moment the prior estate determines. Thus, if an estate is conveyed to A for twenty years, remainder to B in fee, B has a vested remainder, which nothing can defeat or set aside; and, generally, a person entitled to a vested remainder has an immediate fixed right of future enjoyment, — that is, a present estate, though it is only to take effect in possession and receipt of the profits at a future period. Contingent (or executory) remainders are such as are limited to take effect in favor of a dubious and uncertain person; as if an estate is conveyed to A for life, with remainder to B's eldest son (then unborn) in tail, — this is a contingent remainder, for it is quite uncertain whether B will have a son or not; but the instant that a son is born, the remainder is no longer contingent, but becomes vested.

There is an extended and varied body of learning upon this subject, for which the standard treatises on real-property law should be consulted. The distinctions and details connected with the subject are of but limited interest in most of the United States.

Although generally used of landed property, this is because the permanent character of lands gives more frequent occasion for creation of future estates in them than in personalty, — not because the word is necessarily confined to realty. There may be a remainder in personal property.

Upon the construction and force of the word remainder, in a devise of the remainder of an estate, see Fowler *v.* Depau, 26 *Barb.* 224; France's Estate, 75 *Pa. St.* 220.

Remainder-man. The person to whom is reserved an estate created to come into possession after determination of a precedent estate; a tenant in remainder.

REMAND. 1. The recommittal of an accused person to prison, or his readmission to bail, on the adjournment of the hearing of a criminal charge in a police court. It is used as verb and noun. When an accused is sent back, after a partial hearing, to await other proceedings, collection of further evidence, &c., the magistrate is said to remand him; also, the order of recommitment is called a remand.

2. Moreover, when a cause, having been removed from one tribunal to another, as from a state court to a circuit court of the United States, is found by the latter to be improperly before it, and is ordered back, it is said to be remanded.

REMANET. It remains. This word is used in a substantive sense, in English practice, signifying an adjourned cause. When a cause entered for trial cannot be tried during the term, and is postponed, it becomes a *remanet*.

Remanent pro defectu emptorum. They remain unsold for want of buyers. This is a sheriff's return to a writ of *fi. fa.*,

when he finds himself unable to sell the goods distrained. In such case, a writ of *venditioni exponas* may be sued out, ordering him to expose the goods for sale; or if in the mean time the sheriff goes out of office, then a writ called *distringas nuper vicecomitem* is issued to his successor, commanding him to distrain the late sheriff to sell the goods. (*Lush Pract.* 610.) The old practice in these cases is continued under the judicature act, 1875 (Stat. 38 & 39 Vict. ch. 77), first schedule, order 43, rule 2. *Mozley & W.*

REMEDY. Judicial means of enforcing a right or redressing a wrong.

Remedy includes an application for admission to practice. Matter of Cooper, 22 *N. Y.* 67.

Remedial laws, or statutes. Such enactments as have it for their prominent object to give better means of enforcing rights or redressing wrongs; such as aim to supply defects in existing law; in distinction from laws to define and punish crimes; laws to create a revenue, &c.

REMEMBRANCERS. Were three officers or clerks of the exchequer, who were formerly called clerks of the remembrance. One was called the king's remembrancer; the second, the lord-treasurer's remembrancer; and the third, the remembrancer of the first-fruits. The king's remembrancer entered in his office all recognizances taken before the barons for any of the king's debts, or for appearances, or for observing of orders; he wrote process against the collectors of customs, subsidies, and fifteenths for the accounts, &c. The lord-treasurer's remembrancer made process against all sheriffs, escheators, receivers, and bailiffs, for their accounts; also of *fieri facias* and extent for any debts due to the king, either in the pipe or with the auditors, &c. The remembrancer of the first-fruits took all compositions and bonds for the first-fruits and tenths, and made process against such as did not pay the same. *Cowel.*

The remembrancer of the city of London is an ancient officer of the corporation, whose original duties were mainly ceremonial, it being his office to see to the due observance of all presentations, public processions, and other matters affecting the privileges of the corporation. In this character he was their agent in parliament, and at the council and treasury boards; and at this day he performs the duty of parliamentary solicitor to the corporation. He attends the houses of parliament, and examines bills likely to affect the privileges of the city, and reports upon the same to the corporation. He also attends the courts of aldermen and common council, and committees, when required. *Pulling Laws & Cust. Lond.*

REMISE. To return; to surrender. It is nearly interchangeable with the verb release; and the two words, remise and release, are often conjoined in conveyancing.

REMISSION. See REMIT.

REMISSNESS. Implies that the act involved was performed, but was done in a tardy, negligent, or careless manner. The word is not applicable to entire omission or default. See Baldwin *v.* United States Telegraph Co., 6 *Abb. Pr.* N. S. 405, 423.

REMIT, and REMISSION. Are applicable, without involving departure from the vernacular meaning, to the release of a debt, the discharge of a penalty, and the pardon of an offence.

Remit also means, in mercantile parlance, to forward money to a person at a distance; but the noun corresponding with this sense is remittance. Remittee and remitter are the persons receiving and sending the money respectively.

REMITTER. A term in real-property law for a fiction or theory whereby one who has the right of entry in lands, but is out of possession, and who obtains possession of the lands under some subsequent title, which, however, is of course defective, is considered to be sent back (remitted), by operation of law, to his ancient and more certain title. The possession which he gained by a bad title is deemed annexed to his own good title, and his defeasible estate is annulled by the act of the law.

REMITTITUR. It is sent back; it is remitted. The word is used as an English substantive in two senses.

1. A *remittitur* of record is the sending back of a record or transcript from a superior to an inferior court, for entry of judgment and issue of execution, or for a new trial, or other proceedings.

It is the term in common use in the practice of the New York court of appeals, for the order sending down the cause after decision, as mandate is in the practice of the United States supreme court.

This species of *remittitur* was used when the house of lords, having affirmed the judgment on a writ of error from the queen's bench, returned the record, so that the court might carry its sentence into execution. *Tidd Forms*, 574, 615. But pro-

ceedings in error are now abolished under the judicature act, by order 58, rule 1.

2. A *remittitur* of damages is the relinquishment or surrender of a portion of the amount awarded by the jury.

This is sometimes made when, because the award exceeds the jurisdiction of the court or the amount claimed in the declaration, the plaintiff cannot enter judgment for the entire damages allowed; and sometimes when, upon appeal or motion for new trial, the court is of opinion that the plaintiff is entitled to recover some damages, but not so large a sum as the jury have found. The court will give the plaintiff an option to enter a *remittitur* as to the excess, on doing which he may retain his judgment for the amount adjudged proper; or, if he declines, a new trial is ordered.

A common instance of the first description of *remittitur* is afforded in an action of replevin, wherein the defendant, having pleaded and established an avowry, cognizance, or justification, is entitled to damages; but as that action is generally brought merely to establish a right, the defendant often excuses or remits the payment of those damages to which he would be otherwise entitled; and, when he does so, it is thus recorded in the judgment: "And hereupon the said C D freely here in court remits to the said A B his damages aforesaid; therefore let the said A B be acquitted thereof." *Brown.*

REMOVAL. As used in Stat. 1785, ch. 75, § 4, respecting vacancies in town offices, means a removal from the town. Inhabitants of Barre *v.* Inhabitants of Greenwich, 1 *Pick.* 129.

A statute allowing the surety to be sued before the principal, when service of process cannot be made "by reason of the removal of such person from the state," does not apply where service of process is prevented by the death of the principal. Tute *v.* James, 46 *Vt.* 60.

REMOVED. A marshal is not to be deemed "removed from office" by the appointment of a successor, until he has received actual notice of the new appointment. Bowerbank *v.* Morris, *Wall. C. Ct.* 119.

The words remove from, in an indictment upon a statute declaring to "cut down or remove from land any tree, timber, stone, or other valuable article a criminal trespass," have no technical meaning restricting them to articles forming a part of the realty. The statute itself may and should be restricted by construction to cases of removing from land something which pertains to it, and would pass by a sale of it. But the language of an indictment cannot be thus modified. Bates *v.* State, 31 *Ind.* 72.

RENDER. To give up; to yield; to surrender. Also, to pay or perform; as to render homage or rent.

There are certain things in a manor which lie in prender, that is, which may be taken by the lord or his officers when they happen, without any offer made by the tenant, such as escheats, &c.; and certain which lie in render, *i.e.* must be rendered or answered by the tenant. *Jacob.*

In feudal law, render was used in connection with rents and heriots. Goods subject to rent or heriot-service were said to lie in render, when the lord might not only seize the identical goods, but may also distrain for them. *Cowel.*

RENEWAL. Substitution of a new obligation or right, of the same nature, for an old one. Thus the renewal of a lease is giving a lease embodying substantially the same terms and conditions, to commence from expiration of a previous lease; renewal of a note is making a note of the same tenor, but due at a postponed date; renewal of a patent is a new patent issued upon surrender of an original, but with modifications designed to cure defect, error, or excess in the specification or claim in the original.

An assignment of letters-patent, or any renewal thereof, may include an extension of the patent. Pitts *v.* Hall, 3 *Blatchf.* 201; Goodyear *v.* Cary, 4 *Id.* 271, 303.

Renewal is not predicable where a note, payable in United States currency, is given for an amount agreed upon at a settlement made after the late war, and adjusting the equities of a previous confederate contract. Greene *v.* Lowry, 46 *Ga.* 55.

RENOUNCE. To give up, explicitly; to disavow a right or privilege; to disclaim. Renunciation: declaring that one will not assume an office, privilege, or right; disclaimer.

Renounce is narrower than abandon, being appropriate where some affirmative act or avowal of disclaimer is involved; while abandon may mean merely to omit or refrain from exercising the right.

RENT, *n.* The periodical compensation or pecuniary return made by a tenant to his landlord, for the enjoyment of the property held.

In modern times, rent is generally reserved in money; but this is no part of the former meaning of the word. There were three principal kinds of

rents known in earlier English law; viz., rent-service, rent-charge, and rent-seck. Rent-service consisted of fealty and a certain rent; and this is said to have been the only kind of rent originally known to the common law: it was called rent-service, because it was given as a composition for the services to which the land was originally liable. Rent-charge was a rent granted out of lands by deed; for this the grantee had no power to distrain, because there was no fealty annexed to such grant; but to remedy this inconvenience an express power of distress was commonly inserted in the grant. Where, however, a rent for the recovery of which no power of distress was given either by the rules of the common law or the agreement of the parties, — as where a landlord granted away his rent without at the same time granting the reversion to which that rent was incident, — this was called rent-seck, or barren rent. But by Stat. 4 Geo. II. ch. 28, a power of distress was made incident both to rents-charge and to rents-seck. There were other minor varieties of rents.

63 Rent is a certain profit issuing yearly out of lands and tenements corporeal. It may be regarded as of a twofold nature: as something issuing out of the land, as a compensation for the possession during the term; and as an acknowledgment made by the tenant to the lord of his fealty or tenure. It must always be a profit: yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, fowls, horses, corn, and other matters may be, and occasionally are, rendered by way of rent. It may also consist in services or manual operations, as to plough so many acres of ground, and the like; which services, in the eye of the law, are profits. The profit must be certain, or that which may be reduced to a certainty by either party; it must issue yearly, though it may be reserved every second, third, or fourth year; it must issue out of the thing granted, and not be part of the land or thing itself, which must be either lands or tenements corporeal. *Wharton.*

Rents are not included under "earnings," in a statute making an unrecorded assignment of future earnings invalid against a trustee process, where they are payable under an ordinary contract of lease, which requires no personal services on the part of the lessor. Kendall *v.* Kingsley, 120 *Mass.* 94.

The expression rents and profits, in a devise, may be so construed as to include the whole interest, and to authorize a sale of the land, if necessary to effect the testator's intention. Schermerhorne *v.* Schermerhorne, 6 *Johns. Ch.* 70.

Rents of assise. The certain and determined rents of the freeholders and ancient copyholders of manors are called rents of assise, apparently because they were assised or made certain, and so distinguished from *redditus mobilis*, which was a variable or fluctuating rent. See 3 *Cruise Dig.* 314.

Rents resolute. Rents anciently payable to the crown from the lands of abbeys and religious houses; and after their dissolution, notwithstanding that the lands were demised to others, yet the rents were still reserved and made payable again to the crown. *Cowel.*

REPAIR. A statute directing repair of sewers includes keeping a sewer large enough to carry off all the water naturally entitled to flow into it. Blood *v.* Bangor, 66 *Me.* 154.

A covenant to repair involves the obligation to rebuild, if the structure is removed without the fault of the covenantee. Beach *v.* Crain, 2 *N. Y.* 86; McIntosh *v.* Lown, 49 *Barb.* 550.

Repairs, spoken of a street, includes the substitution of new curbstones and gutters for old ones. People *v.* City of Brooklyn, 21 *Barb.* 484.

Repairs does not include additions to houses, or adaptations of the premises to new uses. Stephens *v.* Milnor, 24 *N. J. Eq.* 358.

It does not include the substitution of a new and different kind of pavement from that existing on a public street. Matter of Fulton Street, 29 *How. Pr.* 429.

Reparatione facienda. The name of an old English writ which lay in various cases to enforce a duty of making repairs. Thus, if there were three tenants in common or joint tenants of a mill or house which had fallen into decay, and one of the three was willing to repair it and the other two not, in such case, the party who was willing to repair it might have this writ against the other two. *Reg. Orig.* 153; *Cowel.*

REPEAL, *v.* To abrogate or revoke an enactment by the direction or effect of another. Repeal, *n.*: an abrogation or revocation of one enactment by another.

Express repeal takes place where the later statute directs that the former shall be repealed. *Implied* repeal arises when the two statutes are so inconsistent that both cannot reasonably stand; in such case, the later one, being the most recent expression of legislative will, must prevail.

Repellitur a sacramento infamis. An infamous person is repelled from an oath. An infamous person is not allowed to be sworn as a witness. A leading maxim in the law of evidence, abrogated in England by Lord Denman's act (6 & 7 Vict. ch. 85). The stringency of the rule has also been much relaxed in the United States.

REPLEAD. To plead anew. Repleader: an order of court, directing that parties shall interpose new pleadings.

The expressions and the practice on the subject are more appropriate to the former and strict common-law practice than to other systems. In common-law courts, whenever, in the course of pleading, the parties raised an issue which seemed immaterial or insufficient to determine the true question in the case, — or when, after issue joined in an action and verdict given thereon, the pleading was found (on examination) to have miscarried, and failed to effect its proper object, viz., of raising an apt and material question between the parties, — the court would, on motion of the unsuccessful party, award a repleader; that is, order the parties to plead anew, for the purpose of obtaining a better issue. An example given by Brown is that of a case of an action of debt on bond conditioned for the payment of £10 10*s.* at a certain day, in which the defendant should plead the payment of £10, according to the form of the condition. Now, if the plaintiff, instead of demurring, tenders issue upon the payment as averred, then, whether the issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled or not to maintain his action; for in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is, whether the exact sum were paid or not; and repayment in part is a question quite beside the legal merits. An order that the parties should plead anew was one mode of correcting such defects. Upon its being granted, the pleadings began anew at that stage of the cause where the first defect was found; thus, in the example above given, the plaintiff must demur to the defendant's plea.

Repleader is said to have been less used since the courts have received extended power of allowing amendments for the purpose of determining the real question in controversy between the parties.

REPLEVIN. The name of one of the common-law actions, the distinguishing features of which are that it is brought to obtain possession of specific chattel property, and is prosecuted by a provisional seizure and delivery to plaintiff of the thing in suit.

Replevy is the verb allied to replevin, and signifies to obtain, by means of the action or writ of replevin, possession of chattel property of which one claims to be owner. Repleviable, or replevisable: liable to be replevied; subject to be obtained by means of replevin. Property is said to be repleviable or replevisable when proceedings in replevin may be resorted to for the purpose of trying the right to such property. Thus goods taken under a distress are repleviable; for the validity of the taking may be tried in an action of replevin: but goods delivered to a carrier and unjustly detained are not repleviable; for the unjust detention of goods delivered on a contract is not an injury to which the action of replevin applies, but forms the ground of an action of detinue or trover. Replevisor: plaintiff in replevin.

The word has been said to mean, originally, a redelivery of the pledge or thing taken upon a distress, to the owner, by the court, upon the owner giving security to try the right of the distress, and to restore the subject-matter, if the right be adjudged against him. *Wharton.* Or perhaps a redelivery upon his pledge thus to prosecute. *Burrill.* But the action in modern practice is not confined to goods taken in distress, but may be brought generally for goods and chattels unlawfully taken.

Upon receiving a writ or plaint in replevin, it is the sheriff's duty to take possession of the property, and deliver it to the plaintiff upon the latter's giving satisfactory security to prosecute his suit and establish his title to the goods; or that, if judgment passes against his claim, he will return them. After this, the action proceeds as any other, the plaintiff being meantime in possession

of his goods, subject to the obligation to return them. The course of proceedings is modified, in almost all the jurisdictions, by modern statutes; and no one account of it can be given which is everywhere applicable. A sketch of the action as employed in England at the present day is given below.

Being a common-law form of action, the terms have no place or use in equity or admiralty jurisprudence. Under codes of reformed procedure, replevin does not exist as a distinct action, but is replaced by the provisional remedy, "claim and delivery," allowed as ancillary to a civil action to try the title to the goods. But, for want of other nomenclature, these words are often used, in reports under the codes, as if they were precisely applicable to actions commenced by claim and delivery.

Replevin is of two sorts: in the *detinet;* in the *detinuit.* Where the party has had his goods redelivered to him, the action is in the *detinuit,* "wherefore he detained the goods," &c.; but where replevin has not been made, but the distrainor still keeps possession, the action is in the *detinet,* "wherefore he detains the goods," &c. The action in the *detinet* has long fallen into disuse, and is never brought unless the distrainor has eloigned the goods, so that they cannot be got at to make replevin. *Wharton.*

The registrar of the county court now grants the replevin, approves of the replevin bonds, and issues all necessary process in relation thereto, which is executed by the high bailiff of the county court. The replevin is granted at the instance of the party whose goods are distrained, who is called the replevisor, who must give security for prosecuting the action. The security must be of sufficient amount to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause; and to make a return of the goods, if a return shall be adjudged. The action, if intended to be commenced in a county court, must, according to the condition of the bond, be commenced within a month; if in a superior court, then within a week. In the latter case, the replevisor further undertakes to prove before the court in which the action is brought that he had good ground for believing that the title to some corporeal or incorporeal hereditament, or to some toll, fair, market, or franchise was in question, or that the rent or damage exceeded £20; in other words, that the facts were such as to exclude the jurisdiction of the county court. When the action is brought, the defendant must appear to the writ, as in ordinary cases. The plaintiff's declaration states in general terms the taking of the goods. If the defendant insists that the goods were lawfully taken by him in his own right, the pleading is called an avowry; if in the right of another, it is called a cognizance. He may claim also a return of the goods; so that both parties are regarded as actors, or claimants seeking redress. The plaintiff's next pleading is called a plea in bar, and that of the defendant a replication, and so on. The judgment, if for the plaintiff, awards damages for the unlawful taking; if for the defendant, it is that he have a return of the goods taken; and, if the distress was for rent, he recovers the amount of arrears in damages. If the action be in the county court, it is tried in the same way as other actions in county courts. (*Termes de la Ley; Cowel;* 3 *Bl. Com.* 145–151; 3 *Steph. Com.* 420–423; *Lush Prac.* 1013–1026; *Fawcett L. & T.* 176–178.) *Mozley & W.*

REPLICATION. The pleading interposed by plaintiff in an action at law in response to defendant's plea; or by complainant in equity, in response to defendant's answer. The corresponding pleading under codes of reformed procedure is called the reply.

REPLY. 1. Generally, reply is appropriate to a response to an answer. In respect to correspondence, it is accurate to speak of a letter, answer, and reply.

2. In parlance of the courts, the speech of counsel for the plaintiff in a civil case, or for the prosecution in a criminal case, in answer in either case to the points raised by the defence, is generally called the reply.

3. Under codes of reformed procedure, reply is very generally the name of the response made by a plaintiff to the answer interposed by defendant, and corresponds to "replication" in common-law or equity practice. It is, however, believed to be necessary only where new matter constituting a counter-claim is interposed in the answer, or where, on consideration of special reasons, the court orders a reply. Where no counter-claim is interposed, the cause proceeds as if the matters alleged in the answer were formally denied. The term reply is also understood to have been introduced in the practice under the judicature acts.

REPORT, *n.* An official or formal statement of facts or proceedings. Report, *v.*: to make a statement of facts or proceedings by which they are officially or formally made known.

Mailing a letter, prepaid and properly addressed, to an insurance company, if done by general direction of their agent, satisfies a condition in a policy that the facts stated in the letter shall be "reported" to the company. Edwards *v.* Mississippi Valley Ins. Co., 1 Mo. App. 192.

Reports of committees. These pertain to legislative and parliamentary practice. Questions arising on legislation, both of law and of fact, are constantly referred to committees for preliminary investigation; and the report of a committee is the usual basis upon which a bill or measure is brought forward in the house for deliberate discussion and passage.

Reports of the courts. Published volumes containing accounts of judicial decisions are termed the reports, or reports of cases. A full report of a case, in this sense, usually contains a brief statement of the important facts, an abridgment of the argument of counsel, and the opinion of the court, either as furnished by the judge or judges in writing, or as taken down by the reporter, when orally delivered; and these are preceded by a brief statement of the points decided, called head-notes. But the preparation and arrangement of these is purely a literary duty. The good sense and judgment of the reporter are his guides in the execution of the task, in most jurisdictions. In some of the states, he is directed in respect to what decisions shall be reported, and what features his reports shall contain, by statutes and rules of court.

The series of reports compiled by Lord Coke have been very generally styled The Reports, *par excellence*, as it were, and cited without the author's name.

Report of commissioner, master, receiver, or referee. The official statement drawn up by a commissioner of court, master in chancery, receiver, or judicial referee, to whom a cause or question has been referred, the evidence he has collected, or the decision or computation he has made, or of his dealings with property or funds committed to his charge. The similar statement of an arbitrator, as to his decision, is not called a report, but an award.

Reporter. The style or title of a person who is appointed or voluntarily assumes to edit and superintend the publication of reports of the courts, *q. v.* In England, this duty was formerly an individual or private undertaking. Since the commencement of 1866, the chief reporting has been done under the superintendence of a council styled the incorporated council of law reporting for England and Wales. In the courts of the United States, the reports are, for the most part, prepared by or under the direction of the judges. The reporter to the supreme court, however, enjoys a legislative recognition of his office, in a permanent appropriation of a sum in compensation of his furnishing to government three hundred copies of his reports; and there is usually a congressional appropriation in support of the reports of the court of claims. In many of the states, the reporter of the court of last resort (and in New York the supreme court reporter also) is a salaried officer of the state. But besides these authorized reports are many series, authorized only by appointment of the courts, and depending for pecuniary support only upon publishers' sales; and some compile without even a formal judicial appointment, and winning favor according to the value of the cases reported and merits of the reporter's method.

As will be inferred from the above remarks, the term reporter is only applicable to one who prepares reports of courts. It is not in use in reference to legislative, or to master's or referee's, reports.

REPRESENT. 1. To represent a person is to stand in his place, to act his part, exercise his right, or take his share. Representation: the standing in the place, acting the part, exercising the right, or taking the share, of another person. Representative: one who thus stands for another.

Representation is, in most of its uses, a somewhat higher or stronger term than agency. The present continuing authority of a representative is, in general, derived from the law, not merely from the will of the constituent.

The words have many applications. An heir is called the representative of

the ancestor; and an executor is the representative of the testator, — the heir standing in the place of his deceased ancestor with respect to his realty; the executor standing in the place of his deceased testator with respect to his personalty; and hence the heir is frequently denominated the real representative, and the executor the personal representative.

So, for the purposes of intestate succession to any one, the children of a deceased relative are, within certain degrees, allowed to represent their parent. Thus, if a man die, leaving a brother A, and the children of a deceased brother B, the children of B are said to take by representation. In legislation, representatives are persons chosen by the electors to exercise the rights of the people in the popular branch; and, in international law, an ambassador or public minister is said to represent his sovereign.

The term representatives, in an endowment policy of life insurance not expressed to be for the benefit of any third person, was held to include the administrator of the estate of the assured. Wason *v.* Colburn, 99 *Mass.* 342.

The expression personal representative, in its ordinary sense, means executor or administrator, and does not include ordinary agents. Atkinson *v.* Duffy, 16 *Minn.* 45.

A person appointed by the court as a substitute for a deceased trustee is not a representative of the deceased. Guery *v.* Kinsler, 3 *S. C.* 423.

The terms a representative or a personal representative, within the meaning of a statute governing the competency of a party to the record as a witness, when the adverse party is a personal representative of a deceased person, should be confined to executors or administrators, and not extended to embrace a guardian in socage, heir, dowress, &c. McCray *v.* McCray, 12 *Abb. Pr.* 1.

A representative is one who occupies another's place, and succeeds to his rights. Executors and administrators represent, in matters in which the personal estate is concerned, the person of the testator or intestate; and so does the heir that of the ancestor. Representatives of a deceased person are either real or personal, the former being the heirs at law, and the latter being ordinarily the executors or administrators. The term representative includes both classes. Lee *v.* Dill, 39 *Barb.* 516; 16 *Abb. Pr.* 92.

See further, on the meaning of the word in such a statute, Buckingham *v.* Andrews, 34 *Barb.* 434; Schenck *v.* Warner, 37 *Id.* 258; Traphagen *v.* Traphagen, 40 *Id.* 537.

2. To represent facts is to narrate, recount, or state them; and representation is an account, narrative, or statement of matters of fact.

Representative is not used in this meaning; nor is the verb represent in frequent use, as technical; but representation is an important term in insurance law, to denote any statement of facts made by either of the parties to a policy of insurance to the other, whether in writing or orally, expressly or by implication, preliminarily and in reference to making the insurance, obviously tending to influence the other as to entering into the contract.

The term represent, in the sense of to declare facts, does not import a promise. Cooper *v.* Landon, 102 *Mass.* 58.

In relation to the contract of insurance, there is an important distinction between a representation and a warranty: the former, which precedes the contract of insurance, and is no part of it, need be only materially true; the latter is a part of the contract, and must be exactly and literally fulfilled, or else the contract is broken and inoperative. Glendale Woollen Co. *v.* Protection Ins. Co., 21 *Conn.* 19. s. p. Witherell *v.* Maine Ins. Co., 49 *Me.* 200; State, &c. Ins. Co. *v.* Arthur, 30 *Pa. St.* 315; Lycoming Ins. Co. *v.* Mitchell, 48 *Id.* 367.

The representations of the insured are not to be taken as warranties, so that the slightest variation would release the insurers, but as statements of facts, which do not release the insurers unless they are materially different from the truth, and that in a way which increases the risk. Nicoll *v.* American Ins. Co., 3 *Woodb. & M.* 529.

In contracts of insurance, a representation differs from a warranty and from a condition expressed in the policy, in that the former is part of the preliminary proceedings which propose the contract, and the latter is part of the contract when completed. The validity of the contract depends upon the fulfilment of the warranties and conditions, and non-compliance therewith is an express breach, which of itself avoids the contract; whereas a misrepresentation, to avoid the policy, must have been made with a fraudulent intent, or with respect to some material matter. Dewees *v.* Manhattan Ins. Co., 34 *N. J. L.* 244.

A statement in an application for insurance is to be considered a representation rather than a warranty, unless it is clearly made a warranty by the terms of the policy, or by some direct reference therein. Daniels *v.* Hudson River, &c. Ins. Co., 12 *Cush.* 416; Wilson *v.* Conway Fire Ins. Co., 4 *R. I.* 141.

As used in insurance law, "representation" has not always been confined in use to declarations of facts as existing at the

time of making the policy, but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future, — to facts which no human being knows, but are matters of expectation or belief, or of promise and contract. Such statements, when not expressed in the form of a distinct and explicit warranty which must be strictly complied with, are sometimes called "promissory representations," to distinguish them from those relating to facts, or "affirmative representations." And these words express the distinction: the one is an affirmation of a fact existing when the contract begins; the other is a promise, to be performed after the contract has come into existence. Kimball *v.* Ætna Ins. Co., 9 *Allen*, 540.

Representation of the people act. The Stat. 30 & 31 Vict. ch. 102 (1867), for amending the representation of the people in England and Wales. The following are the principal changes made by this act: The number of members returnable by places of comparatively small population is reduced, and the number sent by the more important towns increased. On the university of London is conferred the right of sending one member to parliament. By section 9, it is provided that, at a contested election for any county or borough represented by three members, no person shall vote for more than two candidates; and by section 10, that at a contested election for the city of London (which returns four members) no person shall vote for more than three candidates. By sections 3 and 4 of the act, the franchise for towns is conferred on inhabitant occupiers of dwelling-houses, and on lodgers. By section 12, the boroughs of Totnes, Reigate, Great Yarmouth and Lancaster are wholly disfranchised; and by section 17, boroughs having a population of less than 10,000 are to return but one member in future. Such boroughs, to the number of thirty-eight, are enumerated in schedule (A) to the act. Three of these, — Honiton, Thetford, and Wells, — together with Arundel, Ashburton, Dartmouth, and Lyme Regis, are altogether disfranchised by section 43 of the Scotch act (Stat. 31 & 32 Vict. ch. 48), for the purpose of providing additional representation for Scotch constituencies. *Mozley & W.*

Representative peers. The representative peers are those who at the commencement of every new parliament are elected to represent Scotland and Ireland in the British house of lords; namely, sixteen for the former, and twenty-eight for the latter country. At the union of Scotland with England in 1707, and of Ireland in 1800, the peers of those two countries were not admitted *en masse* to seats in the British parliament, but were allowed to elect a certain number of their body to represent them therein; hence the term representative peers. The Scottish representative peers must have descended from ancestors who were peers at the time of the union. *Brown.*

REPRIEVE, *n.* A suspension of the execution of a sentence to punishment; a respite from penalty. Reprieve, *v.*: to grant a suspension of execution.

Several grounds are recognized for granting a reprieve to a criminal sentenced to death: it may be granted upon doubt as to the justice of the conviction, and to allow time for further investigation, or for applying for a pardon; or because the convict appears to have become insane, or, being a woman, to be pregnant; or may be granted at the discretion of the executive power.

RÉPRISAL. The taking one thing in satisfaction for another: it is either ordinary, as arresting and taking the goods of merchant-strangers within the realm; or extraordinary, as satisfaction out of the realm, — and is under the great seal. (*Lex Mercat.* 120.) *Wharton.*

REPUBLIC. 1. The commonwealth or state; the mass of the people in their collective capacity; as in the expression it concerns the republic that there should be an end of litigation.

2. That form of government is called a republic, or a republican government, in which the sovereign power is confided to and immediately exercised by representatives and officers chosen by popular will.

REPUBLICATION. A second making public. Applied particularly to wills, when it signifies the revival, either by re-execution or by a codicil adapted to the purpose, of a will previously revoked.

REPUGNANT. Inconsistent. Generally used of a clause in a written instrument, statute, &c., inconsistent with some other clause, or with the general object of the instrument.

REPUTATION; or **REPUTE.** The general opinion in the community concerning a person or thing. Thus the books speak of the reputation of a man for veracity; of proving pedigree or marriage by reputation.

Reputed: believed upon common report.

On the use of character and reputation as interchangeable terms, see CHARACTER; also Marts *v.* State, 26 *Ohio St.* 162.

Reputation of a person is the estimate in which he is held by the public in the place where he is known. Cooper *v.* Greeley, 1 *Den.* 347.

Testimony of a witness personally acquainted with the accused in a trial for rape, that he is of a quiet and peaceable character, is competent; though the question as put does not call for the reputation. State *v.* Lee, 22 *Minn.* 407.

Reputed owner. In English bankruptcy practice, a bankrupt, in reference to goods and chattels in his apparent possession, with the consent of the true owner, is called the reputed owner of such goods.

Reputed has a much weaker sense than its derivation would appear to warrant, importing merely a supposition or opinion derived or made up from outward appearances, and often unsupported by fact. The term reputed owner is frequently employed in this sense. 2 *Steph. Com.* 206.

Reputed ownership. The doctrine of reputed ownership, by which a bankrupt trader is deemed the reputed owner of goods in his apparent possession, was introduced into the bankrupt laws by Stat. 21 Jac. I. ch. 19, § 11, for the purpose of protecting the creditors of a trader from the consequences of the false credit which he might acquire by being suffered to have in his possession, as apparent owner, property which did not really belong to him. Such property may, in general, be claimed by the trustee in the bankruptcy, for the benefit of the creditors. (2 *Bl. Com.* 488; 2 *Steph. Com.* 166; *Robson Bk'cy*, ch. 20, 2d ed. 412–440.) *Mozley & W.*

REQUEST. In law, is much used in its vernacular sense, and also as substantially equivalent to demand.

The two words, request and require, as used in notices to creditors to present claims against an estate, are of the same origin, and virtually synonymous. Prentice *v.* Whitney, 15 *N. Y. Supreme Ct.* 300.

REQUISITION. A demand in writing, or formal request or requirement.

The term is applied to a request preferred by a governor of one state to that of another, for the extradition of a fugitive from justice; to a written statement, furnished by officers charged with serving out supplies in the government service, to those charged with custody of them in store, of the quantities of rations, clothing, stationery, lumber, materials, &c., they will require in the discharge of their duties for some limited time to come; to similar official requests for supplies of money; to a requirement in proceedings of claim and delivery under reformed codes of procedure, that the sheriff seize and deliver to plaintiff the goods for which the action is brought; and to some other official demands.

Requisitions on title. In English conveyancing, are written inquiries made by the solicitor of an intending purchaser of land, or of any estate or interest therein, and addressed to the vendor's solicitor, in respect of some apparent insufficiency in the abstract of title. *Mozley & W.*

RES. A thing; also, in the plural, things.

In the Roman law and early English law, *res* is a term of the most extensive import, applied to things which are not the subject of property as well as to objects of property, and including corporeal and incorporeal things of every kind, nature, and species. It is particularly applied, by English writers, to the subject-matter of an action against or concerning some particular property, which is termed "the *res;*" and proceedings or judgment against such subject-matter directly are said to be *in rem*, as distinguished from proceedings or judgments *in personam*. *Res* is also applied, especially in the civil law, to the action itself; and the phrase *in re* is commonly used, in English and American practice, in entitling judicial proceedings other than actions between party and party.

Res adjudicata. See RES JUDICATA.

To make a matter *res adjudicata*, there must be a concurrence of the four conditions following: identity in the thing sued for; identity of the cause of action; identity of persons and of parties to the action; identity of the quality in the persons for or against whom the claim is made. Atchison, &c. R. R. *v.* Commissioners, 12 *Kan.* 127.

A verdict and judgment are conclusive, by way of estoppel, only as to facts without the existence and proof or admission of which they could not have been rendered. Thus a judgment against a surety on a note does not, necessarily, bar a suit against his co-surety. Hill *v.* Morse, 61 *Me.* 541.

Res communes. Things common to all. Things which may be used by every one, and cannot be appropriated exclusively by any one; such are light, air, running water, the sea, &c.

Res gestæ. Things done. The essential circumstances of a transaction. This expression has a peculiar application in

the law of evidence; as when employed to designate what is apparently mere hearsay, but yet is relevant and admissible because an essential part of the principal transaction. All circumstances forming part of a transaction are, as to that transaction, part of the *res gestæ*.

The idea of *res gestæ* presupposes a main fact or principal transaction; and the *res gestæ* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. No definition can be framed so comprehensive as to embrace all cases; hence it is left to the sound discretion of the courts what they shall admit to the jury along with the main fact, as parts of the *res gestæ*. Carter *v.* Buchannon, 3 *Ga.* 513.

Res integra. A thing yet entire; a matter not yet touched upon; a question quite new. The term is applied, by law writers, to points or questions of law which are not yet decided, and remain open for discussion and argument, untouched by any decision.

Res inter alios acta. A thing done between others; a transaction between other parties. See the following maxim.

Res inter alios acta alteri nocere non debet. A thing done between others ought not to injure one. A person should not be affected unfavorably by transactions between strangers to him. *Burrill.*

This is, perhaps, one of the most important and useful of the maxims relating to the law of evidence. Its intention and effect is to protect the rights of a litigant from being taken away or impaired by the acts, conduct, declarations, or evidence of strangers to the litigation. The depositions of witnesses in proof of a fact, the verdict of the jury finding the fact, and the judgment of the court upon the fact found, are not evidence of the existence of such fact in another action between different parties. The rule is otherwise as between the parties to the original suit, or where the judgment in that suit is *in rem;* in which latter case, the promulgation of a different or contrary judgment by another court, in a subsequent suit, affecting the same *res*, is an arrogation and exercise of the functions of a court of appeal. A judgment *in rem*, therefore, is conclusive, not only as between the original parties to the suit *in rem*, but also as to all other persons; the effect of the judgment being to change the character of the *res* itself. Therefore, where letters testamentary or of administration have been lawfully granted by a court of competent jurisdiction, they are conclusive against all the world, until revoked. So a sentence of a court of admiralty of competent jurisdiction, condemning a vessel as lawful prize, is conclusive as to the existence of the grounds of condemnation against all persons, until it is reversed on appeal. And it may be said, generally, that, in the case of any statute, decree, or judgment of a public nature, or which operates *in rem*, the above maxim does not apply; for to such proceedings all persons are privies. There are several other extensive classes of cases to which this maxim has no application; but they are so closely allied to the elementary principles of evidence that they need not be enumerated here.

The doctrine is of such familiar application that the entire maxim is seldom quoted; the objectionable matter is merely designated as *res inter alios acta*, and thereupon excluded from consideration as of course.

The maxim must be taken with this important qualification, that though a decision in a case between A and B cannot directly prejudice C, yet, if there is a legal point at issue in C's case identical with one which was in controversy between A and B, the court will generally regard itself as bound by the prior decision; at least, if the court which pronounced it was the same, or one of equal or superior authority.

To the form of the maxim above given, some books add "*sed quandoque prodesse potest,*" or "*sed prodesse possunt,*" and, in some, it runs, "*nec nocere nec prodesse possunt.*" These additions are, however, unnecessary; for the rule is only of general, not universal, application, — there being several exceptions, both ways. Neither does the expression *inter alios* mean that the act must be the act of more than one person. Nor does it make any difference that the act was done or confirmed by oath; consequently, the sworn evidence of a witness in one cause or proceeding cannot be made available in another cause or proceeding

between other parties. When the person whose words or acts are offered in evidence is also the opposite party to the suit, the evidence is further inadmissible, by virtue of another important principle, — that no man shall be allowed to make evidence for himself. *Best Evid.* § 506.

Res judicata. A matter adjudged; a case decided. The principle expressed in the succeeding maxim is frequently referred to as "the doctrine of *res judicata;*" and any matter within the application of the maxim is termed *res judicata*, or *res adjudicata.*

Res judicata pro veritate accipitur. A matter adjudged is received for truth. The records of a court of justice are presumed to have been correctly made, the judges and juries to have done no causeless or malicious acts, the decisions and judgments of the court to have been well-founded and regular, and the facts necessary to sustain the verdict to have been proved on the trial, until the contrary is affirmatively shown. A judgment, standing unimpeached and unreversed, is conclusive evidence of the facts involved in it between the same parties or their privies. This principle of the authority and finality of judicial decisions is a rule of universal law, and is founded on considerations of sound policy. But it is subject to some limitations, both as to the matters which are deemed to be conclusively established by a judgment and as to the persons who are thereby concluded. To render matters once judicially decided in one proceeding *res judicata* as against parties to another proceeding, the following conditions must exist: 1. Identity in the thing sued for; 2. Identity in the cause of action; 3. Identity of persons and parties to the action; 4. Identity of quality in the persons for or against whom the claim is made. If any one of these conditions of identity is wanting, the former adjudication is merely *res inter alios acta* (q. v.), and has no greater effect than any other transaction between strangers to the later litigation.

The principle in question must not be confounded, either with the rule of law which requires records to be in writing, or with its conclusive presumption that they are correctly made. The mode of proving judicial acts is a different thing from the effect of those acts when proved; and the rules regulating the effect of *res judicata* would remain exactly as they are, if the decisions of our tribunals could be established by oral testimony. In truth, the record of a court of justice consists of two parts, which may be denominated respectively the substantive and judicial portions. In the former, — the substantive portion, — the court records or attests its own proceedings and acts. To this, unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects, nor the facts thus recorded or attested to be proved in any other way than by production of the record itself, or by copies, proved to be true in the prescribed manner. In the judicial portion, on the contrary, the court expresses its judgment or opinion on the matter in question; and, in forming that opinion, it is bound to have regard only to the evidence and arguments adduced before it by the respective parties to the proceeding, — either of whom may, in most cases, appeal from such a judgment to that of a superior tribunal. Such a judgment, therefore, with respect to any third person, who was neither party nor privy to the proceeding in which it was pronounced, is only *res inter alios judicata;* and hence the rule, that it does not bind, and is not, in general, evidence against any one who was not such party or privy. *Best Evid.* § 590.

Res nova. A new matter; a new case; a question not before decided. See RES INTEGRA.

Res nullius. Things of no one. Things which are the property of nobody.

In the Roman law, *res nullius* designated things which were not and never could be the property of any one; such as things consecrated to religious purposes, temples, the ground on which they were built, burial-places, &c. But it was also applied to all things which had no owner; both those in their original state, which never had had an owner, and those which had belonged to an owner who had lost or abandoned his ownership. In the common law, the term is in like manner applied to all property without an owner. Thus Bracton (fol. 8) classes as *res nullius* wild animals, derelict property, wrecks, waifs, and strays. A thing abandoned by its owner is as much *res nullius* as if it had never belonged to any one. As to how rights of ownership in things which are *res nullius* may be acquired, see the maxims, *quod nullius est fit domini regis*, *quod nullius est fit occupantis.*

Res perit domino. The thing per-

ishes to its owner. The loss of property destroyed falls upon the owner. Thus where loss or damage arises from what is termed the act of God, — such as storms, tempests, and the like, — the loss will fall upon the owner of the property, not upon the carrier in whose custody it is undergoing transportation. The rule applies also to losses occasioned by invasion or capture by the public enemy in time of war, or by persons engaged in insurrection, riot, &c. Frequent occasion for the application of the rule arises upon sales of goods which are injured or destroyed at or near the time of the completion of the contract of sale. If the contract has been perfected, and the title to the property has passed to the buyer, the loss is his; if any thing remains to be done before the title becomes vested in the buyer, the loss falls on the seller.

Res privatæ. Things belonging to individuals; private property.

Res publicæ. Things belonging to the public; public property. Such are the seas, sea-shores, navigable rivers, highways, harbors, &c.

Res quotidianæ. Every-day matters; familiar subjects.

Res religiosæ. Things pertaining to religion. In Roman law, especially, burial-places, which were regarded as sacred, and could not be the subjects of commerce.

Res sacræ. Sacred things. In the Roman law, things publicly consecrated to religious purposes.

Res sanctæ. Holy things. In the Roman law, things protected by special sanctions, against injury of man. Thus the walls of a city, any offence against them being punished capitally, were *res sanctæ*.

Res universitatis. Things of a community. The things held by a city or other municipal corporation, for the common benefit of the citizens.

RESCEIT. An old English law term, nearly equivalent to our modern word receipt. It applied where any action was brought against a tenant for life or term of years, and the person in remainder or reversion came in and prayed to be received to defend the land, and plead with the demandant. *Termes de la Ley; Cowel.* But the old real actions to which *resceit* applied are abolished, and the word has become obsolete.

RESCIND. To abrogate, annul, avoid, or cancel a contract; spoken particularly of nullifying a contract by the act of a party. Rescission: the act or step of abrogating or declaring null a contract, particularly when by one of the parties.

Thus one speaks of a buyer's right to rescind a contract of sale, because the thing delivered proved worthless.

Rescissory action. A term of Scotch law, meaning an action to have a contract rescinded.

RESCOUS. A resistance against lawful authority; also, the name of an old writ which lay to redress such resistance. As, for instance, the taking back by force goods which have been taken under a distress, or the violently taking away a man who is under arrest, and setting him at liberty, or otherwise procuring his escape, are both so denominated; and for either, writs of rescous used to lie, as now an ordinary prosecution for the rescue lies against such offenders, offending parties, or rescussors, as they were termed. *Brown.*

RESCRIPT. The answer of the Roman emperor, when consulted by particular persons on some difficult question: it is equivalent to an edict or decree; a counterpart.

Rescue of distress. The taking away and setting at liberty, against law, a distress effected. Rescue lies where a person distrains for rent or services, or for damage feasant, and is desirous of impounding the distress, and another person rescues the distress from him. The party distraining must be in possession of the distress, otherwise there cannot be a rescue. The action of rescue has fallen into disuse. *Wharton.*

RESEALING A WRIT. The second sealing of a writ by the master, so as to continue it, or to cure it of an irregularity. *Wharton.*

RESERVE, *v.* To keep back; to withhold. Reservation: the act of keeping back or withholding; also, the clause in a conveyance or contract whereby some part of the subject-matter is kept back or withheld from the operation of the instrument. Reservation, or reserve: a portion, particularly a tract of land, kept back or withheld.

1. The words often occur in their general sense of keeping back; as when it is said that one lets a house, reserving certain rooms.

2. More technically, a clause of reservation, or a reservation in a deed or lease, is a clause whereby the grantor or lessor reserves, either to himself or to the lord of the fee, some money, chattel, or service, not being part of the thing granted or demised, or an appurtenant thereto. It is considered that reservation, in the strict sense, cannot be made in favor of a stranger, although such, if attempted, might be good as a condition. And it follows from the definition that a man cannot grant an estate, and reserve part thereof, or make a feoffment in fee, and reserve a lease for life; also, that a man cannot reserve rent to his heirs without first reserving it to himself. Moreover, a reservation is often confounded with an exception: the distinction between them is said to be, that in a reservation some new hereditament is created, and that usually of an incorporeal kind; whereas in an exception a portion, as it were, of an already existing hereditament is merely withheld, or excepted, out of the conveyance. These distinctions and niceties are of less importance in American conveyancing than in English.

A reservation is something taken from the whole thing covered by the general terms making the grant, and cuts down and lessens the grant from what it would be except for the reservation. Miller *v.* Lapham, 44 *Vt.* 416.

How far the word reserving, in a deed of an ore-bed, imports a license to enter, &c., see Stockbridge Iron Co. *v.* Hudson Iron Co., 107 *Mass.* 290.

Reserving, in a deed, may operate to create an exception, instead of a technical reservation only, if such is the evident intent. Sloan *v.* Lawrence Furnace Co., 29 *Ohio St.* 568

3. In the United States public-land laws, a reservation, sometimes also called a reserve, is a considerable portion of the public domain segregated and withheld from sale for other public uses. Thus there are military reservations, being tracts of land required for military posts; Indian reservations, which the government has set apart for the dwelling of Indian tribes; and reservations for parks, mines, &c.

4. In the practice of the courts, to reserve a point is a mode of taking the opinion of the full bench upon a law question of doubt, without putting the parties to the expense of a formal writ of error or appeal. Should the judge before whom a cause is tried be of opinion that a point of law made, and upon which the case depends, deserves consideration by the full court, he may reserve it, as it is called. This may be done at *nisi prius*, with the consent of the parties; and, when done, an agreement is usually made that the court before which the point is argued shall be in the same situation as the judge was before whom it was originally raised, and shall have power to order a verdict or nonsuit to be entered, as they may think fit. By the judicature acts, this practice is so far extended that power is given to a judge to reserve points of law at his discretion for the consideration of a divisional court; but this is not to take away or prejudice the right of any party to have the issues for trial by jury submitted and left by the judge to the jury, with a complete and proper direction upon the law and the evidence applicable to such issues. Reserving a point may also be done by the judge in a criminal case; in which case the point is left for the judgment of the court for the consideration of crown cases reserved, composed of judges from the superior courts at Westminster. This has been a method for disposing of doubtful questions of criminal law, long and frequently employed; and the reports of decisions on these questions reserved form an important body of the criminal-law reports, known as Crown Cases Reserved.

This proceeding of reserving a point accomplishes, by a little different method, substantially the same result as is attained under the New York code of procedure, by the step of taking a verdict subject to the opinion of the court; or under the practice of the United States supreme court, by what is known as a case certified.

RESET, or **RESETTER.** A Scotch term for receiving or harboring a proscribed person.

Reset of theft. Receiving stolen goods, or harboring the thief.

RESIANCE, also **RESIANT.** Old English terms for residence and resident.

Resiant rolls. Rolls containing the resi-

ants in a tithing, &c., which were called over by the steward on holding courts-leet. *Tomlins.*

RESIDE. To live at or in a place; to dwell. Residence: place of abode or dwelling; domicile; home. Resident: dweller or inhabitant at or in a place or civil division.

It is not easy to see that the cases on these affiliated terms can be reconciled as conforming to any precise definitions. See ABODE; DOMICILE; DWELL; HOME; INHABITANT.

Residence usually imports the place of one's permanent domicile, rather than a temporary abode. Reeder *v.* Holcomb, 105 *Mass.* 93.

The difference between a residence and a domicile may not be capable of easy definition; but every one can see at least this distinction: a person domiciled in one state may, for temporary reasons, such as health, reside for one or more years in some other place deemed more favorable. He does not, by so doing, forfeit his domicile in the first state, or, in any proper sense, become a non-resident of it, unless some intention, manifested by some act, of abandoning his residence in the first state is shown. Walker *v.* Walker, 1 *Mo. App.* 404.

That the two words, resident and inhabitant, have the same meaning, see Roosevelt *v.* Kellogg, 20 *Johns.* 208.

Residence means a fixed and permanent abode or dwelling-place for the time being, as contradistinguished from a mere temporary locality of existence. So does inhabitancy; and the two are distinguishable, in this respect, from domicile. Matter of Wrigley, 8 *Wend.* 134.

Temporary sojourn within a state, for pleasure or business, accompanied by an intent to return to the state of one's former inhabitancy, does not constitute residence. Boardman *v.* House, 18 *Wend.* 512.

Resident and inhabitant are distinguishable in meaning. The word inhabitant implies a more fixed and permanent abode than does resident; and a resident may not be entitled to all the privileges or subject to all the duties of an inhabitant. Frost *v.* Brisbin, 19 *Wend.* 11.

The actual residence is not always a person's legal residence or inhabitancy. Crawford *v.* Wilson, 4 *Barb.* 504.

The word residence was held to mean the town in which the person dwelt, in Holmes *v.* Carley, 32 *Barb.* 440.

In most cases, where a person has two residences, one of them is also his domicile; but his residence and his domicile, in the legal sense of the terms, are distinct, notwithstanding. Douglas *v.* Mayor, &c. of N. Y., 2 *Duer*, 110.

Upon the distinction between "domicile" and "residence," see Burrill *v.* Jewett, 2 *Robt.* 701.

The fact that, by reason of a prolonged absence from the state, a party might be proceeded against by attachment at the instance of a creditor, does not prevent his being deemed a resident of this state for all other purposes. Roberti *v.* Methodist Book Concern, 1 *Daly*, 3.

While a person who has abandoned all dwelling in another state, and come to New York, continues undetermined whether he will remain permanently in New York, or not, he is not a resident of New York. He cannot be said to have any residence. Burrows *v.* Miller, 4 *How. Pr.* 349.

An immigrant who had left for ever his native land, and was living in New York, without any determination to reside elsewhere, was held a resident. Heidenbach *v.* Schland, 10 *How. Pr.* 477.

As they are used in the New York code of procedure, the terms "residence" and "resident" mean legal residence; and legal residence is the place of a man's fixed habitation, where his political rights are to be exercised, and where he is liable to taxation. Houghton *v.* Ault, 16 *How. Pr.* 77.

A statute prohibiting the sale of goods by sample, &c., by any person not a resident merchant, mechanic, or manufacturer, does not require a personal residence, but refers to the person's place of business, and allows any person, though a citizen of and living in another state, to take out a license to transact business as a resident merchant, &c. Speer *v.* Commonwealth, 23 *Gratt.* 935.

That "resident" and "citizen" are not synonymous; and the constitutionality of a statute conferring an exclusive privilege on residents of the state may be sustained on the ground that any citizen of another state may take the benefit of it on becoming a resident, — see Frost *v.* Brisbin, 19 *Wend.* 11.

Notwithstanding a person is often or continuously absent from the place of his legal home, as in case of a travelling preacher, he may still be deemed to "reside" there. Dearing *v.* Thomas, 25 *Ga.* 223.

S. P. as to a volunteer in the army while absent from home, in the military service of the government. Tibbitts *v.* Townsend, 15 *Abb. Pr.* 231.

When a person takes up his abode in a certain place, without any present intention to remove therefrom, such place of abode becomes his residence, and will continue to be his residence, notwithstanding temporary personal absences, until he departs with intention to abandon such residence. Warren *v.* Thomaston, 43 *Me.* 406.

Residence, as used in a statute suspending a statute of limitations during the time that a debtor is absent from and resides out of the state, means not a mere temporary sojourn or occasional abode, but the acquisition of a domicile outside the state. Langdon *v.* Doud, 6 *Allen*, 423.

A sojourn without the state, in the case of a witness, is residing out of it. Pooler *v.* Maples, 1 *Wend.* 65.

A law authorizing attachment against a debtor "who may reside out of this state," means a debtor on whom summons cannot be served, by reason of his foreign residence. Clark *v.* Likens, 26 *N. J. L.* 207.

Although a debtor is established in business in another state or county, yet if his legal residence or domicile is in the state, and summons can be served upon him there, he is not subject to attachment as a non-resident debtor. The term "not resident in this state," in section 1 of the New Jersey attachment act, means that the debtor is not actually present in person within the state; while the same term, in section 26 of the act, means that the debtor has not only a legal residence or domicile abroad, but that the ordinary process of the courts cannot be served upon him in the state. Brundred *v.* Del Hoyo, 20 *N. J. L.* 328.

A person may have a residence for a part of each year in one place, where his place of business is, and a residence for the remainder of each year at another place, where also his domicile is, so as to be taxable in the former place. Bartlett *v.* New York City, 5 *Sandf.* 44.

The carrying on a mercantile business in a city, and staying within its limits, for that purpose, during business hours, do not alone constitute residence within the state, which will protect a person from foreign attachment; and if the debtor's family live in a neighboring state, and he provides for them, and resorts to them on the sabbath, and other days of cessation from business, and abides with them whenever he may, his home is there, and he is to be deemed a resident of that state. Chaine *v.* Wilson, 1 *Bosw.* 673; 8 *Abb. Pr.* 78.

The place of a man's residence will be considered to be where his family permanently reside, although he may be boarding and doing business in another place. Cunningham *v.* Maund, 2 *Ga.* 171.

While residence, in laws prescribing conditions to bringing suit for divorce, may mean something more transient in its nature than a domicile, yet it always includes some intent of permanent business or stay. Residence cannot be acquired by a visit to a state to bring a suit, while the party's domicile or business is in another state. Way *v.* Way, 64 *Ill.* 406.

In such a law, "resident" requires not only an actual residing, but such a residence as that, when a man leaves it temporarily or on business, he has an intention of returning to it, and such that, when he has returned to the place, it is *de facto* and *de jure* his domicile. Hinds *v.* Hinds, 1 *Iowa*, 36.

A homestead law, requiring residence of the owner's family on the land exempted, requires actual presence of the wife: her constructive presence is not enough. Benedict *v.* Bunnell, 7 *Cal.* 245; Rix *v.* McHenry, *Id.* 89.

Although a party may derive his title to different tracts of land from different sources, yet if the tracts adjoin each other, and are all in one enclosure, and there is no one but the owner residing thereon, such residence is within a law requiring an "actual residence" upon the land, and applies to all the tracts. Wharton *v.* Bunting, 73 *Ill.* 16.

In a law authorizing summons to be served, in certain cases, by leaving it at the defendant's residence, that word is synonymous with dwelling-house. Foot *v.* Harris, 2 *Abb. Pr.* 454.

Residence, in constitutional provisions prescribing qualifications of electors, held the same as domicile, the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights. Chase *v.* Miller, 41 *Pa. St.* 403.

The term resident, in provisions prescribing the qualifications of electors, means one who has a permanent abode, and does not apply to a person sojourning as a student in a college. Fry's Case, 71 *Pa. St.* 302.

In the Wisconsin statutes relating to taxation, the two words, residence and domicile, are used interchangeably, as synonymous. Kellogg *v.* Supervisors of Winnebago County, 42 *Wis.* 97, 107.

In general, the word resident, in statutes relative to remedies, taxation, &c., includes corporations created by and carrying on business within the state. Louisville, &c. R. R. Co. *v.* Letson, 2 *How.* 497; Conroe *v.* National Protection Ins. Co., 10 *How. Pr.* 403; Hubbard *v.* Same, 11 *Id.* 149; Vallette *v.* Whitewater Valley Canal Co., 4 *McLean*, 192; New York & Erie R. R. Co. *v.* Shepard, 5 *Id.* 455. To same general effect are Cape Sable Co.'s Case, 3 *Bland*, 606; Central Bank of Georgia *v.* Gibson, 11 *Ga.* 453; United States Bank *v.* Deveaux, 5 *Cranch*, 61; King *v.* Gardner, *Cowp.* 79.

In New York, a corporation created by the laws of that state is deemed a resident thereof, notwithstanding the bulk of its property and business may lie in a foreign state. Crowley *v.* Panama R. R. Co., 30 *Barb.* 99.

As used in provisions prescribing qualifications of electors, "resident" ordinarily means a natural person, and does not include corporations. People *v.* Schoonmaker, 63 *Barb.* 44.

When the word residence, as used in the Cal. practice act, is to be applied to a corporation, it means the place where its principal office or place of business is established. Jenkins *v.* California Stage Co., 22 *Cal.* 537.

A railroad corporation, in legal contemplation, resides in the counties through which its road passes, and in which it transacts its business; so that it may be sued or taxed in any county through which the road passes, or in which its corporate powers are exercised. Baldwin *v.* Mississippi, &c. R. R. Co., 5 *Iowa*, 518; Richardson *v.* Burlington, &c. R. R. Co., 8 *Id.* 260;

Belden *v.* N. Y. & Harlem R. R. Co., 15 *How. Pr.* 17; People *v.* Fredericks, 48 *Barb.* 173; 33 *How. Pr.* 150.

The residence of a corporation is deemed to be at the place where its principal office is located, or where its principal operations are carried on. Thorn *v.* Central R. R. Co., 26 *N. J. L.* 121; Conroe *v.* National Protection Ins. Co., 10 *How. Pr.* 403; Androscoggin, &c. R. R. Co. *v.* Stevens, 28 *Me.* 434.

The fact that a corporation has a secondary office in another county, where some of its business is done, does not make it a resident there. The residence is where the general business is transacted. Hubbard *v.* National Protection Ins. Co., 11 *How. Pr.* 149.

That a corporation which has several places of business may be deemed a resident of each, see Pond *v.* Hudson River R. R. Co., 17 *How. Pr.* 543.

The legal residence of a corporation, for the purpose of serving process, is not confined to the immediate locality of its principal office of business, but extends to the territorial limits of the jurisdiction which granted its charter; and such corporation may be made a party to a suit, by service of a writ on its president, in any district where the plaintiff resides or the cause of action accrues; and its appearance may be enforced, when necessary, by a *distringas* on its property in such district. Glaize *v.* S. C. R. R. Co., 1 *Strobh.* 70.

But, for the purposes of taxation, the residence is in the city where the principal office is kept and the financial business is transacted. Orange & Alexandria R. R. Co. *v.* Alexandria, 17 *Gratt.* 176.

Although a corporation is deemed a resident subject or citizen of the state in which it is created, and cannot have a legal existence beyond the boundaries of that state, yet it will not be deemed a non-resident of another state where it maintains a regular office and general agent. St. Louis *v.* Wiggins Ferry Co., 40 *Mo.* 580; N. Y. Piano Co. *v.* New Haven Steamboat Co., 2 *Abb. Pr.* 357.

Under a statute which declares non-residents doing business within the state liable to taxation upon the capital employed in such business, corporations doing business within the state, but created under the laws of another state, are liable to be taxed. International Life Ass. Soc. *v.* Commissioners of Taxes, 28 *Barb.* 318; 17 *How. Pr.* 206.

Resident freeholder. In the Wisconsin highway laws, a person who resides in the town in question, and owns a freehold interest in lands situate therein. Damp *v.* Dane, 29 *Wis.* 419.

RESIDUE. As applied to decedent estates, means all that property which remains after paying the charges and debts, and satisfying the devises and legacies. Residuary: relating to or connected with the residue; thus a residuary devisee or legatee is a person named in a will to take all the real or personal property which may remain when the estate has been settled.

The "residue" of a testator's estate and effects, means what is left after all liabilities are discharged, and all the purposes of the testator, specifically expressed in his will, are carried into effect. Graves *v.* Howard, 3 *Jones Eq.* 302.

Residue, as used in wills, ordinarily means that portion of an estate which is left after the payment of charges, debts, and particular bequests. The presumption is that a testator uses it in this sense, unless a contrary intention clearly appears. And the fact that a testator gives a portion of the residue of the estate by an early clause of his will, in connection with a particular legacy, and that various particular legacies are given later in the will, is not sufficient evidence that the testator used the word residue in any other than the usual sense. Phelps *v.* Robbins, 40 *Conn.* 250.

In construing the word residue, in a will, the courts generally incline it to the whole of the residue of the estate, in cases of doubt. Carr *v.* Dings, 58 *Mo.* 400.

That a gift, in a will, of the residue may include real as well as personal property, see Atkins *v.* Kron, 2 *Ired. Eq.* 58; Seekright *v.* Carrington, 1 *Wash.* (*Va.*) 45; Smith *v.* Smith, 17 *Gratt.* 268.

RESIDUUM. Residue, *q. v.*

RESIGNATION. Relinquishment or surrender, by an officer, representative, or trustee, of his authority or trust; or by a beneficed clergyman, of his living; and so in other cases of a personal privilege or power.

In ecclesiastical law, resignation is the yielding up a benefice into the hands of the ordinary, called, by the canonists, renunciation; and though it is all one in nature with the word surrender, yet it is, by use, restrained to yielding up a spiritual living to the bishop, as surrender is the giving up of temporal land into the hands of the lord. *Jacob.*

Resignation bond. A bond or other engagement in writing taken by a patron from the clergyman presented by him to a living, to resign the benefice at a future period. This is allowable in certain cases under Stat. 9 Geo. IV. ch. 94, passed in 1828. 2 *Steph. Com.* 721.

RESIST. To oppose.

Resist properly describes an opposition by direct action and quasi forcible means. State *v.* Welch, 37 *Wis.* 196.

The offence of resisting an officer of the United States may be complete, although no violence is used or threatened. If a person says he will not go with the officer, and does not go, it is a resistance. United States *v.* Lukins, 3 *Wash.* 335.

Resisting an officer may be perpetrated

without his being assaulted, beaten, &c. Woodworth *v.* State, 26 *Ohio St.* 196.

RESOLVE, *v.* To decide; to determine; to bring to a termination. Resolution, also resolve, *n.*: a formal decision or determination of a question, particularly one made at a public meeting. In this sense, resolution is used much oftener than resolve.

In the practice of congress and of parliament, some matters of a kind not appropriate to be embodied in acts — such as a vote of thanks, a declaration of mere opinion, a consent — are framed in what are called resolutions; or, in congress, if the concurrence of both houses is necessary, joint resolutions.

Resolutory condition. A condition included in a contract which is of such a nature that, if it should take effect, it will annul or determine — *i.e.* resolve — the principal obligation, is called, in the civil law, a resolutory condition. The condition of an ordinary penal bond seems to be a fair illustration; because if the obligor pays the money or does the act named in the condition, the principal contract — the engagement to pay the penal sum — is annulled and discharged.

RESPITE, *v.* To adjourn; to forego; to prolong. Respite, *n.*: an adjournment; a delay; a postponement.

In its application to sentences of offenders to punishment, respite is equivalent to reprieve; but it is not confined to use in this connection.

A respite is a temporary suspension of the execution of a sentence; a delay, forbearance, or continuation of time. Mishler *v.* Commonwealth, 62 *Pa. St.* 55.

Respite of appeal. Adjourning an appeal to some future time. *Brown.*

Respite of homage. The forbearing or dispensing with the performance of homage by tenants who held their lands in consideration of performing homage to their lords. *Brown.*

RESPONDEAT. Let him answer.

Respondeat ouster. That he answer over. The form of the judgment anciently rendered for the plaintiff upon a plea in abatement, that the defendant answer over; that is, interpose a better plea. The phrase has been generally adopted as the name for judgments of like character.

Upon an issue in law arising on any dilatory plea, the form of the judgment may be that the defendant answer over, — *respondeat ouster;* and this not being a final judgment, the pleading is resumed, and the action proceeds.

Respondeat superior. Let the master answer. The principal or master is responsible for the acts done by his agent or servant, as such. This rule is of almost universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful, provided it is not the wilful, wanton act of the servant. The fact that the master did not authorize the act, or even know of its performance, makes no difference. Even if he disapproved of and forbade it, he is still liable, if the act or neglect of the servant was done in the scope of the employment or agency. The reason upon which the rule rests is, that, as the master has the selection of those admitted to his employment, he ought to be responsible for the results, if, through want of due inquiry or otherwise, he selects an improper person. He is thus made responsible only for his own want of care.

The tendency of modern decisions is to narrow the application of this maxim in several respects. As is above explained, if the act of the servant or agent be wilful, and not done in the ordinary scope of his employment or authority, the master cannot be held. Besides this limitation, an exception is made in favor of public officers, such as judges, magistrates, &c., who are not held responsible for the malfeasance of persons whom they are compelled to employ in inferior ministerial capacities. Bailey *v.* New York, 3 *Hill* (*N. Y.*), 531; 2 *Den.* 433. A master is not now held responsible (although formerly he might be) for an injury inflicted by one servant upon a fellow-servant engaged in the same common employment.

RESPONDENT. Person answering. As the party who appeals against the judgment of an inferior court is termed the appellant, so he who contends against the appeal is the respondent. The word also denotes the persons upon whom libel in admiralty, or an ordinary petition in the court of chancery, is served,

and who are made, as it were, defendants thereto. The term respondent is used in like manner in proceedings in the English divorce court; and co-respondent is the paramour in the adultery laid as cause of divorce, who may be joined, in the practice of that court. In general, it corresponds to defendant, in the various proceedings to which it is applied.

RESPONDENTIA. A mercantile contract, generally defined to be a loan of money upon hypothecation of cargo (as bottomry is upon security of the hull), to be repaid with maritime interest if the cargo arrives safe, or sustains injury only through its own defects, or the fault of master and mariners. See 3 *Kent Com.* 354.

The etymology of "bottomry" and "respondentia" would seem to suggest a somewhat different definition, — bottomry being a loan on the security of the vessel's hull or bottom; and respondentia being a loan made on the personal security of the borrower; on the lender's confidence that the borrower will answer or respond to the obligation of repayment at maturity. Practically, the result is the same. The loan upon the cargo rests chiefly upon the personal responsibility of the borrower; for, by the very nature of the mercantile adventure involved, the cargo is to be sold or exchanged, and the lender must trust the borrower to repay him from the proceeds. Increased interest is allowed in these loans, because the lender takes the marine risk. See *Kent, supra.*

There seems some tendency in modern books to use "bottomry" for either contract for a loan of money, subject to marine risk, and at maritime interest, whether upon hull or cargo, and to discontinue the use of the term respondentia.

The general nature of a respondentia bond is this: the borrower binds himself in a large penal sum, upon condition that the obligation shall be void, if he pay the lender the sum borrowed, and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. (2 *Park Ins.* 615.) But such a contract is now usually called a bottomry bond, although (as the name denotes) the latter phrase was appropriate only where the vessel itself, or bottom, was included in the security. (*Maude & P. Merch. Ship.* 433; *Kay Law of Ship.*) *Brown.*

The word respondentia properly applies to the loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port. Maitland *v.* The Atlantic, *Newb.* 514, 516.

RESPONSA PRUDENTIUM. Answers of learned men; opinions of those learned in the law. These decisions or opinions of authorized jurisconsults were one of the principal sources of the Roman law, holding a place in the Roman jurisprudence somewhat similar to that occupied by precedents and reports of adjudged cases in the common law.

The answers of learned men are the decisions and opinions of those that have been allowed to build up the laws. It was an institution of ancient times that there should be men to interpret the laws on behalf of the state. To them the emperor gave the right to answer, and they were called jurisconsults. The decisions and opinions of all of them held such authority, that, as has been settled, a judge could not lawfully depart from what they answered. *Just. Inst.* Book I. 2. 8.

RESPONSIBLE. In a statute requiring awards of municipal contracts to be made "to the lowest responsible bidder," means more than mere pecuniary ability, and imports that the municipal officers have deliberative and discretionary powers in the selection of a contractor. Commonwealth *v.* Mitchell, 82 *Pa. St.* 343; Findley *v.* Pittsburgh, *Id.* 351.

A promise "to be responsible" for the contract of another is merely a guaranty, and not a suretyship. Bickel *v.* Auner, 9 *Phila.* 499. 11 Jd 219

REST. An account is said to be taken with annual or semiannual rests, when, at the end of the items for each year or half-year, the accountant pauses in his entries, and strikes a balance, upon which interest is allowed and charged; and at the next rest a new balance is ascertained, which likewise draws interest. In chancery, when the equities of a suit for an account are such that the defendant ought to pay interest, the obligation is enforced by the chancellor's directing the account to be taken with annual (or semiannual) rests.

RESTITUTIO. A remedy in the civil law corresponding quite closely to our judicial rescission of contracts was called *restitutio*, or, more fully, *restitutio*

in integrum, the meaning being that the parties were restored to the unbroken position which they formerly held.

The remedy by *restitutio* was granted only in cases where the contract or transaction was apparently valid or obligatory; for, if it could not be enforced, the complainant had no need of relief against it, where it was operating to cause complainant some pecuniary loss or injury, and where the complainant was not himself legally in fault. These conditions existing, *restitutio* might be ordered on either of the following grounds:

Force or fear. One who had acted under the influence of force or reasonable fear, caused by the acts of another party, had an *actio quod metus causa*, for restitution, against the wrong-doer; and also against a third person in possession of what was illegally obtained from complainant; and also against the heir of the wrong-doer.

Fraud. One who had been fraudulently induced to become a party to a transaction which was legal in all respects, saving the fraud, had an *actio de dolo malo* against the guilty person and his *heredes*, so far as they were made richer by the fraud, for the restoration of the thing of which he had been defrauded, and, if that were not possible, for compensation. But against a third party, who was in *bona fide* possession of the thing, he had no action.

Infancy. In certain cases, one injured by a transaction affecting his estate, done with assent of his tutor or curator, while he was under the age of twenty-five years, might maintain an action for *restitutio*.

Absence, which included some mental and civil incapacities, and error or mistake, were grounds on which, in a proper case, *restitutio* might be decreed. Consult *Calv. Lex.*; *Heinecc. Elem. Jur. Civ.* lib. 4, tit. 6, § 1150; *Wharton*.

RESTITUTION. 1. The restoring of any thing unlawfully taken from another.

2. The name of a writ or order issued in favor of a successful plaintiff in error, to restore to him all that he has lost by the judgment which has been reversed on error. Also, of a writ issuable, in English practice, on the conviction of a thief, for the restitution of the stolen goods to their true owner. 4 *Bl. Com.* 362, 363. Restitution, however, may be ordered in a summary manner without writ; and this is believed to be the usual practice throughout the United States.

Restitution of conjugal rights. A suit for restitution of conjugal rights is a suit which, by English law, may be brought when either husband or wife lives separately from the other without any sufficient reason to compel the party so living separately to return to the other. 3 *Bl. Com.* 94. It was formerly brought in the ecclesiastical court; but since the divorce act of 1857 it has been brought in the court for divorce and matrimonial causes, now consolidated with the high court of justice. No such proceeding is allowed or known, we believe, throughout the United States.

Restitution of minors. A term of Scotch law for the relief grantable to a minor, on his attaining full age, against a deed executed by him during his minority, which may be hurtful to him. In some cases, a deed so executed is absolutely null and void; and its invalidity may be pleaded in an exception to an action founded upon it. But in other cases it is merely voidable; and, unless an action be brought to rescind it within four years of his attaining full age, called the *quadriennium utile*, the deed cannot be afterwards impeached. *Bell.*

RESTRAIN. Though somewhat less technical than "enjoin," is often used, in equity practice, as equivalent to and interchangeable with that word. Thus an injunction suit is said to be brought to restrain defendant from an act which he threatens; and one who has been enjoined is said to have been restrained.

Some of the significations of the word restrain are: to keep in, hold in, abridge, limit, confine. Each of these definitions clearly imports that the thing shall be permitted to exist only in a modified form, — that it shall not be suppressed, but regulated. Hence, when, by the charter of a city, the common council may "suppress and restrain" nine and ten pin alleys, &c., the common council may, in their discretion, restrain and regulate such places, or they may suppress them. Smith *v.* City of Madison, 7 *Ind.* 86.

A grant of power to restrain and suppress billiard-tables implies a power to license them. City of Burlington *v.* Lawrence, 42 *Iowa*, 681.

Restraining order. An order in the

nature of an injunction. The term is said to be particularly applied in England to an order restraining the bank of England, or some public company, from allowing any dealing with some stock or shares specified in the order. It is granted on motion or petition. *Hunt Eq.* Pt. III. ch. 3, § 2.

Restraining statute. An enactment which diminishes or restricts privileges or rights allowed by the common law. It is said to be particularly used in England of acts of parliament passed to restrain simoniacal practices in presentations to livings, 2 *Steph. Com.* 720; also of acts restraining the powers of corporations in regard to leases, 2 *Bl. Com.* 319.

RESTRAINT. The words "constraint" and "restraint" are so nearly alike in meaning, that to use restraint instead of constraint in a certificate of a wife's acknowledgment does not vitiate. Edmondson *v.* Harris, 2 *Tenn. Ch.* 427.

The terms "restraint" and "detention of princes," as used in policies of marine insurance, have the same meaning, — that of the effect of superior force, operating directly on the vessel. So long as a ship is under restraint, so long she is detained; and whenever she is detained, she is under restraint. Richardson *v.* Maine Ins. Co., 6 *Mass.* 102.

RESTRICTIVE. An indorsement on a bill of exchange or note is called restrictive when it limits the negotiability of the instrument to a particular person or for a particular purpose; as "pay to J S only," or "pay J S for my use." It is distinguishable from a blank indorsement, which consists merely of the signature of the indorser; from a full indorsement, which makes the bill or note payable to a given person or his order; and from a qualified indorsement, which qualifies the liability of the indorser. *Story Bills*, 206.

RESULTING. Has a technical use in the following phrases:

Resulting trust. At the present day, this term seems used somewhat vaguely: sometimes as equivalent to implied, as distinguished from both express and constructive trusts; and sometimes for either implied or constructive trusts, as distinguished from express. Story (*Eq. Jur.* § 1195) seems to approve the first or restricted use, and Bouvier to allow the second or broader one. Certainly, the term is often met where there is no apparent intent to confine it to implied trusts.

Burrill criticises the common use of the phrase, on the ground that the term "resulting," in strictness, imports a going back or reverting of an estate to the party from whom it proceeded (citing 2 *Crabb R. P.* 571, § 1796); and that the term resulting trust ought to be confined to trusts which arise in the nature of an equitable return of an estate to a grantor; as in a case where the legal estate in land is conveyed to A, upon such trusts as the grantor shall thereafter appoint; here, as the trusts intended cannot, prior to appointment, take effect, and as it is clear that A is not intended to hold the land for his own benefit, there arises by necessary implication, until the appointment be made, a trust for the grantor, which is in the nature of a return of the estate to him.

Now, it seems altogether probable, especially when the old definitions of the parallel phrase "resulting use" are noticed, that resulting was originally introduced as conveying the idea of a return.

But these etymological reasons are very delusive, since they tend to restrict the student from following out the changes in language which practical wants and convenience are all the time introducing. "Resulting trust," however it may have come into the law, seems to have been laid hold of and used in the view that it was an apt name for a trust not expressed, but decreed as the equitable result of all the facts attending a transaction, and without particularly considering whether probable intention of parties was one of these. In other words, while little need exists at the present day for any distinct name for a trust involving a return to a grantor, there is much use of a division of trusts into three kinds: express, which are declared in terms; implied, which are impressed on the transaction in view of the probable intent of parties; and constructive, which are impressed from reasons of equity and justice, independent of intent. A familiar example of an implied trust is the case of a person who supplies the pur-

chase-money for buying lands, but directs the deed to be made to a third person as grantee, the intent, however, being that the one who advances the money is the real buyer and owner. Here the deed is intended by all parties to operate in favor of the payer of the money. But if a scrivener employed to draught a will should corruptly insert his own name to take a legacy, instead of that of the legatee named in his instructions, and should, by misreading the will, procure its execution, and after testator's death should claim the legacy, he might probably be decreed in equity to hold the money in trust for the legatee designed, although there would be no pretence to say that either he or testator intended any trust. The trust could not be implied in a strict sense, but might be adjudged as constructive. Yet "implied" and "constructive" are often used as interchangeable. We think it is convenient, and accords with very general usage, to employ "resulting trust" for either class of trusts which, not being declared in words, result from the character and circumstances of the transaction, when one does not care to indicate whether intent is one of the circumstances relied upon or not. If intent is the ground of raising a trust, it is well called an implied trust; and if intent is excluded, the trust is, in strictness, constructive.

It should be borne in mind that the importance of these distinctions has been much diminished of late years in New York and many other states, by statutes restricting all non-expressed trusts.

Resulting use. Whenever the use limited by a deed expires or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a resulting use. As if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of the first-born son in tail: here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and if she dies without issue, the whole results back to him in fee. *Jacob.*

A resulting use arises where the legal seisin is transferred, and no use is expressly declared, nor any consideration nor evidence of intent exists, to direct the use. The use remains in the original grantor, for it cannot be supposed that the estate was intended to be given away; the statute immediately transfers the legal estate to such resulting use. But if an intent of the parties that the use should not result is plainly manifested, it will remain in the persons to whom the legal estate is limited. And the doctrine of resulting uses extends only to those cases where an estate in fee-simple passes: it is not applicable where an estate-tail, an estate for life, or an estate for years is granted; for a consideration or declaration of the use prevents its resulting, and a tenure is a consideration, in consequence of the rent or service, which it includes. A use, therefore, cannot result on the conveyance of a particular estate; *i.e.*, an estate less than fee-simple. And when any particular uses are declared, which do not exhaust the whole estate, so much of the use as the owner of the lands does not dispose of remains in him. Neither resulting uses nor uses by implication can ever arise to any person other than the original owner of the estate. And, where a use is expressly limited to the owner of the estate, he will not be allowed to take any resulting or implied use inconsistent with the use limited to him. *Wharton.*

RETAILER. The gratuitous distribution of ardent spirits at a public gaming-table does not constitute the proprietor a retailer of spirituous liquors. United States *v.* Mickle, 1 *Cranch C. Ct.* 268.

RETAINER. 1. The act of employing or engaging an advocate, barrister, attorney, counsel, solicitor, or proctor, to appear and prosecute or defend.

The word is also used for the notice served by an attorney, &c., on the opposite party or attorney, that he has been retained; in which use it is by elision for notice of retainer: and for the fee paid to a lawyer upon his undertaking a cause; in which use it is by elision for retaining fee.

2. The right which an executor, who is a creditor of his testator, has to retain so much of the testator's assets as will pay his own debt is called the right of retainer; and the term would not be inapplicable in other cases of a depositary or trustee of funds who should claim to withhold a portion to reimburse his expenditures. Retention is also applied to this right.

3. A servant, not menial or familiar, — that is, not continually dwelling in the house of his master, but only wearing his livery, and attending sometimes upon special occasions, — is, in old English usage, called a retainer. *Cowel.*

RETENTION. In the law of Scotland, is the right of withholding a debt or retain-

ing property until a debt due to the person claiming the right of retention shall be paid. *Bell.* See RETAINER.

RETIRE. In its application to bills of exchange, is an ambiguous word. In its ordinary sense, it is used of an indorser who takes up the bill by handing the amount to a transferee, and thereupon holds the instrument with all his remedies intact. But it is sometimes used of an acceptor who pays a bill at maturity, and thereby extinguishes all remedies upon it. *Byles.*

RETORNA BREVIUM. The return of writs. In English practice, the certificate by a sheriff or other officer, indorsed upon the back of each writ, of what he has done in execution thereof, and delivered to the court upon a certain day of each term.

RETORNO HABENDO. For having a return. The name of a writ in the action of replevin, issued to compel a return of the property in question to the party to whom it is adjudged to belong; the writ of execution in replevin.

RETRAXIT. He withdraws. This word, used as a substantive, is the name of the act by which, in old English practice, a plaintiff might withdraw his suit, — *retraxit* being the emphatic word used in entering the withdrawal of record. It was a voluntary renunciation of the suit, by which the plaintiff lost his right of action, and was barred from ever commencing another action for the same cause. The proceeding is obsolete in England.

A *retraxit* is an open and voluntary renunciation in court of a suit by the plaintiff, by which he for ever loses his action. A *retraxit* is very similar to a *nolle prosequi*; the difference between them being that a *retraxit* is a bar to any future action for the same cause, whereas a *nolle prosequi* is not, unless made after judgment. (2 *Arch. Pract.* 1515; Herber *v.* Sayer, 2 *Dowl. & L.* 65, note *b.*) *Brown.*

RETROACTIVE; RETROSPECTIVE. Laws which look backwards, which assume or purport to operate upon past events or transactions, are called retrospective, or sometimes retroactive.

One class of these laws, known as *ex post facto* laws, generally understood to be laws assuming to impose a punishment on a person for his past acts, are expressly prohibited by the federal constitution; and laws which operate retrospectively on vested rights may be pronounced void for exceeding the legislative power. Outside of these classes, retrospective laws are not necessarily void. But they are deemed objectionable; and it is a well-settled rule of the courts, in the construction of statutes, that a retrospective operation will not be imputed to a statute, unless the language clearly requires.

Article 23 of the New Hampshire bill of rights declares that retrospective laws are injurious, oppressive, and unjust, and ought not to be made. Within the intent and meaning of this article, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past, must be deemed retrospective. Society, &c. *v.* Wheeler, 2 *Gall.* 105, 139.

Retrospective laws, as distinguished from *ex post facto laws*, are not in conflict with the United States constitution or with the state constitution. State *v.* Squires, 26 *Iowa*, 340.

A statute is not objectionable, as retrospective, because it purports to operate on prior contingent or qualified rights, but only where it operates to devest vested rights. Clarke *v.* McCreary, 20 *Miss.* 347.

Not all retroactive legislation is unconstitutional. Retroactive legislation is competent to affect remedies, but not to affect rights. Hinton *v.* Hinton, *Phill. L.* 410.

RETURN. 1. In the practice of courts, to return a writ or process is for the sheriff or other officer to bring it back or send it back to the court, with a certificate of what he has done under it; and "a return" or "the return" is the certificate usually indorsed on a writ or process of what has been done.

Writs are directed to certain persons, — to sheriffs, for instance, — commanding them to perform certain acts, and, after a certain time, to return the same into the court again, together with a certificate or memorandum, certifying or stating what they have done, in pursuance of such command. This memorandum or certificate is written on the back of the writ, and is now commonly called the return to it; so that, when a writ is directed to a sheriff, commanding him to perform certain acts, and the sheriff in due time returns the writ, together with such a memorandum as above described indorsed thereon, this memorandum is called the sheriff's return. *Brown.*

Return-day. The day named in a writ or process, within which the officer is required to bring it back, with an indorsement of what he has done under it. A process is said to be returnable on a

given day; meaning that it ought to be, or is directed to be, returned on that day.

Return irreplevisable. A writ allowed by the statute of Westminster 2, ch. 2, to a defendant who had had judgment upon verdict or demurrer in an action of replevin, or after the plaintiff had, on a writ of second deliverance, become a second time nonsuit in such action. By this writ, the goods were returned to the defendant, and the plaintiff was restrained from suing out a fresh replevin. Previously to this statute, an unsuccessful plaintiff might bring actions of replevin *in infinitum*, in reference to the same matter. 3 *Bl. Com.* 150.

2. In England, the election of a member of parliament is called the return of a member; and a man elected to the house of commons is said to be returned, — in allusion to the report or certificate of the officers conducting the election that he is the candidate elected. Other official reports are there called returns; as the returns of the census.

Return-book. The book containing the list of members returned to the house of commons. *May Parl. Pract.*

Returning officer. The officer to whom a writ is directed, requiring him to proceed to the election of a member or members to serve in parliament. He is generally the sheriff in the case of a county, and the mayor in the case of a borough. (2 *Steph. Com.* 370, 378; *May Parl. Pract.* ch. 1.) *Mozley & W.*

REUS. A defendant in a civil suit, as distinguished from the plaintiff. See ACTOR. Also, a person judicially accused of crime; the defendant in a criminal prosecution.

REVE. Another form of the word reeve, *q. v.*

REVELAND. Such land as, having reverted to the king after the death of his thane, who had it for life, was not afterwards granted out to any other person by the king, but remained in charge on the account of the reve or bailiff of the manor, who, it seems, usually kept the profit of it himself, till it was discovered and presented to the king. (*Domesday; Spelm. Feuds.*) *Brown.*

REVENUE. Pecuniary means, considered as being received from day to day; income. The word is especially applied to the current income of the state or nation, properly applicable to expenses of taxation.

Revenue law. The ordinances of municipal corporations, laying taxes, are not within the meaning of a statute allowing causes involving revenue laws of a state, pending in the supreme court of the United States, to be advanced upon the docket. Davenport City *v.* Dows, 15 *Wall.* 390.

The revenue of the state is the produce of taxes, excise, customs, and duties, which it collects and receives into the treasury for public use. It is the income which it receives to enable it to perform its proper functions; and laws relating to the revenue are laws enacted in reference to such income, — giving rules as to the mode of its collection, and as to the conduct of the officials employed. All taxes which are imposed by the state, whether direct or indirect, are, when collected, the revenue of the state. They are its income. As they are the revenue of the state, all laws regulating such taxes and giving rules for their collection are laws relating to the revenue. The duty paid for the carriage of letters by the agency of government is, at times, a most important branch of the public revenue; and laws relating to the same are revenue laws as much as laws imposing taxes upon the importation of foreign goods into the country. Warner *v.* Fowler, 4 *Blatchf.* 311.

The act of congress of March 2, 1833, giving to the United States courts jurisdiction of all cases arising under the United States revenue laws, does not embrace cases arising under the internal revenue laws. Stevens *v.* Mack, 5 *Blatchf.* 514.

Revenue laws are not necessarily laws for raising revenue, within the constitutional rule that a bill for raising revenue must originate in the house of representatives. United States *v.* James, 13 *Blatchf.* 207.

The act of congress of July 18, 1866, authorizing proceedings *in rem* for a violation of the revenue laws, means laws relating to the income of the government arising from duties, taxes, and the like, and does not extend to a law the general purpose of which is unconnected with revenue, — such as the laws regulating the carriage of passengers in steamboats, merely because they contain requirements such as imposing license fees, penalties, and the like, which may incidentally produce money payable into the United States treasury. The Nashville, 4 *Biss.* 188.

Any law which provides for the assessment and collection of a tax to defray the expenses of the government is a revenue law. Such legislation is commonly referred to under the general term "revenue measures;" and those measures include all the laws by which the government provides means for meeting its expenditures. Any definition of a government revenue must include all the money raised by any form of taxation. Peyton *v.* Bliss, 1 *Woolw.* 170.

That the term revenue laws, when used broadly and generally, includes internal revenue, as well as customs laws, see United States *v.* Dustin, 15 *Int. Rev. Rec.* 30.

The internal revenue laws are embraced within the general expression, the revenue

laws of the United States. United States *v.* Wright, 3 *Pittsb.* 192.

REVERSE. To set aside; to annul; to vacate. Reversal: applied to an order, judgment, or decree, signifies the formal decision of an appellate court, pronouncing it erroneous, and therefore annulling it.

REVERSION. In its original meaning, is the coming back or returning of a subject of property (usually lands) to one who formerly granted an estate in it which has terminated. In another aspect, it is the residue of the fee remaining in the grantor of a particular estate.

When the general owner of lands grants or devises any estate less than the fee, he or his heirs will be entitled to enjoy the property again on the close of the particular estate. This right — which, if one regards the land, is a coming back of the subject to the former owner; or, if one regards the title, is what was always left in the owner while the grant or devise was operative — is the reversion. Various definitions have been given, some presenting one aspect, others the other.

The residue of the estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. 2 *Bl. Com.* 175

Where an estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived, the ulterior interest is called the reversion. 1 *Steph. Com.* 290.

When a person has an interest in lands, and grants a portion of that interest, or, in other terms, a less estate than he has in himself, the possession of those lands shall, on the determination of the granted interest or estate, return or revert to the grantor. This interest is what is called the grantor's reversion, or, more properly, his right of reverter, which, however, is deemed an actual estate in the land. *Watk. Conv.* 16.

Reversion hath two significations: the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended. *Jacob.*

That portion left of an estate after a grant of a particular portion of it, short of the whole estate, has been made by the owner to another person. *Wharton.*

The idea of a reversion is founded on the principle that, where a person has not parted with his whole estate or interest in a piece of land, all that which he has not given away remains in him; and the possession of the land reverts or returns to him, upon the determination of the preceding estate. Thus, if a person who is seised in fee of lands conveys them to A for life, he still retains the fee-simple of the lands, because he has not parted with it; but, as that fee-simple can only return or fall into possession upon the determination or ending of the preceding estate (*i.e.* of A's estate for life), it is only a fee-simple estate in reversion. So that, perhaps, a reversion may be shortly defined as "the residue of an estate left in the grantor." *Brown.*

A return of an estate to the original or general owner, after a limited or less estate carved out of it has determined. See 4 *Kent Com.* 354.

The residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. 1 *N. Y. Rev. Stat.* 723, § 12.

A reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate; while a remainder is an estate limited to take effect and be enjoyed after another estate is determined. Todd *v.* Jackson, 26 *N. J. L.* 525.

The expression reversion and remainder, in a grant of land for a public highway, leaves nothing in the grantor he can afterward convey; his reversionary right vests in his grantee. Vaughn *v.* Stuzaker, 16 *Ind.* 338.

In Scotch law, a reversion is a right of redeeming landed property which has been either mortgaged or adjudicated to secure the payment of a debt. In the former case, the reversion is called conventional; in the latter case, it is called legal; and the period of seven years allowed for redemption is called the legal. *Bell; Paterson.*

Reversionary interest. The right, title, or interest which a person has in or to the reversion of lands or other property. A right to the future enjoyment of property at present in the possession or occupation of another is also frequently so called.

Reversioner. Strictly, a person entitled to an estate in reversion; but the word is used generally to signify any person entitled to any future estate in real or personal property, as in speaking of dealings with expectant heirs, reversioners, &c.

REVIEW, *v.* To examine a second time; to reconsider or revise; to consider for the purpose of correction. Review, *n.*: a second consideration; an examination to correct; revision.

In a very prominent use of these words, they signify any and all the modes by which a judicial act may be

revised, — appeal, writ of error, rehearing, re-examination by a master, &c.

In another sense, review is one head of the jurisdiction of courts of equity; and a bill known as a bill of review may be filed to reverse a decree which, after it has been duly enrolled, a party may find good grounds for having reversed, either from error apparent on the face of it, or from new facts discovered since the decree was made, or at least since publication passed in the cause, and which consequently could not be used when the decree was made.

Under the highway laws of some of the states, there is, at the outset of a petition to establish a road, an appointment of a jury of view, who view the proposed line of a highway asked for, and report upon its desirability; and, if their report is not satisfactory, a jury of review is appointed, who investigate the question again, and are called reviewers.

A court known as the court of review was established by 1 & 2 Wm. IV. ch. 56, for the adjudicating upon such matters in bankruptcy as before were within the jurisdiction of the lord chancellor. It formed a constituent and most important part of the court of chancery, and exercised a general jurisdiction in bankruptcy, the same as had theretofore been exercised by the lord chancellor; and all such matters to be heard and determined in the court of review were to be subject to an appeal to the lord chancellor on matters of law and equity, or on the refusal or admission of evidence. This court has long ceased to exist, and been superseded by an appeal to the lords justices in chancery, or (in matters of unusual legal importance) to the lord chancellor and lords justices together. *Brown.*

Reviewing taxation. The re-taxing or re-examining an attorney's bill of costs by the master. The courts sometimes order the masters to review their taxation, when, on being applied to for that purpose, it appears that items have been allowed or disallowed on some erroneous principle, or under some mistaken impression. *Arch. Pract.*

REVISE. To correct upon a second examination, as to revise the statutes, to revise a judgment.

Revise, somewhat more strongly than review, imports amending, correcting, rearranging. Both terms import a second examination for the purpose of amending, but revise is more appropriate where amendment is actually made.

Revised statutes. For the distinction between the force of revised statutes and of "code," see CODE.

Revising barristers. Barristers appointed every year to revise the register of parliamentary electors in each district. They hold open courts for the purpose. (2 *Steph. Com.* 355.) From their decision there is an appeal, — formerly, to the court of common pleas, now, to the common pleas division of the high court of justice. (3 *Steph. Com.* 334.) *Mozley & W.*

REVIVE. To renew; to make operative again. Reviving: spoken of a suit, implies that it has abated, and means taking steps — such as bringing in a new party — to make it again a living suit. Spoken of a judgment, it implies that it has become dormant or extinct, and means instituting some proceeding or obtaining some order to make it operative anew.

Revival; reviver; revivor: the act or step of renewing that which has abated or become dormant. As to bill of revivor, see BILL.

Revivor was a proceeding to revive a suit or action which became abated by the death of one of the parties, the marriage of a female party, or some other cause. In chancery, this was formerly done by bill of revivor, in which the whole of the original bill was set forth, together with the new matter which had arisen; but now, may be done by order of revivor, obtainable on motion or petition of course.

At law, a writ of revivor lay to revive a judgment which could not be enforced directly by writ of execution, in consequence of lapse of time or change of parties. *Mozley & W.*

REVIVE. A statute, providing that causes of action founded on contract are "revived" by an admission or new promise, does not imply that the new promise must be made after the debt is barred. Lindsey *v.* Lyman, 37 *Iowa*, 206.

In a will which gave property to testator's sons, and directed that, if either should die without issue, his share should go to the "reviving" son, "reviving" was construed to mean "surviving." Pond *v.* Bergh, 10 *Paige*, 140.

REVOCATION. See REVOKE.

Revocatur. It is revoked. This term, applied to a judgment, denotes that the judgment is annulled for an error in fact, as distinguished from a reversal for an error in law.

REVOKE. To annul, cancel, or recall one's own act; to reverse what one formerly did. Revocable: that which may be annulled or recalled by

its author. Revocation: the cancellation or extinguishment of an instrument or act by him who made or did it.

Some instruments are in their nature revocable, others are not so. Deeds are not in general revocable, unless a power of reservation is expressly reserved, which, in settlements, trusts, &c., is often done. Thus, when it is provided in a marriage settlement or other instrument, that an appointment may be made "with or without power of revocation," it is implied that the party making the appointment may, if he think fit, reserve the power of annulling what he has done. A power granted or reserved in a deed or other instrument to revoke an appointment already made, and to make a fresh one, is called a power of revocation and new appointment.

In powers of attorney it is quite usual to reserve a right of revocation, or expressly to constitute the agent attorney irrevocable. And any power to an attorney to appoint sub-agents is usually coupled with a power to revoke such appointments. Yet, upon general principles, and independent of the wording of the power, an appointment of an agent is usually revocable, saving the rights of the agent as to matters past, unless it is coupled with an interest, or given upon a consideration.

Wills are deemed revocable in their nature, though it has been found necessary in many jurisdictions to specify what acts shall be and what shall not be efficient to revoke a will. The following are often allowed as revocations: marriage of testator; the execution of another will or codicil; some writing of revocation executed as a will; the burning, tearing, or other destruction of the original will by the testator, or by some other person in his presence and by his direction; some other disposal of the property by the testator during his lifetime.

Revocation is the calling back of a thing granted; or a destroying or making void of some deed that had existence, until the act of revocation made it void. A revocation may be either general, of all acts and things done before, or special, to revoke a particular thing; and where any deed or thing is revoked, it is as if it never had been. *Jacob.*

Revocation of probate, is where probate of a will, having been granted, is afterwards recalled by the court of probate, on proof of a subsequent will, or other sufficient cause.

REVOLT. An offence on shipboard, which consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or to take possession of the vessel against his will, by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. United States *v.* Kelly, 11 *Wheat.* 417; 4 *Wash.* 528.

Revolt may consist not only in an attempt to usurp the command from the master, or to transfer it to another, or to deprive him of it for any purpose by violence, but in resisting him in the free and lawful exercise of his authority. United States *v.* Peterson, 1 *Woodb. & M.* 305.

The endeavor to make a revolt necessarily implies an attempt to stir up others of the crew to a resistance or rebellion against the lawful authority of the master and officers. It is in effect an endeavor to make a mutiny among the crew of the ship. A mere act of disobedience to a lawful command of the officers is not of itself an endeavor to make a revolt. The offence is not committed unless the party attempts to excite others to aid his unlawful purposes. United States *v.* Smith, 1 *Mas.* 147.

A mere conspiracy of a ship's crew to make a revolt will not amount to an endeavor to make it, unless such conspiracy be followed up by some overt act tending to that end. United States *v.* Kelly, 4 *Wash.* 528.

A combination by the crew of a vessel to prevent her going to sea, pursuant to the order of the master, is an attempt to commit a revolt. United States *v.* Nye, 2 *Curt.* 225.

REX. The king.

As the king is the source of authority, honor, and power, in a monarchical government, the word often stands for the sovereign power. In particular,

during a king's reign, criminal prosecutions, and decisions in criminal cases, and suits on behalf of the crown, are entitled Rex *v.* The Defendant.

Rex non potest peccare. The king can do no wrong. This is an ancient and fundamental principle of the English constitution. It means, first, that whatever is amiss in the condition of public affairs is not to be imputed to the king, so as to render him answerable therefor to his subjects; second, that the prerogative of the crown is created for the benefit of the people, and cannot, therefore, be exerted to their prejudice. See 1 *Bl. Com.* 246; *Broom Max.* To suppose that it supports a doctrine that the king can do what he pleases, in the sense that all royal acts are operative and valid, is a misconception.

Rex nunquam moritur. The king never dies. The English law ascribes to the king, in his political capacity, an absolute immortality; and on the death of a reigning prince in his natural capacity, the dignity, prérogatives, and political capacities of the supreme magistrate, without any interval or interregnum, vest at once, by act of law, in his successor, who is, *eo instante*, king, to all intents and purposes.

Rege inconsulto. The king not being consulted. The name of a writ in old English practice, which issued from the king to the judges, bidding them not to proceed in a cause which might prejudice the king, without the king being advised. *Tomlins.*

RICHARD ROE. The name generally given to the fictitious defendant in an action of ejectment brought according to the strict forms of the old practice.

RIDER. In parliamentary and legislative practice, an additional clause prepared and annexed to the bill while in course of passage; one which is or is supposed to be draughted on a small separate paper, and fastened to the main bill, so as to ride upon it, as it were, through the legislature; is called a rider. And the term is not inappropriate to similar additions, made in other kinds of draughting.

RIEN. Nothing. It appears in one or two law-French phrases.

Rien en arrere. Nothing in arrear, that is, due. A plea appropriate for traversing a declaration for rent.

Rien passa per le fait. Nothing passed by the deed. A plea appropriate for denying the validity or effect of a conveyance.

Rien per descent. Nothing inherited.

RIGHT. A right, in jurisprudence, is an enforceable claim or title to any subject-matter whatever; either to possess and enjoy tangible things, or to do any act, pursue any course, enjoy any means of happiness, be exempt from any cause of annoyance, &c. It is often used to denote one's claim to something out of his possession. On the other hand, it is not always restricted to a claim to property, or in the nature of property; but is often used to designate power, prerogative, and privilege, especially when applied to corporations. People *v.* Dikeman, 7 *How. Pr.* 124, 130.

Right accrued. For meaning of the phrase in an enactment declaring that certain new legislation shall not affect rights already accrued under the former law, see Brotherton *v.* Brotherton, 41 *Iowa*, 112; Link *v.* Benner, 3 *Cai.* 325.

Right in action. The Anglicized form, now often used, of the old phrase, chose in action. It contemplates a division of all rights into two classes, according as they are actually possessed and enjoyed, or depend upon a judicial remedy to enforce them (if resisted) before enjoyment. It includes the large class of rights over things in the possession of others, which must be asserted by action, in cases where the qualified or temporary possessor refuses to deliver them up.

Right of action. Such a right as will sustain a suit; the right, upon a given state of facts, to recover by any judicial remedy, particularly by action at law.

Right to begin, or to open and close. The privilege, upon a jury trial, of making the opening address, and introducing the first evidence, is associated with that of putting in rebutting evidence, and making the closing argument; and these, taken together, are often an important advantage, known

in the parlance of the court-rooms as the right to begin, or the right to open and close. This right is generally conceded to the party who holds the affirmative or has the burden of proof; and it is not uncommon for a defendant who relies chiefly on matter of affirmative defence to declare at the outset of the trial that he admits the entire case alleged by the plaintiff, in order that, by thus assuming the burden of proof, he may secure the right to open and close.

Brown gives a more minute and exact statement of the rule as it obtains in the English courts, as follows:

The general rule deciding the matter is the following: Supposing no evidence were adduced on either side, the party against whom the verdict would be given has the right to begin. This rule, however, does not mean that the defendant (if it should so happen) must open the pleadings; for in every case, without one exception, these are opened by the plaintiff or his counsel. The rule has therefore reference to the evidence merely. There are the three following principal applications of the rule:

The plaintiff begins, if the onus of proving any one of the issues rests on him.

The defendant begins, if the onus of proving not a single issue rests on the plaintiff, but all of them on the defendant.

Where the burden of proving all the issues lies on the defendant, and the burden of proving the amount of the damage only lies on the plaintiff, then the plaintiff begins (Carter *v.* Jones, 6 *Car. & P.* 64), although formerly the rule in that case was that the defendant should begin. (Cooper *v.* Wakley, 3 *Id.* 474).

Right to redeem. The terms, right of redemption, and right to redeem, are familiarly used to describe the estate of the debtor, when under mortgage, to be sold at auction, in contradistinction to an absolute estate, to be set off by appraisement. It would be more consonant to the legal character of this interest to call it the debtor's estate subject to mortgage. Such is the character of the interest, as fixed by law. Should the purchaser never exercise the right to redeem; should the mortgage debt be paid by the debtor, or by another, in performance of the condition; still the purchaser, under the officer's deed, would hold the estate. It is, therefore, something more than a mere right to redeem: it is the estate, subject to the mortgage. White *v.* Whitney, 3 *Metc.* (*Mass.*) 81. See REDEEM.

Right of search. The right of a public vessel to examine and inspect the papers of a neutral vessel; of a suspected slaver, &c.; on the high seas, and the goods on board.

Right of way. A right enjoyed by a person or corporation of passing over land the fee of which is vested in another party. This right may be subject to such conditions and restrictions as are specified in the grant, or sanctioned by the custom, by virtue of which the right exists. Rights of way are susceptible of almost infinite variety: they may be limited both as to the intervals at which they may be used (as a way to church), and as to the actual extent of the user authorized (as a footway, horseway, or carriage-way). See *Washb. Easem.; Gale Easem.*

A grant of right of way, made to a railroad company, should be understood as embracing the land only used as a way for the road, and not such additional ground as may be used for the convenience of the railroad, but not a part of its way. Chicago, B. & Q. R. R. Co. *v.* Paddock, 75 *Ill.* 616.

A man cannot have a right of way over his own land. A way, in law, is the right of going over another man's ground. Green *v.* Morris & Essex R. R. Co., 24 *N. J. L.* 486.

RIOT. According to Hawkins, whose definition has been often quoted and approved, is a tumultuous disturbance of the peace by three or more persons assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act be of itself lawful or unlawful. *Pl. C.* ch. 65, § 1.

Jacob defines riot as the forcible doing of an unlawful thing by three or more persons assembled for the purpose; but several later authorities say explicitly that the thing done need not be unlawful: going about to do a thing lawful in itself, by numbers of persons in combination, with force and use of arms, and breach of the peace, may be a riot.

Upon the distinction between riot, rout, and unlawful assembly, see UNLAWFUL ASSEMBLY.

To constitute a riot, it is not essential that an unlawful intention should have existed at the time of meeting. If persons who have met for a lawful purpose afterwards form and execute an unlawful intention, this may be sufficient; and the unlawful act is evidence of the unlawful intent. United States *v.* McFarland, 1 *Cranch C. Ct.* 140.

The term riot does not involve the idea of an unlawful act done. If three or more persons do any act in a violent and tumultuous manner, there is a riot. Kiphart *v.* State, 42 *Ind.* 273.

Persons assembled with intent to whip a man, or to have it done, are guilty of a riot, though some other person inflicts the blow. Newby *v.* Territory, 1 *Oreg.* 163.

To support an indictment for a riot, the defendants must be active in doing or countenancing an unlawful act, or stand ready to support such act. Pennsylvania *v.* Craig, *Add.* 190.

A riot is the execution, with force, of an enterprise of a private nature, by three or more persons, with an understanding mutually to assist each other. State *v.* Cole, 2 *McCord*, 117.

Where three or more armed persons assemble to assist one another in a private enterprise, and execute the same in a threatening manner, it is a riot, whether the act done is lawful or not. State *v.* Brooks, 1 *Hill* (*S. C.*), 361.

It is not necessary to say that the accused assembled for the unlawful purpose, but there must be an unlawful assembly; and then whatever act will make a trespass, will constitute a riot. Per Holt, C. J., 11 *Mod.* 116.

Riot act. A noted English statute (the 1 Geo. I. st. 2, ch. 5) for the suppression of riots. It provides that whenever twelve or more persons unlawfully assemble, to the disturbance of the peace, if any justice of the peace, sheriff, under-sheriff, or mayor of a town, shall command them by proclamation to disperse, then if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony. The form of the proclamation is in these words: "Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart for their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumultuous and riotous assemblies. God save the Queen." The act also contains a clause indemnifying the officers and their assistants in case any of the mob should be unfortunately killed in the endeavor to disperse them.

What is known as reading the riot act, is making proclamation to a mob, according to the above-recited directions, which seems to be deemed necessary in cases of public disturbances, before ordering the military to fire.

RIPARIAN. Relating to the banks of rivers. Riparian proprietors are those who own lands on the banks of rivers. Riparian rights are such rights as arise out of or are connected with or peculiar to banks of rivers; such as ownership of the soil under water, right to maintain landing-places, ownership of accretions, &c. States whose jurisdictions are bounded by rivers are sometimes called riparian states.

For want of another word of like meaning, and etymologically more appropriate, riparian is used of banks of other waters than running streams; thus the term riparian rights is sometimes found where the general connection shows that rights incident to the banks of a lake, or to the sea-shore, are meant.

RISK. A danger, hazard, or peril. Also, in insurance law, the obligation of an insurer; the probability that he may be called upon to respond for a loss; and sometimes the anticipated cause of loss against which he engages to indemnify the insured.

RIVER. In general, if in a body of water there is a steady and uniform current, it will be a river. But this definition must be taken in connection with the particular body of water to which it relates, and is not applicable to a lake in which there may be a uniform current from its head to its outlet. State *v.* Gilmanton, 14 *N. H.* 467.

ROAD. Is not limited to a public way. As used in a statute prescribing the law of the road for travellers, it should be deemed to include private ways; for the object of the law is to prescribe a rule of conduct, for the convenience and safety of those who may have occasion to travel, and actually travel, with carriages, on any place adapted to and fitted for travel, and actually used for that purpose. Commonwealth *v.* Gammons, 23 *Pick.* 201.

Road and way are not synonymous terms. "Road" is used to mean the land over

which a way, public or private, is established. Chollar-Potosi Mining Co. *v.* Kennedy, 3 *Nev.* 361.

A statute requiring cattle-guards at road-crossings is applicable to a street-crossing in a village or city. Highways, including streets, which, strictly, are paved ways, are roads. Brace *v.* N. Y. Central R. R. Co., 27 *N. Y.* 269.

But it does not apply to mere farm-crossings. Brooks *v.* N. Y. & Erie R. R. Co., 13 *Barb.* 594.

A passage or way made by a man over his own farm, although it crosses a railroad, is not a "road," in the legal sense of the term. Green *v.* Morris & Essex R. R. Co., 24 *N. J. L.* 486.

An exception of public roads in a statute does not include a turnpike. A turnpike is not a public road. Buncombe Turnp. Co. *v.* Baxter, 10 *Ired. L.* 222. Consult PUBLIC.

ROAD; ROADSTEAD. A road or roadstead, in the commercial sense, and by the maritime definition, is "a place where ships may ride at anchor at some distance from the shore." In the very name, therefore, of Hampton Roads, is implied a place of anchorage at a distance from the shore. The J. W. Everman, 2 *Hugh.* 17.

ROBBERY. The felonious taking of property from the person of another, accomplished by means of force or fear.

The taking must be felonious, criminal; any taking by lawful right, as by a sheriff in the execution of process, is excluded. It must be from the person; stealing from a house in the owner's absence is not robbery, in the technical sense, though the thief may use violence in breaking into the house, or in tearing away the things stolen. And it must be accomplished by use of force or fear; either will do, but one is essential. Even snatching a thing from the owner's hand has been held not robbery; and, on account of the mildness of the law in this respect, larceny from the person is, by statute in New York, made subject of increased punishment.

Robbery is the felonious taking of goods from the person of another, or in his presence, by violence, or by putting him in fear, and against his will. United States *v.* Jones, 3 *Wash.* 209; Seymour *v.* State, 15 *Ind.* 288; McDaniel *v.* State, 16 *Miss.* 401; State *v.* Sowls, *Phill. L.* 151; *Trial of the Officers and Crew of the Savannah*, 370.

A taking from the person is an essential element in robbery. Stegar *v.* State, 39 *Ga.* 583.

To constitute robbery, the taking must be from the person, or in the immediate presence of the person robbed. Crews *v.* State, 3 *Coldw.* 350.

A charge of robbery may be established by proof that the property was obtained through intimidation from threats, whether of immediate or future violence. State *v.* Howerton, 58 *Mo.* 581.

Inasmuch as in the Missouri statute defining robbery in the first degree the words "by violence to his person, or by putting him in fear," &c., are disjunctive, fear is not an essential ingredient where force is used. Hence where one snatched a watch, tearing the chain from the owner's buttonhole, and struck him in order to escape, this was held robbery. State *v.* Broderick, 59 *Mo.* 318.

Merely snatching a pocket-book from the owner's hand is not robbery, but simple larceny, if there is neither violence nor putting in fear. Bonsall *v.* State, 35 *Ind.* 460.

The property must be taken by violence to the person; and this requires more than mere assault and battery. The violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance. The gist of the crime of robbery is force or terror. (2 *East P. C.* 707.) If there is nothing to inspire fear, there must be superior force, and the property must be relinquished upon compulsion. People *v.* Hall, 6 *Park. Cr.* 642.

To define the term robbery, as employed in the act of congress, punishing robbery on the high seas, resort must be had to the common law. Wherever a statute of the United States uses a technical term, which is known, and its meaning clearly ascertained by the common law or civil law, from one or other of which it is obviously borrowed, it is proper to refer for its meaning to the source from which it is taken. United States *v.* Jones, 3 *Wash.* 209.

ROGUE, is said to be used in former English law in a sense somewhat different from the vernacular one, now very common, of an ingenious swindler; viz., in that of an idle, sturdy beggar, who wanders from place to place without license, after he hath been by justices bestowed, or offered to be bestowed, on some certain place of abode. *Cowel.*

Rogues and vagabonds. A general term, used in English police administration, for various persons who may be summarily dealt with by the magistracy, much as disorderly persons, tramps, or vagrants may be, under various laws of the states. The term is said to include, by force of various statutes, persons of the following sorts: persons convicted for a second time as idle and disorderly persons; fortune-tellers and

persons using subtle arts to deceive any of her majesty's subjects; persons wandering abroad, and lodging in barns or out-houses, or in any deserted or unoccupied building, or in the open air, or in any tent, cart, or wagon, not having any visible means of subsistence, and not giving a good account of themselves; persons guilty of indecent exhibitions, or indecently exposing the person; persons exposing wounds to obtain or gather alms; persons collecting alms under fraudulent pretences; persons running away, leaving their families chargeable to the parish; women who desert their bastard children, leaving them so chargeable; persons playing or betting in a public highway, or in any place to which the public are permitted to have access, with any instrument of gaming, &c.; persons having picklocks, &c., with intent feloniously to break into a house; persons armed with a gun or other offensive weapon, or any instrument, with intent to commit a felonious act; persons found on any premises for an unlawful purpose; reputed thieves, frequenting public places with intent to commit felony; persons resisting their apprehension as idle and disorderly persons.

ROLL. In modern usage, a schedule or sheet of parchment on which legal proceedings are entered. Thus, in English practice, the roll of parchment on which the issue is entered is termed the issue roll. In New York, the file comprising the pleadings and other papers necessary to support the judgment, when collected and attached in their order, is called the judgment roll. In England, the rolls of a manor, wherein the names, rents, and services of the tenants are copied and enrolled, are termed the courtrolls. There are also various other rolls which have become notable, such as those which contain the records of the court of chancery, which are kept in the rolls office, and those which contain the registers of the proceedings of old parliaments, and which are called rolls of parliament. Old books say there is kept in the Inner and Middle Temple a roll called the calves'-head roll, wherein every bencher was taxed annually 2*s.*, every barrister, 1*s.* 6*d.*, and every gentleman under the bar, 1*s.*, to the cook and other officers of the house, in consideration of a calves'-head dinner provided for them in Easter term, &c. The word is considered to have originated from an old practice of rolling up a legal document in the form of a pipe; now no longer usual. It appears that court proceedings were noted, as they occurred, on a long strip of parchment, which was rolled up as the entries proceeded, and at last filed away, when it was full, in the archives of the court.

Rolls court. The office appointed for the custody of the rolls and records of the chancery, the master whereof is called the master of the rolls. The phrase is especially used to signify the court-room in which the master of the rolls sits as judge. (*Cowel; Hayn. Eq.* lect. 2.) Under the judicature acts, the master of the rolls was continued as a judge of the high court, and an *ex officio* member of the court of appeal, and his non-judicial duties are not affected by those acts; but provisions are made looking towards the abolition of his office when it shall become vacant. *Mozley & W.*

Roman Catholic charities act. The Stat. 23 & 24 Vict. ch. 134, passed in 1860. By this act, estates given upon trust, for the exclusive use of Roman Catholics, but invalidated by reason of certain of the trusts being superstitious or otherwise illegal, may be apportioned in chancery, or by the charity commissioners; and a declaration may be made, that a fixed proportion thereof shall be subject to such trusts as are lawful, the residue to such trusts for the benefit of persons professing the Roman Catholic religion, as the court or commissioners may, under the circumstances, consider to be most just. 3 *Steph. Com.* 76, note.

ROOM. As used in a policy of insurance, was held, upon evidence of usage, to mean the whole of one loft or story appropriated to a particular department, although divided by partitions with doors. Daniels *v.* Hudson River Fire Ins. Co., 12 *Cush.* 416.

ROPE-WALK. In a deed, will pass such land of the grantor as is exclusively devoted to the use of the rope-walk. Davis *v.* Handy, 37 *N. H.* 65.

ROUT. According to Hawkins's definition, which has been often quoted and approved, is a disturbance of the peace by persons assembling together with an intent to do a thing which, if executed, will make them rioters, and actually making a motion towards the execution thereof. As to the distinction between riot, rout, and unlawful assembly, see UNLAWFUL ASSEMBLY.

ROUTE. A state statute provided that, "when an injury is done to a building or other property by fires communicated by a

locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury," and have an insurable interest in such property along its route. It was held that the phrase "along its route" meant in proximity to the rails upon which the locomotive engines run; and that the corporation was liable for such an injury to buildings or other property near its road-bed, whether they were outside of the lines of its road-way or lawfully within those lines. Grand Trunk R. R. Co. *v.* Richardson, 91 *U. S.* 454.

Power, given in a railroad charter to change the route or location of a road, does not include power to change the termini. Attorney-Gen. *v.* West. Wis. R. Co., 36 *Wis.* 466.

RULE, *n.* 1. A formal regulation agreed upon or prescribed by authority; as rules of a society or company, general rules of court.

2. A decision, direction, mandate, or order of court; generally, one less solemn and formal than a decree or judgment, and made incidentally in the progress of a cause, or upon some interlocutory proceeding. In this use, a rule is usually a direction made in writing, and a ruling is a decision orally made, as in excluding evidence. Thus a judge grants a rule to show cause, or makes erroneous rulings on a trial; a party serves a rule to plead, or excepts to a ruling against him. Connected with this sense is — Rule, *v.*: to decide an incidental point; to give a direction, or determine an interlocutory question or motion, either orally or in writing; to command or require by order of court, as to rule in favor of evidence offered, or to rule a sheriff to return a writ.

It is worthy of notice that there is a tendency in the English books to use "rule" for a direction or decision made upon occasion arising in a particular cause, and "orders," for the general regulations to govern practice which are prescribed by the courts to apply in any causes; while in the United States (at least in the states following the code system), the tendency is to use "rules" in the sense of general regulations, and "order," for any decision of an application or motion in a particular cause.

Rule absolute. When a rule to show cause has been defaulted, or has been heard, and the cause shown is adjudged insufficient, the next step is called making the rule absolute; that is to say, making a final, peremptory, unconditional order that the party do as the rule to show cause called upon him to do. A rule absolute is opposed to a rule *nisi*, or to show cause, and means one not open to argument.

Rule of course. There are some rules which the courts authorize their officers to grant as a matter of course, without formal application being made to a judge in open court, and these are technically termed rules of course; also, in former English practice, side-bar rules, because formerly they were moved for by the attorneys at the side bar in court. Examples are the rule to plead, which was an order or command of the court requiring a defendant to plead within a specified number of days; also, the rules to reply, to rejoin, and many others, the granting of which depended upon settled rules of practice rather than upon the discretion of the courts; so that no argument or exercise of judicial decision is needed.

Rule of court. A submission to arbitration, or the award of an arbitrator, is said to be made a rule of court, when a court of law or equity makes a rule that such submission or award shall be conclusive. This is authorized by statute as one way of rendering arbitrament of controversies effective and obligatory.

The rules for regulating the practice of the courts, and which the judges are empowered to frame, and to put in force, as occasion may require, are termed rules of court. Courts have an inherent power to frame and establish rules; and power of this kind has been explicitly conferred by statute in several instances.

Rule nisi, or rule to show cause. In English practice, an ordinary mode of invoking the authority of the court to compel a party to do some act or take some step in the cause is by taking out a rule which is expressed that he do the act or take the step desired, unless (*nisi*), on a certain day, he shall show cause why he should not be so required. When the day comes, if he makes default, or shows insufficient cause, the rule is made absolute; *i.e.*, he is ordered peremptorily. If he shows cause which is sufficient, the rule is said to be discharged.

Rule in Shelley's case. A famous

decision argued upon a rule of real-property law, which is briefly thus expressed: That wherever a man, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation, and not of purchase; in other words, it is to be understood as expressing the quantity of estate which the party is to take, and not as conferring any distinct estate on his heirs, or the heirs of his body, as the case may be. This doctrine is frequently mentioned in decisions on conveyancing and real-property law, as the rule in Shelley's case.

Rules of the king's bench prison. Were certain limits without the walls, within which all prisoners in custody in civil actions were allowed to live, upon giving security by bond with two sufficient sureties to the marshal not to escape, and paying him a certain percentage on the amount of the debts for which they were detained. *Bagley Pract.* The term corresponds to "jail liberties" or "prison bounds," used with reference to confinement of prisoners in the United States.

RUN. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. Thus, if A grants B a lease of the land for twenty-one years, and the lease, amongst other covenants, contains a covenant on the part of A for the quiet enjoyment of the land by B during the term, and also a covenant on the part of B to cultivate the land demised in a particular manner, and B afterwards assigns the land to C for the residue of the term, in this case the liability to perform the covenant made by B and the right to take advantage of the covenant made by A would devolve upon C as assignee of the land to which the covenants related; and in so doing they would be said to run with the land. (Noke *v.* Awder, *Cro. Eliz.* 436; Cockson *v.* Cock, *Cro. Jac.* 125; Spencer's Case, 1 *Smith Lead. Cas.* 22.) A covenant is said to run with the reversion when either the liability to perform or the right to take advantage of it passes to the assignee of that reversion. Thus, if A grants a lease of land to B for twenty-one years, and the lease, among other covenants, contains a covenant on the part of A for the quiet enjoyment of the land by B during the term, and also a covenant on the part of B to cultivate the land demised in a particular manner, and A afterwards assigns the reversion in the land to C, in this case the liability to perform the covenant made by A, and the right to take advantage of the covenant made by B would devolve upon C as assignee of the reversion in the land to which the covenants related; and in so doing they would be said to run with the reversion. (See Noke *v.* Awder, *Cro. Eliz.* 436; Campbell *v.* Lewis, 3 *B. & Ald.* 392; Middlemore *v.* Goodale, *Cro. Car.* 503; Cockson *v.* Cock, *Cro. Jac.* 125; Spencer's Case, 1 *Smith Lead. Cas.* 22.) *Brown.*

"Running," in a policy of insurance of a barge, "while running on the Hudson river," includes all that ordinarily would be comprehended by the business of a vessel in active employment, both while lying temporarily at a wharf, and while actually in motion. It describes the condition of a vessel commercially engaged, and may be deemed used by way of contrasting the difference between vessels laid up and out of use, and those making trips upon the water. St. Nicholas Ins. Co. *v.* Merchants', &c. Ins. Co., 18 *N. Y. Supreme Ct.* 108.

Running days. In a charter-party allowing "twelve running days for each one hundred register tons" for loading the ship, means consecutive days. Crowell *v.* Barreda, 16 *Gray*, 471.

Running accounts. The exception, in the Indiana statute of limitations, of running accounts between merchant and merchant was not intended to be limited to actions of account or for not accounting, or to cases in which such actions will lie. The language used differs materially from the English act, and requires a different construction. The term "running accounts," in the statute, means mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled. Whenever the accounts and demands which occasion the suit are of that description, and are between merchant and merchant, the case, whether an action of account or for not accounting, would lie or not, must be considered as not limited by the statute. After accounts between merchant and merchant are closed, and a balance stated, they are no longer "running accounts," and the statute runs as to such balance. Brackenridge *v.* Baltzell, 1 *Ind.* 333.

RURAL DEAN. An officer of the established church in England, generally a parochial clergyman, appointed to act under the bishop or archdeacon; his proper duty being to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine candidates for confirmation. *Cowel;* 1 *Bl. Com.* 383; 2 *Steph. Com.* 676, 677.

Rural deanery. The circuit of the jurisdiction of a rural dean. Every diocese is divided into archdeaconries, each archdeaconry into rural deaneries, and each rural deanery into parishes. *Cowel;* 1 *Bl. Com.* 112; 1 *Steph. Com.* 116, 117.

S.

SABBATH, or SABBATH-DAY. Is sometimes used as a designation of the first day of the week, considered as a religious holiday; a day consecrated to rest, and such religious observances as individuals voluntarily associate with it.

Sabbath-breaking. One designation of the offence of violating laws to protect the repose and quiet of the sabbath, otherwise known as Sunday laws.

The term sabbath-breaking, in Md. code, art. 57, § 11, does not apply to selling beer on Sunday. State *v.* Popp, 45 *Md.* 432.

Sabbath night. As used in a prohibitory liquor law, includes as well the time between midnight on Saturday and daylight on Sunday, as the time between after dark on Sunday and midnight on Sunday night. Kroer *v.* People, 78 *Ill.* 294.

SAC. Authority to exercise jurisdiction in the court of a lordship or manor, and to impose mulcts and forfeitures upon transgressors. *Termes de la Ley; Cowel.*

SACRILEGE. The offence of desecrating any thing that is consecrated to religious uses; despoiling churches, and the like. The alienation of lands which were given to religious purposes to laymen, or to profane and common purposes, was also, in old English law, termed sacrilege. *Cowel.*

SAFE-CONDUCT. An assurance of safety, granted by the sovereign power, or commander-in-chief in time of war, guaranteeing that a person may pass through a portion of the territory without molestation.

SAFEGUARD. A security given by the king to a stranger, who fears the violence of some of his subjects, for seeking his right by course of law. *Cowel.*

SAFE-PLEDGE. A surety given for a man's appearance at a day assigned. *Cowel.*

SAID. Is constantly used in legal papers, with the same force as, and apparently as a contraction of, aforesaid.

The word said, in an entry, is a relative term, and refers to its next antecedent. Ellis *v.* Horine, 1 *A. K. Marsh.* 417.

The rule that the word "said" will be referred to the next antecedent only when the plain meaning requires it, applies to the construction of an indictment. Wilkinson *v.* State, 10 *Ind.* 372.

SAILING. When a vessel quits her moorings, in complete readiness for sea, and it is the actual and real intention of the master to proceed on the voyage, and she is afterwards stopped by head-winds, and comes to anchor, still intending to proceed as soon as wind and weather will permit, this is a sailing on the voyage. Bowen *v.* Hope Ins. Co., 20 *Pick.* 275.

Sailing instructions. Written or printed directions, delivered by the commanding officer of a convoy to the masters of ships under his care, by which they are enabled to understand and answer his signals, and also to know the place of rendezvous in case of dispersion. Without these sailing instructions, no vessel can have the full protection and benefit of a convoy. *Marsh. Ins.* (4th ed.) 291.

SALARY. A recompense or consideration made to a person for his pains and industry in another man's business. *Jacob.*

Salarium, at first, signified the rents or profits of a *sala*, hall or house; but afterwards it was taken for any wages, stipend, or annual allowance. *Cowel.*

Salarium is so called, as Pliny saith, in the thirty-first book of his Natural History, ch. 7, because it is as necessary for a man as salt; and makes his labor relish, as salt doth his meat. *Termes de la Ley.*

The ancients derive the word from *sal*, salt (*Plin.* H. n. xxxi. 41); the most necessary thing to snpport human life being thus mentioned as a representative for all others. *Salarium*, therefore, composed all the provisions with which the Roman officers were supplied, as well as their pay in money. In the time of the republic, the name *salarium* does not appear to have been used: it was Augustus, who, in order to place the governors of provinces and other military officers in a greater state of dependence, gave salaries to them, or certain sums of money, to which afterwards various supplies in land were added. *Smith Dict. Antiq.*

Salary signifies the periodical compensation to men in official and some other situations. The word is derived from *salarium*, which is from the word *sal*, salt, that being an article in which the Roman soldiers were paid. Cowdin *v.* Huff, 10 *Ind.* 83.

SALE. We regard Kent's definition as very satisfactory, — a contract for the

transfer of property from one person to another, for a valuable consideration. 2 *Kent Com.* 625.

Another definition, in which several of the books concur, is: the transferring the property of goods from one to another, upon valuable consideration. But it is not clear that the word sale is limited to chattels, or that the common use of the term as to real property, stocks, evidences of debt, &c., is not correct, in jurisprudence. It is common, in reports and statutes, to say that a mortgage of lands or a trust-deed contains a power of sale; that a pledgee of stocks must give notice of sale; and the like. There seems abundant warrant in usage for employing the word as equally applicable to all kinds of property. If this is its proper use, it cannot, without hesitation, be defined as the transfer of property; for with respect to lands a conveyance, and with respect to many rights in action an assignment, must follow the sale, to give effect to it, and vest title in the buyer; and in respect to chattels there is some ground to say that delivery is a distinct transaction from sale, and that delivery, or some ascertaining and setting apart of the thing sold, deemed equivalent to delivery, must follow sale of chattels, to operate a transfer of the title. Then, again, the expressions conditional sale and executory sale import that there are sales which do not at once transfer the ownership.

Yet many respected authorities consider "sale" as including the actual and complete transfer of the title. Thus, according to Blackstone, sale is a transmutation of property from one man to another, &c. 2 *Bl. Com.* 446. Blackburn seems to define sale as an agreement transferring to the purchaser the general property in the goods, and with it the rights and liabilities attached to property in them; so that the purchaser has a specific interest in the goods themselves, and becomes liable to the general risk; otherwise called an executed sale. And he considers an agreement between the owner of goods and another, that the property in them shall (for a consideration) be transferred at a future time, to be, not a sale, but a contract concerning a sale, otherwise called an executory agreement. *Blackb. Sales*, 3. Story (W. W.) says, that a sale is a transfer of the absolute title to property for a certain agreed price. It is a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a price. *Story, Sales*, 1. Hilliard defines a sale of goods and chattels as a transfer of property from one man to another, in consideration of some price or recompense in value, or in consideration of a money price; accompanied, when practicable, with delivery to the purchaser. *Hill. Sales*, 1. Long defines it as a transferring of property from one person to another, in consideration of a sum of money to be paid by the vendee to the vendor. *Long, Sales*, 1. Benjamin defines sale of personal property to be a transfer of the absolute or general property in a thing, for a price in money; and says that (independent of the statute of frauds) if the property in the goods passes immediately to the buyer, the contract is "a bargain and sale of goods;" but if the property in the goods is to remain for the time being in the seller, and only to pass to the buyer at a future time, it is an executory agreement. *Benj. Sales*, 1, 5. He moreover draws a strong distinction between an actual sale and an executory agreement; consisting in this, that in a bargain and sale the thing becomes the property of the buyer the moment the contract is concluded, whereas, in the executory agreement, the goods remain the property of the vendor till the contract is executed: in the one case, A sells to B, in the other, he only promises to sell. *Id.* 235.

But it is to be noticed that all these definitions are given in the course of treating of sales of personal property, only. Moreover, there is a distinction between the effects of a sale, and the meaning of the term sale. Doubtless, it may be true that, by English law (and excluding Roman and civil law), sale may operate to transfer the title, where that is the purpose of the parties, without, in the case of chattels, further formalities, yet that element may not be a part of the definition.

Upon the whole, the view that seems to reconcile all the uses of the word most satisfactorily is to regard sale as a contract or agreement for transferring ownership, not as the very transfer. It may then be properly applied to lands and rights in action, as it daily is, as well as to chattels. The sale of lands and the sale of evidences of debt, &c., are alike contracts to transfer the ownership, which is done by conveyance, or by assignment, indorsement, &c. The sale of goods is still the contract to transfer the ownership, which is done by delivery, when that is necessary, or by compliance with any formalities that may be prescribed by positive law, or by any sufficient substitute for delivery, or may result *ipso facto* from the contract. This view also supports the very usual and convenient expressions, "conditional sale," "executed sale," and "executory sale;" for it allows sales to be divided into those which are executed, either by operation of law upon the contract or by after acts, and those which are executory, or yet to be carried into effect by conveyance, assignment, or delivery.

It is true that the definition given by Kent includes exchange or barter; and, if this ought to be excluded, some such phrase as "a price in money" ought to be substituted for "a valuable consideration." Very generally, "sale" is used in distinction from exchange (see 2 *Bl. Com.* 446); but, in a broad view of the meaning, to include exchange does not seem improper.

The definition by Kent may possibly be objected to, in that "property" is ambiguous, — may mean either ownership or things owned (see PROPERTY); and that, if it is read in the sense of things owned, the definition will include bailments, leasehold interests, and possibly agreements to manufacture and furnish a thing not yet existing. To exclude these more explicitly, the definition may perhaps be restated, thus: a contract in which one agrees, for a valuable consideration (or for a price in money, if exchange is to be excluded), to transfer the general ownership in any existing things to another.

For numerous decisions as to what facts or transactions are deemed to constitute a sale, see *U. S. Dig.* tit. Sale.

The contract of sale, in English law, is a real contract, or in the nature of a real contract, some tender or transfer being required by the common law to make the sale complete; in Roman law, on the other hand, the contract of sale is a consensual contract, being complete as soon as the price is agreed on. The two systems of law agree in this, that, so soon as the sale of a specific article or ascertained bulk is complete, all risk attaching to it forthwith rests upon the purchasers, the Roman law expressing this rule in the maxim, *periculum rei venditæ statim ad emptorem pertinet*, and the English law, in the maxim, *res perit domino*; and that, in the case of a non-specific article or unascertained bulk, the risk does not so vest until the article or bulk becomes specific, or is ascertained. But there is this very striking difference between the English and the Roman law in the contract of sale; namely, that in English law the property in a specific article (or in a non-specific article or unascertained bulk, so soon as the same becomes specific or ascertained) passes to and vests in the purchaser even before delivery, the vendor retaining only a lien on it while in his possession for the price; whereas, in Roman law, such property does not pass into the purchaser until after payment of the price, and also delivery of the article. *Brown.*

Sale is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. Per Wayne, J., 8 *How.* 495, 544.

The ordinary definition of a sale, as a transmutation of property from one person to another for a price, does not fully express the essential elements which enter into and make up the contract. A more complete enumeration of these would be, competent parties to enter into a contract, an agreement to sell, and the mutual assent of the parties to the subject-matter of the sale, and to the price to be paid therefor. Gardner *v.* Lane, 12 *Allen*, 39.

An oral contract to manufacture and deliver goods (such goods to be thereafter manufactured at the contractor's mills) is not within the provisions of the statute of frauds; for it is not a "contract for the sale of goods," but an agreement to manufacture goods. Parsons *v.* Loucks, 48 *N. Y.* 17.

For definitions of the word sale, see Schermerhorn *v.* Talman, 14 *N. Y.* 93; Rahilly *v.* Wilson, 3 *Dill.* 420.

"Sale," also "sold," and "bargain and sell," &c., import a completed transfer of the title. Barrow *v.* Window, 71 *Ill.* 214.

A declaration which alleges a promise to pay for a certain lot of land sold by the plaintiff to the defendant, imports that the land was conveyed. Otherwise, the count itself would be bad. A sale, or alienation,

— for the meaning of these words is the same, except that the latter usually relates to lands and tenements, and the former to personal goods, — is the transferring of the property in a thing from one to another; and, in the case of lands, a conveyance is the instrument by which such transfer, alienation, or sale is made. There can be no perfect sale or alienation of lands without a conveyance; and, therefore, an averment that lands were sold is equivalent to an averment that they were sold by deed of conveyance; and a denial of the conveyance is, in effect, a denial of the averment of sale. Stanton *v.* Henderson, 1 *Ind.* 69.

An agreement to pay a broker upon sale of the estate, applies when there has been made a written contract for the purchase of the estate, binding both vendor and purchaser. Rice *v.* Mayo, 107 *Mass.* 550.

A statute allowing an officer a fee upon making actual sales, means upon making a sale followed by collection of the price, and does not include a sale to a purchaser who fails to complete, rendering a resale necessary. Miles *v.* Miller, 5 *Neb.* 269.

The term sale embraces every transfer for a valuable consideration, whether paid in cash or other property. Madison Ave., &c. Church *v.* Baptist Church, 46 *N. Y.* 131; 11 *Abb. Pr.* N. S. 132.

A sale is a transfer of the absolute or general property in a thing for a price in money. The price must be certain; and there can be no executed sale so as to pass the property, when the price is to be fixed by agreement between the parties afterwards, and the parties do not afterwards agree. Wittkowsky *v.* Wasson, 71 *N. C.* 451.

The word sale, in a penal statute, was held not to include exchange, in Gunter *v.* Leckey, 30 *Ala.* 591.

Sale, in a statute prohibiting manufacture and sale of intoxicating liquors, includes a barter or exchange. In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value; without reference to the particular mode in which the consideration is paid. It was in this sense that the legislature used the word, and not in the technical and narrow sense of a transfer for a price paid, or agreed to be paid, in money. The legal distinction between a sale and an exchange is a purely artificial one; the rules of law are the same as applied to both transactions. Practically, there is no difference between them. So held, where the question was not as to the infliction of a penalty, but as to validity of the contract. Howard *v.* Harris, 8 *Allen*, 297.

An act to regulate the sale of liquor may include prohibitions of giving it, as a necessary incident to prevent evasions. Williams *v.* State, 48 *Ind.* 306.

A prohibition upon the trustees of a corporation to sell real estate does not necessarily preclude the power to mortgage. Krider *v.* Western College, 31 *Iowa*, 547.

Sale by auction. The essential element of sale by auction is the endeavor to obtain an enhanced price, as the result of a competition among bidders. One who sells goods, adhering to a fixed retail price, is not amenable to the charge of selling at auction without license, by reason that he employs outcries and loud offers, like those usual among auctioneers. Crandall *v.* State, 28 *Ohio St.* 479. Consult AUCTION.

Sale by auction act. The Stat. 30 & 31 Vict. ch. 48, passed in 1867. By this act, the particulars or conditions of any intended sale by auction must state whether the sale is without reserve, or subject to a reserved price, and whether a right to bid is reserved. And if the sale is stated to be without reserve, or to that effect, the seller is forbidden to employ any person to bid at the sale, and the auctioneer knowingly to take a bid from any such person. The act also abolishes the practice of opening biddings in sales under the authority of the court of chancery, except in cases of fraud or mismanagement of the sale. *Wms. R. P.; Hunt Eq.*

Sale of reversions act. The Stat. 31 Vict. ch. 4, passed in 1867. It was a strict rule in courts of equity to set aside sales of reversions, unless the purchaser (on whom the burden of proof rested) could show that a full consideration was paid, or that the bargain was fully made known to and approved by the person to whose estate the expectant heir hoped to succeed; the policy of equity being to prevent designing men from taking advantage of persons whose interests are future, and are therefore apt to be underestimated or improvidently disposed of, and to discourage transactions by which the expectations of the ancestor or person in possession might be disappointed. The object of the above act is to prevent any sale of a reversion from being set aside merely on the ground of undervalue. The burden of proof is, however, still on the purchaser, to show that he has acted fairly, and has not made any improper use of personal influence. *Smith Man. Eq.; Chute Eq.*

Sale on approval. This phrase, and the corresponding phrases "sale on trial" and "sale or return," is a sale dependent upon a condition precedent; viz., on condition that the purchaser is satisfied with or approves the goods. The approval need not be express: it may be implied from keeping the goods beyond a reasonable time. *Benj. Sales*, 483.

Sale with all faults. On what is called a sale with all faults, unless the seller fraudulently and inconsistently represents the article sold to be faultless, or contrives to conceal any fault from the purchaser, the latter must take the article for better or worse. Baglehole *v.* Walters, 3 *Camp.* 154.

SALIC, or SALIQUE LAW. This expression, as generally used, means a

rule prevailing in some monarchies by which women are excluded from inheriting the crown. But the ancient code of laws from which the phrase is taken is said to have embraced many other matters, and to have prescribed a preference for males in matters of inheritance, not with respect to sovereignty merely, but with respect to landed property, or, at least, to family homesteads, generally.

SALOON. Does not necessarily import a place to sell liquors. It may mean a place for the sale of general refreshments. Kitson *v.* Mayor, &c. of Ann Arbor, 26 *Mich.* 325.

Saloon has not acquired the legal signification of a house kept for retailing intoxicating liquor. It may mean a room for the reception of company, for exhibition of works of art, &c. State *v.* Mansker, 36 *Tex.* 364.

Saloon-keeper. This expression has a definite meaning; namely, a retailer of cigars, liquors, &c. Cahill *v.* Campbell, 105 *Mass.* 40.

SALT LICK; SALT SPRING. In the act of April 19, 1816, the terms "salt lick" and "salt spring" seem to be mentioned as words of substantially the same meaning. State of Indiana *v.* Miller, 3 *McLean*, 151, 154.

Salus populi est suprema lex. The welfare of the public is the highest law. The rights or interests of an individual must yield to the public welfare. The principle expressed by this maxim is one fundamental to the organization and existence of society, and its application is almost unlimited. Instances are found in the exercise of the powers of eminent domain; of taxation; of taking or destroying private property in war, to aid the common defence; of punishing crime, to the extent of depriving the offender against the public of his property, his liberty, or his life itself. The public welfare is the first and highest consideration, on account of which individuals are restricted in the exercise of rights and privileges which otherwise they might naturally enjoy without restriction. So, private agreements are controlled by considerations of public policy; and acts of individuals, though not objectionable in themselves, are invalid, if they fail to conform to the requirements imposed by the law.

This is a maxim of universal application. Even liberty of conscience, when it would interfere with the paramount rights of the public, ought to be restrained. Donahoe *v.* Richards, 38 *Me.* 379, 412.

In a case of necessity, to prevent the spreading of a fire, magistrates or individuals may destroy private property, without subjecting themselves to an action for damages. This is only one of the many cases where the maxim applies, — *salus populi suprema lex.* Mayor, &c. of New York *v.* Lord, 17 *Wend.* 285. And see American Print Works *v.* Lawrence, 23 *N. J. L.* 590.

SALVAGE. An allowance for saving a ship or goods from the danger of the seas, from fire, pirates, or enemies. Weeks *v.* The Catharina Maria, 2 *Pet. Adm.* 424; Lea *v.* The Alexander, 2 *Paine*, 466. Salvage service: such service as is rendered in the rescue or relief of property at sea in imminent peril of loss or deterioration. The H. B. Foster, *Abb. Adm.* 222, 228. Salvor: one who, without any particular relation to a vessel in distress, proffers useful service, giving it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the vessel. The Wave *v.* Hyer, 2 *Paine*, 131; Evans *v.* The Charles, 1 *Newb. Adm.* 329.

Salvage is the compensation allowed to persons by whose assistance a ship or boat, or the cargo of a ship, or the lives of the persons belonging to her, are saved from danger or loss in cases of shipwreck, derelict, capture, and the like. And a salvor is he who renders such assistance. The services entitling to salvage must be such as demanded skill, enterprise, and risk on the part of the salvors; for mere ordinary services, as towage, no salvage is claimable. (The Princess Alice, 3 *W. Rob.* 138.) Moreover, these services must have been attended with success (The Edward Hawkins, 31 *L. J. Adm.* 46); for salvage, it is said, is a reward for services actually conferred, not for services attempted to be conferred (The Chetah, 5 *Moo. P. C. C.* N. S. 621). The chief statutory provisions at present in force with reference to wreck and salvage are contained in Part VIII. of the merchant shipping act of 1854, Stat. 17 & 18 Vict. ch. 104. *Brown.*

The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property from such peril, constitute a case of salvage; and where the compensation is not fixed by such a contract as a court of admiralty will enforce, it will be determined by the liberal rules which form a part of the mari-

time law. Adams *v.* The Island City, 1 *Cliff.* 210. See also Baker *v.* Hoag, 7 *N. Y.* 555.

One who claims salvage must show, among other things, that he rendered a voluntary service; not one owed to the property in peril or to its owner. Thus, where vessels come into collision, no claim for salvage arises because one renders service afterwards to the other. Upon a collision, either vessel is bound to render any aid which may be in her power, necessary to the safety of the other; and this is so, even though she is not in fault for the collision. The Clarita and The Clara, 23 *Wall.* I.

One of two vessels which have been in collision may, if an innocent party, be entitled to salvage for services rendered to the other party (and this is so, notwithstanding 25 & 26 Vict. ch. 63, § 33); but not so, if both ships were equally in fault. Cargo *ex* Capella, *L. R.* 1 *A. & E.* 356.

Risk of life is not a necessary element of salvage service. Where such risk is incurred in saving property, it will place the salvors in a higher position of merit, and entitle them to a more liberal compensation for the service than would otherwise be accorded. But the controlling inquiry in salvage cases is, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors? Spencer *v.* The Charles Avery, I *Bond*, 117; Blagg *v.* The E. M. Bicknell, *Id.* 270.

Salvors, strictly so called, are persons who undertake to save property in peril, at the request of the owners, or of the master. They are under the direction and control of the master, and may be discharged by him, with or without good cause, upon being compensated for what they have already done, or without such immediate compensation, if their lien is not endangered. Finders, on the other hand, take possession primarily, by right of discovery, and cannot be dispossessed afterwards by the owner or master. Again, finders being in possession, under no contract, may abandon their enterprise if their exertions have not diminished the chances of ultimate safety; and this without waiting for any such danger to life, or apparent hopelessness of the enterprise, as would alone justify salvors in abandonment. But both salvors and finders are under an implied obligation to use good faith, honesty, skill, and energy in what they do undertake. The Ida L. Howard, 1 *Low.* 23.

SAME. The word same does not always mean identical, not different or other. It frequently means of the kind or species, not the specific thing. Crapo *v.* Brown, 40 *Iowa*, 487, 493.

A contract between the owner of a farm and his tenants for stocking and carrying on the same, which stipulated that the proceeds and stock should be divided at the end of the year in a certain proportion, the tenants then to "draw out the same property they put in," and return to the landlord the "stock, tools, hay, and grain belonging to" him, keeping the tools in repair, was construed to mean, not the identical articles received, but stock, &c., of the same kind, description, and value, in Brockway *v.* Rowley, 66 *Ill.* 99.

Same offence. In the fifth amendment to the United States constitution, means one which is the same both in law and in fact. If an act is made an offence by the articles of war, and also by the criminal law, the perpetrator is not exempt from indictment because he has been tried and acquitted by court-martial. The act is the same, but the offence is not. United States *v.* Cashiel, 1 *Hugh.* 552.

SANCTUARY. A place privileged for the safeguard of offenders' lives, being founded upon the law of mercy, and the great reverence and devotion which the prince bears to the place whereunto he grants such privilege. Sanctuaries were first granted by King Lucius to our churches and their precincts; and, among all other nations, our ancient kings of England seem to have attributed most to those sanctuaries, permitting them to shelter such as had committed both felonies and treasons, so as within forty days they acknowledged their fault, and submitted themselves to banishment; during which space, if any layman expelled them, he was excommunicated; and if a clerk, he was made irregular. The immunity of these privileged places was very much abridged by the Stat. 27 Hen. VIII. ch. 19; 32 Hen. VIII. ch. 12. And now, by the Stat. 21 Jac. I. ch. 28, all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished. *Jacob.*

SANE. Of natural and normal mental condition; healthy in mind.

Sane memory: sanity; health of mind; soundness of understanding.

Sanity is the natural and usual condition of the mind. Wood *v.* Sawyer, *Phill. L.* 251.

SATISFY. In technical use, generally means to comply actually and fully with a demand; to extinguish, by payment or performance. Satisfaction: the extinguishment of a demand, particularly of a judgment or lien, by payment, or of a claim by performance.

In equity, the term satisfaction is largely used of extinguishment of a demand by something given, either in whole or in part, as a substitute and equivalent for something else, and not (as in performance) something that may be construed as the identical thing covenanted to be done. And in the phrase "accord and satisfaction" the

word imports a discharge or extinguishment of a debt, by payment and acceptance of something less in value than the sum due.

Under an agreement to deliver certain notes or "make satisfaction," the satisfaction required is legal damages, being the value of the notes, if genuine, to be proved by the plaintiff. Moore *v.* Fleming, 34 *Ala.* 491.

Where sales by the East India Company were made subject to a regulation that any buyer not making good the remainder of his purchase-money on or before the day limited for such payment should forfeit the deposit, and should be rendered incapable of buying again at any future sale, "until he shall have given satisfaction to the court of directors," it was held that the term satisfaction must be construed to mean pecuniary compensation for the non-performance of a buyer's agreement to pay on the appointed day. Eagleton *v.* East India Company, 3 *Bos. & P.* 55.

The phrase "fully satisfied," applied to mental state, implies an exclusion of all doubts, reasonable or other. State *v.* Sears, *Phill. L.* 146.

Satisfaction piece. A brief, formal acknowledgment, in writing, made by a judgment creditor or his attorney, or by a mortgagee, setting forth that the judgment or mortgage has been satisfied; *i.e.*, paid or otherwise extinguished. According to very general practice, this paper authorizes the officer having charge of the record to enter or mark upon the record that the incumbrance is satisfied, which extinguishes it for all purposes.

Satisfied term. A term of years in lands, created for a temporary purpose, which is executed or performed before the period named has expired, so that the object of the term is answered, the use for it is extinguished. It has been for some time the practice of English conveyancers, in draughting provisions in deeds affecting real estate, for the purpose of raising money for temporary objects (as, in marriage settlements, where it is desired to raise portions for younger children, or to apply money for the maintenance and education of children out of real estate intended to be settled), to demise such estate to trustees for two hundred, five hundred, or other fictitious and imaginary term of years, for this purpose; and, subject thereto, the term was to be "in trust to attend the inheritance;" in other words, after the purposes of raising portions, &c., or whatever the object of the term might be, had been fulfilled, the land was to be enjoyed beneficially, as if the term had never been created. But the legal estate in the term of years was in the trustees; and, if it were disposed of by them to a *bona fide* purchaser, for valuable consideration, and without notice of the claim of those who would otherwise be entitled thereto, such purchaser would have the priority, during the remainder of the term of two hundred or five hundred years, over the eldest son intended to be benefited by the settlement. To avoid this result, provision was generally made for the "cesser of the term," when its purposes should be accomplished.

By an act passed in 1845 (Stat. 8 & 9 Vict. ch. 112), known as the satisfied terms act, this cesser of a term the purpose of which has been accomplished is enacted once for all; and terms which shall thenceforth become attendant upon the inheritance, either by express declaration or by construction of law, are to cease and determine. This, in effect, abolishes outstanding terms. See 1 *Steph. Com.* 380–382; *Wms. R. P.* Pt. IV. ch. 1.

SAVINGS BANK. An institution only partially embodying the features of a bank in the full sense of the term, the purpose of which is to promote the prosperity of persons of small means and limited opportunities of investing them, by receiving their savings in even trivial sums, and lending them in larger amounts, whereby interest may be gained, to be divided among the depositors.

SCANDAL. When used in reference to pleading in equity, scandal is defined to be any thing alleged in a bill, answer, or other pleading, in such language as is unbecoming the court to hear, or as is contrary to good manners; or any thing set forth which charges some person with a crime not necessary to be shown in the cause. *Brown.*

Scandalum magnatum. Slander of the nobility. Scandal, or spreading false reports against peers and great officers of the realm, was so called, and was subjected to peculiar punishment by ancient statutes. *Cowel.*

SCHISM. A clause of a statute that, "in case a schism or division shall take place in a society," &c., is exactly equiva-

lent to saying that in case a society shall separate, divide, or become partitioned, without any reference to its external relations. McKinney *v.* Griggs, 5 *Bush*, 401, 415.

SCHOOL. Is a very general term for almost any kind of institution for instruction in art, science, literature, &c. It is very commonly employed, however, as meaning, particularly, institutions of a subordinate or ordinary character, — those which teach elementary learning to young people, in distinction from places for more advanced instruction, which take distinctive names, such as academy, college, high school, seminary, university. Of schools in this sense, ordinary places of instruction for young persons (and speaking of such as are devoted to secular learning, not of Sunday schools), there are two kinds, — those which are maintained by private means, and in which each pupil enters by virtue of a contract with the proprietor or teacher, and common or public schools (*q. v.*), being those which are maintained at the expense of the public, and are open to all children of the locality for which each particular school is established. In a majority of cases in which the word school is used in reports and statutes of the states, it probably refers to these common schools, the schools thus specially known to the law; though this limitation is deduced from the connection, only; it is not in the meaning of the word.

A statute which provides a penalty for the disturbance of "any district school, or any public, private, or select school, while the same is in session," embraces a "singing school," or school for instruction in sacred music. State *v.* Gager, 26 *Conn.* 607.

But it is essential to a school that there should be a teacher and pupils. A meeting of persons assembled for the purpose of singing together, for their common improvement in the art of singing, but without a teacher, is not a school. Hence a complaint under a statute making it a criminal offence to wilfully interrupt or disturb any public, private, or select school while the same is in session, which charged a wilful disturbance of "a school met and assembled for culture and improvement in sacred and church music," but did not allege that the school was in session, was held defective. State *v.* Gager, 28 *Conn.* 232.

Whether a statutory exemption of any school or school-house from taxes extends to private schools, or to a building which is private property and leased for a private school, or is limited to public schools and buildings erected for them, see Chegaray *v.* Mayor, &c. of N. Y., 13 *N. Y.* 220; 3 *Sandf.* 409; 2 *Duer*, 521.

SCIENTER. Knowingly; with knowledge. In the Latin forms of declarations and indictments, *scienter* was the formal and emphatic word used to express knowledge, on the part of a defendant, of certain facts, knowledge of which was an essential part of the wrong or crime charged upon him. Hence it was frequently used, substantively, as the name of that clause of a pleading or indictment which charged such knowledge. Inserting such a clause was called laying the action or the indictment with a *scienter*. Hence the word, retaining these meanings, has also come to signify, most often, the guilty knowledge itself. Thus, in a criminal prosecution for passing counterfeit money, the word *scienter* designates both the knowledge of the character of the money which is necessary to constitute the crime, and the averment of such knowledge in the indictment.

Scientia utrimque par pares contrahentes facit. Equal knowledge on both sides makes contracting parties equal. Thus a person applying for insurance need not mention what the underwriter knows, or what he ought to know.

SCILICET. To wit; that is to say; namely. This word was formerly much used in pleadings and in written instruments generally, introducing some explanatory matter relating to that which immediately precedes. As with other words so used, a clause introduced by *scilicet* cannot enlarge or diminish what it purports to explain; and, if repugnant to the preceding matter, it will be rejected. It is often abbreviated *sc.* and *ss.* *Videlicet* (q. v.) is now more frequently used than *scilicet*, with like meaning and effect.

This is not a direct and separate clause, nor a direct and entire clause, in a conveyance; neither is it a substantive clause of itself, but it is rather to usher in the sentence of another, and to particularize that which was too general before, or distribute that which was too gross, or to explain that which was doubtful and obscure; and it must neither increase nor diminish the premises or *habendum*, for it gives nothing

of itself; but it may make a restriction where the precedent words are not so very express but that they may be restrained. *Hobart*, 171.

SCINTILLA JURIS. A spark of right. The smallest particle of legal right or interest. This term was applied to a legal fiction employed to enable feoffees to uses to serve and support contingent uses when they should come in existence, so that they might be executed by the statute of uses, 27 Hen. VIII. The theories upon which this fiction was sustained, were, that a very small, yet sufficient, portion of the fee-simple of the estate — a mere *scintilla juris* — remained in the feoffee to uses; that such *scintilla juris* was a possibility of future seisin; that it was a capacity to receive future seisin, &c. Upon some such theory, the *scintilla juris* was held sufficient for the purpose desired to be accomplished, — the execution, by the statute of uses, of the contingent uses when they came *in esse*.

By more modern writers the phrase has been somewhat loosely used in the sense of a spark of right sufficient to sustain an action or defence.

Scintilla juris et tituli — a spark of law and title — is a possibility of seisin, which is supposed to exist in the grantee to uses, when all actual seisin is taken from him by the operation of the statute, upon a limitation of springing uses, and the creation of contingent ones. To illustrate this, let us take a springing use: a grant to A and his heirs, to the use of B and his heirs until C perform an act, and then to the use of C and his heirs. Here the statute executes the use in B, which, being coextensive with A's seisin, leaves no actual seisin in A. When, however, C performs the act, B's use ceases, and C's use springs up, and he enjoys the fee-simple; upon which the question arises, out of what seisin is C's use served? It is said to be served out of A's original seisin; for, upon the cesser of B's use, it is contended that the original seisin reverted to A, for the purpose of serving C's use, and is a possibility of seisin or *scintilla juris*.

If there must be a seisin somewhere to serve the future uses when they arise, it must be either in the original grantee or feoffee to uses or the *cestui que use;* but the seisin of the *cestui que use* cannot serve any other uses, because that would be a use upon a use, which the common law repudiates; there only remains, then, the grantee or feoffee, who is capable of the requisite seisin, which cannot be a vested interest, but what is known as a *scintilla juris*. Again, a feoffment to A in fee to the use of B for life, remainder to the use of his first son unborn in tail, with remainder to the use of C in fee,— what seisin remains in A until the birth of a son of B? A has not an actual seisin during the suspense of the contingency, but there is a possibility of seisin reverting to him; for, upon the birth of B's son, a seisin coextensive with the use limited to such son will vest in A, for the purpose of serving it.

This doctrine of *scintilla juris* has been warmly contested. Lord Coke admitted it (Chudleigh's Case, 1 *Co.* 120 *a*); so did Mr. Booth (see his opinion at the end of *Sheppard's Touchstone*), Mr. Sanders (1 *Uses and Trusts*, ch. 2, § 2, 107 *et seq.*), and Mr. Burton (*Comp.* p. 59, 6th ed.); but Lord Bacon (*Uses*, 47), Mr. Fearne (*Cont. Rem.* 300), Lord St. Leonards (1 *Powers*, ch. 1, § 3, and note 10 to *Gilb. Uses*, 296), and Mr. Preston (1 *Estates*, 170, and 1 *Hayes Conv.* 61) opposed it; and Lord St. Leonards contends that the doctrine never received a regular judicial decision. *Wharton.*

SCIRE. To know. A Latin word, which appears in names still used for one or two writs, returns, &c.

Scire facias. That you cause to know. This phrase is applied to a writ, and to all the proceedings thereon, which is founded on some public record, and requires the person against whom it is issued to show cause why the party bringing it should not have advantage of such record. In the Latin form, it commanded the sheriff that he make the party named to know that he be before, &c., to show cause, &c.; the name of the writ being derived, as usual, from its characteristic words. It is frequently used to revive a judgment after a certain time (generally one year) has elapsed, or after the death of one or more parties, or merely to have execution upon the judgment. It is also used as a proceeding upon a recognizance against bail, the recognizance being considered a public record, in the nature of a judgment, and upon other like matters; the characteristic of the remedy being, that it must always be founded upon some matter of public record, which is assumed as conclusive upon the parties, and cannot be questioned in this proceeding. The particular applications of the writ, and the procedure under it, are now regulated by statutes, varying in the different jurisdictions.

Though really in its nature and origin a judicial writ issued in an action, *scire*

facias is, for some purposes at least, considered and treated as an original writ, and the proceedings founded on it as a distinct action. Lord Coke says it is to be "accounted in law in nature of an action," because the defendant may plead to it. *Co. Lit.* 290 *b*. The courts of the United States have held, that, although a *scire facias* is a judicial writ, the purpose of which is to enforce the execution of some matter of record, it is so far original that the defendant may plead to it. Winder *v.* Caldwell, 14 *How.* 434; Bentley *v.* Sevier, *Hempst.* 249; Stearns *v.* Barrett, 1 *Mas.* 153, 167. It has been held to be a writ on which process of attachment may issue, Ensworth *v.* Davenport, 9 *Conn.* 390; but not a "writ or other original process by which a suit is commenced," within the meaning of an act of congress requiring such process to be stamped, Smyth *v.* Ripley, 32 *Conn.* 156; a suit or action within a statute allowing assignees to sue in their own names, Murphy *v.* Cochran, 1 *Hill* (*N. Y.*), 339; within a statute relative to pleading in all actions at law, Smyth *v.* Ripley, 33 *Conn.* 306; and within a statute regulating costs, State *v.* Harlow, 26 *Me.* 74. A distinction is made in most cases, however, between a *scire facias* to carry into effect a judgment already obtained, where the writ is a mere continuation of the action in which such judgment was rendered, and a *scire facias* upon a recognizance or matter of record other than a judgment, which is in the nature of a new action against the sureties or other parties sought to be charged; and this distinction seems to be well founded.

Scire feci. I have caused to know. The form and also the name of the return to a writ of *scire facias*, that the sheriff has caused notice to be given to the party or parties named in the writ.

Scire fieri. To cause to know. The name of a writ formerly used in English practice to enforce a judgment against an executor. The proceeding is frequently termed a *scire fieri* inquiry.

When to a writ of execution issued against an executor or an administrator the sheriff returns *nulla bona*, the plaintiff, if he can prove a *devastavit*, may sue out a *scire fieri* inquiry, which is a writ directed to the sheriff, commanding him that, in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to inquire whether the defendant has wasted the goods of the testator, and, if a *devastavit* be found, that he shall warn the defendant that he be in court upon a day mentioned, to show cause why the plaintiff should not have a *fieri facias de bonis propriis* against him. 2 *Arch. Pr.* 1233. *Brown.*

SCOT. A contribution formerly paid to the use of the sheriff or his bailiffs. *Cowel.*

Scot and lot. Customary contributions laid upon all subjects according to their ability. *Cowel.*

The phrase appears to have been in use in reference to the English law of elections, to designate certain duties which must be paid by those who claim to exercise the elective franchise within certain cities and boroughs before they are entitled to vote. It is said that the practice became uniform to refer to the poor-rate as a register of "scot and lot" voters, so that the term, when employed to define a right of election, meant only the payment by a parishioner of the sum to which he was assessed on the rate. *Brown.*

These old words are not grown obsolete, for whoever in like manner (though not by equal proportion) are assessed to any contribution, are generally said to pay scot and lot. *Tomlins.*

SCRAWL. See SCROLL.

Scribere est agere. To write is to act. Treasonable words, such as words of advice or persuasion to commit the crime, if set down in writing, constitute an overt act of treason. *Brown Max.*

SCRIP. Certificates of shares in a public company, of an interest in corporate profits, &c. A scrip certificate is a certificate entitling the holder to apply for shares in a public company, either absolutely or on the fulfilment of specified conditions. Insurance scrip is a certificate issued from time to time by some insurance companies, showing that the holder will, in course of time, be entitled to a certain share in profits of the company when they shall be realized and declared.

SCRIPT. Generally, any writing.

In English probate practice, it is used of a testamentary document of any kind, whether a will, codicil, draft of a will or codicil, or written instructions for

the same. Thus it is said that, in testamentary causes, the plaintiff and defendant must, within eight days of the entry of an appearance on the part of the defendant, file their affidavits of scripts; meaning, of whatever testamentary papers they rely upon.

SCRIVENER. Seems to have signified, in old times, a class of agents who made it their business to receive money from persons desirous to lend it, find borrowers, advise on the securities offered, and draught the necessary papers; receiving a commission (it might be from each party) for their services. The function was, therefore, much the same as that of notary, abroad, or real-estate agent, in this country. But, at the present day, the duty of draughting the papers is the feature of his employment prominently intended when the word is used. It frequently occurs in the sense of conveyancer, draughtsman, scribe, writer for another. To use draughtsman or scribe, instead, when drawing up a document in form is all that is meant, would tend to accuracy.

Money scriveners were understood to be those who received money to place it out at interest, and who supplied those who wanted to raise money on security; thus rendering themselves useful to and receiving a profit from both parties. *Tomlins.*

When an attorney is the general depositary of money of his clients and other persons who employ him, not simply in his character of attorney, but as a money agent, to invest their money on securities at his discretion, allowing him procuration fees for any sum laid out on bond or mortgage, as well as a fee or charge for preparing the deeds, such a course of dealing is substantially the business of scrivener. 3 *Camp.* 539.

A scrivener is one who draws contracts; one whose business is to place out money at interest, receiving a bonus or commission for his trouble. *Wharton.*

An agent to whom property was intrusted, for the purpose of lending it out to others at an interest payable to his principal, and for a commission or bonus for himself, whereby he sought to gain his livelihood. *Brown.*

SCROLL. In the parlance of conveyancing, means a flourish with the pen, representing a seal, and allowed by the laws of some of the states to operate as a seal. It is usually made by drawing a circle or marking a pair of brackets opposite the signature, and writing within the letters L. S., which stand for *locus sigilli*, the place of the seal. This is also sometimes called a scrawl; but scroll seems preferable.

SCUTAGE. The payment made by tenants in chivalry, in lieu of personal service. *Cowel;* 1 *Bl. Com.* 310; 2 *Id.* 74.

A tax or contribution raised by those that held lands by knight service, towards furnishing the king's army, at one, two, or three marks for every knight's fee. *Wharton.*

Se defendendo. In defending himself. A phrase used in expressing the rule as to homicide committed in self-defence.

SEA. Prior to the series of decisions which have made the term admiralty jurisdiction independent of the ebb and flow of the tide (see ADMIRALTY), the decisions of American courts were to the effect that the word sea includes not only the high seas (*q. v.*), but arms of the sea, waters flowing from it into ports and havens, and as high up a river as the tide ebbs and flows. Waring *v.* Clarke, 5 *How.* 441, 462. In other words, all waters within the ebb and flow of the tide are to be considered the sea. Baker *v.* Hoag, 3 *Barb.* 203; Hubbard *v.* Hubbard, 8 *N. Y.* 196; Gwin's Will, 1 *Tuck.* 44.

We do not understand that the decisions enlarging admiralty jurisdiction to rivers above the ebb and flow of the tide have any effect on the legal meaning of the word sea; that remains limited by the tidal line. But this remark does not apply to "sea" in all its compounds. See SEAMAN and SEAWORTHY.

Sea-birds' protection act. The Stat. 32 & 33 Vict. ch. 17, passed in 1869, by which penalties are imposed upon any person who shall, between the 1st of April and the 1st of August, kill or wound, or attempt to kill or wound, or take, any sea-bird, or shall use any boat, gun, net, or other engine or instrument for the purpose, or shall have in his possession any sea-bird recently killed, wounded, or taken.

Sea-brief, or sea-letter. One of the documents which the law of nations requires every neutral ship to carry, in proof of her nationality.

The accounts of it in various books

differ somewhat. It appears to be in the nature of a certificate granted, directly or indirectly, by the sovereign power of a neutral state, giving permission to the master of the ship to proceed on the voyage proposed, and declaring that the vessel, while on such voyage, is under the protection of the neutral state. But the form of this document has been variously given in different commercial treaties, which may explain the different descriptions given by the text-writers. Arnould says that it usually specifies the name and residence of the master; the name, property, description, tonnage, and destination of the ship; the nature and quantity of the cargo, and place from whence it comes, &c.; but that no general rule can be given on these points. 1 *Arn. Ins.* 623. He considers the term as generally used to be synonymous with "passport;" and that the distinction drawn between them is confined to New York state. But Marshall describes the sea-letter as a distinct document from the passport, relating more particularly to the cargo, as passport does to the vessel. See 1 *Arn. Ins.* 623; 1 *Marsh. Ins.* 317; 1 *Kent Com.* 157; Sleght *v.* Rhinelander, 1 *Johns.* 192; Sleght *v.* Hartshorne, 2 *Id.* 531.

Sea laws. Laws governing maritime affairs, especially.

Sea-reeve. An officer in maritime towns and places who took care of the maritime rights of the lord of the manor, and watched the shore, and collected wrecks for the lord. *Tomlins.*

Sea-shore. The space between high and low water mark. Cutts *v.* Hussey, 15 *Me.* 237. See SHORE.

The sea-shore must be understood to be the margin of the sea, in its usual and ordinary state. Thus, when the tide is out, low-water mark is the margin of the sea; and when the sea is full, the margin is high-water mark. The sea-shore is therefore all the ground between the ordinary high-water mark and low-water mark. It cannot be considered as including any ground always covered by the sea; for then it would have no definite limit on the seaboard. Neither can it include any part of the upland, for the same reason. This definition of the shore seems to result necessarily from its nature and situation. Storer *v.* Freeman, 6 *Mass.* 435.

In England, the sea-shore is deemed to be the property of the sovereign, subject to the public right of the sovereign and people together, to pass and repass over it; which latter right is in the nature of an easement. The extent of the crown's right to the sea-shore, landwards, is the line of the medium high tide between the springs and the neaps, and the bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is vested in the crown, but subject to the right of navigation. If the sea, by gradual and imperceptible progress, encroaches upon the land of a subject, the land thereby covered with water accrues to the crown, and, in the case of a like retirement of the sea, the land accrues to the adjoining owner. *Brown.*

Sea stores. The term sea stores, in a duty law, does not include cordage, ravensduck, and sail-cloth found on board a vessel on her return from a voyage. United States *v.* Twenty-four Coils of Cordage, *Baldw.* 502, 507, 509.

SEAL. Originally, an instrument for impressing wax or wafer, as a means of attesting the genuineness and solemn intention of a writing; but it has come to be much more used, in law, to signify the impression thus made. Seal, *v.*: to affix wax or wafer, suitably impressed, upon a writing, in token that the person whose name is subscribed has deliberately executed the instrument.

In many of the states (Burrill says in the southern and western states, from New Jersey inclusive), enabling statutes have been passed allowing a scroll (*q. v.*) as a seal. But these are not to be considered as changing the meaning of the word seal, but as permitting something which is not properly a seal to be used in the place and perform the office of one.

To constitute a seal, wax or something in the nature of wax, and capable of receiving an impression, must be affixed to the instrument. A scroll or scribble, or other device directly upon the paper on which an instrument is written, cannot be treated as a seal, unless by authority of statute. Overseers of Hopewell *v.* Overseers of Amwell, 6 *N. J. L.* 169; Perrine *v.* Cheeseman, 11 *Id.* 174.

At common law, a seal is an impression upon wax, wafer, or some other tenacious substance. An impression upon paper alone is not a seal, except where it has been made so by statute. Coit *v.* Millikin, 1 *Den.* 376; Warren *v.* Lynch, 5 *Johns.* 239.

The impression of a distinctive corporate seal, upon the substance of the paper on which the instrument requiring a seal is written, is a good seal. Wax is not necessary to a seal. Corrigan *v.* Trenton, &c. Falls Co., 5 *N. J. Eq.* 52; Curtis *v.* Leavitt, 17 *Barb.* 309; Ross *v.* Bedell, 5 *Duer*, 462.

The impression of a seal upon paper,

sufficiently clear to be recognized, is a valid legal seal. History of the use of wax, and reasons why it should no longer be deemed essential to a seal, — stated. Pillow *v.* Roberts, 13 *How.* 472 ; s. c. *Hempst.* 624 ; Follett *v.* Rose, 3 *McLean*, 332.

In New York, a stamp or impression of the seal of a corporation, like that of an individual, made directly on the paper, was formerly held a mere nullity. Farmers' and Manufacturers' Bank *v.* Haight, 3 *Hill* (*N. Y.*), 493.

But now, in that state, the seal of a corporation may be made by impression directly on the paper. *Laws of* 1848, 305, ch. 197, § 1 ; *Rev. Stat.* (5th ed.) 687, § 77.

The treasurer of a corporation, being authorized by a vote of the directors, procured "a corporate seal, bearing the title of the corporation, with the year of its charter," as required by statute, and the scrip issued by the corporation duly authorized and signed, bore a printed impression of this seal, with the title and date inscribed, and contained the words "in testimony of which the seal of said company," &c., is "hereunto affixed." It was held, in an action of covenant broken, that the instruments thus executed were sealed with the corporate seal. Though, at common law, the impression of a seal is not a seal, yet, under a statute providing that, whenever a seal is required to be affixed to a paper, the word seal shall be construed to mean the impression of such seal, made on paper alone. Bonds issued by a corporation, impressed with a seal declared on their face to be sealed, and accepted as such by the holders, are deemed to be under the corporate seal. Woodman *v.* York & Cumberland R. R. Co., 50 *Me.* 549.

The word seal involves some act of a grantor or obligor, in executing an instrument, independent of his signature. Printing a figure to represent a seal, at the same time with, and as part of, the printing of a blank form of an obligation, to be afterwards signed by the obligor, cannot amount to a seal ; for it leaves nothing to be done by the obligor, except a simple signature. Such a practice would be in derogation of the whole theory of sealing contracts. It was the fact that the obligor did two independent acts — first, that of signing, and, secondly, that of sealing — that, in the theory of the law, gave so much more solemnity to the contract, and imported so much greater deliberation, and, therefore, entitled it to be enforced, without any proof of a particular consideration or recital that it was for value received, as well as extended its vitality beyond the period of six years, and excepted it from the bar incident to all personal contracts which were merely signed by the promisor. Bates *v.* Boston & N. Y. Central R. R. Co., 10 *Allen*, 251.

SEAMAN. A person whose business is navigating ships; a mariner; a sailor.

Wharton limits the word to an individual engaged in navigating ships, barges, &c., upon the high seas; and says that those employed for this purpose upon rivers, lakes, or canals are denominated watermen. This seems correct, according to English usage, but is not to be adopted for this country. While it is probably true that "sea" (*q. v.*) does not include the lakes nor rivers above the tide, the word seaman — at least, whenever it appears in American jurisprudence in any connection warranting a liberal construction (as in a statute giving a remedy for seamen's wages, or authorizing a nuncupative will) — should be read as including those who are concerned in prosecuting navigation in aid of commerce, equally, whether their service is rendered on tidal or non-tidal waters. See MARINER.

In a broad sense, seaman may extend to the master and officers; in a narrower one, it means only one of the crew. The context and general object must determine.

SEARCH. A careful, strict examination; usually one made by authority of law.

There is a search made by officers of a vessel of one nation visiting and examining the papers of a vessel of another nation, to see whether she carries goods contraband of war, is sailing on a prohibited adventure, &c. There is a search made in the proper record office, to discover whether any conveyances, mortgages, mechanics' liens, judgments, &c., exist against real property about to be sold; and the officers who make such examinations their business are called searchers. There is a search allowable of the premises of a person who is believed to have stolen goods, illicit distilling or gambling apparatus, smuggled merchandise, intoxicating liquors kept for unlawful sale, or other articles, concealed; and there are other kinds.

Search-warrant. An authority in writing from a court or magistrate requiring the officer to whom it is addressed to make examination of a house or other place specified, for things alleged to be there unlawfully concealed. A familiar provision of the United States constitution (amend. 4) declares that "the right

of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." The same principle is recognized by English judicial authorities. See 2 *Hale P. C.* 149.

SEAWORTHY. Is an adjective applied to vessels, signifying in good condition to be navigated; fit to go on her voyage. The proper meaning of the term, alone, is fit for general navigation, such as she is designed to engage in. But in a particular contract, or special connection, it may well mean capable and equipped for the particular voyage in contemplation. There is some distinction between the meaning of "seaworthy" and what will fulfil a particular warranty of seaworthiness.

Seaworthiness: good condition for going to sea; fitness for voyaging, or for a special voyage in contemplation.

No stress should be laid on "sea," in this compound, as meaning tidal waters. A vessel employed on non-tidal rivers or on the lakes may well be called seaworthy, if fit for the demands and exposures of service there.

A warranty of seaworthiness means that the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill. 3 *Kent Com.* 287. S. P. Draper *v.* Commercial Ins. Co., 4 *Duer*, 234.

To constitute seaworthiness, as between carrier and owner of cargo, the hull of the vessel must be so tight, staunch, and strong as to resist the ordinary action of the sea during the voyage, without damage or loss of cargo. Dupont de Nemours *v.* Vance, 19 *How.* 162.

It might have contributed to greater clearness and certainty in the rules of law on insurance, if the word seaworthiness had been confined to the sense in which it is most commonly used; that is, to designate the condition in which, by the well-known implied warranty, every vessel must be at the commencement of the voyage, in order to be the subject of a contract of insurance, and, if some other word or form of words had been used, to describe that state of equipment, preparation, and fitness for the exigencies of the voyage, in which it is the duty of the owners to keep and maintain their vessel, as far as it is in their power to do so, from time to time, during the whole progress of the voyage. But the word is used in this double aspect. Copeland *v.* New England Marine Ins. Co., 2 *Metc.* (*Mass.*) 432.

The term seaworthy is somewhat equivocal. In its more literal sense, it signifies capable of navigating the sea; but more exactly, it implies a condition to be and remain in safety, in the condition she is in, whether at sea, in port, or on a railway, stripped and under repairs. If, when the policy attaches, she is in a suitable place, and capable, when repaired and equipped, of navigating the sea, she is seaworthy. But where a vessel is warranted seaworthy for a specified voyage, the place and usual length being given, something more is implied than mere physical strength and capacity: she must be suitably officered and manned, supplied with provisions and water, and furnished with charts and instruments, and, especially in time of war, with documents necessary to her security against hostile capture. Capen *v.* Washington Ins. Co., 12 *Cush.* 517, 521.

The term seaworthy, as used in the law and practice of insurance, does not mean, as the term would seem to imply, capable of going to sea or of being navigated on the sea: it imports something very different, and much more; viz., that she is sound, staunch, and strong, in all respects, and equipped, furnished, and provided with officers and men, provisions and documents, for a certain service. In a policy for a definite voyage, the term seaworthy means "sufficient for such a vessel and voyage." Capen *v.* Washington Ins. Co., 12 *Cush.* 517, 536.

Seaworthy does not, necessarily, mean a state completely fit for sea navigation; but includes a fitness for present navigation, either on a sea or river, of a vessel about to sail on either. Hathaway *v.* Sun Mutual Ins. Co., 8 *Bosw.* 33.

SECOND DELIVERANCE. A writ which lies for a plaintiff after he has been nonsuited in an action of replevin, in pursuance of which the sheriff must again deliver to the plaintiff the goods that were distrained, on his giving security, as he did in the first instance, to redeliver them, if the distress prove a justifiable one. It is said to have become practically obsolete in England.

SECOND DISTRESS. When distress for rent is allowed, if the property taken under the first distress is not enough to satisfy the landlord's demand, he might distrain again, in cases allowed by law, which is a second distress.

SECOND SURCHARGE. If, after admeasurement of common, upon a writ of

admeasurement of pasture, the same defendant surcharges the common again, the plaintiff may have this writ of second surcharge. *Wharton.*

SECONDARY. An officer of the court of king's bench and common pleas, so called because he was second or next to the chief officer. The secondaries of these courts were abolished by 7 Wm. IV. & 1 Vict. ch. 30 (1 *Arch. Pr.* 11). But at the present day there is a law officer in the city of London who bears the name of secondary. *Brown.*

SECONDARY CONVEYANCE. A conveyance of such a nature as pre-supposes some other conveyance precedent, and which only serves to alter, confirm, enlarge, restrain, restore, or transfer the interest granted by such original conveyance, is sometimes distinguished as secondary. Thus an assignment of a lease may be considered a secondary conveyance, with respect to the lease itself. See ORIGINAL CONVEYANCE; PRIMARY CONVEYANCE.

The secondary conveyances are otherwise called derivative, and are: releases, confirmations, surrenders, assignments, and defeasances.

SECONDARY EVIDENCE. A familiar and reasonable rule of evidence requires that a party shall produce that species of evidence which the nature of the fact to be proved indicates as most proper, and which is called the primary or best evidence, or shall show some good reason why he does not produce such primary evidence, before he will be allowed to employ other and remoter means of proof. Thus, if the question is as to contents of a writing, to produce the writing is the most natural, or the primary, evidence. If, however, the party shows that it has been destroyed, he may then call witnesses who read it while in existence to testify to its contents. This species of evidence — which is not such as the nature of the question suggests or calls for, but is received on proof that the primary evidence cannot be obtained — is called secondary.

SECONDARY USE. A use limited to take effect in derogation of a preceding estate, otherwise called a shifting use, *q. v.* An example is: a conveyance to the use of A and his heirs, with a proviso, when B returns from India, then to the use of C and his heirs. *Wharton.*

SECRET COMMITTEE. A secret committee of the house of commons is a committee specially appointed to investigate a certain matter, and to which secrecy being deemed necessary in furtherance of its objects, its proceedings are conducted with closed doors, to the exclusion of all persons not members of such committee. All other committees are open to members of the house, although they may not be serving upon them. *Brown.*

SECRET PARTNERSHIP. One where the existence of certain persons as partners is not avowed to the public by any of the partners. Deering *v.* Flanders, 49 *N. H.* 225.

SECRETARY. A title of one intrusted with business involving writing as a chief element. Five of the heads of departments in the United States government have the title of secretary; viz., the secretaries of state, of war, of the treasury, of the navy, and of the interior; so do several of the cabinet officers in England; and in most of the states of the Union there is a secretary of state.

SECTA. Suit. This word, in its secondary meaning (see SUIT) means suit in the courts; lawsuit. Thus *ad sectam*, which is often seen in the abbreviated form, *ads.*, means at the suit of.

Secta ad curiam. A writ that lay against him who refused to perform his suit, either to the county court or court baron. *Cowel.*

Secta curiæ. Suit of court; that is to say, the attendance at the lord's court, to which the tenant was bound in time of peace. See 2 *Bl. Com.* 54; 1 *Steph. Com.* 180.

Secta ad molendinum. A writ which lay for the owner of a mill against the inhabitants of a place where such mill is situated, for not doing suit to the plaintiff's mill; that is, for not having their corn ground at it. *Brown.*

Secta regalis. A suit so called by which all persons were bound twice in a year to attend in the sheriff's tourn, in order that they might be informed in things relating to the public peace. It was so called because the sheriff's tourn was the king's leet, and it was held in order that the people might be bound by oath to bear true allegiance to the king. *Cowel.*

Sectis non faciendis. A writ which lay for a dowress, or one in wardship, to be free from suit of court. *Cowel.*

SECTION. 1. The writ of measurement in the government surveys of the United States public lands. The general features of the system prescribed are, that the lands have been divided by survey into townships of six miles

square; and each township into sections of six hundred and forty acres each. The sections are subdivided, for sale, into half-sections (three hundred and twenty acres) and quarter-sections (one hundred and sixty acres), and still further into what are called in the statutes half quarter-sections and quarter quarter-sections; but these last are, in practice, quite as often called eighties and forties, from the number of acres they respectively comprise; or are called fractions of a section.

2. In references to law-books, section is usually the smallest subdivision embracing a distinct subject, and separately paragraphed and numbered. Modern treatises, the codes, and the more extended and systematic statutes are very generally divided into books or parts; these into titles and chapters; and these last into sections, which is as far as any distinct subdivision usually runs.

SECUNDUM. According to; following. A Latin word, which occurs in some phrases.

Secundum allegata et probata. According to what is alleged and proved. This phrase is used in expressing the rule that a party must recover, if at all, and a decision must proceed, upon the allegations and the evidence, not upon matters which are not pleaded, or not admissible under the pleadings; nor upon matters within the knowledge of the judge or jury, but not in evidence; nor upon facts which, though proved, do not make out the cause of action, or the defence alleged in the pleadings.

Secundum formam statuti. According to the form of the statute.

SECURE. To make certain of payment or performance; to assure, guarantee, or indemnify. A debtor who gives his creditor a lien upon some property by means of which the creditor may collect his demand, if the debtor fails personally to pay it, is said to secure him. Sometimes one who gives his own engagement to guarantee a payment or performance of an obligation by another is said to secure it.

Secured: made certain of payment or performance, as by a lien given on property, or a guaranty given by a third person. Security: a lien or engagement given additional to an obligation, debt, or duty, for the purpose of assuring payment or performance. Security is sometimes applied to the person who engages for payment or performance by another; but this is unadvisable; surety (*q. v.*) is the proper term for the person. Securities (*plu.*) is in use as a general term for written assurances for payment of money; evidences of debt.

A contract whereby a vendor of land agrees to execute a conveyance thereof as soon as the vendee "secures the payment" of the purchase-money, means not when he pays it in money, but when he gives something by means whereof payment may, at some future time, be procured or compelled. Foot *v.* Webb, 59 *Barb.* 38.

A wife's separate property being sold, a part of the proceeds was loaned by her husband, who took the borrower's note, payable to the wife. It was held that this sum was "secured" in her name, within a statute protecting the wife's title to proceeds of her separate estate, if secured or invested in her name. Promissory notes are securities for money. Jennings *v.* Davis, 31 *Conn.* 134.

The employment of the word securing, in section 8 of article 1 of the Constitution of the United States, — declaring that congress shall have power "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," — does not imply the protection of an acknowledged legal right. The acts of congress passed in the exercise of the power thus conferred create rights, rather than sanction previously existing ones. Wheaton *v.* Peters, 8 *Pet.* 591, 660.

Security embraces every interest or right which is a charge upon specific property, including lien. Storm *v.* Waddell, 2 *Sandf. Ch.* 494, 506.

Secured creditor. A creditor who holds some special pecuniary assurance of payment of his debt, such as a mortgage or lien.

Security for costs. When the plaintiff in a suit resides out of the jurisdiction of the court in which his suit is pending, or lives abroad, and the defendant is apprehensive that the plaintiff, in the event of being defeated, will evade payment of the costs or expenses of the suit, it is usual for him to apply to the court to compel the plaintiff's attorney to give security for such payment, and which the court usually orders to be done, on its appearing that there are good grounds for the applica-

tion. This rule exists very generally; but the cases in which security for costs may be required, and the manner in which it is to be enforced, and in which it is to be furnished, are regulated somewhat differently by the various statutes.

Security for good behavior, or to keep the peace. One who has committed or threatened acts of disorder or violence, may be brought before a magistrate, and, on proper proofs, be required to enter into a bond or recognizance with sureties, that for a certain time he will be of good behavior, or will keep the peace, as towards the complainant and all other persons.

SECUS. Otherwise. Used in the reports and digests to introduce a converse proposition, or an exception to the general principle which has been previously stated.

SED PER CURIAM. But by the court. An expression sometimes used in reports, after stating remarks of a single judge, to introduce the opinion of the court.

SEDGE FLAT. Like "sea-shore," imports a tract of land below high-water mark. Church *v.* Meeker, 34 *Conn.* 421.

SEDITION. Conduct tending towards treason, but wanting an overt act; attempts made, by meetings or speeches, or by publications, to disturb the tranquillity of the state, which do not amount to treason. All contempts against the sovereign and the government, and riotous assemblies for political purposes, may be ranked under the head of sedition.

In the Scotch law, sedition is distinguished from leasing making, in that leasing making consists of libellous attacks upon the private character of the sovereign, while sedition is directed against the government and constitution. *Bell.*

SEDUCE. To procure unlawful sexual intercourse by persuasion, overcoming the natural scruples of a chaste character; to debauch by means of solicitations. Seduction: the wrong (in some jurisdictions a crime) of inducing a female to consent to unlawful sexual intercourse by enticements and persuasions, overcoming her reluctance and scruples.

Bouvier defines seduction as "the act of a man in inducing a woman to commit unlawful sexual intercourse with him." But this seems to include the ordinary request of a man to a prostitute, or of a paramour to his mistress. To constitute seduction, there should be, not previous virginity, perhaps not even entire purity of life, unless as a statute may require "previous chaste character," but some virtue opposing the request, some moral objection or reluctance on the part of the woman, overborne by excitements and persuasions, and urging.

On the other hand, the words do not include intercourse obtained by force or fear, and against consent, which is rape.

The principle *volenti non fit injuria* has always been considered to forbid the woman seduced to maintain an action, directly, for damages; and, at common law, seduction was not esteemed punishable as a crime.

A husband may, however, upon well-settled principles, maintain an action for damages for the seduction of his wife. This action, and the wrong on which it is founded, is more frequently called criminal conversation.

And if the female seduced is under any relation in which she owes service, as the case of a minor daughter to her father, and the value of the service is (in the least) diminished by the seduction, this scintilla of legal injury will sustain an action by the parent or other master, suing in the character of an employer who has lost the service of his servant through defendant's tort; and in this action the jury may give exemplary damages. By this fiction, a substantial redress for seduction, considered as a civil wrong, is often reached.

And in several of the states, seduction of a female of previous chaste character is made a punishable offence. So, enactments of congress have made the seduction of female emigrants on board ship, by those in charge of the vessel, punishable.

The word seduce, when used with reference to the conduct of a man toward a woman, has a precise and determinate signification, and *ex vi termini* implies the commission of fornication. An information for the crime of seduction need not charge the offence in any other words. State *v.* Bierce, 27 *Conn.* 319.

Seduce implies an act of fornication or adultery. Commonwealth *v.* Dorus, 108 *Mass.* 488.

A man who obtains carnal intercourse with a woman solely by means of his promise of marriage, made to her at the time, and without which she would not have yielded to his desires, is guilty of the statutory crime of seduction. And where defendant obtained intercourse with a woman on his promise of marriage; the intercourse was afterwards broken off, and then again renewed solely on the ground of his renewed promise of marriage; the woman appeared otherwise to have always led a chaste life, — it was held that the man might be prosecuted for seduction at any time within one year of such last intercourse. People *v.* Millspaugh, 11 *Mich.* 278.

SEE, *n.* The circuit of a bishop's jurisdiction; or his office or dignity, as being bishop of a given diocese.

SEIGNIOR. In its general signification, means lord, but in law it is particularly applied to the lord of a fee or of a manor; and the fee, dominions, or manor of a seignior is thence termed a seigniory, *i.e.* a lordship. He who is a lord, but of no manor, and therefore unable to keep a court, is termed a seignior in gross. *Kitchin*, 206; *Cowel.*

Seigniorage. A privilege or prerogative of the king, by which he claims an allowance in respect of gold and silver brought in the mass to be exchanged for coin. *Cowel.*

SEISED. See SEISIN.

Seised in demesne as of fee. This is the strict technical expression used to describe the ownership in "an estate in fee-simple in possession in a corporeal hereditament." The word seised is used to express the "seisin" or owner's possession of a freehold property; the phrase "in demesne" or "in his demesne" (*in dominico suo*) signifies that he is seised as owner of the land itself, and not merely of the seigniory or services; and the concluding words, "as of fee," import that he is seised of an estate of inheritance in fee-simple. Where the subject is incorporeal, or the estate expectant on a precedent freehold, the words "in his demesne" are omitted. (*Co. Litt.* 17 *a*; *Fleta*, l. 5, ch. 5, § 18; *Bract.* l. 4, tr. 5, ch. 2, § 2.) *Brown.*

SEISIN. A possession of real property founded on title; enjoyment or occupancy assumed in virtue of a right. Seise: to take possession of lands of freehold tenure, by livery. Seised: invested with possession of lands in virtue of a freehold estate.

The words are often, but unadvisably, spelled with a *z*, — seizin.

Under the feudal system, the word seisin was applied only to the possession of an estate of freehold, in contradistinction to that precarious kind of possession by which tenants in villenage held their lands, which was considered to be the possession of those in whom the freehold continued. It is opposed to a merely beneficial or equitable title, and to the possession of a mere leasehold or chattel estate. Instances are found in which it has been applied to chattel property; but, in general, seisin, with respect to freehold estates, corresponds to possession with respect to chattel interests and property; and in modern books possession is more and more used of real property, seeming to be gradually substituted for seisin. The older word might advantageously be retained, and the two might well be continued in use for real and personal property respectively.

According to Washburn's very complete and lucid exposition of this and other feudal terms, seisin was, originally, the completion of the feudal investiture by which the tenant was admitted into the feud, and performed the rights of homages and fealty. There could be but one seisin of given lands; but it might be either in fact or in law. Seisin in fact was an actual investiture of possession, generally accomplished by the forms and tokens of livery, such as the lord, or some one empowered by him, going upon the land with the tenant, and there delivering to him a turf or a twig; and there were other modes. Seisin in law occurs in such cases as where an ancestor or devisor dies leaving his lands vacant. The heir in one case, and the devisee in the other, is deemed by the law to have a seisin which may at any time be converted into a seisin in fact.

To constitute a seisin in fact, there must be an actual possession of the land; to constitute a seisin in law, there must be a right of immediate possession, according to the nature of the interest, as either corporeal or incorporeal. Seisin in fact necessarily implies possession; there being no legal difference between "seisin" and "possession," if the possession is with intent on the part of him who holds it to claim a freehold interest. Yet there are distinctions in some of the

applications of the words; thus, though there may be a concurrent possession of the same lands by several persons, there cannot be such concurrent seisin. And seisin is applied to estates of which there is no present possession, such as remainders and reversion, meaning that the party has a fixed vested right of future enjoyment. Moreover, lands may be, for a time, vacant, as regards possession; but the seisin cannot be (at common law) in abeyance or suspense: it must always be in some one as freeholder. 1 *Washb. R. P.* 3 *et seq.*

A tenant for years is not said to be seised of the lands, the possession not being given to him by the ceremony of livery of seisin; nor does the mere delivery of a lease for years vest any estate in the lessee, but only gives him a right of entry on the land; when he has actually entered, the estate becomes actually vested in him, and he is then possessed, not properly of the land, but of the term for years, the seisin of the freehold still remaining in the lessor. *Cruise Dig.* tit. 8, ch. 1, § 10.

Seisin means possession under some legal title or right to hold. The possession may be shown by parol; the title must be shown by the proper conveyance. Ford *v.* Garner, 49 *Ala.* 601, 604.

Seisin is of two kinds: seisin in law arises when the grantor of real estate gives the right of present possession to the grantee; seisin in deed is the actual possession of freehold estate. Hart *v.* Dean, 2 *MacArthur*, 60.

Seisin ox. A perquisite formerly due to the sheriff in Scotland when he gave possession to an heir holding crown lands. It has now for a long time been converted into a payment in money, proportioned to the value of the estate. *Bell.*

Seisina facit stipitem. Seisin makes the stock. Actual seisin makes a person the stock from which inheritance must be derived. By the inheritance act, 3 & 4 Wm. IV. ch. 106, this maxim has been discarded in England. By that act, descent must in every case be traced from the purchaser, — the person last entitled who did not inherit. (1 *Steph. Com.* 367.) In most, if not all, of the United States, also, the rule has been changed in like manner. (4 *Kent Com.* 388, 389.

Seisina habenda quia rex habuit annum, diem et vastum. A writ formerly in use for delivery to the lord of seisin of the lands or tenements of a tenant attainted of felony, after the king, in right of his prerogative, had had his year, day, and waste. *Cowel.*

SEIZE. To take a thing into custody of the law, as a means of enforcing some demand or proceeding involving it. Seized: taken into official custody. Seizure: actual caption of property, by authority of law.

The words are more appropriate to movable property, and are more used of a taking which is designed as a means of enforcing some claim or demand against the thing itself. Thus, taking property on a claim of forfeiture, or in virtue of a right to hold it under attachment or sell it on execution, is appropriately called a seizure. They import actual control or custody of the subject-matter.

Seizure. In order to constitute a valid seizure, so as to entitle the party to the proceeds of a forfeiture, there must be an open, visible possession claimed, and authority exercised under the seizure. A seizure, once voluntarily abandoned, loses its validity. The Josefa Segunda, 10 *Wheat.* 312.

The fact that correspondence has taken place between the collector, secretary of the treasury, and district attorney, and that directions were given to the latter to file a libel, while the vessel was lying within the collector's district, does not constitute a seizure by the collector. The Silver Spring, 1 *Sprague*, 551.

Seizure, even though hostile, is not necessarily capture, though such is its usual and probable result. The ultimate act or adjudication of the state, by which the seizure has been made, assigns the proper and conclusive quality and denomination to the original proceeding. A condemnation asserts a capture *ab initio;* an award of restitution pronounces upon the act as having been not a valid act of capture, but an act of temporary seizure only. Appleton *v.* Crowninshield, 3 *Mass.* 443.

Seizure, in the ordinary covenant in a policy, that the ship shall be free from capture, seizure, or detention, ordinarily, perhaps exclusively, signifies only the taking of a ship by the act of government or other public authority, for a violation of the laws of trade, or some rule or regulation instituted as a matter of municipal police, or in consequence of an existing state of war. It is so understood in the commercial code of continental Europe. In this sense, too, it is used in other clauses of the policy declared on which exempt the underwriters from liability for "seizure for or on account of illicit or prohibited trade, or trade in articles contraband of war." Such, undoubtedly, is its most common and ordinary signification, as applied to the subject-matter of marine insurance. It cannot be interpreted to include the dispossession of the master and other officers

from the ship by the mariners, and the barratrous conversion of her by them to their own use. Greene *v.* Pacific Mut. Ins. Co., 9 *Allen*, 217.

The words in a policy, "assured against all risks, except seizure in port," must be understood to mean any arbitrary seizure. Barney *v.* Maryland Ins. Co., 5 *Har. & J.* 139.

Seizure of heriots. The seizing of heriots, when due on the death of a tenant, is a species of self-remedy, resembling that of taking cattle or goods in distress; excepting that a distress is merely taken as a pledge for other property, whereas a heriot is or becomes the actual property of him who so seizes it. *Brown.*

SELECTMAN. The style or title of a town officer. In many of the United States, the affairs of a town are decided by popular vote in town meeting; but the executive conduct of them, and the determination of many details, are intrusted to a board of officers elected by the towns-people, and known as the selectmen.

SELL. To dispose of by sale, *q. v.* Seller: the party in a contract of sale who parts with the property principally mentioned; one who, for a valuable consideration, contracts to transfer his ownership in something.

An agreement to sell land binds the party to execute a proper deed of conveyance. Smith *v.* Haynes, 9 *Me.* 128.

A statute, enacting that no license to an administrator to sell the real estate of his intestate, for the payment of debts, shall be in force for a longer time than one year, requires that a deed must be delivered within the year, to render the sale valid, under the license. Although the popular sense may be the true one where the act of the legislature does not relate to a technical subject, yet here, the object being to limit the time of sales and prevent estates being kept open longer than is necessary, the legal sense seems the proper one; and, in a legal sense, there is no sale till the deed is delivered. Macy *v.* Raymond, 9 *Pick.* 285.

A charter power to "sell" negotiable securities carries with it, by implication, the right to make the assignment necessary to transfer the legal title to a purchaser. Savage *v.* Walshe, 26 *Ala.* 619.

Sell, in a statute making it a felony to fraudulently sell or dispose of land after having once sold it, does not include a mortgage. People *v.* Cox, 45 *Cal.* 342.

A charter authority to a bank "to sell and convey" its property, empowers it to transfer negotiable paper by indorsement. Cooper *v.* Curtis, 30 *Me.* 488.

A charter power "to sell and dispose of," clearly gives a power to mortgage. Gordon *v.* Preston, 1 *Watts*, 385.

Under laws authorizing a probate court to give to an administrator a license to sell real estate, the word sell is the operative word, both in the statute and in the license, and imports that the title is to be parted with, and not that the estate is to be incumbered. Brown *v.* Van Duzee, 44 *Vt.* 529.

An agreement authorizing a pledgee of shares in a corporation "to give the stock to any broker to sell," permits a private sale by a broker for the market price. Bryson *v.* Rayner, 25 *Md.* 424.

To constitute a violation of a law imposing forfeiture on any person whomsoever, of white people, who shall bring goods and sell them in an Indian nation, there must be a completed sale: it is not sufficient that there should be an offer to sell. Mingo *v.* Goodman, 2 *Miss.* 552.

Upon the distinction between the expressions, to sell, and to barter, see Lumpkin *v.* Wilson, 5 *Heisk.* 555.

SEMBLE. It seems. A word frequently used in judicial opinions and in the syllabi of reporters, to denote that what follows it is an expression of opinion on some point not directly involved in the case, or not necessary to be decided, and therefore *obiter dictum*. Such an expression of opinion is valued only as an indication of what would probably be the decision of the court or judge upon such a question when properly submitted.

SEMINARY. Has no definite and fixed legal meaning; it is used in a general way to designate institutions of learning. Chegary *v.* Mayor, &c. of N. Y., 13 *N. Y.* 220.

SEMPER. Always. A word which introduces several Latin maxims, of which some are also used without this prefix.

Semper in dubiis benigniora præferenda sunt. In doubtful matters, the more favorable constructions are always to be preferred. As a rule of construction, this rule is equivalent to the maxim, *benignior sententia in verbis generalibus seu dubiis est preferenda*, q. v. But a wider application is, that in all cases where doubt exists, whether concerning the meaning of a word, the intent with which an act was done, or the guilt or innocence of an accused, the most favorable construction which the words, acts, or circumstances will admit of is to be preferred. But there are many well-founded exceptions.

Semper paratus. Always ready. The name of a plea in common-law practice, by which the defendant alleges that he has always been ready to perform what is demanded of him.

Semper præsumitur pro legitimatione. The presumption is always in favor of legitimacy. This maxim is founded on the rule that the law presumes against immorality. A child, born after wedlock, of which the mother was, even visibly, pregnant at the time of marriage, is presumed to be the offspring of the husband. So every child born during wedlock, where the married parties are of the age of puberty, and not physically disqualified for sexual intercourse, is presumed legitimate, even though the parties are living apart by mutual consent; but in the latter case, the presumption may be rebutted by proof of non-access on the part of the husband. But where the parties live apart by reason of a sentence pronounced by a court of competent jurisdiction, the presumption of legitimacy does not arise; in that case, obedience to the sentence will be presumed. This presumption of legitimacy may be rebutted by proof of non-access during the proper period of gestation, but not by slight evidence. Evidence of adultery on the part of the wife, without proof of non-access by the husband, will not suffice, as the law will not allow a balance of evidence as to who was most likely to be the father of the child. A seaman who had promised to marry a woman, went to sea, and was gone longer than he expected. On his return, a formal marriage took place between the parties, pursuant to his promise; but a few days before his return the woman gave birth to a child, which was always treated by both parties as legitimate. The court presumed a marriage in fact before the departure of the father. Starr *v.* Peck, 1 *Hill* (*N. Y.*), 270.

Semper præsumitur pro negante. The presumption is always in favor of the party denying. This is merely a statement of the rule that the burden of proof rests upon the party having the affirmative of the issue.

SENATE. In American constitutional law, is the name of the less popular branch of the legislature. In the United States congress, senators are elected, two from each state, by its legislature.

SENATUS CONSULTUM. Ordained of the senate. In the earlier periods of Roman history, laws were enacted by popular vote; but when the number of the people had grown so large that they could not be assembled to pass laws, a practice arose of consulting the senate, instead of the people; and to any law thus passed, the name *senatus consultum* was applied. *Hunt. Rom. L.* xlvii; *Trayn. Max.*

Historians differ as to the power of the senate to enact laws during the republic; but this power was one of the principal sources of new enactments during the empire.

SENTENCE. May mean almost any final determination by a judicial tribunal; but it was commonly used of those of criminal and ecclesiastical courts; while "judgment" is generally used of civil decisions at common law, and "decree" of decisions in equity. Sentence is sometimes found used with reference to admiralty courts; while the word decree is more common in that connection.

Sentence of death recorded. The Stat. 4 Geo. IV. ch. 48, allowed the recording of a sentence of death not actually pronounced, on the understanding that it would not be executed in capital felonies other than murder. The effect of such a record is the same as if the judgment had been pronounced and the offender reprieved by the court. The number of capital felonies has, however, been so much reduced by modern legislation that this is now seldom done.

SEPARALITER. Separately. This word was used in Latin forms of indictments to qualify the description of the offence so as to make it appear that the two or more defendants named were charged as severally and not jointly guilty. In some cases this is essential. An indictment which charged two persons of an offence which could not be a joint one, without apt words to show they were charged severally, only, would doubtless be held bad.

SEPARATE. In its vernacular meaning of distinct, set apart, occurs in some technical phrases.

Separate action. A phrase used with reference to the doctrine which, in many cases, allows two persons interested in the same demand, or injured by the same wrong, to join in one suit. Where such privilege is refused it is common to say they must bring separate actions.

Separate demise. A demise in a declaration in ejectment used to be termed a separate demise, when made by the lessor separately or individually, as distinguished from a demise made jointly by two or more persons, which was termed a joint demise. No such demise, either separate or joint, is now necessary in this action. *Brown.*

Separate estate, or property. Is chiefly employed in speaking of ownership of property enjoyed by a married woman to her own use independent of her husband, so that she may dispose of it by will, and bind it by her contracts in writing, as if she were unmarried (except as restricted by the instrument creating it). At common law, the rents and profits of a wife's lands, with her chattel property, and her choses in action, as far as he reduced them to possession, were the husband's in right of marriage; but a separate estate might arise in favor of a wife in several ways. One was by local custom; but this has lost importance. Another was by any deed or instrument in writing, whereby property was settled to her sole and separate use, or by other sufficient words to that effect. The enforcement and protection of separate property rights of married women, under settlements and trusts, has long been an important head of equity jurisprudence. By statutes in very many of the United States, the property of a wife is preserved to her notwithstanding the marriage, and she may acquire or part with it, or contract with reference to it, substantially as if unmarried. These enactments, where they prevail, deprive the rules relative to separate property of much of their distinct importance, and the term separate property of its definite meaning and use. Where the rights of a wife in certain property are different in the view of equity from their position at law, and her estate is peculiarly of equitable creation and protection, there is need for a distinctive term, and separate property arose naturally, and was serviceable. But under statutes which in effect obliterate the marital right over the wife's property, and preserve it to her as if she were unmarried, there seems less reason for a distinguishing name for a married woman's ownership of property. The wife's property is hers, just as the husband's is his.

Separate property, as distinguished from the wife's general property, is that of which she has the exclusive disposal independent of her husband. Alston *v.* Rowles, 13 *Fla.* 117, 126.

The term separate estate, used in Ala. Code, §§ 1991, 1992, which take away or limit the right of dower of a widow who has a separate estate, means a separate estate created by law, and not one arising by contract or will. Smith *v.* Smith, 30 *Ala.* 642; Glenn *v.* Glenn, 41 *Id.* 571.

Separate estate, within the meaning of the bankrupt law, is that in which each partner is separately interested at the time of the bankruptcy. The term can only be applied to such property as belonged to one or more of the partners, to the exclusion of the rest. *Re* Lowe, 11 *Bankr. Reg.* 221.

Separate maintenance. An allowance made to a woman by her husband on their agreement to live apart; and distinguishable from alimony, which is an allowance decreed as incident to a divorce.

Separate post. Within a statute authorizing extra allowances to army officers commanding at separate posts, an officer may be said to command at a separate post when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command in the neighborhood. Parker *v.* United States, 1 *Pet.* 293.

SEPARATIM. Separately. A word used in conveyances, in Latin, to make a several covenant.

SEQUESTER. In modern use, to take into judicial custody, pending a controversy. Sequestration: the name of a remedy used in chancery and ecclesiastical courts, whereby property is taken into the custody of the court, to secure it pending a controversy, or to enforce obedience to the order of the court, or for like purpose. Sequestrator: one of persons appointed to take charge of property seized upon sequestration.

The principal meaning of sequestration is the separating or setting aside a thing in controversy from the possession of both the parties that contend for it; and it is twofold, voluntary and necessary: voluntary is that which is done by consent of each party; necessary, is what the judge of his authority doth, whether the party will or not. *Jacob.*

Sequestration, in its most ordinary sense, signifies a kind of execution for debt, and is most frequently used against a beneficed clerk or clergyman. In this case, the plaintiff sues out a *fieri facias de bonis ecclesiasticis*, directed to the bishop of the diocese, commanding him to make of the ecclesiastical goods and chattels belonging to the defendant within his diocese the sum mentioned in the writ. This writ is taken to the registrar of the diocese, who thereupon issues a sequestration, which is in the nature of a warrant directed to the church-wardens, requiring them to levy the debt of the tithes and other profits of the defendant's benefice. Sequestration also issues in chancery when a defendant has eluded the process of the court, and a commission of rebellion has been awarded against him to no effect; by virtue of which sequestration his personal estate, and the profits of his real, are seized and detained until the defendant obeys the commands of the court. The word sequestration is used also to signify the act of the ordinary in disposing of the goods and chattels of a deceased person whose estate no man would meddle with. It is also used to signify the gathering, collecting, and taking care of the fruits and profits of a vacant benefice for the benefit of the next incumbent. *Brown.*

Sequestrari facias de bonis ecclesiasticis. That you cause to be sequestered of ecclesiastical goods. These are the emphatic words, and also constitute the name, of a writ of execution, in English practice, in an action against a beneficed clergyman, commanding the bishop to enter into the rectory and parish church, and take and sequester the same, until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt. This writ is in the nature of a *levari facias*. It is retained in the practice under the judicature acts.

SERGEANT; or **SERJEANT.** The style or title of several officers. The term is more in use in England than in this country.

In the army, the sergeant is an inferior officer attached to each company, whose duties are to see that discipline is observed, to teach private soldiers the exercises, and to direct them in forming ranks, files, &c.

Sergeant-at-arms. There seem to be in England many officers bearing this title, and holding office by appointment from the crown; but those best known are two, who, by royal permission, attend on the two houses of parliament. The one assigned to the house of lords is charged to attend upon the chancellor with the mace, and to execute the orders of the house for the apprehension of delinquents; and in the commons, the sergeant attends upon the speaker with the mace, carries messages from the bar to the table, and executes the orders of the house with respect to delinquents to be taken into custody for breaches of its privileges.

There is also a sergeant-at-arms belonging to the court of chancery, whose duty it is to apprehend such persons as are guilty of contempt of court, &c.

In the United States congress and in several of the state legislatures there are sergeants-at-arms, whose duties are closely copied from those of the sergeants attending parliament.

Sergeant-at-law. A barrister of the common-law courts of high standing, and of much the same rank as a doctor of law is in the ecclesiastical courts. These sergeants seem to have derived their title from the old knights templars (amongst whom there existed a peculiar class under the denomination of *frères sergens*, or *fratres servientes*), and to have continued as a separate fraternity from a very early period in the history of the legal profession. The barristers who first assumed the old monastic title were those who practised in the court of common pleas, and until a very recent period (the 25th of April, 1834, 9 & 10 Vict. ch. 54) the sergeants-at-law always had the exclusive privilege of practice in that court. Every judge of a common-law court, previous to his elevation to the bench, used to be created a sergeant-at-law; but since the judicature act, this is no longer necessary. *Brown.*

Sergeants' Inn. Was formerly called Faryndon Inn, near Chancery Lane, and is a law society to which the sergeants belong. In the hall of this inn, during term, the judges and sergeants dine together; and there the judges sit as visitors of the inns of court. 3 *Steph. Com.* (6th ed.) 387, note.

SERGEANTY. A species of tenure by knight service, which was due to the king only; and was distinguished into grand and petit sergeanty. The tenant holding by grand sergeanty was bound, instead of serving the king generally in his

wars, to do some honorary service to the king in person, — as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. Petit sergeanty differed from grand sergeanty in that the service rendered to the king was not of a personal nature, but consisted in rendering him annually some small implement of war, — as a bow, a sword, a lance, an arrow, or the like. (*Cowel.*) Both these species of tenures were spared at the general abolition of feudal tenures in 1660 (12 Car. II. ch. 24); and the estates of Strathfieldsaye (Duke of Wellington) and Blenheim (Duke of Marlborough) are examples, — perhaps the only examples, — at the present day, of the tenure by petit sergeanty. *Brown.*

SERIATIM. Successively; one after another; in order; individually.

In cases of great importance, or where the judges differ in opinion, it is usual for them to deliver their judgments individually, instead of delegating one with the power of delivering the united judgment of the whole court, and in such cases they are said to deliver their judgments seriatim. *Brown.*

SERIOUS. When used in a phrase such as "serious bodily harm," this word is synonymous with great, and its use in criminal pleading, instead of the word great, is a sufficient compliance with a statute using the phrase great bodily harm. Lawlor *v.* People, 74 *Ill.* 228.

SERVAGE. In feudal law, was where a tenant, besides payment of a certain rent, found one or more workmen for his lord's service. *Tomlins.*

SERVANT. Is used with somewhat different shades of meaning. In its early sense, a hireling employed in and about a house to perform duties of an inferior nature — tasks appropriate for a serf — were called servants. These are now called, when there is need to distinguish them particularly, domestic or menial servants. More recently, the word has been extended to embrace persons employed by men in various trades and avocations, to render miscellaneous assistance, without having, as an agent has, an authority to act in the place of the master. In some such general sense as this the word appears used in such rules of law as that a master is or is not responsible for the act or neglect of his servant, that an action lies for interfering with or enticing away one's servant, that stockholders are liable for wages of laborers and servants. Somewhat broader still is the sense in the rule that an employer is not liable to one servant for an injury received by the negligence or unskilfulness of a fellow-servant; for here persons who in other respects would be deemed agents are embraced. But there is some tendency to adopt the word employe for this more general meaning, and keep "servant" to its old sense of nondescript inferior assistance.

Within the purview of rules holding a master or employer liable for the act or neglect of his servant, a drover travelling in a freight train of a railroad company with his live-stock, without paying any fare other than what was included in the amount of freight paid on his stock, is not an employe or servant of the railroad company. Flinn *v.* Philadelphia, Wilmington, & Baltimore R. R. Co., 1 *Houst.* 469.

Servant, in such connection, does not include a contractor engaged under an entire contract to construct or perform work, in doing which he is not subject to the direction or control of the employer as to details. Forsyth *v.* Hooper, 11 *Allen,* 419; Aikin *v.* Wasson, 24 *N. Y.* 482.

Servants of such contractor are not servants to the general employer. Callahan *v.* Burlington, &c. R. R. Co., 23 *Iowa,* 562; Young *v.* New York, &c. R. R. Co., 30 *Barb.* 229.

Servants are of two kinds: Menial servants, being persons retained by others to live within the walls of the house, and to perform the work and business of the household. Persons employed by men of trades and professions under them, to assist them in their particular callings. *Mozley & W.*

Servants are hirelings who make a part of a man's family, employed for money, to assist in the economy of the family, or in matters connected with it; persons who, from the nature of the station, must render servile offices within the walls of a house. The term may well include a bar-keeper in a tavern. Boniface *v.* Scott, 3 *Serg. & R.* 351.

A person employed as a superintendent or "boss," is not a servant, within a statute which punishes the employment of the servant of another. Bryan *v.* State, 44 *Ga.* 328.

Where a person of full age is hired by the year as a clerk, by a merchant, the relation of master and servant is thereby created; and the employer may maintain an action, on the case, for loss of service, against one who unlawfully imprisons the person employed. Woodward *v.* Washburn, 3 *Den.* 369.

An agricultural laborer who engages with a land-owner to work on the land for a share in the crop, is not a servant, within the rule that a master may recover damages from a third person who unlaw-

fully prevents the servant from performing his duty. Burgess *v.* Carpenter, 2 *S. C.* 7.

A civil engineer, employed by a railroad company at a fixed salary, and subject, in his duties, to the company's orders, is a servant of the company, within a statute declaring stockholders liable for debts to laborers and servants; and may recover, also, his disbursements to an assistant. Conant *v.* Van Schaick, 24 *Barb.* 87.

A contractor for construction of part of a railroad is not a servant, within such a statute. The word servant in the connection is limited by association with laborers; the intent of the statute is to protect those who perform manual labor. Aikin *v.* Wasson, 24 *N. Y.* 482.

The secretary of a corporation, being an officer or agent of the company, is not a servant, within such a statute. Coffin *v.* Reynolds, 37 *N. Y.* 640. To the contrary was Richardson *v.* Abendroth, 43 *Barb.* 162.

A person employed by a manufacturing corporation as its civil engineer and travelling agent at a fixed salary, is a servant of the corporation, within the meaning of such a statute; for he is in subordination to the commands of those under whose direction and authority he acts. This constitutes the relation of master and servant. A servant is one who is merely a helper. Williamson *v.* Wadsworth, 49 *Barb.* 294.

One who was employed by a manufacturing company to perform a variety of services, who was an overseer, and yet worked with the men, worked in the mills of the company, and had a general supervision of their business, and kept their books, was held entitled to recover against stockholders, as a servant of the company, on the ground that, while the word laborer in such a statute must probably be restricted to mean manual work, servant cannot be confined to mere menial service. "Laborer" is more distinctive than "servant," and embraces a smaller class; the former comprehending such only as perform labor with their hands, while the latter includes also such as do menial services. Hovey *v.* Ten Broeck, 3 *Robt.* 315. S. P. Vincent *v.* Bamford, 12 *Abb. Pr.* N. S. 252.

A police-officer is not a servant of the city which appoints him, in any such sense as to take away his right of action against it for an injury sustained by reason of a defective highway. Kimball *v.* Boston, 1 *Allen*, 417.

All agents and employes on a railroad who are engaged in the same general employment and business of keeping up, running, and operating the road are fellow-servants, within the rule that a corporation or other employer is not liable for injuries suffered by one servant solely through the carelessness or negligence of another servant of the same master, engaged in the same general service or business, and under the same general control. Master mechanics, foremen of round-houses, and other persons engaged in the repair of machinery and rolling-stock are fellow-servants with engineers, conductors, and other persons engaged in running trains. Haugh *v.* Texas, &c. Ry. Co., 22 *Int. Rev. Rec.* 257.

SERVE. Besides its popular meaning of to render subordinate aid or perform menial duty (see SERVANT), the verb "to serve" has an important technical meaning in connection with process. See SERVICE.

SERVI. Bondmen or servile tenants. They were of four sorts: such as sold themselves for a livelihood; debtors sold for being incapable of paying their debts; captives in war, retained and employed as perfect slaves; *nativi*, born servants, as such, solely, belonged to the lord. There were also said to be *servi testimentales*, those which were afterwards called covenant-servants. *Cowel.*

SERVICE. 1. Is sometimes that description of duty, inferior and even menial, which a servant is bound and expected to render; thus slaves were, in the constitution, described as persons held to service; apprentices are bound to service; domestics are engaged for service in the household.

2. Service, and its plural, services, are used generally for any useful work, even for skilled or professional duty and exertion; as in the expressions, services of an attorney, or of a physician; contracts for personal service; skilled services.

3. Service is sometimes used to designate one of the kinds of public duty, or a branch of employment, under government; as in the expressions, service in the army or navy; the civil service; military or naval service; the public service.

4. In practice of courts, the word service includes various ways by which a paper may be communicated to the person to be affected by it, so as to render it operative. Various kinds are known, and the names and requisites to their sufficiency differ under various statutes; but the principal are: *Personal* service, which consists in delivering a copy of the process, summons, notice, order, or other paper to the individual himself sought to be charged with it, and leaving it with him. The paper is said to be served when a copy is delivered and left. There are cases in which the original must be exhibited or read,

and perhaps some in which the original must be delivered. Service by or upon *attorney*, which consists in delivering the copy to or leaving it at the office of the attorney of the party, in the manner prescribed by the statute or rule of court, and is more applicable to notices, orders, &c., in the course of a suit, than to summons or process. Service by *publication*, which is allowed in some cases to be made against non-residents, and is performed by publishing the paper to be served as an advertisement in newspapers designated in the order allowing the service, and mailing a copy of the paper to the last known address of the party; and this mode is allowable, by leave of statute, with respect to summons and process, though it is not equal to personal service as respects the effect of the judgment which can be founded upon it. *Substituted* service, which is some mode which, by local statute, may be employed instead of personal service, in some cases where that is impracticable, and service by publication is inappropriate.

5. In feudal law, service was a general term for whatever tenants were bound to render to their lord in recompense for the lands they held of him. This service in original feuds was only two-fold: to follow or do suit to their lord, in his courts in time of peace, and in his armies or warlike retinue in times of war. There gradually arose, however, a great variety of these services, some being of a personal nature, others not; some of an honorable, others of a menial or servile, character. They are now mostly disused and obsolete.

Service of an heir. By the former law of Scotland, before an heir could regularly acquire a right to the ancestor's estate, he ought to be served heir, which was a form proceeding upon a writ, and including the decision of a jury, fixing the right and character of the heir to the estate of the ancestor. (*Bell; Wharton.*) But by Stat. 37 & 38 Vict. ch. 94, § 9, passed in 1874, it is enacted that the personal right shall vest in the heir, without service or other procedure.

Service of the ship. In the rule that a seaman is entitled to be cured of a hurt or sickness incurred in the service of the ship, the phrase "service of the ship" is not confined in meaning to acts done for the benefit of the ship, or in the actual performance of the seaman's duty. A seaman is entitled to be cured, at the expense of the ship, of any injury received by him in executing an improper order, or inflicted upon him by the wrongful violence of an officer of the ship, in the exercise of his authority to punish. Ringold *v.* Crocker, *Abb. Adm.* 344.

SERVIENT. Subject to a burden or servitude. In the law of easements, a tenement whose owner is, as such, subject to an easement enjoyed by an adjoining tenement is called a servient estate or tenement.

SERVITIUM. The old law-Latin word for service (*q. v.*), in the sense of a duty owed to a feudal superior.

Servitium liberum. A sort of free or liberal service which certain feudatory tenants, called *liberi homines*, were bound to perform; and as these tenants themselves were different from vassals, so were their services of a more honorable nature, — as to attend the lord's court, to find a man and horse to go with the lord into the army, and such like. *Cowel.*

Servitium regale. Royal service, or the rights and prerogatives of manors which belong to the king as lord of the same, and which were generally reckoned to be six; viz., power of judicature, in matters of property; power of life and death, in felonies and murders; a right to waifs and strays; assessments; minting of money; and assise of bread, beer, weights, and measures. *Cowel.*

SERVITOR. Messengers of the marshal of the king's bench, who were sent to serve bills or writs to summon men to court, were, in old times, called servitors of bills.

SERVITUDE. In the vernacular, more commonly means the condition of being bound as a servant; but in its legal use, it is applied to things. Kent defines it as a charge upon one estate for the benefit of another; a species of incorporeal right, derived from the civil law, resembling and answering to the easement of the common law. (3 *Kent Com.* 436.) When the freedom or ownership in land is fettered or restricted, by reason that some person, other than the owner thereof, has some right therein, the land is said to serve such person; the restricted condition of the ownership, or the right which forms the subject-matter of the

restriction, is termed a servitude; and the land so burdened with another's right is termed a servient tenement, while the land belonging to the person enjoying the right is called the dominant tenement.

The principles with regard to servitudes, and the terms employed in treating of them, are borrowed from the Roman law. In the language of the Roman law, a thing is said to be servient in which, although it is owned by one person, another has a real right, by virtue of which, and for the advantage of his person or property, the latter can require the owner, or any possessor of the thing, to suffer, or omit to do something with respect to such thing, which he would not have to submit to, if the rights which constitute ownership remained in himself undiminished. Servitude is, therefore, a *jus in re*, as distinguished from a *jus ad rem*: the former is a real right, or a right in the thing itself, and, consequently, has effect against every third person; while the latter is a personal right, or a right to the thing, and hence applies only against the actual obligee. The word servitude may be said to have both an active and a passive signification, — in the former sense, denoting the restrictive right belonging to the entitled party; in the latter, the restrictive duty entailed upon the proprietor or possessor of the servient land. See *Brown*.

As to penal servitude, see that title.

SESSION. A sitting; sometimes used for the time during which any body of persons or tribunal is organized, competent for transaction of its business; in other connections, the time during which it is convened and actually engaged in business. To illustrate this double use of the term, it is common to speak of the first or the second session of a congress, meaning the whole time from the first Monday of December to the adjournment, on the fourth of March, or later; and equally common to say, in the holidays' recess, that congress is not in session. There is a similar ambiguity in the use of the word with respect to parliament or the state legislatures. In respect to courts, where "term" takes the place of session to express the period during which the tribunal is organized and competent for transaction of business, the double meaning of session is less noticeable. It generally imports an actual sitting, but not necessarily; it may be used as equivalent to term.

Brown mentions the following kinds of sessions, as often mentioned in English practice: Session of parliament; this signifies merely the sitting of parliament, in order to transact the business of the state. The great session of Wales; this was a session or court held in Wales twice in every year, similar to assises in England. These sessions, however, were abolished by Stat. 1 Wm. IV. ch. 70; and the judges now go the circuits in Wales and Cheshire the same as in the English counties. Session of jail delivery; this was a sitting or term held for delivering a jail of the prisoners therein confined. Session of the peace; this is a court of record, and is held before two or more justices of the peace, one of whom must be of the quorum; and its jurisdiction (by Stat. 34 Edw. III. ch. 1) extended to the trying and determining all felonies and trespasses whatsoever, although they seldom, if ever, try any greater offence than small felonies. There are, moreover, three different kinds of sessions, held by justices of the peace: General sessions, which may be held at any time of the year, for the general execution of the authority of the justices; the general quarter sessions, which are held at four stated times in the year; and a special or petty sessions, which may be holden on any special occasion for the execution of some particular branch of the authority of the justices.

As to any court of session, see COURT OF SESSION.

Sessional orders. These are certain resolutions which are agreed to by both houses, at the commencement of every session of parliament, and have relation to the business and convenience thereof; but they are not intended to continue in force beyond the session in which they are adopted. They are principally of use as directing the order of business. *Brown*.

SET, *n.* In one sense of this word, it is said to be nearly synonymous with the

word lease, and, when used as a verb, to convey the same meaning as "to lease." A lease of mines is frequently termed a "mining set." See *Brown; Burrill.*

Set also appears in some compounds and phrases.

Set of exchange. A foreign bill of exchange is usually drawn in counterparts, or duplicates. These are commonly three; they are numbered first, second, and third; and the request for payment of the sum drawn for which each contains is upon the condition of the other two remaining unpaid. This is done in order to obviate delays and inconveniences which might otherwise arise from the loss or mislaying or miscarriage of the bill, and also to enable the holder to transmit the same by different conveyances to the drawee, so as to insure the most prompt and speedy presentment for acceptance and payment. The three compose what is called a set of exchange.

Set fire. To constitute a setting on fire, it is not necessary that any flame should be visible. Rex *v.* Stallion, 1 *Moo. Cr. Cas.* 398.

SET, *v.* Setting down a cause for hearing is done by entering the name of the cause in the list of matters ready to come on for hearing in court, specifying the stage at which it is ready to come on for hearing. This has been a familiar expression in courts of equity. And, similarly, in the judicature act, 1875, first schedule, order 40, rules 3, 7, it is provided that a party may, under the circumstances mentioned in those rules, set down the action on motion for judgment. *Mozley & W.*

The phrase, setting down a plea for hearing, in the hitherto received chancery practice, indicates that a plaintiff considers a defendant's plea insufficient in point of law; to set down the plea for hearing is a course answering to a demurrer in an action at law. *Hunt Eq.*

Set off. When incorporated, a poll-parish is considered as "set off" from the town. Sutton *v.* Cole, 8 *Mass.* 96.

SET-OFF. Is a remedy which consists in merging two independent demands held by two persons, each against the other, in allowing or ordering that a demand held by A against B shall extinguish, as far as amounts permit, a demand held by B against A. And a set-off is a demand of such nature that it may be used thus to extinguish, wholly or in part, the principal demand in an action.

Set-off differs from recoupment in that it is more properly applicable to demands independent in their nature and origin; while recoupment (*q. v.*) implies a cutting down of a demand by deductions arising out of the same transaction. It also differs from counter-claim, which means the mode in which, under the codes of reformed procedure, either a claim in set-off or in recoupment may be interposed in answer to plaintiff's action. In other words, set-off is, as very well defined by Jacob, a mode of defence whereby the defendant acknowledges the justice of the plaintiff's demand, on the one hand, but, on the other, sets up a demand of his own to counterbalance it, either in the whole or in part.

This remedy is said to have been unknown to the common law. Under that system, if the plaintiff was as much, or even more, indebted to the defendant than the defendant was to him, yet he had no method of striking a balance, unless the demands were connected. Equity would, however, for many years past, compel defendant, in a proper case, to submit to a set-off; but, to obtain this relief, where one was sued at law yet held a cross-demand against plaintiff, he must file a separate bill in equity. To remedy this inconvenience, it was enacted by Stat. 2 Geo. II. ch. 22, § 13, that, where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as, at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon

what account it became due, or otherwise such matter shall not be allowed in evidence upon the general issue. This clause was made perpetual by Stat. 8 Geo. II. ch. 24, § 4; and, it having been doubted whether mutual debts of a different nature could be set against each other, it was, by the last-mentioned statute, further enacted and declared that, by virtue of the said clause, mutual debts may be set against each other, either by being pleaded in bar or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and, in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shown how much is truly and justly due on either side; and, in case the plaintiff shall recover any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid.

These enactments are the origin of the general doctrine of set-off, as applied or invoked by plea or answer in actions of legal cognizance; the principal of them having been adopted by statutes in the various states of the Union, and, indeed, in most of them, extended and reinforced. The jurisdiction of equity to decree and enforce a set-off also continues where equity jurisprudence is distinctly administered; and there is also a useful branch of the remedy consisting in set-off on motion, which is applicable where the two demands are in judgment, so that there is no opportunity to plead one against the other. The privilege, liberally granted in many states, of pleading a counterclaim, is in the nature of a further extension of this remedy.

Set-off is a demand which the defendant in an action sets up against the plaintiff's demand, so as to counterbalance that of the plaintiff, either altogether or in part. Thus, if the plaintiff sues for ten pounds, due on a note of hand, the defendant may set off nine pounds due to himself from the plaintiff, for merchandise sold to the plaintiff; and, if he pleads such set-off in reduction of the plaintiff's claim, such plea is termed a plea of set-off. A set-off may, therefore, be defined to be a claim which a defendant has upon a plaintiff, and which he sets up or places against the plaintiff's demand. The leading principles of set-off are the following: At law, there was no set-off in case of mutual, unconnected debts until the statutes of set-off (2 Geo. II. ch. 22, and 8 Geo. II. ch. 24) permitted it, in the case of the bankruptcy of either debtor; but, as to connected accounts, the balance was, in the general case, recoverable at law. In equity, set-off has been allowed in the following cases, additional to those at law: In case of mutual independent debts, contracted upon the faith of a mutual credit (Lanesborough *v.* Jones, 1 *P. Wms.* 326); in the case of cross-demands admitting a set-off at law, but of which the one or both are of an equitable nature; in the case of cross-demands arising in different rights, but under particular circumstances, *e.g.* of fraud (*Exp.* Stephens, 11 *Ves.* 24). *Brown.*

Set-off differs from a lien, inasmuch as the former belongs exclusively to the remedy, and is merely a right to insist, if the party think proper to do so, when sued by his creditor on a counter-demand, which can only be enforced through the medium of judicial proceedings; whilst the latter is, in effect, a substitute for a suit. 2 *Op. Att.-Gen.* 677.

The term "set-off" is applicable only where the claim set off grows out of a transaction independent of the contract sued on. Avery *v.* Brown, 31 *Conn.* 398.

SETTLE. The expression "to settle" is sometimes used in the sense of to pay. Thus, if, upon a balance being struck, one says, "I have not the money now, but will call in a few days and settle it," the promise to settle is a promise to pay. At other times, settling is used in the sense of accounting together, and striking a balance by computation. When so used, a promise to settle implies a promise to pay the balance. At other times, it is used in the sense of adjusting matters of controversy, about which there has been a difference of opinion, and striking a balance by agreement. When so used, a promise to settle implies a promise to pay the balance, provided it is agreed on. Moore *v.* Hyman, 13 *Ired. L.* 272. To same effect is National Bank *v.* Norton, 1 *Hill* (*N. Y.*), 572.

A promise to settle a demand which has been liquidated and is undisputed means to pay it. Pinkerton *v.* Bailey, 8 *Wend.* 600; Stilwell *v.* Coope, 4 *Den.* 225.

Under other circumstances, the phrase to settle means to adjust, to liquidate, but not necessarily "to pay." Fort *v.* Gooding, 9 *Barb.* 371.

To settle has an established legal meaning, and implies the mutual adjustment of accounts between different parties, and an agreement upon the balance. Baxter *v.* State, 9 *Wis.* 38.

Settled, written at the foot of a bill of parcels, imports a receipt or acquittance for the money. Rex *v.* Martin, 7 *Car. & P.* 549.

Settled, in a due-bill, implies a general, not special, account. Dorsey *v.* Kollock, 1 *N. J. L.* 35.

Settled limits of the United States. In a condition in a life policy, restricting the assured from travel, means the established boundaries of the United States; not the region of settlements. The condition allows the insured to go to California, if he takes the overland route. Casler *v.* Conn. Mut. Life Ins. Co., 22 *N. Y.* 427.

Settling a bill of exceptions, or a case. When an appellant has prepared and served on respondent a bill of exceptions, or a case, such as he proposes should be submitted to the appellate court, if the respondent considers it in any respect incorrect, he prepares and serves amendments. If the appellant will not consent to these, the questions on which they differ are carried before the judge who tried the cause, and he decides them according to his minutes and recollection of what took place. This decision, which forms a final adjustment of the bill or case, is called settling it, or the settlement of it.

Settling interrogatories. The party who obtains a commission to take testimony of a witness prepares interrogatories, and the adverse party prepares cross-interrogatories; and, if either are objected to, the question of their propriety may be brought before a judge of the court. His decision as to the proper form of questions is called settling them, or the settlement of them.

Settling issues. The deciding the form of the issues to be determined in a trial. It is provided by the judicature act, 1875, first schedule, order 26, that where, in any action, it appears to the judge that the statement of claim or defence or reply does not sufficiently define the issues of fact between the parties, he may direct the parties to prepare issues; and such issues shall, if the parties differ, be settled by the judge.

SETTLEMENT. 1. As between debtor and creditor, settlement, or a settlement, will usually be considered to mean accounting, an adjustment, a liquidation of amounts due; though to settle (*q. v.*) may, under special circumstances excluding the idea of controversy and adjustment, be understood as meaning "to pay."

2. In conveyancing, a settlement is the name applied to deeds of either real or personal property, the object of which is to prescribe the mode of holding, using, and disposing of it for a considerable time to come, in view of conflicting interests and rights of various persons who are to share in its enjoyment. The party making the deed is called the settlor; and those who are to benefit by it, the beneficiaries. Such deeds are often executed upon the eve of a marriage, to provide for the interests of children in the wife's property, and protect her from the common-law liabilities of her property for her husband's debts; and are called the marriage settlements. They may, however, be made for other purposes, as to provide for gradual payment of creditors, without absolute disposal of the property.

According to Brown's account of the English practice, a settlement of real estate may be either a strict settlement, as it is called, or one that is not strict. The latter kind of settlement is made where it is desired to settle the land in such a way as that the children shall take equally; and the proper mode of attaining that object is by conveying the land to trustees in trust for sale, such trust being made exercisible during the lives of the tenants for life, with their consent only, and afterwards at the sole discretion of the trustees; and the proceeds to arise from the sale are then settled as personal estate, with a proviso that until sale the rents and profits shall be paid and applied in the same manner as the income of the proceeds would be applicable if a sale had been already made. On the other hand, if the real estate (being an old family estate, or for any other reason) is to be settled strictly, the general form and contents of the settlement are as follows: The first *testatum* contains a grant of the freehold property to the general trustees (grantees to uses) to the use

of the settlor until the marriage, and thereafter to the use of pin-money trustees for a term of ninety-nine years, and subject thereto to the use of the settlor for life, remainder to the use that the wife surviving her husband shall receive a jointure rent-charge during her life, and subject thereto to the use of jointure trustees for a term of two hundred years, and subject thereto to the use of portion trustees for a term of six hundred years, and subject thereto to the use of the first and other sons of the marriage successively in tail male [here sometimes adding, remainders to the use of the husband's younger brothers for life, and to their respective issues in tail male in succession, with remainder to the first and other sons of the intended husband in tail, with the like remainder to his daughters in tail, with remainder to the first and other sons of the husband's brother in tail, with remainder to the first and other daughters of the same brothers in tail], with remainder to the right heirs of the settlor. And Brown gives a list of thirteen special clauses which may be added, appropriate to the circumstances of the different cases arising.

A settlement of personal property is, he says, seldom made, except it is a marriage settlement. It is made by deed of trust; and usually the first trusts (after providing for the investment of the trust funds) relate to the destination of the income during the lives of husband and wife, and that of the survivor of them. When the property put into settlement is contributed by the husband, the first life-interest is in general given to him; on the other hand, where the property is contributed by the wife, the first life-interest is invariably given to her own separate use, without power of anticipation; but it is competent to the wife to allow the husband to receive the income without account. After the decease of both husband and wife, the ordinary trusts of the settlement are for the children or remote issue of the marriage, as the husband and wife or the survivor shall appoint; and in default of, or subject to, any such appointment, then in trust for the children equally, sons taking a vested, *i.e.* transmissible, share at twenty-one, daughters the like at twenty-one or marriage, whichever is the earlier event; and, in case of a failure of children or remote issue of the marriage living to attain a vested interest, the trust property is usually made to revert to the party who has contributed the same. The settlement usually contains special provisions regarding the maintenance, education, and advancement of the children of the marriage; as to which see these titles. Very generally, it also contains a covenant to bring into settlement the after-acquired property of the wife, exceeding a certain value.

3. Under the poor-laws, the right, depending on various circumstances, which entitles a pauper to be maintained by a particular locality, whether parish or union, is called his settlement; the idea being that the place where he was last settled, *i.e.* resided, is presumably the place by which he should be relieved. The term, therefore, imports such residence of any person in a parish, or other circumstance relating thereto, as would enable him, if in need of parochial relief, to apply for it in that parish, rather than in any other. A settlement may, under the present English laws, be gained, — by birth; by parentage; by marriage, in the case of a female; by renting a tenement, coupled with residence in the same for forty days; by being bound apprentice, and inhabiting for forty days under such binding; by having an estate of one's own there, of whatever value, whether the interest be legal or equitable, by a person residing within ten miles thereof; by being charged to and paying the public taxes, and levies of the parish. And when the settlement is acquired in right of another person, as in the cases 2 and 3 above mentioned, it is called a derivative settlement.

The word is used in the same general signification in the various statutes and decisions of the states concerning the support of paupers; though the facts necessary to gain a settlement, and the ways in which it may be changed or lost, are entirely dependent on statutory regulation, and vary in the different states.

4. In English constitutional history, the act of settlement is the Stat. 12 & 13 Wm. III. ch. 2, by which the crown was limited to the house of Hanover; the meaning being, that it is the act which adjusted or determined the future course of descent of the crown. Some new enactments were made in the statute at the same time, for the better securing of the religion, laws, and liberties of the kingdom. See *Wharton.*

SEVER. See SEVERANCE.

SEVERAL. Distinct; separate; the opposite of joint.

A will provided for a division of testator's property after the "several deaths" of four persons named. Held, that "several" should not be deemed synonymous with "respective," but that the intention was that the division be postponed until all four were deceased, thus avoiding the will under the statute against perpetuities. Colton *v.* Fox, 67 *N. Y.* 348.

Several actions. A phrase which denotes separate actions brought against different defendants in respect of the same subject-matter; as in the case where the different partners of a firm are sued separately in respect of a partnership debt.

Several covenant, or obligation. A covenant or obligation made by two or more persons, so that they are liable distinctly, and not jointly; so that they are separately bound by it.

Several fishery. A fishery of which the owner is also the owner of the soil, or derives his right from the owner of the soil. 2 *Bl. Com.* 39, 40; 1 *Steph. Com.* 671, note.

Several inheritance. An inheritance conveyed in such manner as to descend or come down to two or more persons severally, and not jointly, by moieties. *Cunningham.*

Several pleas. Different pleas disclosing independent grounds of defence to the same action. This was allowed by Stat. 4 & 5 Anne, ch. 16; but under the judicature act, a defendant in an action, having several grounds of defence, must combine them in his statement of defence.

Several tail. This expression is used to denote a limitation whereby land is given and entailed severally to two. For example, land is given to two men and their wives, and the heirs of their bodies begotten; the donees have a joint estate for their two lives, and yet they have several inheritances, because the issue of the one shall have his moiety, and the issue of the other his moiety. *Cowel.*

Several tenancy. See SEVERALTY.

SEVERALTY; SEVERAL TENANCY. The holding of real property by a person in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. It is thus opposed to holding in joint tenancy, in coparcenary, and in common. 2 *Bl. Com.* 179; 1 *Steph. Com.* 338.

SEVERANCE. Singling; dividing; disjoining.

1. In pleading at law, when there are several defendants in an action, they may either all plead jointly one and the same defence, or each defendant may plead a separate defence for himself, if he thinks such a course preferable; in which latter case he is said to sever, and his doing so is termed severance in pleading.

2. The word severance is also used to signify the cutting of the crops, such as corn, grass, &c., or the separating of any thing from the realty.

SEWER. May apply to an underground structure for conducting the waters of a natural stream, as well as to one used exclusively for the surface flow. Bennett *v.* New Bedford, 110 *Mass.* 433.

SEXUAL INTERCOURSE. In a statute prohibiting incest, is equivalent to "carnal knowledge," in the law against rape. Noble *v.* State, 22 *Ohio St.* 543.

SHALL. Whether the word shall imports futurity, depends upon the subject-matter and the context. Hannibal, &c. R. R. Co. *v.* State Board of Equalization, 64 *Mo.* 294, 304. 2

A statute declaring that, when any persons "shall have" actually settled on military bounty lands, &c., they shall be entitled to be paid for their improvements, was held retrospective only, in Jackson *v.* Chapman, 3 *Cow.* 390.

A statute that an appeal "shall be allowed," means "must be allowed," when asked by one who stands in such relation to the cause that he is entitled to appeal, irrespective of whether he will gain any thing by appealing. *Exp.* Jordan, 94 *U. S.* 248.

A statute provided as follows: "The commissioners shall return the assessment roll within forty days." Held, that as no public or private right required the word shall to be construed in an imperative sense, it was to be taken as directory merely. Wheeler *v.* Chicago, 24 Ill. 105.

A statute prescribing that courts shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, on complaint or motion filed within two years, imposes an imperative duty. The word

shall excludes the idea of any mere discretionary power in the court in granting or refusing the application, and confers on the party the right to demand the relief. Smith *v.* Noe, 30 *Ind.* 117.

A statute as to a county charge, which provides that the supervisors shall audit and allow it as it becomes due, is imperative. Morris *v.* People, 3 *Den.* 381.

Shall be given. Where an act of congress enacts that certain lands shall be given to, &c., the words "shall be given" are words of absolute donation, and convey a present right. Rutherford *v.* Greene, 2 *Wheat.* 196.

Shall be lawful. These words, when found in the by-law of a corporation, are not to be construed as obligatory. Therefore, where a by-law of a corporation ordained that, under certain circumstances, "it shall and may be lawful" for the bailiffs to admit to the freedom of the town certain persons, it was held that this by-law was only optional, and that the admission of such persons to the freedom of the borough could not be enforced by *mandamus*. Rex *v.* Bailiffs of Eye; 1 *Barn. & C.* 85; 2 *Dowl. & R.* 172.

Shall go. The words "shall go," in a statute defining the rights of husband and wife to property held in common, in case of the death of either, were held to mean "shall vest." Broad *v.* Broad, 40 *Cal.* 493.

Shall not. The words "shall not" were held to mean "cannot," in Parker *v.* United States, 2 *Wash.* 361.

SHAM. Applied to pleas, means a plea setting up matter which is false, and is known to be so by defendant, being interposed for delay.

The long-established rules of equity practice authorize such pleas to be stricken out; and, under the English judicature act of 1875 (first schedule, order 27, rule 1), the court or a judge may order to be struck out or amended any matter in the pleadings which may tend to prejudice, embarrass, or delay the fair trial of the action. Several of the codes of reformed procedure, the New York code in particular, contain express provisions allowing a sham answer to be stricken out. The course of decisions in New York has been to the effect that a sham answer is one which, although good in form, — that is, presents what would be a defence if true, — is false in fact; and is to be distinguished from a frivolous answer, which is one setting up a matter which may be true in fact, but forms no defence. The distinguishing characteristic of a sham answer is falsity; and, to warrant applying the severe rule of striking out, the matter must be shown to be unquestionably false. People *v.* McCumber, 18 *N. Y.* 315. Early rulings were to the effect that, as sham meant false, only an answer alleging new matter as an affirmative defence could be stricken out as sham; but the court of appeals decided (in the case last cited) against this limitation. Upon this rule, and by the more recent practice, an answer containing only general denials of the allegations in the complaint may be stricken out as sham, on proof of its falsity and that it is not pleaded in good faith. Corbett *v.* Eno, 13 *Abb. Pr.* 65; Elizabethport Manuf. Co. *v.* Campbell, *Id.* 86; Butterfield *v.* Macomber, 22 *How. Pr.* 150.

A defence is sham which is so clearly false as not to present any substantial issue; and a motion to strike out, as sham and irrelevant, a defence consisting of denials only, is properly granted where the falsity of the denials appears by other parts of the answer, by the affidavit made on behalf of the moving party, and by the fact that no affidavit to sustain the truth of the denials was produced in opposition. People *v.* McCumber, 18 *N. Y.* 315; 27 *Barb.* 632; 15 *How. Pr.* 186. But, to strike out an answer as sham, it is not enough that the court should perceive but little prospect of a result favorable to defendant, or even that plaintiff's ultimate success appears sure: the answer must be false in the sense of being a mere pretence, set up in bad faith, and without color of fact. Kiefer *v.* Thomas, 6 *Abb. Pr.* N. S. 42.

SHARE. How to be construed, when used with respect to ownership of bank stock, in a statute regulating taxation, see Harrison *v.* Vines, 46 *Tex.* 15; Van Syke *v.* State, 23 *Wis.* 655.

In speaking of the wife's share in the personal estate of her husband, the Illinois dower act means only such share as may be equal to one-third part of the whole estate. McMurphy *v.* Coolbaugh, 49 *Ill.* 110.

Meaning of share, as used in a will, speaking of a share in the estates, see De Nottebeck *v.* Astor, 13 *N. Y.* 98; Genet *v.* Beekman, 27 *Barb.* 371; Parsons *v.* Lyman, 4 *Bradf.* 268.

Share and share alike. In wills, the expressions "equally to be divided," "share and share alike," "respectively between and amongst them," will create a tenancy

in common. Gilpin *v.* Hollingsworth, 3 *Md.* 190.

Where testator bequeathed his property "upon trust, as to one moiety, to invest the same," &c., "to pay over the income thereof to M," "and, after her decease or marriage, to hold the same to the use of my grandchildren," "share and share alike, the income to be applied to their maintenance, and the capital to be paid to them as they respectively attain the age of twenty-one years," it was held that the words "share and share alike" destroyed the joint tenancy which would otherwise have been presumed. Provenchere's Estate, 1 *Leg. Gaz. Rep.* 68.

SHAVE. While "shave" is sometimes used to denote the act of obtaining the property of another by oppression and extortion, it may be used in an innocent sense to denote the buying of existing notes and other securities for money, at a discount. Hence to charge a man with using money for shaving is not libellous *per se*. Stone *v.* Cooper, 2 *Den.* 293.

SHED. A building, twenty-four feet square, the sides of which were composed of wood, with glass windows, which was roofed, and was used by a gentleman who built houses on land of his own for the purpose of sale, as a storehouse for seasoned timber, a place of deposit for tools, and as a place where timber was prepared for use, was held to be rightly called a shed, in an indictment for setting fire to it. Reg. *v.* Amos, *Temp. & M.* 423; 2 *Den.* 65; 15 *Jur.* 90; 20 *L. J. Mag. Cas.* 103; 5 *Cox Cr. Cas.* 222.

SHERIFF. An officer of great antiquity and important functions, being charged, to speak generally, with the preservation of the peace and the execution of judicial orders and decisions within a county.

The office of sheriff is not known under the laws of the United States, but the corresponding duties are performed for the United States courts by an officer, known as the marshal. In England, and under the state governments throughout the United States, there is in and for each county a sheriff. The office generally exists in this country substantially as derived from England, where it has been in existence from the earliest times. The name is considered to be of Saxon origin, Anglicized to shire-reeve (see REEVE), which, softened in successive forms, such as schireve and shyrefe (many others are found in old books), became sheriff. The same office is designated in the law Latin of early times by the title vice-comes, as being the deputy of the earl or comes to whom the custody of the shire is said to have been committed at the first division of the kingdom into counties. But the earls, in process of time, on account of their high employments and attendance on the king's person, not being able to transact the business of the county, were relieved of that burden, reserving to themselves the honor, but the labor was laid on the sheriff, who now, therefore, does all the crown business in the county; the crown committing the custody of the county to the sheriff, and to him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties, in confirmation of which it was enacted in 1300, by Stat. 28 Edw. I. ch. 8, that the people should have election of sheriffs in every shire where the shrievalty is not of inheritance; for, anciently, in some counties, the sheriffs were hereditary. The city of London had the election of the sheriffs of London and Middlesex vested in their body by a charter of Henry I.; and this right they still exercise. But, throughout England generally, it is provided by Stat. 9 Edw. II. st. 2, passed in 1316, that the sheriffs should thenceforth be assigned by the chancellor, treasurer, and the judges, as being persons in whom the same trust might with confidence be reposed. And the custom now is, that all the judges, together with the great officers and privy councillors, meet in the exchequer on the morrow of St. Martin, and then and there the judges propose three persons for each county, to be reported (if approved of) to the crown, who afterwards appoints one of them to be sheriff. And by Stat. 8 & 9 Vict. ch. 11, passed in 1845, the manner of assigning and appointing sheriffs in Wales is to be the same as in England. See *Brown; Cowel;* 1 *Bl. Com.* 117, 339–345; 2 *Steph. Com.* 623–634; also PRICKING FOR SHERIFFS.

The office of sheriff lasts in England for one year, and until a successor is appointed. Many of the duties, which are very numerous and important, are commonly performed by a deputy, called an under-sheriff. The administrative duties principally consist in executing writs, precepts, warrants from justices

of the peace for the apprehension of offenders, &c. The sheriff has also long enjoyed important judicial authority; being empowered to act as judge in the county court (or sheriff's court, as it was sometimes called), where actions were brought for the recovery of sums under twenty pounds. But, by recent statutes, a new organization of county courts has been provided; and the county court judge presides over each county court, — except, perhaps, in London. See *Brown.*

Throughout the states of the American Union, the general nature of the sheriff's office and administrative duties are the same as have been (independent of any recent legislation) known in England; but all details are matters of statutory or constitutional regulation; and the rule on any particular subject may vary in the different states. The sheriff is very generally elected by the people of the county; his term is not usually limited to one year, but may be two or three, as prescribed by the local law. He is usually paid by fees, which are numerous, and amount in the aggregate, in counties where the volume of judicial business is large, to a considerable sum. His judicial duties are not important; the duty of presiding at an inquest by a sheriff's jury being the chief one remaining. He has numerous and varied duties, — generally performed by deputy, — of a ministerial nature, in aid of the courts of record; such as serving or levying process, making arrest, summoning a jury, rendering ministerial service to the court, and enforcing execution of the judgment.

The Scotch sheriff differs from the English, being, from ancient times, an office of important judicial power, as well as ministerial. The sheriff exercises a jurisdiction of considerable extent, both of civil and criminal character, which is, in a proper sense, judicial; in addition to powers resembling those of an English sheriff. *Tomlins; Bell.*

Sheriff, as used in Oreg. Civ. Code, § 110, subd. 1, is a generic term, and comprehends constable. Hume *v.* Norris, 5 *Oreg.* 478.

The term sheriff, used in a statute declaring duties of that officer, may include a coroner, when there is a legal objection to the sheriff. DeWit *v.* Decker, 9 *N. J. L.* 148.

An escape from the custody of a deputy-sheriff may be declared on as an escape from the sheriff. Skinner *v.* White, 9 *N. H.* 204.

Sheriff's court. The court formerly held by the sheriff of an English county, or his deputy, either in virtue of a writ of inquiry to assess the damages which the plaintiff has sustained in an undefended action, or to try issues sent to him for that purpose by a writ of trial; also, particularly, a court of this description, more lately known as the city of London court.

Sheriff's jury. A jury usually summoned by a sheriff, for trial, before himself, of an inquest or other inquiry.

Sheriff's sale. A sale of property, conducted by a sheriff, or sheriff's deputy, in virtue of his authority as an officer holding process; such as a sale of property seized on execution, or of perishable goods taken under an attachment.

An auction sale by a sheriff, under agreement of the parties on mesne process, and without advertisement or legal precept therefor, is not within the expression, a sheriff's sale. Batchelder *v.* Carter, 2 *Vt.* 168.

Sheriff's tourn. The name of an English court of record, formerly held twice in every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being, indeed, only the turn of the sheriff to keep a court-leet in each respective hundred. This was, in its time, the great court-leet of the county; but it is now disused.

SHIFTING USE. A secondary or executory use, which, when executed, operates in derogation of a preceding estate; as where land is conveyed to the use of A and his heirs, with proviso that, when B pays a certain sum of money, then to the use of C and his heirs. *Wharton.*

SHIN-PLASTER. The terms shin-plasters, small bills, small notes, have no established definitions. The object of the legislature, in passing an act to prohibit the issue and circulation of bills or notes so designated, may be supposed to be to prevent the circulation of any or all bills and notes intended and issued to be used as a circulating medium, in place of, or as a substitute for, bank-notes. Madison Ins. Co. *v.* Forsythe, 2 *Ind.* 483.

SHIP. Nautical men apply the term ship to distinguish a vessel having three masts, each consisting of a lower mast, a top-mast, and a top-gallant-mast, with their appropriate rigging. In familiar language,

it is usually employed to distinguish any large vessel, however rigged. It is also frequently used as a general designation for all vessels navigated with sails; and this is the sense in which it is employed in law. *Tomlins.*

An open boat is not a ship or vessel, within the purview of the statutes which prohibit commercial intercourse from the British colonies. United States *v.* An Open Boat and Lading, 5 *Mas.* 120.

The terms "ship" and "vessel," in the provision of the act of congress of March 3, 1851, — that the liability of owners for a collision "shall, in no case, exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending," — include, respectively, the tackle, apparel, and furniture of the ship or vessel; but sea-stores (as, in the case of a whaler, the outfit consisting of whaling-gear, casks, provisions, and supplies for the crew, and for trading) are not embraced. They have been held included in "appurtenances," used in the similar English statute, 53 Geo. III. ch. 159 (1 *Hagg.* 109); but this word is not used in the act of congress. Swift *v.* Brownell, 1 *Holmes*, 467.

The term ship, in the act above mentioned, should be construed to include the appurtenances of a vessel, appropriate and necessary for the voyage; *e.g.*, for a whaling voyage. The Ontario, 2 *Low.* 40.

Coal-barges or flat-boats, used to transport merchandise down rivers, and broken up and sold for lumber at the end of their voyage, are not ships or vessels, such as are subject to admiralty jurisdiction. Jones *v.* Coal Barges, 3 *Wall. Jr.* 53.

A ferry-boat, plying across a river, is not a ship, within a state statute authorizing the arrest of ships or vessels for debts. Birkbeck *v.* Hoboken Ferry-boats, 17 *Johns.* 54.

Small, open, undecked boats, employed within a port, out of sight of which they never go, except temporarily, are not ships, within such a statute. Farmers' Delight *v.* Lawrence, 5 *Wend.* 564.

A canal-boat is not a ship, within the meaning of such a statute. Many *v.* Noyes, 5 *Hill* (*N. Y.*), 34; Hicks *v.* Williams, 17 *Barb.* 523.

That a policy of insurance on a ship in process of construction will not include sticks of timber, cut to be used in completing the vessel, but not yet inserted, being still lying about, near by, at the time of the fire, — see Hood *v.* Manhattan Fire Ins. Co., 11 *N. Y.* 532.

Ship-chandlery. This is a term of extensive import, and includes every thing necessary to furnish and equip a vessel, so as to render her seaworthy for the intended voyage. Not only stores, stoves, hardware, and crockery have been held to be within the term, but muskets and other arms also; the voyage being round Cape Horn to California, in the course of which voyage arms are sometimes carried for safety. Weaver *v.* The S. G. Owens, 1 *Wall. Jr.* 359, 368.

Ship-money. The name of a pecuniary exaction or tax, anciently levied on all the ports, towns, cities, boroughs, and counties of the realm of England, for providing and fitting out ships-of-war for the king's service. It fell, for a long time, into disuse. King Charles I., in 1635 and 1636, attempted to revive it; the attempt was resisted, under the lead of John Hampden; was at first sustained by the courts (in the Case of Ship-money, 3 *State Tr.* 825), but was finally defeated and suppressed by parliamentary declaration (in Stat. 17 Car. I. ch. 14) that it was contrary to the laws and statutes of the realm.

Ship-yard. In the case of a policy on a "stock of ship timber in a ship-yard," bounded by three streets and a river, usage was held competent to show that the term ship-yard meant the yard as in fact used, and embraced timber lying on the sidewalks. Webb *v.* National Fire Ins. Co., 2 *Sandf.* 497.

Ship-of-war. That this term may include a privateer, see The Wilson, 1 *Brock.* 423.

Ship's bill. The copy of the bill of lading retained by the master is called the ship's bill. It is not authoritative as to the terms of the contract of affreightment; the bill delivered to the shipper must control, if the two do not agree. The Thames, 14 *Wall.* 98.

Ship's-husband. The designation of a general agent of the owners of a vessel in its use and employment. His duty is, in general, to exercise an impartial judgment in the employment of tradesmen and the appointment of officers; to see that the ship is properly repaired, equipped, and manned; to procure freights and charter-parties; to preserve the ship's papers, make the necessary entries, adjust freight and averages, disburse and receive moneys, and keep and make up the accounts as between all parties interested. *Abb. Shipp.*

The term ship's-husband is used to designate the person who, in the home port where the vessel belongs, does what the owner would otherwise do, — obtains a cargo for her, and attends to every thing essential to the due prosecution of the voyage for which the cargo has been obtained. Whilst the ship is abroad, the master is empowered to do all that is essential during the voyage. He may be said to be then the ship's-husband, except so far as he may be limited by his instructions; and if the duties which he would otherwise discharge in a foreign port with respect to the vessel, such as entering her at the customs, collecting the freight, obtaining a cargo, and clearing the vessel, are, by the owner's directions, intrusted to

a person at that port, then she is consigned to that person, and he is properly called the consignee. Gillespie *v.* Winberg, 4 *Daly*, 318.

Ship's papers. This is a general term for several papers which a commercial vessel must carry, to make known the ownership, nationality, &c., of the ship and cargo. The general law of nations prescribes some, and the statutes of particular commercial nations prescribe others, in addition.

The ship's papers are of two sorts. Those required by the law of a particular country; such as the certificate of registry, license, charter-party, bills of lading and of health, required by the law of England to be on board all British ships. Those required by the law of nations to be on board neutral ships, to vindicate their title to that character; these are the passport, sea-brief or sea-letter, proofs of property, the muster-roll or *rôle d'equipage*, the charter-party, the bills of ladiog and invoices, the log-book or ship's journal, and the bill of health. 1 *Marsh. Ins.* ch. 9, § 6.

SHIPPER. Is said to have been formerly used to designate the master of a vessel, or a seaman. At the present day, it generally means one who places his goods on board a vessel for transportation; the employer of a vessel in a contract of affreightment.

Shipper is a Dutch word, signifying the master of a ship. It is mentioned in some of the statutes; is now generally called skipper. *Tomlins.*

SHIPPING. Ships of any kind intended for navigation. Also, relating to ships; as in the expressions, shipping interest, shipping affairs, shipping business, shipping concerns. Also, the act of putting on board a ship or vessel, or sometimes that of receiving on board a ship or vessel.

The law of shipping is that branch of the general law which relates to vessels; including such subjects as their registration, building, tonnage, ownership, and national character; also, the employment and rights of the seamen on board of them, and the powers and duties of their masters and commanders; also, ship-brokers and ship-agents, pilots, &c.; also, the sale or transfer and mortgage of merchant vessels; also, freight, charter-parties, demurrage, salvage, towage, collisions, &c.

Shipping articles. The name of the formal contract in writing by which seamen in the merchant service are taken into the service of a vessel for the voyage.

Shipping commissioner. An officer, under acts of congress, charged with attention to the engagement of seamen in the merchant service, and with enforcement of the laws for their protection and relief.

SHIRE. A county.

Shire clerk. The under-sheriff. Also, a clerk in the old county court, who was deputy to the under-sheriff. *Cowel.*

Shire-man. The ancient title in England of the judge of the county, by whom trials for land, &c., were determined. *Tomlins.*

Shire-mote. The assises of the shire, or the assembly of the people, was so called by the Saxons. It was nearly, if not exactly, the same as the scyr-gemote, and in most respects corresponded with what were afterwards called the county courts. *Brown.*

SHOP. The word shop is not the legal equivalent of the word store, in a statute which makes it a penal offence to keep "open store" on Sunday. Sparrenberger *v.* State, 53 *Ala.* 481.

Nor within a statute punishing breaking and entering any shop or store. State *v.* Caney, 19 *N. H.* 135.

The cabin of a vessel is a "shop," within a statute for the punishment of burglary. State *v.* Carrier, 5 *Day*, 131.

But a district school-house is not. State *v.* Bailey, 10 *Conn.* 144.

A banking-house is a "store, shop, or warehouse," within the meaning of a statute punishing the offence of burglariously breaking and entering a shop, store, and warehouse. Wilson *v.* State, 24 *Conn.* 57.

A building kept and used for the sale of goods is rightly denominated a "shop," in an indictment, rather than a "store." Commonwealth *v.* Riggs, 14 *Gray*, 376.

Strictly, a shop is a place where goods are sold by retail, and a store a place where goods are deposited; but in this country, shops for the sale of goods are frequently called stores. Commonwealth *v.* Annis, 15 *Gray*, 197.

SHORE. That ground which is between the ordinary high and low water mark. It does not include (when the king's title is the matter in question) land which the sea overflows only at high spring tides, or leaves bare only at extraordinary low tides. *Hale De Jure Maris*, ch. 4.

When the sea-shore is referred to as a boundary, the meaning must be understood to be the margin of the sea in its usual and ordinary state; the ground between the ordinary high-water mark and low-water mark is the shore. Hence a deed of land bounded at or by the "shore" will convey the flats as appurtenant. Storer *v.* Freeman, 6 *Mass.* 435.

The shore of a sea or bay is, according to the civil law, the line of the highest tide in winter; the common law would restrict a grant bounded by the shore to the line of ordinary high tide. Galveston *v.* Menard, 23 *Tex.* 349. Consult SEA-SHORE.

In common parlance, the word shore is understood to mean the line that separates the tide-water from the land about it, wherever that line may be, and in whatever stage of the tide. The word shore, in its legal and technical sense, indicates the land adjacent to navigable waters, where the tide flows and reflows, which at high tides are submerged and at low tides are bare. Bell *v.* Gough, 23 *N. J. L.* 624, 683.

Where a deed of land bounding on the sea reserved the privilege "of piling up sea-weed on the shore," it was held that the word shore was here used in its popular, and not in its strictly legal sense, and that the right was reserved to pile sea-weed upon the adjoining upland. Mather *v.* Chapman, 40 *Conn.* 382.

The westerly terminus of a tunnel was defined, in a certificate filed under the New Jersey general railroad law, to be on the "western shore of the Hudson river, and within or near Jersey city or Hoboken." Held, that the word shore was not used in its strictest sense, but in the more extended and popular sense; as that Jersey city is built upon the western shore of the Hudson river. State *v.* Hudson Tunnel R. R. Co., 38 *N. J. L.* 548.

SHORT. Occurs in some conventional phrases.

Short cause. In several of the states, as in England, statutes or rules of court have made provision for trying or hearing causes which a party asks to have advanced, on proof that they will occupy the court but a very short time, earlier than the regular order of the calendar or docket. Causes which may have this preference are known as short causes.

In English chancery practice, if a plaintiff in chancery desires to accelerate the suit, and if the hearing will probably not occupy more than ten minutes, he may have the cause heard as a short cause, for which purpose he must obtain from his counsel a certificate that the matter is, in his opinion, proper to be heard as a short cause. On this certificate being produced to the registrar, he will mark the cause as "short" in the cause-book. This may be done without the consent of the defendant; but notice must be given him that the cause has been so marked. One day in each week during the sittings of the court (generally Saturday) is appointed for hearing short causes. *Hunt Eq.* Pt. I. ch. 4, § 4.

If both parties consent to the speedy decision of the suit, the cause is heard as a "consent cause;" but if one refuses to consent, and throws obstacles in the way of its speedy decision, it may, in a proper case, be heard as a short cause. But, at the present day, the difference between a short cause and a consent cause is practically non-existent. 1 *Dan. Ch. Pr.* 800.

Short entry. In banking, when a bank receives a bill or note from a depositor, without accepting it as a deposit, but taking it for collection only, it is customary to note it in the pass-book, writing the amount within the body of the page, instead of carrying it out into the column ruled for dollars and cents, as ordinary deposits are entered. This checks its being added up with the deposits, and is called entering it short. The effect is, that the bill or note remains the property of the depositor, and the bank holds it as collecting agent only.

The custom of bankers in London, on receiving bills for collection, was to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected (9 *East*, 12; 1 *Mont. & M.* 102, 110); and this was called a "short entry" or "entering short." Such bills continued the property of the customer, unless the contrary was to be inferred from special facts. Country bankers throughout England generally credited to their customers at once all bills considered to be good. Blaine *v.* Bourne, 11 *R. I.* 119.

Short notice. Less than the notice required by the usual rule of law. Upon letting a defendant in to plead, as a favor; or in other cases, where the court is called upon to impose terms, and anticipates that the plaintiff is exposed to prejudice from delay; it is not uncommon to require defendant to take short notice of trial.

SHRIEVALTY. The office or jurisdiction of sheriff, *q. v.*

SI. If. The Latin conjunction expressing condition. The apt word to introduce a condition in a conveyance. See QUOD. Also, the initial word of several Latin phrases and maxims.

Si aliquid sapit. If he knows any thing; if he is not altogether devoid of reason.

Si antecedit ictum licet non congressum. If it precedes the blow, although not actually joined or connected with it. In treating of the malice necessary to constitute murder, Hume states that it is not necessary that the

malice should be conceived at the moment the fatal blow is struck, but it is sufficient to constitute the capital offence if it has been entertained at any time prior to the blow. (1 *Hume*, 254.) *Trayn. Max.*

Si constet de persona. If it be certain who is the person meant.

Si ingratum dixeris, omnia dixeris. If you affirm that one is ungrateful, in that you include every charge. A Roman maxim. *Trayn. Max.*

Si fecerit te securum. If he makes you secure.

This writ was in use, where nothing was specifically demanded, but only a satisfaction by way of damages to be assessed by a jury. The security had become a mere matter of form when Blackstone wrote; John Doe and Richard Roe being always returned as the standing pledges for this purpose. (3 *Bl. Com.* 274.) *Mozley & W.*

Si ita est. If it is so. This phrase characterized the Latin form of a writ, in the nature of a *mandamus*, used to compel a judge to seal a bill of exceptions; it directed him, if the facts were as alleged, to affix his seal to the bill.

Si non omnes. If not all. The characteristic words, and hence the name, of a writ of association of justices, in English practice, by which, if all in commission cannot meet at the day assigned, two or more of them may finish the business. *Cowel.*

Si recognoscat. If he should acknowledge. The characteristic words, and so the name, of an old English writ, issued for a debt which had been judicially acknowledged. *Cowel.*

SIC. So; thus. The initial word of the following Latin maxims:

Sic interpretandum est ut verba accipiantur cum effectu. Construction should be such that all the language may, if possible, have effect.

Sic utere tuo ut alienum non lædas. So use your own that you shall not injure another's. Ownership of any subject appears to entitle the owner to make any use he pleases of it; but the law has long recognized that the rights and safety of the persons to be affected must be considered and protected. The maxim therefore expresses a restriction upon the use of one's own property, which is one of the fundamental rules of the law. The principle, that a man may do what he will with his own, is otherwise almost unrestricted. But his use of his own property must not injure the property of others. And the maxim is applied to protect not only tangible property, but rights, and rights which are common to every one, as well as the rights of private individuals.

The maxim may be illustrated by the following out of many similar instances: the obstruction of ancient lights; the stopping, by obstruction or diversion, on your own land, of a flow of water on to your neighbor's; the erection of public works, brick-kilns, &c., emitting large quantities of smoke, offensive smells, &c., near to a private dwelling-house; all cases of nuisance, negligence, &c. *Whart. Max.*

SICKNESS. In a regulation of a friendly society, that any member shall receive a weekly allowance during "any sickness or accident" that may befall him, includes insanity. Burton *v.* Eyden, *L. R.* 8 *Q. B.* 295.

SICUT ALIAS. As before. A phrase sometimes applied to a second writ, issued where the previous writ was not executed. See ALIAS.

SIDE. A statute requiring fences to be erected and maintained on the sides of a railroad, means on the vacant spaces between the road-bed and the outer lines of the company's land; not necessarily on the dividing line itself. Marshall *v.* St. Louis, &c. R. R. Co., 51 *Mo.* 138.

SIDESMEN; SYNODSMEN. Persons whom, in the ancient episcopal synods, the bishops were wont to summon out of each parish to give information of the disorders of the clergy and people. In the process of time they became standing officers, under the title of sidesmen, synodsmen, or questmen. All their duties seem now to have devolved by custom upon the churchwardens of a parish. *Cripps Laws of Church & Clergy*, 180.

SIGN. To sign and signature are commonly used in modern law as substantially interchangeable with the terms to subscribe and subscription. There is, however, a shade of difference between them, in that "signing" less distinctly imports a writing underneath the body of the instrument than does "subscribing." Etymologically, subscribe imports a writing underneath, while sign is satisfied by any conventional token evidencing the authenticity of the instrument;

indeed, it is probable that the word came into the language of the common law as importing affixing the seal, which anciently was the chief sign of executing a paper, and did not, in its earliest use, imply writing at all. However this may be, a requirement that a paper should be signed has been held, in some of the cases, to be satisfied by the party's writing his name in the body of the instrument; while, if the requirement were that it should be "subscribed," this would not suffice. See SUBSCRIBE.

To sign is merely to write one's name on paper, or declare assent or attestation by some sign or mark; and does not, like subscribe, require that one should write at the bottom of the instrument signed. James *v.* Patten, 6 *N. Y.* 9, 13; Miller *v.* Pelletier, 4 *Edw.* 102.

A statute requiring a document to be "signed" is satisfied by a document with the name of the person whose signature is required, in his own handwriting, at the beginning thereof. Clason *v.* Bailey, 14 *Johns.* 484; People *v.* Murray, 5 *Hill*, 468.

A will is not signed, within the meaning of the law, unless the testator's name is affixed at the bottom, or otherwise outside the body, either in his own handwriting or in that of some one else by his direction. Catlett *v.* Catlett, 55 *Mo.* 330.

Where a city charter required certain documents to be signed by certain officers, the word "countersigned," prefixed to one of the signatures, was held not to prevent its being a compliance with the requirements of the charter. Gurnee *v.* Chicago, 40 *Ill.* 165.

Sign-manual. The signature or subscription of the king (or queen) is termed the sign-manual. There is this difference between what the sovereign does under the sign-manual and what he or she does under the great seal; viz., that the former is done as a personal act of the sovereign, the latter as an act of state. *Brown.*

Signing judgment. The formal act of entering a judgment, which either the plaintiff or defendant has obtained in an action. Judgments, like the pleadings, were formerly pronounced in open court, and are still always considered to be so, in theory. But by a relaxation of practice, there is now, in general, except in the case of an issue in law, no actual delivery of judgment, either in court or elsewhere. The plaintiff or defendant, when the cause is in such a state that by the course of practice he is entitled to judgment, obtains the signature or allowance of the proper officer of the court, expressing generally that judgment is given in his favor, and this is called signing judgment, and stands in the place of the actual delivery thereof by the judges themselves. And sometimes the officer only grants his permission to sign; for it has been stated that the signing of the judgment is but the leave of the master of the office for the attorney to enter the judgment for his client. *Brown.*

The expression signing judgment, in section 420 of the Indiana code, — providing that a stay of execution shall commence "from the time of signing the judgment," — relates to the signature of the judge to the proceedings of the court of the day on which the judgment is rendered. Galbraith *v.* Sidener, 28 *Ind.* 142.

SIGNATURE. A sign or mark impressed upon any thing; a stamp; a mark; the name of a person written and subscribed by himself.

Signature implies the personal act of writing of his own name by a man, or that of actually making his mark. Authorizing another person to do either is not sufficient. Chapman *v.* Limerick, 56 *Me.* 390.

Where the signature of the clerk is made by pasting on to the writ a piece of paper with his signature on it, there is no defect apparent on the record, as it may have been done with his permission. Stevens *v.* Ewer, 2 *Metc.* (*Mass.*) 74.

Signature, in a statute relative to obtaining a signature by false pretences, includes indorsement of a negotiable note. People *v.* Chapman, 4 *Park. Cr.* 56.

SIGNET. One of the king's seals in England, used in sealing his private letters, and all such grants as pass his majesty's hand by bill signed; which seal is always in the custody of the king's secretaries, and there are four clerks of the signet office attending them.

In Scotland, the signet is the seal by which the king's letters, and also writs for the purpose of private justice, are authenticated. Hence clerks to the signet, or writers to the signet, in Scotland, are nearly the same as attorneys in England. They were anciently clerks in the office of the secretary of state, by whom writs passing the king's signet were prepared. When, in consequence of the change of the ancient forms of judicial procedure, the signet was applied to writs, sunmonses, and process in private causes, the new writs, which became requisite, were prepared by the writers to the signet, who have also the privilege of acting as agents or attorneys in causes before the court of session. *Jacob.*

SILK GOWN. Is the professional robe worn by those barristers who have been appointed of the number of her majesty's counsel, and is the distinctive badge of queen's counsel, as the stuff gown is of the "juniors" who have not attained that dignity. Accordingly, when a barrister is raised to the degree of queen's counsel, he is said to have "got a silk gown." The right to confer this dignity resides with the lord chancellor, who disposes of this branch of his patronage according to the talents, the practice, the seniority, and the general merits of the junior counsel. *Brown.*

SILK VEIL. The term silk veil, in the absence of any other language, in an act imposing a duty on them, presumably includes all veils made of silk; and "crape veils," being manufactured of silk, must be deemed embraced. Morrison *v.* Arthur, 13 *Blatchf.* 194.

SIMILITER. Likewise; the like. This word is used in pleadings at common law, as the name of the formula accepting an issue of fact tendered by the adverse party, thus joining an issue of fact. The Latin form was *et prædectus a similiter*, the equivalent of which in English — as in a replication — is, "and the plaintiff doth the like." The signification is, in such a case, that, as the defendant has put himself upon the country, he, the plaintiff, does the like. It occurs only when the plea has the conclusion to the country, and its effect is to join the plaintiff in the issue thus tendered by the defendant.

The use of the *similiter* is only applicable to issues of fact which are triable by the country (*i.e.* a jury). It serves to mark the acceptance both of the question itself and the mode of trial proposed, although originally it seems to have been introduced with the view to the latter point only. The resort to a jury in ancient times could, in general, be had only by the mutual consent of each party. It appears to have been with the object of expressing such consent that the *similiter* was in those times added in drawing up the record; and from the record it afterwards found its way into the written pleadings. Accordingly, no *similiter* or other acceptance of issue is necessary, when recourse is had to any of the other modes of trial. (*Steph. Pl.* 4th ed. 265, 266.) *Brown.*

SIMILITUDE. This word, as used in Me. Rev. Stat. ch. 157, § 5, relative to counterfeiting, is synonymous with forged or counterfeit. To make a case within the statute, the bill should have the external appearance of those issued by the bank named. A paper containing the words and figures of a genuine bank-bill, but having no other resemblance to one, cannot be said to be in the similitude of the latter, within the meaning of the act. Nor can "similar" be substituted for "in the similitude." State *v.* McKenzie, 42 *Me.* 392.

SIMONY. The corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward; and any resignation or exchange for money is deemed corrupt, however fair the transaction may appear to be. It is said to be called "simony," from the resemblance it bears to the sin of Simon Magus. 3 *Coke Inst.* 156.

The offence has been generally committed either by the purchase of the next presentation to a living actually vacant, or by a clergyman purchasing, either in his own name or another's, the next presentation to a living, and afterwards presenting, or causing himself to be presented thereto. See *Cowel;* 1 *Bl. Com.* 389, 393; 2 *Id.* 278–281.

SIMPLE. The word simple, as applied to contracts, is used in contradistinction to special. The class called simple contracts includes all such contracts as are entered into either orally or by writing not sealed; the latter comprehending such contracts as are entered into by the parties in writing, and authenticated by their affixing their seals. The former species of contracts are said, by some, to be called simple, because they subsist by reason simply of the agreement of the parties; by others, because their subject-matter is usually of a less complex nature.

A written agreement not under seal is classed as a simple contract, the same as any agreement by mere word of mouth; for the common law drew no important distinction as to contracts in writing, unless they were sealed; and the requirement of the statute of frauds that certain agreements must be in writing has not been considered adequate reason for transferring them from the class of simple contracts to that of specialties.

As to simple larceny, see LARCENY; simple trust, see TRUST.

Simplex commendatio non obligat. A simple recommendation does not bind. No obligation binding in law arises out of a mere recommendation.

Where goods are sold by sample, or without the buyer seeing any of the goods which he purchases, he is entitled to rely upon the statements of the seller as to their character and quality; and he will be entitled to repudiate the transaction, or claim damages, if the seller's statements should be false, or calculated to deceive. But where the goods are inspected by the buyer, he has no such remedy; for in that case his eye is his merchant, and he is bound to satisfy himself. In the latter case, the mere commendation of the seller of the goods he is disposing of, or boastful representations of their quality or value, infers

no obligation or warranty that they are what he represents them to be; and the buyer can only claim compensation, or rescind his contract, where the defect, subsequently discovered, was one in the knowledge of the seller at the time, and one which he, the buyer, could not have discovered from careful inspection. This maxim may also be taken as expressing one of the rules of law concerning guaranties. A mere letter of introduction, or one conceived in general terms, recommending a certain person as worthy of confidence, and to whom credit in mercantile transactions may be safely given, is regarded as a mere recommendation, not inferring any liability as against the person writing such a letter. But when it goes beyond this, and specifies a sum as the limit to which credit may be given, or when it applies specially to a transaction, or dealing, or course of dealing, in which credit is necessary, and is accompanied by an assurance of safety, it will be held as a guaranty. *Trayn. Max.*

SIMUL CUM. Together with. The words formerly used in indictments and pleadings and writs, generally, against several persons, to connect some of the defendants who were known with those who were not known; charging that those known (naming them), together with others unknown, did the act complained of.

SIMULATE. To pursue, for a fraudulent purpose, a course which resembles, but is not, a transaction or condition of things from which the party might derive benefits or rights. Thus to simulate a disease, or an attack of insanity, is to feign the symptoms and imitate the behavior characteristic of either, with the purpose, for example, of escaping military duty, or founding a defence to a prosecution. A simulated sale is a transaction carried through by collusion, which presents the outward appearance of a sale, while, by the real intention, no transfer of the property is to be made; with the purpose, for example, of protecting the property against claims of creditors.

SINE. Without. The initial word of several Latin phrases.

Sine assensu capitali. Without the assent of the chapter. The name of a writ issued, in English practice, when a dean, bishop, prebendary, abbot, prior, or master of an hospital aliened land held in right of his house, without the consent of the chapter, convent, or fraternity; in which case his successor should have this writ. *Cowel.* With other real actions, this writ was abolished in 1833, by Stat. 3 & 4 Wm. IV. ch. 27, § 36.

Sine die. Without day. Without a day fixed to appear again. A phrase in general use, expressing a final adjournment. When used in reference to legal proceedings, it imports a final discharge or dismissal. Formerly, judgment for the defendant in many cases was, in terms, *quod eat sine die*, — that he go without day.

Sine hoc. Without this. A technical phrase in pleading equivalent to *absque hoc*, q. v.

SINECURE. Originally, without care. Applies to an office to which no substantial duties are attached.

SINGLE. Enters into some legal phrases.

Single bill, or **bond.** An obligation for payment of money, draughted without a condition or defeasance.

Single demise. A declaration in ejectment might contain either one demise or several. When it contained only one, it was called a declaration with a single demise. In order to maintain an action of ejectment, he who was alleged as making the demise must always have had the legal estate in the premises sought to be recovered; and hence, whenever a doubt existed as to whether the legal estate was in one of several persons, it was usual, in framing the declaration, to insert a demise by each. In such cases, the declaration was said to contain several demises; and the action was then entitled "John Doe, on the several demises of A, B, and C," meaning the several lessors. In England, since the common-law procedure acts, no demise at all is necessary in ejectment, but the action proceeds against the actual tenant in possession, as nearly as may be in accordance with the rules in other actions; and similar, and even more radical, changes have been introduced in most of the United States.

Single man. In the construction of a benevolent statute of the government, inviting its own citizens to settle on its distant public lands, the words "single man"

may, especially if aided by the context and other parts of the statute, be held to include an unmarried woman. Silver *v.* Ladd, 7 *Wall.* 219.

SINGULAR. Each, as in the expression all and singular. Also, individual. It is applied to various things or objects regarded individually.

Singular successor. A purchaser or transferee of a specific chattel or specific land, as opposed to a universal successor, such as the trustee of a bankrupt's estate, or the executor or administrator of a deceased person.

Singular title. The title by which a party acquires property as a singular successor.

SINKING FUND. A fund arising by setting apart some specific taxes or other source of government income, to be applied towards paying a specified indebtedness, usually interest first and then principal.

SITTINGS. Is used in the English parlance of the courts much as session is in the United States. The sittings at *nisi prius* and *in banc* are, respectively, the session of the court for giving trials and for cases in error, &c. Sittings after term were sessions which were held in London and Middlesex, after the close of the respective terms, for the trial of issues of fact before a judge and jury, now superseded by new provisions of the judicature acts, as to London and Middlesex sittings.

That the word sittings, as applied to courts, is equivalent to term, see Gird *v.* State, 1 *Oreg.* 308.

SITUATE. In general, a house may be said to be situate on all the lands within the same enclosure necessary for its proper enjoyment, and actually so used and occupied. Orr *v.* Baker, 4 *Ind.* 86.

SIX CLERKS. Officers formerly attached to the English court of chancery, whose duties consisted in receiving and filing all bills, answers, replications, and other records, in all causes on the equity side of the court. They signed all copies of pleadings made by the sworn clerks and waiting clerks, after seeing that the originals were regularly filed. They examined and signed dockets of decrees and dismissions prepared for enrolment, and saw that the records and orders were duly filed and entered, &c. They had the care of all records in their office, which remained in their studies for six terms, for the sworn clerks and waiting clerks to resort to without fee, &c. But the office was abolished in 1842, by Stat. 5 & 6 Vict. ch. 103, § 1, and their functions were transferred to the record and writ clerks. See *Brown.*

SLANDER. Aspersion by word of mouth; oral defamation; words uttered falsely and maliciously, by which the reputation of another is injured.

The kinds of slander which may be the subject of an action for damages are the following:

1. Words falsely spoken of a person, which impute to him the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person, which impute that he is infected with some contagious disease, where, if the charge were true, it would exclude the party from society. 3. Words falsely spoken of a person, which impute to him unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Words falsely spoken of a person, which prejudice him in his profession or trade. 5. Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion him special damage. Pollard *v.* Lyon, 91 *U. S.* 225.

Slander of title. This is a statement of something tending to cut down the extent of title to some estate vested in the plaintiff. Such statement, in order to be actionable, must be false and malicious; *i.e.*, both untrue and done on purpose to injure the plaintiff. Damage must also have resulted from the statement. *Brown.*

SLAVE. A person held to serve another under a claim of ownership; one who is accounted the property of another person; a bondman, in virtue of belonging to another; a servant whose master claims title in him. Slavery: the condition of a slave; also, that political or civil state in which a claim of persons of one class or race to own persons of another is recognized and sustained by law.

Slave-trade. Buying and selling

slaves; particularly, buying or importing them from one country, to be sold in another.

SLEEPING RENT. A phrase used, especially in leases of coal-mines, to denote a fixed rent, as opposed to a rent varying with the profits. Jones *v.* Shears, 2 *Har. & W.* 43.

SMART-MONEY. A term sometimes used as equivalent to exemplary damages (*q. v.*), or to punitive or vindictive damages.

SMUGGLE. To transport dutiable merchandise in such a manner as to defraud the revenue out of the duty or tax upon it. Smuggler: one who makes it a practice of defrauding the revenue, by stealthily carrying merchandise past the revenue officers, without payment of duty or tax. Smuggling: fraudulently carrying dutiable merchandise past the officers of the revenue, without paying duty or tax. Smuggled: brought into consumption without payment of lawful duty or tax, by fraudulent means.

As these words have generally been used in the United States, they present the idea of an evasion of the laws imposing duty on imported goods; but they are probably not confined to importation. Tomlins says that smuggling is the offence of importing *or exporting* goods, without paying the duties imposed thereon by the custom or excise laws, whereby the revenue is defrauded. And Wharton defines it as the offence of importing prohibited articles, or of defrauding the revenue by the introduction of articles into consumption, without paying the duties chargeable upon them; and says that it may be committed indifferently, *either upon the excise* or customs revenue.

Throughout the commercial history of the United States there has been but little legislation imposing duties on exportation of merchandise, and only for a recent period have taxes on internal production been notable. Hence there has been little occasion to use "smuggle," except in reference to importations; but it may well have the broader meaning. It may, perhaps, extend to importing, exporting, or manufacturing goods contrary to absolute prohibitions of the duty or revenue laws, or, as they are called in England, the customs or excise laws; that is to say, perhaps a person who stealthily imports lewd and indecent pictures, the importation of which is not made subject to duty by the acts of congress, but is absolutely prohibited, is to be deemed a smuggler. But this point is doubtful, and it is very difficult to combine this element in one definition with all the others.

And smuggling is not necessarily committed for the purpose of selling the goods: one who imports, &c., goods for his own use, without paying duty, may well be said to smuggle them; and, if he is not well termed a smuggler, it is because he does not make a practice or business of such importations: he is a smuggler *pro hac vice*, although the goods are not intended for market.

Smuggle is a technical word. It implies something illegal, and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods, with intent to avoid payment of duty. (*Stat.* 16 & 17 *Vict.* ch. 107, § 244; Act of June 22, 1874, 18 *Stat. at L.* 186.) United States *v.* Claflin, 13 *Blatchf.* 178.

SOCIETAS; SOCIÉTÉ. The civil and French law terms corresponding to partnership.

Every *société* is either *universelle*, being either of all present property, or of all future gains; or *particulière*, being a particular contract for one definite enterprise. Generally, the modes and consequences of a dissolution of a *société* are the same as for that of a partnership in English law. *Brown.*

Societas leonina. A leonine partnership. In the Roman law, this term indicated a partnership in which the entire profits were to belong to some of the partners, to the exclusion of the others.

It was so called in allusion to the fable of the lion and other animals, who, having entered into partnership for the purpose of hunting, the lion appropriated all the prey to himself. It was void. *Wharton.*

Société anonyme. Seems to correspond to the limited partnership of our law.

Société en commandité. Seems to correspond to the special partnership of our law.

SOCAGE. One of the feudal tenures of land.

In early feudal times, lands were held sometimes on knight service, and some-

times on socage service. Knight service required military duty from the tenant, and was very uncertain in its demands and obligations; the tenant must aid the lord, according to the exigencies of his campaigns and military adventures. Socage called upon the tenant for services in husbandry. Those who attach importance to the derivation of words as a leading means of determining their sense differ whether to deduce the word from the French *soc*, a plough, or the Saxon *soc*, a privilege; but agree in this, that it called for agricultural services, and so imported a privilege which could not be claimed for knight service, viz. the amount due could be and usually was made certain; the tenant knew how much labor or produce the lord could require from him. In the earliest times, knight service was preferred, and deemed the more honorable; but as the arts of peace grew in esteem, and acquisition of property began to attract men from military glory, the greater certainty of socage tenures gradually gave them a preference, and knight service declined, while socage gained strength and extension. There were once two kinds of socage: free socage, where the services were not only certain but honorable; and villein socage, or privileged villeinage, where the services, though certain, were of a baser nature. With the decline of villeinage, free socage attained steady preponderance; and at length, by the Stat. 12 Car. II. ch. 24, the ancient tenures by knight service were abolished, and all lands, with the exception of copyholds, and of ecclesiastical lands (which continued to be held in frankalmoigne), were turned into free and common socage. Under this statute, the great bulk of real property in England continued to be held under this ancient tenure. Historically, then, socage may be said to be a holding of lands in consideration of services which are certain or definite in nature and amount. In another aspect, it may be described as the principal kind of title to lands, recognized by modern English law.

The strong general tendency of constitutional and real-property law in the United States has been to drop the theory of feudal service altogether, and consider lands as held by allodial tenure; that is, without any duty of service to a superior, and subject only to ultimate rights of the state, such as escheat and eminent domain.

Socii mei socius meus socius non est. The partner of my partner is not my partner. A person who is a copartner with one of several members of a different copartnership is not on that account a copartner with all or any other of them. This is a maxim of the civil law, which is also recognized in the common law. A person may become a partner with one individual of a partnership, without being concerned in that partnership. 3 *Kent Com.* 52, and note.

SODOMY. The offence of carnal copulation by one human being with another against nature, or with a beast; buggery.

SOIL. Used with reference to mineral rights, is equivalent to surface. Pretty *v.* Solly, 26 *Beav.* 606.

Soit fait comme il est desiré. Let it be as it is desired. The form of giving the royal assent to private acts of parliament.

SOLATIUM. Compensation. Especially the compensation allowed by the law for injury done to the feelings, as distinguished from the indemnification awarded for pecuniary loss sustained, or physical injury inflicted.

SOLD. See SALE; SELL.

The word sold, at the commencement of a memorandum of agreement, made, on the sale of goods, by the vendors, means, contracted to sell. Russell *v.* Nicoll, 3 *Wend.* 112.

The words "I have sold," in a conveyance, import a valuable consideration. Reaves *v.* Ore Knob Copper Co., 74 *N. C.* 593.

In a count to recover the price of land, an allegation that the land was sold imports that the land was conveyed. Staunton *v.* Henderson, 1 *Smith*, 54.

Where the authorities of a city constituted trustees to manufacture gas for the city use, under arrangements with city creditors that the city should not take the ultimate ownership of the property where the gas was manufactured until the debt created by raising the funds required in establishing the gas-works should be paid; and it was further agreed with the creditors that the city must have the gas at a certain reduced rate, and that the trustees should manage the establishment, and set aside all profits for a sinking fund to pay

the principal of that debt, it was held that the gas must be deemed "sold" to the city, and that it was subject to internal revenue tax, under a law which declared illuminating gas taxable if "made and sold," but exempt if made by a person "not for sale, but for his own use." Philadelphia *v.* Collector, 5 *Wall.* 720.

Sold note. See BOUGHT NOTE.

SOLE. Alone; individual; single. Thus a corporation consisting of a single natural person is called a sole corporation; a woman unmarried is called a *feme sole;* one who holds lands alone, no other being joined with him, is called sole tenant.

SOLEMN FORM. There are two kinds of probate; namely, probate in common form, and probate in solemn form. Probate in common form is granted in the registry, without any formal procedure in court, upon an *ex parte* application made by the executor. Probate in solemn form is in the nature of a final decree pronounced in open court, all parties interested having been duly cited. The difference between the effect of probate in common form and probate in solemn form is, that probate in common form is revocable, whereas probate in solemn form is irrevocable, as against all persons who have been cited to see the proceedings, or who can be proved to have been privy to those proceedings, except in the case where a will of subsequent date is discovered, in which case probate of an earlier will, though granted in solemn form, would be revoked. *Coote Prob. Pr.* (5th ed.) 237-239.

SOLEMNIZE. To solemnize, spoken of a marriage, means no more than to enter into a marriage contract, with due publication, before third persons, for the purpose of giving it notoriety and certainty; and may be before any persons, relatives, friends, or strangers, competent to testify to the facts. Pearson *v.* Howey, 11 *N. J. L.* 12, 19.

SOLICITOR. In English practice, has heretofore been the style or title of a practitioner in the court of chancery. The two words, solicitor and attorney, have, however, been commonly used indiscriminately; although there was a distinction between the titles, — an attorney being a practitioner in the courts of common law, a solicitor, a practitioner in the courts of equity. But as attorneys took out a certificate to practise in the courts of chancery, and therefore became solicitors also, and, on the other hand, most, if not all, solicitors took out a certificate to practise in the courts of common law, and therefore became attorneys also, it was common to use the two words as interchangeable.

But the judicature acts introduce a change in this respect. They provide for only one admission to practise in all the courts, as attorney, solicitor, or proctor; and direct that all three classes shall be known as solicitors of the supreme court. In other words, the title solicitor, in England, now embraces the functions of attorneys and proctors, as well as those of practitioners in equity courts.

Throughout the United States, solicitor has been but little used as a title of a distinct class of practitioners; for the reason that all three classes of practitioners have generally been admitted as attorneys-at-law, — there has not usually been any distinct privilege of practising as proctor or as solicitor.

Solicitor of the supreme court. In Scotland, the solicitors before the supreme courts are a body of men entitled to practise in the court of session, &c. In England, the attorneys, solicitors, and proctors admitted to practise in the supreme court of judicature are, by the judicature acts, to have this title.

Solicitor of the treasury. The title of an officer now of the department of justice in the United States government, having general charge of law business arising out of the operations of the treasury.

Solicitor-general. The style or title of the second law-officer in the English government, ranking next to the attorney-general; also, that of a similar officer under the United States government, who is connected with the department of justice. Also, in some of the states, the title of the chief law-officer, or one corresponding with the attorney-general in other states.

SOLIDUM. See IN SOLIDO.

SOLUM. The land; the soil.

Solo cedit quod solo implantatur. To the land belongs what is planted. *Solo cedit quod solo inædificatur.* To the land belongs what is built into the land. See *Quicquid plantatur*, &c.

SOLUTIO. Release; payment. A term of the civil law, importing satis-

faction in any manner, as well as by actual payment in money.

SOLVENCY. The pecuniary condition of a person who has means and resources adequate for the payment of his debts. Solvent: possessed of property enough for payment of one's debtors.

These terms are satisfied, according to the more recent New York decisions, if the assets of the person mentioned are enough to cover his debts, so that any valid demand against him can be collected by due course of law. They do not require that he should at all times have money on hand for payment of every demand on presentation, according to the usual course of business; nor even that his pecuniary condition should be such as to enable him to raise money promptly, on credit for payment of debts. A person is solvent who owns property enough and so situated that all his debts can be collected from it by legal proceedings. Huffman *v.* Hulbert, 13 *Wend.* 377; Herrick *v.* Borst, 4 *Hill* (*N. Y.*), 650; People *v.* Halsey, 53 *Barb.* 547.

That solvent means, able to pay one's debts in full out of one's own present means, see 4 *Hill* (*N. Y.*), 652.

It is true that "insolvency" and "inability to pay" are synonymous; but solvency does not mean ability to pay at all times, under all circumstances, and everywhere, on demand, nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Walkenshaw *v.* Perzel, 4 *Robt.* 426.

Solvit ad diem. He paid at the day, *i.e.* punctually.

Solvit post diem. He paid after the day. The Latin names of two pleas formerly in use, by which defendant in an action of debt averred that he had paid the money now demanded, on the day when it fell due; or, what was much the same thing in effect, that he had paid it after the day named in the deed, but before suit brought.

SON. His.

Son assault demesne. His own assault. Has been explained under DEMESNE, *q. v.* It was the form of alleging, in defence of an action for assault, that the act complained of was done by the defendant in his own defence against the plaintiff's first assault.

SON. Male child or descendant.

The phrase, sons and daughters, in a will, may include grandchildren. Case of Smith 2 *Desau.* 123, in note.

SOON. A promise to do an act soon, imports, usually, that the promisor will do it in a reasonable time; he is entitled to a reasonable time for performance, and is liable, after that time has expired without performance. See Sanford *v.* Shepard, 14 *Kan.* 228; Ubsdell *v.* Pierson, 22 *Mo.* 124; Waddell *v.* Reddick, 2 *Ired. L.* 424.

SOUND, *v.* An action brought to recover damages, not for specific property, is said to sound in damages.

SOUND, *adj.* In good condition. A word frequently used, in warranties of things sold, to aver that the subject-matter is in marketable condition; and, in reference to mental capacity, to indicate that it is not overcome by disease.

Sound, when used with reference to wood or vegetables, or other inanimate substances, means free of decay or rottenness. When it is used in reference to animals, and applied to the mind, it means that neither from nature or disease, or other causes, is the subject incapable of performing its ordinary functions. When applied to the organs of seeing, hearing, smelling, &c., it means that the organ has not, either from nature, disease, or other cause, any defect which makes it incapable or unfit to perform the services ordinarily required of it. Bell *v.* Jeffries, 13 *Ired. L.* 356.

As used in a warranty on a sale of merchandise, sound relates to condition only, not to quality or kind; being opposed to defective, decaying, or injured. An article may be inferior, yet not unsound. Hawkins *v.* Pemberton, 35 *How. Pr.* 376.

Sound and disposing mind and memory. This phrase is often used in the law of wills, to signify testamentary capacity.

Judge Washington (in Harrison *v.* Rowan, 3 *Wash.* 580, and Stevens *v.* Van Cleve, 4 *Id.* 262, 267) gave definitions of it, substantially as follows.

By a sound and disposing mind and memory is meant that the testator must be capable of making his will, with an understanding of the nature of the business in which he is engaged, a recollection of the property of which he means to dispose, of the persons who are the objects of his bounty, and of the man-

ner in which it is to be distributed between them. He need not, indeed, view his will with the eye of a lawyer, and comprehend its provisions in their legal form; but if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the distribution of his property in its simple forms, this is sufficient. This definition has often been quoted with approval. See, in particular, Hall *v.* Unger, 2 *Abb. U. S.* 507; Lowe *v.* Williamson, 2 *N. J. Eq.* 82.

The phrase sound disposing mind and memory, used with reference to disposing capacity, stands opposed, not only to idiocy and lunacy, but to all derangement of mind, occasioned by melancholy, grief, sorrow, misfortune, sickness, or disease. It is true that every discomposure of the mind, by these causes, will not render one incapable of making a will: there must be such a discomposure, such a derangement, as deprives him of the rational faculties common to man. But "sound" signifies whole, unbroken, unimpaired, unshattered, by disease or otherwise; and "disposing mind and memory" means a mind and memory which have the capacity of recollecting, discerning, and feeling the relations, connections, and obligations of family and blood. Merritt *v.* Johnson, 5 *N. J. L.* 454.

SPEAKER. The style or title of the presiding officer of some deliberative assemblies; particularly those of the United States house of representatives, and of the two houses of parliament.

According to May, each house of parliament has an officer termed a speaker, who presides over and manages the formal parts of the business. The speaker of the house of lords is the lord chancellor, or keeper of the king's great seal, or any other person appointed by the king's commission; and, if none should be so appointed, the house of lords might elect. He is not necessarily a member: it has frequently happened that the lord keeper has officiated for years as speaker, without having been raised to the peerage; and on Nov. 22, 1830, Mr. Brougham sat as speaker, — being at that time lord chancellor, — although his patent of creation as a peer had not yet been made out. The speaker of the house of commons is chosen by the house, but must be approved by the king.

The duties of the speaker of the lords are principally confined to putting questions; and the lord chancellor has no more to do with preserving order than any other peer. In the commons, his duties are to put questions, to preserve order, and to see that the privileges of the house are not infringed; and, in the event of the numbers being even on a division, he has the privilege of giving the casting vote. He is, moreover, the spokesman of the house on state occasions, in reprimanding delinquents, &c.

In the United States house of representatives, the speaker, in addition to the usual authority and powers of a presiding officer, has the appointment of the standing committees of the house; which imparts to the position a high degree of importance and influence over legislation.

SPECIAL. Occurs without much departure from its vernacular or common sense of relative to a species or single kind; particular; opposed to common or to general; in a number of terms. Indeed, there is an indefinite number of phrases which have special for their introductory word; for almost any thing known to the law may arise sometimes in a particular or individual way, and be characterized, in that use, as special. These phrases may be left to the general knowledge and sound judgment of the reader. These explanations will be confined to such phrases, introduced by the word special, as have some technical meaning which would not be reached by understanding that "special" is equivalent to individual, particular, or unusual, and opposed to general, common, or ordinary, or is sometimes used for mere emphasis.

Special acceptance. An acceptance of a bill of exchange inserting a stipulation that it shall be payable at a particular place, — as thus: Accepted, payable at the First National Bank.

Special administration. Authority to administer upon some few particular effects of a decedent, as opposed to authority extending to his whole estate.

Special agent. One constituted for a single transaction only. See AGENT.

Special assumpsit. When the price or compensation recoverable by plaintiff is dependent upon and determined by the terms of an express contract which

must be pleaded and proved, and plaintiff cannot sue for the value or the market price of what he furnished to defendant, the action of assumpsit framed accordingly is called special assumpsit.

Special bail. Arrest for debt was ameliorated in substance long before it was formally restricted, by a practice of the courts of waiving any inquiry as to the bail which a defendant put in, except in those classes of actions in which it was desirable or just to hold defendant, really, to the duty of giving security. In the great mass of actions on ordinary commercial debts, defendant might be discharged from the arrest which, as matter of form, appeared on the papers to be made as the commencement of the action, by giving nominal sureties, called common bail. In the actions in which the reality of an arrest was maintained, real persons must be produced who would veritably engage for defendant's appearance; these were called special bail.

Special bailiff. A person named by a party in a civil suit, for the purpose of executing some particular process therein, and appointed by the sheriff on the application of such party.

Special calendar, docket, or paper. A court paper or trial list, containing a list of special cases and demurrers set down particularly for trial or for argument.

Special case. 1. When a trial at *nisi prius* appears to the judge to turn on a point of law, the jury may be allowed to find a general verdict, subject to the opinion of the court above, upon what the English books call a special case to be made; that is, upon a written statement of all the facts of the case drawn up for the opinion of the court *in banc*, by the counsel and attorneys on either side, under correction of the judge at *nisi prius*. The party for whom the general verdict is so given is in such case not entitled to judgment till the court *in banc* has decided on the special case; and, according to the result of that decision, the verdict is ultimately entered either for him or his adversary. Moreover, a statute in England provides, that where the parties in an action, on issue joined, can agree on a statement of facts, they may, by order of a judge, draw up such statement, in the form of a special case for the judgment of the court, without proceeding to trial; or, where they are agreed on the facts underlying a question of equity jurisprudence, they may state such question in the form of a special case, for the opinion of the court of chancery. Under the judicature acts, the parties to an action may, after the writ of summons has been issued, concur in stating the questions of law arising in the action, in the form of a special case, for the opinion of the court. It is not easy to see that "special" has any distinct force in these connections, except that, as it is used in the statute, it ought to be used in proceedings under it. The parties prepare a case; that is all that is meant.

2. The constitution of New York, also that of California, conferred jurisdiction on county courts of "special cases." For decisions upon what is to be deemed meant by the expression special case, in this particular connection, see Griswold *v.* Sheldon, 4 *N. Y.* 581; Frees *v.* Ford, 6 *Id.* 176; Kundolf *v.* Thalheimer, 12 *Id.* 593; Doubleday *v.* Heath, 16 *Id.* 80; Arnold *v.* Rees, 18 *Id.* 57; People *v.* Main, 20 *Id.* 434; Beecher *v.* Allen, 5 *Barb.* 169; Hall *v.* Nelson, 23 *Id.* 88; Benson *v.* Cromwell, 6 *Abb. Pr.* 83; Parsons *v.* Tuolumne County Water Co., 5 *Cal.* 43; People *v.* Kern County, 45 *Id.* 679; Spencer Creek Water Co. *v.* Vallejo, 48 *Id.* 70.

Special charter. Special has no distinct force in this phrase. Corporations are formed in American legislation in two ways: under a general act, authorizing any individuals who will comply with the law to form a corporation; or under an act designating individuals by name, to form with their successors a corporation created by such act. An act of this last description is a charter Sometimes, in order to emphasize the distinction of a charter from a general act, it is called a special charter; but the meaning is not altered: there are not two kinds of charters, one general and one special; but the two species of laws

contrasted are general acts of incorporation and charters.

Special commission. An extraordinary commission of oyer and terminer and jail delivery, issued by the crown to the judges for the trial of certain designated offences which ought to be immediately tried.

Special constable. One of an additional number of constables appointed and sworn in for a single exigency; as to aid in keeping the peace at a time of anticipated riot.

Special contract. Contracts under seal, or specialties, are sometimes called special; but the expression special contract oftener means actual contract, express contract, contract particularly stating the obligations of the parties. Thus, when it is said that if compensation of a servant was not fixed by contract, he can recover on a *quantum meruit;* but, if there was a special contract, he must plead and prove it, and recover according to its terms, or not at all, — the meaning is, if there was an actual contract prescribing what he should do, and how much he should receive.

Special count. A count in a plaintiff's declaration, framed on the plan of stating the facts peculiar to the particular case as they actually occurred; in opposition to the common counts which express the ordinary causes of action.

Special damages. The law implies or presumes that a plaintiff suffered those ill consequences which can be seen to be the necessary result of the wrong which he has proved to have been committed by defendant. Special damages are an allowance for such loss as was, in the particular case, natural and proximate, though not the necessary consequence of the wrong. They are compensation claimed for such injury as really and in fact resulted, but will not be implied by law. They are either superadded to general damages arising from an act injurious in itself, as where 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 where words become actionable only by reason of some special or actual damage having resulted from the uttering them. Whenever the damages sustained by a party have not necessarily resulted from the act complained of, and consequently are not implied by law, the plaintiff must, in order to prevent surprise on the defendant, which otherwise might ensue on the trial, state with particularity in his declaration the actual or special damage which he has sustained.

Special damage, as contradistinguished from general damage, is that which is the natural, but not the necessary, consequence of the act complained of. Roberts *v.* Graham, 6 *Wall.* 578.

Special demurrer. Under the stricter systems of procedure, some of the graver defects in a pleading may be reached by a demurrer which does not in terms point out the particular defect relied upon, while for many lesser faults the adverse party, if he demurs at all, must specify the objection. A demurrer which thus points out the ground of demurring is a special demurrer.

Special deposit. A deposit in which the identical thing deposited is to be returned to the depositor.

Special election. An election for a particular emergency; out of the regular course; as one held to fill a vacancy arising by death of the incumbent of the office.

Special examiner. Some person, not one of the examiners of the court of chancery, appointed to take evidence in a particular suit. This may be done when the state of business in the examiner's office is such that it is impossible to obtain an appointment at a conveniently early day, or when the witnesses may be unable to come to London. *Hunt Eq.* Pt. I. ch. 5, § 2.

Special finding. The report of a jury of their opinion as to some particular fact which, though presumably material to the general question submitted to them, does not involve the whole of that question.

Special meeting; special general meeting. In English law of corporations, the meaning of a "special meeting" is, that the meeting shall not be convened unless the parties have notice of the purpose of the meeting. A meeting may be both general and special, — general, for the purpose of doing general business, and special, for a particular purpose; then it becomes a special general meeting. Cutbill *v.* Kingdom, 1 *Exch.* 494; 17 *Law J.* N. S. 177.

Special imparlance. An imparlance which contains the clause "saving to him-

self all advantages and exceptions, as well to the writ as to the declaration aforesaid." 2 *Chit. Pl.* 407, 408.

Special indorsement. A special indorsement on a bill of exchange or other negotiable instrument is one which specifies the person who is to have the benefit of the indorsement. Thus, pay C D or order, subscribed with the indorser's name. This is otherwise called an indorsement in full, opposed to an indorsement in blank. It is the most common form of indorsement in use. Its effect is to make the instrument payable to C D or his order only; and, accordingly, C D cannot transfer it otherwise than by indorsement. The omission of the words "or order" is not material in a special indorsement; for the indorsee takes it, with all its incidents, and, among the rest, with its negotiable quality, if it were originally made payable to order.

A special indorsement on a writ of summons is one which may be made where a plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied (as, for instance, a bill, promissory note, check, &c.), or on a bond or contract, under seal, for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt; or on a guaranty (whether under seal or not) where the claim against the principal is in respect of a debt or liquidated demand. In short, a special indorsement may be made in all cases where a definite sum of money is claimed. When the writ is thus specially indorsed, and the defendant does not appear within the time appointed, the plaintiff may then sign final judgment for any sum not exceeding the sum indorsed on the writ. See 3 *Steph. Com.* 495; *Lush Pr.* 366; *Judicature Act*, 1875, first schedule, order 3, rule 6, and order 13, rules 3, 4.

Special injunction. According to general equity procedure, and independent of changes introduced in the practice of the English court of chancery by recent legislation, a common injunction, which issued as of course, was an injunction to restrain a defendant who was in contempt for not appearing or not answering to a bill, or who had obtained further time to answer, from proceeding at law in respect to the same matter. All other injunctions were called special injunctions; and the granting or refusing them was considered to be a matter resting within the discretion of the judge. *Smith Man. Eq.* tit. 4, ch. 3, § 3. The phrase special injunction has also been applied to injunctions to restrain injuries about to be inflicted upon the property of another, as opposed to injunctions to restrain proceedings at law. *Goldsm. Eq.* (6th ed.) p. 139.

Special issue. The definitions in the dictionaries differ, — very probably because the term is differently used. Bouvier defines special issue as being a plea to the action which denies some particular material allegation which is, in effect, a denial of the entire right of action. It differs from the general issue, which traverses or denies the whole declaration or indictment. This definition is quoted and adopted in the recent law dictionary of Mozley & Whiteley, as correct, under modern English practice. Stephen defines it as the issue produced upon a special plea, and says that it is called special, because usually more specific and particular than are the general issues. This definition has been adopted by Burrill, and by the recent English law dictionary of Brown.

Special jurisdiction. A court authorized to take cognizance of only some few kinds of causes or proceedings expressly designated by statute is called a court of special jurisdiction.

Special jury. Another name for a struck jury, *q. v.*

Special law, act, or statute. Several of the state constitutions restrict the legislatures from enacting special laws when the object in view can be accomplished by a general law. And there are other uses of the term somewhat similar. It is not easy to state in one sentence the distinction between general and special laws; but it may be gathered from the following instances:

A special law is one such as at common law the courts would not notice, unless it were pleaded and proved like any other fact. Hingle *v.* State, 24 *Ind.* 28; Toledo, &c. Railway Co. *v.* Nordyke, 27 *Ind.* 95.

An act changing the venue of a particular trial for murder is special. Smith *v.* Judge, 17 *Cal.* 547.

A law which confers jurisdiction upon a specified court to try offences prohibited by other provisions of the act only, without giving like jurisdiction as to other offences,

is not a special law, within a constitutional provision prohibiting special laws for the punishment of crimes and misdemeanors. The distinction between general and special statutes was well known to the common law, though sometimes a question of great nicety; and it is in accordance with a well-established principle to assume that the constitution, in using the terms, intended them to be understood in the sense which was at that time recognized by the courts. Now, an act which confers jurisdiction for the punishment of a particular misdemeanor, in all cases, is not a special law in this sense, though the court thus empowered could not take cognizance of other misdemeanors. Hingle *v.* State, 24 *Ind.* 28.

An act authorizing supervisors of roads to remove fences standing near public highways on streams or watercourses, &c., is not a special law. Hymes *v.* Aydelott, 26 *Ind.* 431.

An act to establish a court at a particular town is a special law. McGregor *v.* Baylies, 19 *Iowa*, 43.

Enactments declaring the duty of officers of civil corporations, in regard to the payment of judgments against their corporations, and prescribing the consequences to the officers personally of a failure to comply with the law, are not special laws. Porter *v.* Thomson, 22 *Iowa*, 391.

An act to legalize the organization of a particular school district, previously but irregularly created, is not in conflict with a prohibition upon local or special laws. State *v.* Squires, 26 *Iowa*, 340.

An act relating particularly to the roads of a single county is not a special law, but a public local law. State *v.* County Commissioners, 29 *Md.* 516.

Special legacy. See SPECIFIC LEGACY.

Special license. English laws regulating solemnization of marriages, and prescribing publication of banns beforehand, have allowed this publication to be dispensed with and the delay it caused avoided, by obtaining a license, issued on special application, under authority of the archbishop of Canterbury, authorizing the marriage to be celebrated at any convenient time and place. This is called a special license.

Special lien. Another term for a particular lien. See LIEN.

Special matter. The strictness of common-law pleading has been relieved in some jurisdictions, or as to some kinds of actions, by allowing a defendant, instead of pleading specially, to serve a plea of the general issue, accompanied with a simple notice, that on the trial he will give some special matter, the nature of which is indicated in the notice, in evidence in his defence.

Special motion. Special, in this phrase, does not seem to have much distinctive force: it emphasizes the idea of a motion actually made and argued, and judicially decided, as distinguished from a formal application for some order or rule that may be granted of course.

Special occupant. In English real-property law, if an estate for the life of a third person has been granted to a man and his heirs, and the first grantee dies before the third person on whose life the estate is limited does, so that his heir may enter for the rest of such third person's lifetime, the heir is said to enter as special occupant; and his tenure is special occupancy. See *Bouvier; Burrill;* 2 *Bl. Com.* 259; 4 *Kent Com.* 27.

Special owner. See SPECIAL PROPERTY, *infra.*

Special partner, or partnership. There is, perhaps, some distinction in these phrases: special partner usually means the partner who, under laws authorizing formation of limited partnerships, puts in a definite capital, assumes no part (or only such as the statute permits) in the business management, and is liable only to loss of the capital contributed. But the partnership thus formed is commonly called limited partnership; and special partnership may well mean one formed for a single branch of business or subject.

Special plea, pleading, and pleader. The common-law system of pleading encouraged the bringing all ordinary and everyday controversies, such as actions for money lent, goods sold, wages, &c., before the courts, for trial upon issues formed by very simple pleadings; by declarations alleging the legal effect of the facts, and common counts in which the averments for plaintiff were reduced almost to mere formulas; and by a mere denial, called the general issue, and formal pleas adapted to ordinary affirmative defences, such as the plea of payment, of former adjudication, &c. These established forms answered for a multitude of the controversies, but not for all; causes were

frequent in which plaintiff could not aver his cause of action, or defendant could not embody his defence in either of these settled modes, but a count or plea adapted to the peculiar facts of the particular case was necessary. These were called special counts and special pleas; and draughting them was the art of special pleading; and the chamber counsel who, in England, particularly devoted themselves to the business of draughting them were special pleaders. The use of the last two terms, special pleading and special pleader, has been somewhat increased and enlarged to include drawing of all pleadings, from the fact that pleading has been popularly used as meaning oral argument in court.

Special privilege. An act of congress forbidding any territorial legislature to grant a private charter or special privilege, does not preclude passing ordinances to restrict gaming-houses. The act does not forbid conferring upon a particular city the common and usual powers conferred on municipal corporations, of passing by-laws in the nature of police regulations. *Exp.* Douglass, 1 *Utah T.* 108.

Special proceeding. This phrase has been used in the New York and other codes of procedure as a generic term for all civil remedies which are not ordinary actions. See *N. Y. Code of Pro.* § 3.

That so used it does not include the provisional remedies, arrest, attachment, claim, and delivery, injunction and receivership, which, under the codes, are remedies granted in actions, not distinct proceedings, see Allen *v.* Partlow, 3 *S. C.* 417.

Special property. In this expression, property means interest or ownership, not the tangible thing owned. And the phrase distinguishes between the general right or title, the entire ownership in the thing, and some qualified and temporary right of a person to control it as if he were owner, until some particular purpose is accomplished. Such a right is called a special property. Instances are: the control and interest which a carrier has in goods intrusted to him for transportation; which a pawnbroker has in things left in pledge; which a sheriff has in what he has taken upon execution. In these cases, the bailee holds and controls the thing as owner, in virtue of an interest in it, and by a right to which, for the time being, that of the general owner must yield; but the right being temporary and limited, liable to be devested by termination of the carriage or payment of the debt, is distinguished as a special property.

Special rule. This expression may stand opposed either to *general* rule, when it means a temporary or peculiar direction as to practice, not embraced in the usual and permanent body of regulations which the court has prescribed; or to *common* rule, when it means an order in a cause granted upon motion and argument, not grantable as of course. As to general and common rules, see RULE.

Special session. 1. A board, court, deliberative body, or tribunal may be said to hold a special session when it meets at an unusual time, or between its appointed and ordinary times of convening. Thus the president or a governor is said to call a special session of congress or of a legislature.

2. Special sessions is also the statutory or technical title of a kind of court, generally a court of inferior criminal jurisdiction; sometimes also clothed with power to entertain some statutory proceeding. See COURT OF SESSION.

A special sessions is a sessions held by justices acting for a division of a county or riding, or for a borough, for the transaction of special business, such as licensing alehouses or appointing overseers of the poor, or surveyors of highways. A special sessions is generally held by virtue of a provision of some act of parliament. Due notice of it is usually given to all the justices resident within the division for which it is held; and in some cases this is required by act of parliament. A special sessions is sometimes called a special petty session; and a special sessions held for the purpose of licensing alehouses is sometimes called a Brewster sessions. (4 *Bl. Com.* 272, 273, note by Coleridge; 2 *Steph. Com.* 649; *Oke Mag. Syn.* 63, 64, 1112–1169.) *Brown.*

Special tail. This term distinguishes an estate entailed upon and limited to children of two designated parents, from an estate entailed more generally upon children of one designated person; as if the inheritance is limited to A and heirs of his body by his wife B. Obvi-

ously, this is a stricter limitation than one to A and heirs by any wife or wives.

Special term. In New York practice, that branch of the court which is held by a single judge for hearing and deciding in the first instance motions and causes of equitable nature, is called the special term, as opposed to the general term, held by three judges (usually) to hear appeals.

Special terms. May denote peculiar or unusual conditions imposed on a party before granting some application to the favor of the court. Motions not founded in right are often granted upon terms; and if peculiar terms are imposed, in a particular case, they may well be called special. The antithesis is to ordinary, usual terms.

Special traverse. A form of traverse formerly used in common-law pleading, by which the pleader, instead of interposing a direct, unqualified denial of the matter alleged in the pleading he was called upon to answer, sought to explain his denial, or couple it with qualifications. Such a special traverse usually consisted of an affirmative part, alleging some new matter, called an inducement; a negative part, denying certain parts of the opponent's pleading, called an *absque hoc* (without this); and a conclusion to the country.

Stephen gives the following example: The heir of a lessor has sued a lessee for non-payment of rent, and the lessee wishes to contend that the lessor had only a life-estate in the land, so that the heir has no right to sue for the rent. The defendant first states, in proper legal form, that E D (the lessor) was seised as of freehold for the term of his natural life, of and in the premises, and that he died before the expiration of the term of the lease, whereupon the lease came to an end. Then he proceeds, as follows: "Without this, that, after the making of the said indenture, the reversion of the said demised premises belonging to the said E B and his heirs, in manner and form as the plaintiff hath in his said declaration alleged. And of this the defendant puts himself upon the country." The reason given for the adoption of the special traverse in such a case is, that a tenant is estopped (or precluded) from denying generally his landlord's title, but is not estopped from saying that the landlord had only a particular estate, which has since expired. *Steph. Pl.* (5th ed.) 193–218.

Special traverses have been but little used in modern pleading, and were, we believe, abolished for English practice by the common-law procedure act.

Special traverse is that peculiar form of traverse or denial in pleading by which the party traversing seeks to explain or qualify his denial, instead of putting it, as by a common traverse he would, in a direct and absolute form. And this he is enabled to do by first alleging new affirmative matter, which is called the inducement, and then by adding a distinct and formal denial of such portions of the adverse pleading as support the adversary's case. This negative part is, in the language of pleading, termed the *absque hoc* (without this), those being the words with which this portion of the plea commences, and the whole is finished by a conclusion to the country. The inducement or introduction of new affirmative matter is usually employed for the purpose of avoiding some rule of law which would prohibit a plain and simple denial of the adversary's allegation, or sometimes for the purpose of raising a question of law at once upon the pleadings; and the negative part, or *absque hoc*, is generally necessary by reason of the inducement, which by itself would constitute an indirect (or argumentative) denial of the preceding statement, and would be at variance with the rules of pleading against argumentativeness. (*Steph. Pl.* 5th ed. 193–218; 3 *Chit. Pl.* 6th ed. 908; Brudnell *v.* Roberts, 2 *Wils.* 143; Palmer *v.* Ekyns, *Lord Raym.* 1550; *Bac. Abr. Pleas, &c.* (H. 1); *Reg. Gen.*, Hil. Term, 4 *Will. IV.*; Taltarum's Case, 12 *Edw. IV., Year Book*, 19, translated in *Tud. L. C. Conv.* p. 605.) *Brown.*

Special trust. This is better called an active trust. The term applies where the machinery of a trust is introduced for the execution of some affirmative purpose, and the trustee is not a mere passive depositary of the estate, but is expected to take active steps to carry into effect the general intention. A trust to executors to sell property, and apply the proceeds according to certain dispositions contained in the will, is an example.

Special trusts have been divided into ministerial (or instrumental) and discretionary. The former, such as demand no further exercise of reason or understanding than every intelligent agent

must necessarily employ; the latter, such as cannot be duly administered without the application of a certain degree of prudence and judgment.

Special verdict. The usual duty of a jury is to find a verdict in general terms, for the plaintiff so much, or for the defendant. But in cases where the facts are contested, and the law is also doubtful, and cannot be embodied in instructions with certainty, the jury may be directed to find a special verdict. This requires them to report the facts found; not the evidence of the facts on the one hand, nor the mere legal conclusion as to the rights of parties on the other, but the facts on which the ultimate decision of the right in controversy must depend. Their statement of these facts is afterwards brought before the court, generally before the full bench, for argument on the questions of law, and the court directs judgment on the verdict for plaintiff or for defendant, as the legal right may be decided.

SPECIALTY. A contract, engagement, or obligation manifested by an instrument under seal.

The tendency in modern books to use specialty as including obligations appearing by matter of record is not to be encouraged.

That specialty means an obligation under seal, and does not include obligations by record, see *Bac. Abr.* Obligation, A.; *Chitt. Contr.* 3; 2 *Bl. Com.* 465; *Tomlins; Wharton; Burrill.*

The word specialty does not embrace a judgment. Kimball *v.* Whitney, 15 *Ind.* 280.

The word specialty originally imported a writing actually under seal; though it has sometimes been extended to include judgments. But a note is not a specialty because it is secured by a mortgage. Seymour *v.* Street, 5 *Neb.* 85.

A promissory note, in writing, and without seal, is not a specialty, within the meaning of that phrase, at common law; nor is it made a specialty by a statute that the same remedy may be had upon such an instrument as upon a bond or sealed instrument. Bank of the United States *v.* Donnally, 8 *Pet.* 361.

SPECIE. 1. Coin of the precious metals, of a certain weight and fineness, and bearing the stamp of the government, denoting its value as currency. See Henry *v.* Bank of Salina, 5 *Hill* (*N. Y.*), 523, 536.

A note drawn payable in specie, means in gold and silver, within the Kentucky statute requiring the fact to be added to the enrolment of a judgment in such case, that the note recovered on was for gold and silver. Webb *v.* Moore, 4 *T. B. Mon.* 483.

2. When spoken of a contract, the expression "performance *in specie*" means strictly, or according to the exact terms. As applied to things, it signifies individuality or identity. Thus, on a bequest of a specific picture, the legatee would be said to be entitled to the delivery of the picture *in specie*, *i.e.* of the very thing. Whether a thing is due *in genere* or *in specie* depends, in each case, on the will of the transacting parties.

SPECIFIC LEGACY. A gift by will of some particular thing of a personal nature.

Specific legacy. A legacy is general, where its amount or value is a charge upon the general assets in the hands of the executors, and where, if these are sufficient to meet all the provisions in the will, it must be satisfied; it is specific, when it is limited to a particular thing, subject, or chose in action so identified as to render the bequest inapplicable to any other, — as the bequest of a horse, a picture, or jewel, or a debt due from a person named, and, in special cases, even of a sum of money. Langdon *v.* Astor, 3 *Duer*, 477, 543.

A bequest of a sum of money generally, without mentioning out of what fund it is to be paid, is to be regarded as a general legacy, although designated in the residuary clause as a "specific" legacy. Parker *v.* Moore, 25 *N. J. Eq.* 228.

SPECIFIC PERFORMANCE. That branch of equity jurisprudence which compels a contracting party to do as he has agreed, instead of leaving the other party to such remedy as he can obtain by damages for non-performance.

The law courts, according to the old theory of the distinction (it has been much broken down in modern times), could not compel a person to act according to his agreement, but would only take proof of the loss resulting from his refusal, and award judgment for compensation, to be collected, if he still resisted, by sale of his property on execution. In many cases, however this judgment for damages afforded but inadequate redress.

Equity, in obedience to the cardinal rule of natural justice, that a person should perform his agreement, enforces,

pursuant to a regulated and judicial discretion, the actual accomplishment of a thing stipulated for in a great variety of cases in which it has been found practicable, as well as just, to do so. Consult 1 *Fonbl. Eq.* b. 1; 1 *Madd. Chan.* 466–563; 2 *Atk. Conv.* 561–718; *Batten Spec. Perf.*; 2 *Story Eq. Jur.* ch. 18; *Dart Vend. & P.* ch. 18; *Sugd. Vend. & P.* 168 *et seq.*; *Fry Spec. Perf.*

Under the codes of reformed procedure, the jurisdiction to enforce specific performance, or award damages for a breach, is vested in the same courts, and exercised according to the nature of the case at bar.

SPECIFICATION. A particular and detailed account.

In the law of contracts, it denotes an extended statement annexed to complex building contracts, agreements for construction of public works, and the like, describing the details of the erection or structure intended. In the law of patents, it is an exact, particular description furnished by an applicant for a patent of the nature of his invention and process of making it, a copy of which is (under the American system) annexed to the patent when issued; and the validity of the patent and extent of the patentee's rights depend largely on his specification.

SPEEDY EXECUTION. Is an execution which, by the direction of the judge at *nisi prius*, issues forthwith, or on some early day fixed upon by the judge for that purpose after the trial of the action. *Brown.*

SPES RECUPERANDI. Hope of recapture. The title to property captured at sea is not deemed to vest in the captors until their capture has been made entirely complete and certain; until there is no longer any hope of recapturing it. This chance is called the *spes recuperandi.*

SPIRITOUS. Is equivalent to spirituous, and may be used for it in an indictment. Commonwealth *v.* Burke, 15 *Gray*, 408.

SPIRITUAL. Ecclesiastical; pious; religious. Thus the hooks speak of the spiritual courts, and of spiritual corporations.

An indictment for unlawfully selling by retail spirituous liquors is not bad for using the word "spiritual" instead of "spirituous." State *v.* Clark, 3 *Ind.* 451.

Spiritualities of a bishop. Those profits which a bishop receives in his ecclesiastical character, as the dues arising from his ordaining and instituting priests, presentation money, and such like, in contradistinction to those profits which he acquires in his temporal capacity as a baron and lord of parliament, and which are termed his temporalities, consisting of certain lands, revenues, and lay fees, &c. *Staund. Pl. Cor.* 132; *Cowel.*

SPIRITUOUS. The phrase spirituous liquor, in a penal statute, cannot be extended beyond its exact literal sense. Spirit is the name of an inflammable liquor produced by distillation. Wine is the fermented juice of the grape, or a preparation of other vegetables by fermentation; hence the term does not include wine. State *v.* Moore, 5 *Blackf.* 118.

In Stat. 20 Car. II. ch. 1, upon an argument in the exchequer, anno 1668, whether brandy were a strong water or spirit, it was resolved to be a spirit; but in the year 1669, by a grand committee of the whole house of commons, it was voted to be a strong water perfectly made. (See Stat. 22 Car. II. ch. 4.) *Jacob*, tit. Brandy.

SPLIT. Splitting a cause of action signifies the bringing of separate actions for the different parts of a claim, or bringing several actions where one would suffice.

SPOLIATION. 1. In ecclesiastical law, an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right to them, but under a pretended title. It also seems to be used for a suit brought to recover the fruits of a church, or even the church itself, by one incumbent against another, when they both claim by one patron, and the right of patronage is not called in question. *Termes de la Ley.*

2. In the law of evidence, it is used not as a technical term, but as an apt word for destroying, mutilating, or altering a writing, to prevent its being used as evidence. See OMNIA PRÆSUMUNTUR.

Spondet peritiam artis. He promises the skill of his art; he engages to do his work in a skilful manner. Applicable to the engagements of workmen for hire. 2 *Kent Com.* 588; *Story Bailm.* § 428. The same principle applies to the engagements of attorneys, physicians, &c.

SPRINGING USE. A use limited to commence in future, independent of any preceding estate; also called an executory use, or executory interest. 2 *Bl. Com.* 334; *Wms. R. P.* Pt. II. ch. 3.

SPURIOUS. A spurious bill may be a legitimate impression from the genuine plate; but it must have the signatures of persons not the officers of the bank whence it purports to have issued, or else the names of fictitious persons. A spurious bill, also, may be an illegitimate impression from the genuine plate, but it must have such signatures or names as above indicated. A bill may be both counterfeited and forged, or both counterfeited and spurious, but it cannot be both forged and spurious. Kirby *v.* State, 1 *Ohio St.* 185.

SQUARE. A dedication of lands to public use as a square, means for free passage, or to be ornamented and improved as grounds for recreation or health. Meth. Ep. Church *v.* Mayor, &c. of Hoboken, 33 *N. J. L.* 13.

In a charter provision that street improvements shall be made at the cost of owners of lots in each fourth of a square, the word square means each subdivision of the territory bounded on all sides by principal streets. Caldwell *v.* Rupert, 10 *Bush*, 179.

Square yard. A contract stipulating for the payment of a certain rate "per square yard" for the removal of dirt, was held to mean cubic yard, in Louisville *v.* Hyatt, 2 *B. Mon.* 177.

STAB. Imports a wound made with a pointed instrument. State *v.* Patza, 3 *La. Ann.* 512.

To constitute stabbing, the knife need not enter further than to penetrate the skin and draw blood; certainly half an inch, or even one-eighth of an inch, would be deep enough. Ward *v.* State, 56 *Ga.* 408.

Stabit præsumptio, donec probetur in contrarium. A presumption shall stand, until proof to the contrary is made; a presumption prevails until rebutted. This maxim underlies the whole doctrine of presumptions. *Broom Max.* Some presumptions may be rebutted by negative as well as positive evidence. Thus the presumption that one has done an act the not doing of which would make him criminally liable, may be rebutted by showing that he performed the act subsequently to the proper time for performance; for if he had done the act seasonably, he would not have done it after the time prescribed. *Ib.* 949. And another form is *standum erit præsumptioni, donec*, &c.

STACK. A stack is not necessarily something erected out of doors. Reg. *v.* Munson, 2 *Cox Cr. Cas.* 186.

STALE. Courts of admiralty and of equity have not always considered themselves bound by the statute of limitations, but have generally accepted its principle, so far at least as, in the exercise of a sound discretion, to discourage long delay in bringing suit, and to deny relief in cases where commencement of suit is unreasonably delayed, especially if the defendant's situation has been changed, his evidence has been lost, or he is otherwise prejudiced by the delay. A claim which is so old that a court of equity or admiralty will refuse to entertain it on account of complainant's laches is called stale. The time is not governed by positive general rules, but depends very much on the circumstances of the case. The tendency of modern legislation and practice is to apply the statute of limitations uniformly in all the courts.

STAMP. A label or printed device adapted to be attached to some subject of charge or taxation, and prescribed by law to be so attached, as evidence that the proper sum has been paid.

STAND. This verb, and standing, as participle and noun, are used in somewhat technical senses. A transaction or deed which has been objected to or unsuccessfully impeached is said to stand; so a statute may be said to be still standing, — meaning it is in force, has not been repealed. Pleadings sustained against a demurrer are said to stand. And a person who has not a capacity or right to sue, is often said to have a standing, or to have no standing, in court.

Standing by. Is used in law as implying knowledge, under such circumstances as rendered it the duty of the possessor to communicate it; and it is such knowledge, and not the mere fact of "standing by," that lays the foundation of responsibility. State *v.* Holloway, 8 *Blackf.* 45.

The phrase does not import an actual presence, "but implies knowledge under such circumstances as to render it the duty of the possessor to communicate it." Gatling *v.* Rodman, 6 *Ind.* 289.

Standing orders. The rules adopted by the houses of parliament for the per-

manent guidance and order of their proceedings are called standing orders, and are contradistinguished from the sessional orders, by the fact that the former, unless rescinded by a special vote of the house, continue in force, not only from one session to another, but from one parliament to another; while the latter are intended to last only during the session in which they are made. In the house of lords, every new standing order is added to the roll of standing orders, carefully preserved and published from time to time. In the commons, there is no authorized collection of standing orders, except in relation to private bills. *May Parl.*

STANNARIES. See COURT OF STANNARIES.

STAR CHAMBER. See COURT OF STAR CHAMBER; also, an extended and interesting account, 12 *Am. Law Rev.* 21.

STARR, or STARRA. The old term for contract or obligation among the Jews, being a corruption from the Hebrew word *shetar*, a covenant. By an ordinance of Richard I., no starr was allowed to be valid, unless deposited in one of certain repositories established by law, the most considerable of which was in the king's exchequer at Westminster; and Blackstone conjectures that the room in which these chests were kept was thence called the starr chamber. 4 *Bl. Com.* 266, 267, note (*a*).

All the deeds, obligations, &c., of the Jews were anciently called starrs, and written, for the most part, in Hebrew alone, or in Hebrew and Latin. *Jacob.*

Stare decisis, et non quieta movere. To stand by precedents, and not to disturb what is established; to adhere to precedents. This phrase expresses the policy of the courts, and the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations. The doctrine is frequently termed the rule of *stare decisis;* and is, in general, that, when a point has been once settled by decision, it forms a precedent which is not afterwards to be departed from. But this doctrine is not without exception in its application; for the courts occasionally find it necessary to overrule cases, which, on subsequent examination, are deemed to have been decided contrary to principle.

The maxim contemplates not whatever a court may happen to say in deciding a cause, but only the points actually involved and argued. Yet this limitation must not be carried too far. It does not follow that, because a point was not exhaustively argued, the decision upon it is to be deemed *obiter dictum.* A common-sense meaning must be taken. And it also appears that there is good ground for distinguishing between the authority of a decision considered as a judgment between the parties, and considered as determining the law for future cases. The judgment, as a judgment, determines the questions presented by the record, — all of them, and no others. If any were overlooked in argument, or seem slighted in the opinion, so much the worse for the party interested; but the defect, while it may encourage him to seek a review, cannot limit the operation and effect of the judgment, as such, while unreversed. But when the decision is taken in hand, not as a judgment between the parties, but for its instructiveness upon the law, it presents a very different aspect. The thoroughness of the argument, the known ability and learning, and the jurisdictional authority of the court, and the care and attention shown to have been bestowed on the decision, are all legitimate matters for consideration, when the question is, how far to follow the doctrine as sound law, though they have no bearing whatever when the question is of executing the judgment. The well-known case in the law of pledge, of Cortelyou *v.* Lansing, 2 *Cai. Cas.* 200, was stated by Chancellor Kent (in Barrow *v.* Paxton, 5 *Johns.* 258) to be a report of an opinion which was never actually rendered. As a judgment, the decision was a nullity. But the opinion has been cited again and again as a persuasive authority, and is esteemed a leading case on that branch of the law. The maxim *stare decisis* applies to it fully, and the doctrine of *res judicata* does not. In other words, when the maxim *stare decisis* is in question, the endeavor should be not so much to distinguish and follow the rulings which were technically necessary to the judgment, as those which were actually made with deliberation, and upon an argument elicited because they were fairly and reasonably raised in the cause. On the one hand, a case may well be followed as to a point which was actually and thoroughly argued and

decided; though the court might have escaped deciding it, by placing the decision on narrower grounds. And it may well be discarded as an authority on a point which was not so presented as to call for argument, or was not weighed and considered in the decision, although the record may necessarily determine that point as between the parties.

Another limitation on the doctrine of *stare decisis* is, that more is needful to constitute a decision, a precedent, than merely that the doctrine for which it is cited is announced or stated in it. What the judges assert, by way of reasoning or illustration, is not within the principle. One must look for the results, the rulings in which the members of the court agreed, as the ground of their decision. The case is an authority or precedent for the results established; not for all the reasons assigned, or matters stated in support.

Another limitation is, that the language in which a decision is announced must be read in the light of and restricted by the facts of the case under consideration. A single sentence or phrase must not be cut out, severed from its connection, and presented as rigid rule, but the meaning must be judged from the decision as a whole.

Subject to limitations like these, and of which these are the most important, the theory of jurisprudence, as practised in England and America, rests upon the doctrine of standing by past decisions, as its chief corner-stone. The subject has been ably and thoroughly presented, and the leading case collated, in the recent treatise, *Wells on Res Adjudicata and Stare Decisis*, 527.

Stat pro ratione voluntas. The will stands in place of a reason. Applied to the power of a testator to dispose of his property.

Stat pro ratione voluntas populi. The will of the people stands in place of a reason. Applied to the public will as expressed in legislation.

STATE, *n.* 1. A body of people united under a distinct government; an organized community; a government of a united people, deriving authority from consent of the members, not from a superior government.

In this definition is contemplated the use of the word in general public law, and without reference to the associations which have gathered around it in America. In this more general use, it is not very distinctly distinguishable from nation, except that the latter presents more definitely the idea of independence and equality among other nations. State is quite distinguishable from the terms empire and kingdom (and from republic (*q. v.*), in one of its senses), in that they imply something as to the form of government, which state does not. It has much the same meaning as "commonwealth," and as "republic," in its more general sense. State is, moreover, used sometimes so as to point more to the body of people considered as united under one distinct government, and sometimes more to the government considered as maintained by and ruling a distinct people, and sometimes more to the territory which a distinct people inhabit. It embodies the combined ideas of people, territory, and government, — one being sometimes prominent, sometimes another. It is distinguished from city, municipality, and all affiliated words, in that these are governments existing by authority or permission of a superior national government. This is not implied in designating a state; if there is any superior government erected, which controls a state, the fact must be learned independently: it is not suggested by the term.

2. In American constitutional law, the word state has gathered associations which are not to be considered as changing its meaning as a term, but deserve distinct notice. The supreme court has defined it, in the sense in which it ordinarily occurs in the constitution, as meaning a political community of free citizens living in a territory of defined boundaries, and organized under a government authorized and limited by a written constitution, adopted by the will of the people; but in the clause of the constitution which provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them from invasion, the term state is

used to express the idea of a people or political community, as distinguished from the government. Texas *v.* White, 7 *Wall.* 700.

It designates, moreover, a member of the Union; and does not, when accurately used, include a territory, though organized, or the District of Columbia, or even the organized Indian tribes; though by special provision, and to save repetition in a particular statute, the territories and the District of Columbia may be allowed to be understood where only "state" is mentioned.

A state must be a member of the Union. It is not enough to be an organized political body within the limits of the Union. Scott *v.* Jones, 5 *How.* 343, 377; Cherokee Nation *v.* Georgia, 5 *Pet.* 1, 18.

Territories are not states, within the meaning of the judiciary act of Sept. 24, 1789. Scott *v.* Jones, 5 *How.* 343.

The term state, when used in the constitution of the United States, is confined to members of the confederacy, and does not include territories. Seton *v.* Hanham, *R. M. Charlt.* 374.

The exception in the Alabama statute of limitations, that where the debtor is absent from the state at the time the cause of action accrues, suit may be brought "after his return into the state," means after his return within the jurisdiction of the state, where the process of the courts of the state will run. A removal to the Indian nation, where the process of the courts of Alabama did not run, was held not to be a return within the state, although within its territorial limits, in Smith *v.* Bond, 8 *Ala.* 386.

Provisions of a state constitution prohibiting the state from engaging in works of internal improvement, do not forbid authorizing taxation to pay municipal bonds in aid of railroads, because it is well settled that such prohibitions restrict the state as an entirety only, and do not bind the various municipalities within the state. Talcott *v.* Township of Pine Grove, 1 *Bench & Bar*, N. S. 50.

The phrase, out of any particular state, was construed to mean out of "any one of the United States," in United States *v.* Pirates, 5 *Wheat.* 184.

State trial. This phrase may well be used to denote any trial in which the prosecution is conducted by the government, or by the attorney-general *ex officio*. It has not, however, been much used of government prosecutions in America. In England, its use is more common; but only the most important of such trials are generally called by this distinguishing name. The most celebrated collection of published state trials is that which is known as Howell's State Trials, consisting of thirty-four volumes, and continued to the reign of George IV.

STATE, *v.* To allege; to aver; to declare as matter of fact. Stated: alleged or averred. Also, definitely appointed; deliberately settled; regularly recurring; as in the expressions, stated term of the court; account stated; stated attendance at church.

The words "stating" and "showing" differ in signification. Stating a matter may be simply alleging it; while showing it consists of a disclosure of the facts which establish its existence. Spalding *v.* Spalding, 3 *How. Pr.* 297.

State of the case. In New Jersey practice, the expression "state of the case" is conventionally used for the narrative of facts forming or taking the place of a plaintiff's declaration in the inferior courts.

State of facts. Formerly, when a master in chancery was directed by the court of chancery to make an inquiry or investigation into any matter arising out of a suit, and which could not conveniently be brought before the court itself, each party in the suit carried in before the master a statement showing how the party bringing it in represented the matter in question to be; and this statement was technically termed a state of facts, and formed the ground upon which the evidence was received; the evidence being, in fact, brought by one party or the other, to prove his own or disprove his opponent's state of facts. (*Gray Ch. Prac.* 109. 110.) And so now, a state of facts means the statement made by any one of his version of the facts. *Brown.*

Stating part. That part of the body of a bill in chancery, drawn according to the old forms, which contained allegations of facts material to the complainant's case, was called the stating part.

STATEMENT. In a general sense, an allegation or averment; a declaration of matters of fact. The term has also come to be used of a variety of formal allegations or narratives of facts, required by law in various jurisdictions as the foundation of judicial or official proceedings.

In particular, the English judicature acts employ statement as a designation of pleadings. Statement of claim or of complaint is the name of the statement by the plaintiff, in an action brought in the high court of justice, of the ground of his complaint, and of the relief or remedy to which he claims to be entitled. It must be delivered within six weeks from the time of the defendant's entering an appearance in the action, unless the defendant, at the time of his so entering appearance, has stated that he does not require it.

Statement of defence is the name of the statement delivered by a defendant, in answer of the plaintiff's statement of claim. It must be delivered within eight days after the plaintiff's delivery of his statement of claim, and may include facts supporting a right of set-off or counter-claim. To this last there may be a "statement of reply."

STATION. In the broadest sense, station means place or position. It may be said that, wherever a man stays in pursuance of orders, he is stationed, and that, if he is a military man, such place becomes a military station. But, as used in the army laws and regulations, military station is synonymous with military post, and means a place where troops are assembled; where military stores are kept or distributed; where military duty is performed, or military protection afforded, — where something, in short, more or less closely connected with arms or war, is kept or is to be done. It would be a misuse of language to designate, as a post or a military station, a cottage in a country village, in no way distinguishable, in its use or appointments, from every other residence in the village, because one of the persons who lives in it is an officer in the army. Hence, an officer who, pursuant to orders, has left his former station, and gone to his home, and remained there awaiting orders, cannot be said to have made an exchange of stations. His home is not a station. United States *v.* Phisterer, 94 *U. S.* 219, 220.

Station. As used in a statute forbidding a railroad company to abandon a station, without the consent of the railroad commissioners, does not apply to a mere platform, at which certain daily trains stop to take or leave passengers, but at which no office or agent is kept, nor tickets sold. State *v.* New Haven, &c. R. R. Co., 41 *Conn.* 134.

STATIONERS' HALL. The hall of the stationers' company, at which every person claiming copyright in a book must register his title, in order to be able to bring actions against persons infringing it. 2 *Steph. Com.* 37–39.

STATIONERY. Means such articles as are usually sold by stationers, — paper, ink, quills, &c. The term may include ordinary law-blanks, but does not embrace blank forms, appropriate only for the use of some single officer, and which must be printed solely for his use. A statute providing that suitable books and stationery shall be furnished to each county officer, at the expense of the county, does not render the county liable for printing blank forms for business peculiar to his office. Commissioners of Arapahoe *v.* Koons, 1 *Col. T.* 160.

Blank writs, subpœnas, witness certificates, &c., procured by the clerk for, and actually used in, his office, are "stationery," for which he is to be allowed, under the Alabama statutes. Commissioners' Court *v.* Goldthwaite, 35 *Ala.* 704.

STATUTE. The formal writing by which the deliberate will of the legislative power is expressed; an act of legislation; an enactment; a written law. Statutory: relating or pertaining to acts of legislation; as statutory construction. Also, particularly governed or prescribed by enactments; as a statutory bond, or a statutory proceeding.

Many divisions and distinctions have been made among different classes of statutes; some of which are important, because underlying different rules governing the construction and force of different kinds of enactments, while others are of little practical consequence.

The term *general* statutes is applied to enactments operative throughout the jurisdiction, without being restricted to particular persons or places. The expression is substantially equivalent to public laws or statutes (*q. v.*), which is the more accurate and definite term. It does not import that the law designated operates upon all persons or all things. The word "general" comes from *genus*, and relates to a whole *genus*, or kind, — or, in other words, to a whole class or order; hence a law which affects a class of persons or things less than all may be a general law. See Brooks *v.* Hyde, 37 *Cal.* 366.

"General," in this connection, stands opposed to local, private, and special. As to their several meanings, see those titles.

Declaratory, *directory*, and *mandatory*

statutes are three classes important to be recognized. A declaratory act does not purport to change the existing law. It assumes that the rule of a law upon a given subject is doubted, is involved in conflicting decisions of the courts, or inconsistent enactments, or has otherwise become uncertain; and it essays simply to remove the doubt and uncertainty by a distinct, emphatic assertion or declaration of the law as, in the opinion of the legislature, it at the time exists. Such laws are not very numerous; and the power of a legislature to pass them, with any effect to control the decisions of the courts, except as to cases afterwards arising, has been questioned. A directory act is of higher force than a declaratory one, in that it purports to introduce new and positive rules. It embodies directions or requirements which did not before have the force of law; but they are not so enacted that failure to comply with them renders what is done under law void; while a mandatory act must be complied with, obeyed, — at least, in substance, — or the party acquires no rights under it, and may be exposed to immediate penal consequences for disobedience. Thus, the result of adjudging a law requiring a corporate election to be held on the first day of January to be directory merely, would be that an election held, by accidental delay, in February would be valid, and the officers elected would take a lawful title, though the clerk, who omitted to issue timely notice, might be called to account for his default; while, if the statute were deemed mandatory, the election had on a later day would be void. The result of adjudging that a law, requiring witnesses to a marriage or a will to attest in a certain way, was directory merely would be that, notwithstanding their failure to comply, the marriage or the will would stand good in law; while, if the rule were held mandatory, the transaction would be void.

Penal and *remedial* statutes have long been considered distinguishable, upon the view that a penal law, meaning a law creating or declaring offences, or imposing any thing in the nature of punishment or penalty, must be strictly construed, so as to favor and protect the individual; while remedial laws, or such as were designed to give or to improve remedies, or to advance the general welfare and security, should be liberally applied, so as to cure the defect in the old law, and advance the public interest to the full extent of the expressed will of the legislature in the act. *Revenue* laws are deemed entitled to much the same favor in construction as remedial ones in the strict sense. But the reasons for a strict construction of penal laws were largely founded in the desire of courts of justice to protect individuals from tyranny of government, and have lost some of their force as governments have become more truly representative of the will of the people. The tendency is towards assimilation of the rules of construction; towards a doctrine of enforcing penal laws like any others, according to the fair meaning of their language.

The distinctions above indicated are not necessarily applied to a statute as an entirety or not at all; in other words, "statute" or "law," in such phrases as penal statutes, directory laws, does not mean an entire chapter of legislation. Any distinct clause or provision is treated as directory, mandatory, penal, remedial, &c., according to its nature; and one rule of construction applied to one clause and another to another, in the same act.

In an early use of the word, it meant the legislation of an entire session; and successive acts of parliament were designated as chapters of the statute of the session at which they were passed. In modern usage, each distinct act, or what is otherwise called a chapter, is designated as a statute.

For a comparison between statute and the terms law, ordinance, and resolutions, see those titles.

The civilians divide statutes into three classes, — personal, real, and mixed. But by statutes they mean, not positive legislation, such as in England is known as acts of parliament, as contradistinguished from common law, but the whole municipal law of a particular state, from whatever source arising. Sometimes the word is used by them in contradistinction to the imperial Roman law, which they are accustomed to style, by way of eminence, the common law, since it constitutes the general basis

of the jurisprudence of all continental Europe, modified and restrained by local customs and usages, and positive legislation. *Wharton.*

The method of citing acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them, as the statutes of Merton and Marleberge (Marlborough), of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject, as the statutes of Wales and Ireland, the *articuli cleri*, and the *prærogativa regis*. Some are distinguished by their initial words, — a method of citing very ancient; as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward II., is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to the numeral order, as 9 Geo. II. ch. 4. And as all the acts of one session of parliament, taken together, make properly but one statute, when two sessions have been held in one year, they are called stat. I or stat. 2. Thus the bill of rights is cited as 1 Wm. & M. stat. 2, ch. 2, — signifying that it is the second chapter or act of the second statute (or laws made in the second session of parliament), in the first year of King William and Queen Mary. *Jacob.*

Statute-merchant. A writing in the nature of a bond, which was introduced in the reign of Edward I., for the purpose of allowing lands to be charged with the payment of debts contracted in trade, which was contrary to all feudal principles. It is called statute-merchant, because usually made between merchants, and according to the forms expressly provided by statute, which direct both before what persons, and in what manner, it ought to be made. It is somewhat in the nature of what is termed a *vivum vadium*, or living pledge, by which a man borrows a sum of money of another, and grants him an estate to hold till the rents and profits shall repay the sum so borrowed. A statute-merchant may, therefore, be said to be a security for a debt acknowledged to be due, and by which not only the body of the debtor may be imprisoned and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor till out of the rents and profits of them the debt may be satisfied; and during such time as the creditor so holds his lands he is called a tenant by statute-merchant; and such creditor's estate or interest in the lands during that period is termed an estate by statute-merchant. *Brown.*

Statute-staple. A security for a debt acknowledged to be due before the mayor of the staple; that is, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns. It is called "statute-staple," because entered into before the mayor of such staple, and made according to certain forms prescribed by statute. This security, which is in the nature of a bond given by the debtor to the creditor, is very similar to a statute-merchant, and was originally permitted only among traders, for the benefit of commerce. By it, not only the body of the debtor may be imprisoned and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor till out of the profits and rents of them the debts may be satisfied; and during such time as the creditor so holds the lands he is called "tenant by statute-staple;" and his estate or interest in the lands during that period is called an "estate by statute-staple." *Brown.*

Estates by statute-merchant and statute-staple are chattel interests, and pass to the personal representatives of those who hold them. They are now practically superseded by other remedies for the benefit of creditors. See *Termes de la Ley; Cowel;* 2 *Bl. Com.* 160; 1 *Steph. Com.* 309.

Statutes at large. This expression is equivalent to the statutes in full; unabridged; as originally enacted. The publication of the acts of any legislature at length, as they are passed, is properly styled the statutes at large, and distinguished thereby from all abridgments, compilations, and revisions. Statutes at large is also the particular title of well-known publications of acts of congress, known as the United States Statutes at Large, and of the continuous series of acts of parliament. One or two of the states have used the title statutes at large; but generally the successive acts of state legislatures are found under other names, "session laws" being a very common one.

Statutes at large are an authentic collection of the various statutes which have been passed by the British parliament from very early times up to the present day. The oldest of these now extant, and printed in our statute-book, is the famous Magna Charta, as confirmed in parliament 9 Hen. III.; though doubtless there were many acts before that time, the records of which are now lost, and whose provisions are perhaps in the present day currently received for the maxims of the old common law, or customs of the realm. The statutes from Magna Charta down to the end of the reign of Edward II. (including also some which, because it is doubtful to which of the three reigns of Henry III., Edward I., or Edward II. to assign them, are termed *incerti temporis*) compose what have been called the *vetera statuta*. On the other hand, those from the beginning of the reign of Edward III. are contradistinguished by the appellation of the *novo statuta*. *Dwarris Stat.* 626.

Statutes of limitation. Acts limiting the time within which proceedings shall be commenced in a court of justice. The word "limitation," used by itself, is variously applied; but the words "statutes of limitation" have always this definite meaning. Acts regulating proceedings at law, as the time limited for entering an appeal, or staying an execution, or serving a notice, and such like, and acts regulating the rights of two persons against a third, as to preferences between them, though they limit the time within which certain acts shall be done, do not come within the idea of statutes of limitation. Battle *v.* Shivers, 39 *Ga.* 405.

STAY. An interruption or suspension of a judicial proceeding.

Stay is used in the constitution of Delaware, instead of *supersedeas;* the difference between the two words being only verbal. Pettyjohn *v.* Bloxom, 1 *Houst.* 594.

Stay of execution. A suspension of ministerial action to carry a judgment into effect. In civil cases, a stay of execution may arise upon agreement of parties, as where a compromise is in consideration; or it may be expressly ordered by the court, for some cause shown; or it may be the legal effect of appeal or writ of error. In criminal cases, the expression means much the same as a reprieve or respite, except that either of these might well emanate from the executive power: stay would be more appropriate for a delay ordered by the court.

Stay of proceedings. Usually imports an order of court made in a cause, and as a part of its course, suspending further action in it; and is generally conditional or temporary, as, until some order of court has been complied with, until a party shall give required security, or the like. It is distinguishable from injunction to restrain proceedings at law, which is in the nature of an equitable decree in another court, that the party stayed shall proceed no further, because his action is deemed contrary to equity; and from prohibition, which is a mandate of a superior court to an inferior one, commanding it to refrain from proceedings because they are deemed in excess of its jurisdiction.

Stay law. In times of extended and severe financial trouble, the legislatures of some of the states have endeavored to give debtors some protection against oppressive enforcement of the laws for collection of debts, by enactment of laws suspending certain judicial remedies; as by providing that foreclosure suits shall not be commenced for a certain period of time, or that execution shall not issue in certain cases. Laws of this nature are popularly called stay laws.

STEAL. To steal is the verb employed as meaning to commit larceny; and stealing, when used as a noun, is equivalent to and interchangeable with larceny, though less technical, and hence liable to be found in connections where the context shows an intended deviation from the strict sense. For the full meaning of these words see, therefore, LARCENY.

Stealing children and stealing heiresses are expressions found in the books for what ought to be called, if accuracy in use of words is at all to be maintained, kidnapping or abduction. Stealing, as a term of the law, does not apply to persons as subjects of theft, except when used in some figurative sense, or with reference to some local law of slavery, recognizing a slave as a species of mere property.

Steal, in a statute, implies simple larceny. Alexander *v.* State, 12 *Tex.* 540.

The natural and most obvious import of the word steal is that of felonious taking of property, or larceny. But it may be qualified by the context. The words "he stole my patterns" are actionable, as imputing larceny, if defendant used patterns in the sense of chattels constructed for moulding castings; but are not so, if he meant that the plaintiff fraudulently used his knowledge of the parts and proportions of a machine or invention belonging to defendant, — such knowledge as a man may carry away in memory, — to prepare imitations of them. Dunnell *v.* Fiske, 11 *Metc.* (*Mass.*) 551.

STELLIONATE. An obsolete name for offences that are by no means obsolete. It seems to have been vaguely used for a variety of wrongs, chiefly, however, such as involved fraud. Examples given in the books are: fraudulent bankruptcy; selling another man's property as one's own; making a second mortgage without giving notice of the first.

Stet processus. Let the process stand; let the proceedings be stayed. The name of an entry of record in old

practice by which a plaintiff agrees that all further proceedings in the action shall be stayed. In English practice, this course was usually pursued where the defendant became insolvent pending the action. The object was to prevent his obtaining judgment as in case of a nonsuit.

Stet processus is an entry on the roll in the nature of a judgment of a direction that all further proceedings shall be stayed (*i.e.* that the process may stand), and it is one of the ways by which a suit may be put an end to by an act of the party, as distinguished from a termination of it by judgment, which is the act of the court. *Brown.*

STEVEDORE. A person whose occupation it is to stow packages and goods in a ship's hold. *Webster.*

STEWARD. A man appointed in the place or stead of another. It generally denotes a principal officer within his jurisdiction. Thus the steward of a manor is a person appointed by the lord of the manor to hold his courts, to admit tenants, to accept surrenders, &c. See also HIGH STEWARD.

Steward of Scotland. An officer of the highest dignity and trust; he administered the crown revenues, superintended the affairs of the household, and possessed the privilege of holding the first place in the army, next to the king, in the day of battle. From this office the royal house of Stuart took its name. But the office was sunk on their advancement to the throne, and has never since been revived. *Bell.*

STEWARTRY. In Scotch law, is said to be equivalent to the English "county" See *Brown.*

STIPEND. Any periodical payment for services. In English ecclesiastical law, it is particularly used for the income of an ecclesiastical living or curacy; and, in Scotland, to denote the provision made for the ministers of the Presbyterian establishment.

Stipendiary magistrates. A class of magistrates receiving salaries, who are appointed in London and other populous districts, and having powers generally commensurate with those of justices of the peace. See *Oke Mag. Syn.* 6.

STIPULATIO. In the Roman law, the term applied to the solemn form of constituting an agreement. This form consisted of a question and answer: "Do you promise to do such a thing?" "I do." The maker of the promise thereupon became bound to its performance. See *Sand. Just.; Bouvier; Burrill.*

The *stipulatio* was the highest and most authentic contract known to the civil law, entered into before the magistrate or public officer, through the medium of interrogatories and answers calculated to explain the nature and extent of the undertaking, to put the parties entering into it on their guard, and to show it to be their mature and deliberate act. It could not be impeached, except for fraud or deceit; and could not be released or discharged, except by an equally solemn proceeding, conducted by question and answer before the public functionary, called an acceptilation. (*Vinn.* 677; *Sand. Just.* 431.) *Wharton.*

STIPULATION. 1. An instrument of much importance in the practice of admiralty courts, being an engagement in the nature of bail, or of a recognizance or undertaking given to procure discharge, for the time being, of the *res* when it has been seized, or of the defendant when he has been arrested.

2. The term is also frequently used in reference to proceedings in common-law and equity courts, but the stipulations here given are of less definite character and importance. Rules of modern courts very generally provide that agreements between attorneys or counsel will not be enforced unless in writing. The memorandum made between the lawyers on opposite sides, exhibiting any agreement they may have made affecting the proceedings, such as a promise to admit certain facts or waive certain objections, a consent to refer or postpone a cause, or the like, is called, in the parlance of the court-room, a stipulation.

STIRPS. A stock; a source of descent. Used by law-writers frequently in the plural form, —*stirpes.* See PER STIRPES.

STOCK. 1. Indebtedness of states or governments is often represented by stocks, so called, shares in which are represented by scrip issued to creditors of the government, or by entries and records in official books kept in the government offices. The funded national debt of Great Britain is understood to stand wholly in the form of stocks. In this country, an issue of bonds has been the more common form, though there have been federal and state stocks.

The term stock is also employed to denote the moneys advanced to government, which constitute a part of the national debt, whereupon a certain amount of interest is payable. Since the introduction of the system of borrowing upon interminable annuities, the meaning of the word stock has become gradually changed; and, instead of signifying the security upon which loans are advanced, it has for a long time signified the principal of the loans themselves. In this latter sense, we speak of the sale, purchase, and transfer of stock. *Mozley & W.*

Stock-broker; stock-jobber. These are two names for persons who make dealings in stocks their business. According to English writers, the members of the stock exchange are called "jobbers" and "brokers." The jobber is the dealer, who buys and sells at the market prices, and acts as an intermediary between the broker who buys and the broker who sells. The broker, on behalf of his principal, deals with the jobber.

Stock exchange. An association or society in any commercial city of persons making dealings in stocks their business, organized for the better regulation of their transactions; also, the building or establishment maintained by such a society for the public sale of stocks.

2. The property of a business corporation, kept and used to enable it to carry on its business, is called its stock, and is usually treated and dealt in as if divided into shares, represented by certificates setting forth the ownership, and transferable by entries and recorded in the books of the company, such as the transfer book, the stock ledger, &c. The owner of a share or shares is called a stockholder, — a term not minutely accurate, for what he holds is a certificate; as to the stock, he is an owner rather than a holder.

When the word stock, as used in reference to a corporation, means any thing else than the capital of the company, it cannot refer to any thing else than the interests of the shareholders or individuals. Such interests are called stock; and the sum total of them is appropriately enough called the stock of a corporation. People *v.* Commissioners of Taxes, 23 *N. Y.* 192, 220.

That a statute imposing a tax upon the stock of a corporation, means upon its tangible property, and not upon its shares, see Auditor, &c. *v.* New Albany, &c. R. R. Co, 11 *Ind.* 570; State *v.* Hamilton, 5 *Ind.* 310.

That such a statute includes both stock subscriptions, and also all the actual tangible property of the company, see Michigan, &c. R. R. Co. *v.* Porter, 17 *Ind.* 380.

A statute exempting the capital stock of a railroad company from taxation was held to mean the capital to be raised by subscriptions to the stock, and not to include lands granted by congress to aid the road, in St. Louis, &c. Railway *v.* Loftin, 30 *Ark.* 693.

3. The various things accumulated by an agriculturist, artisan, or merchant, or indeed any person in business, for use or disposal in the regular, current prosecution of his vocation, are called his stock, his stock in trade, his stock of goods, stock of his farm or shop. This is a popular use of the term rather than a legal one, and what it includes depends on the connection and circumstances. The expression live-stock belongs under this head. It seems to mean that portion of the stock of a farm or plantation, or other establishment or business, which is composed of live animals. But any distinctions as to the use of the term in this sense belong to the vernacular dictionaries.

4. Stock also means a family, in the sense of persons connected by descent; as in the expression that a person comes from a good stock.

STOCKS. A contrivance in the nature of a large clamp, adapted to hold a man's legs, so that, when it was adjusted, the person sat in confinement. It was originally used to confine offenders for security, and afterwards by way of inflicting punishment of the same nature as that of the pillory, *q. v.* It is now obsolete.

STOP ORDER. The name of an order grantable in English chancery practice, to prevent drawing out a fund in court to the prejudice of an assignee or lienholder. If any person entitled, in expectancy or otherwise, to any share or portion of any stocks or funds standing in the name of the accountant-general of the court to the general credit of any cause, or to the account of any class or classes of persons, assigns his interest in such stock or funds, the assignee (although not a party to the cause in which the fund is standing) may present a petition for a stop order to prevent the transfer or payment of such stock or funds, or any part thereof, without notice to him; and also a person having a lien on a fund in court may obtain a

stop order. Such order is grantable on petition alleging the assignment or lien, and proof by affidavit. The order, being passed and entered, is delivered at the accountant-general's office; upon which the payment of the fund is stayed until the order is discharged, or another order is made directing payment notwithstanding the stop order.

The person putting on the stop order may appear at the hearing, or upon a petition being presented for the payment of the fund to a party in the cause who claims it. The stop order will then be either discharged, or payment to the person who has obtained it will be ordered. See *Wharton.*

STOPPAGE IN TRANSIT. By the general mercantile law, a seller of goods, who has forwarded them to the buyer without having been paid the price, may, if the buyer has become bankrupt or insolvent, or has stopped payment, countermand the transportation, and resume possession of the goods, by demand on the carrier, at any time before they have reached the actual or constructive possession of the buyer. The exercise of this right is known as stoppage in transit, and the right itself is the right of stoppage in transit. The term is constantly seen in the Latin form, stoppage *in transitu;* but the English version is in every respect preferable.

For the cases in and conditions upon which the right may be exercised, see the standard works on sales, particularly the treatises of *Benjamin*, *Long*, *Rand*, and *Story*.

Stoppage *in transitu* is the right which arises to an unpaid vendor to resume the possession, with which he has parted, of goods sold upon credit, before they come into the possession of a buyer who has become insolvent, bankrupt, or pecuniarily embarrassed. Inslee *v.* Lane, 57 *N. H.* 454.

An unpaid vendor may, in case of the vendee's insolvency, stop the goods sold, *in transitu;* but this right may be defeated by negotiating the bill of lading to a *bona fide* indorsee. The right of a vendor to stop *in transitu* is bestowed upon him in order to prevent the injustice which would take place, if, in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized upon in satisfaction of his liabilities, and so the property of one man were to be disposed of in payment of the debts of another. This stoppage must be considered not as a rescission of the contract, but as merely replacing the vendor in the same position as if he had not parted with the possession; from which it follows that the vendor's right of lien on the part stopped is revested, and no more. Stoppage *in transitu*, as its name imports, can only take place while the goods are on their way; if they once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end of the vendor's right over them; and, therefore, in most of the cases the dispute has been whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the decisions is, that they are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission; but that their arrival at their place of destination puts an end to the right of stoppage, though warehoused with the carrier, whose store the vendee uses as his own, or even if they are warehoused with the vendor himself. *Wharton.*

The right determines when the goods have reached their destination, whether or not they are yet in the actual possession of the vendee. Usually, the carrier of the goods is a mere neutral agent between the vendor and the vendee; and in ordinary cases, therefore, the transit is regarded as continuing as long as the goods are in the carrier's possession. But if the carrier enters into any new relation with the vendee, becoming, *e.g.*, custodian as well as carrier, that determines the transit, although the goods may not yet have reached their destination; and, likewise, the exercise by the vendee of acts of ownership over the goods will, in general, determine the transit; for example, if the vendee take samples of the goods with the intention of taking a constructive possession, and the carrier, retaining possession of the goods has expressly or impliedly assented to keep the goods as agent for the vendee. (Whitehead *v.* Anderson, 9 *Mees. & W.* 534.) *Brown.*

STORE, *v.* Storing is the keeping merchandise for safe custody, to be delivered in the same condition as when received, where the safe-keeping is the principal object of deposit, and not the consumption or sale. O'Niel *v.* Buffalo Fire Ins. Co., 3 *N. Y.* 122; Hynds *v.* Schenectady County Mut. Ins. Co., 16 *Barb.* 119.

Keeping oil and liquors, by a grocer, for the purposes of retail, is not within the meaning of a policy which prohibits "storing" goods hazardous or extra-hazardous. Langdon *v.* Equitable Ins. Co., 1 *Hall*, 226.

Keeping spirituous liquors in a house, for the purpose of retailing them to boarders and others, is not a violation of a provision in a policy of insurance against "stor-

ing" liquor therein. Rafferty *v.* New Brunswick Fire Ins. Co., 18 *N. J. L.* 480.

Storehouse. A building in which goods are kept for sale by a retail merchant is a "storehouse," within N. C. Rev. Stat. ch. 34, § 1. State *v.* Sandy, 3 *Ired. L.* 570.

The terms "storehouse" and "warehouse," as used in Ky. Gen. Stat. ch. 29, art. 6, § 4, mean any house not an office or a shop, or any room in a steam or other boat, in which goods, wares, and merchandise are usually deposited for safe-keeping or for sale. Ray *v.* Commonwealth, 12 *Bush*, 397.

STORES. In the sense of ship's supplies, are the supplies of different articles provided for the subsistence and accommodation of a crew and passengers.

Cordage, raven's-duck, and sail-cloth, found on board of a vessel, on her return from a voyage, are not stores, within the duty laws. They are either part of the ship's tackle, apparel, or furniture, or part of the cargo. United States *v.* Coils of Cordage, 1 *Baldw.* 502; *Gilp.* 299.

STORM. A policy of insurance insured against loss by "fire or storm;" a freshet, occasioned by the melting of the snow and prevailing south winds and rain, carried away the property: and the loss was held not to be covered by the policy. Stover *v.* Insurance Co., 3 *Phila.* 38.

STOUTHRIEF. Is a term in Scotch law, signifying a species of robbery. The distinction between the offences of robbery and stouthrief has never been very clearly defined, and, originally, they probably meant the same thing; but, in modern practice, the word stouthrief is confined to cases where the inhabitants of a house are attacked by thieves, and their resistance is quelled by violence actually inflicted, or reasonably dreaded; and to cases of attacks by mobs, in which property is violently carried off, and peaceable persons alarmed. *Macdonald.*

STRAND. The noun strand originally signifies any shore of a sea or (navigable) stream. Hence, to strand is for a vessel to run upon the shore, or to run a vessel upon the shore; and stranding, in the general sense, is any beaching or running ashore of a vessel.

But with reference to the word stranding, as used in a policy, a narrower construction must be applied; for not all cases of stranding are within the provisions as to stranding.

To constitute a stranding, within insurance law, the ship must be in the course of prosecuting her voyage when the loss occurs; there must be a settling down on the obstructing bank, rocks, &c., not a mere striking; and the vessel must take the ground by reason of extraordinary casualty, and not as one of the ordinary incidents of a voyage. See *Arn. Ins.* §§ 297, 318, 319; 2 *Selw. N. P.* 955.

STRANGER. Is often used to denote a person who has no part in a transaction with which he yet may afterwards have some concern. Thus the effect of an act may be drawn in question as to either parties, privies, or strangers. Thus the parties to a fine are either the cognizors or cognizees; the privies are such as are in any way related to those who levy the fine, and claim under them by any right of blood, or other right of representation; the strangers are all persons in the world, except only the parties and privies. In its general legal signification, stranger is opposed to the word privy. In like manner, persons who are in no way parties to a covenant, nor bound by it, are also said to be strangers to the covenant.

Stranger in blood. Any person not within the consideration of natural love and affection arising from relationship.

On a division of a town in 1742, it was provided that lands should be taxed in the town where the owner lived; but that land purchased by strangers should be taxed in the town where it was situate. The provision was held to be in its nature temporary, so far as respected the taxation in the town where the owner lived; and the term strangers, as used in the act, was construed as applicable to such persons as were not land-owners at the time of the division, but became such by subsequent purchase, so that lands purchased after the division were taxable in the towns in which they respectively lay. Lamprey *v.* Batchelder, 40 *N. H.* 522.

STRAY. In the sense of a beast wandering from its owner's close is better spelled estray, *q. v.*

The term "stray beast in a suffering condition," used in a statute, means any beast found astray, and likely, unless taken care of, to suffer injury, or be wholly lost to the owner. Sturges *v.* Raymond, 27 *Conn.* 473.

STRICT SETTLEMENT. This phrase was formerly used to denote a settlement whereby land was limited to a parent for life, and after his death to his first and other sons or children in tail, with trustees interposed to preserve contingent remainders. 1 *Steph Com.* 332, 333.

Generally, a settlement in which land is

tied up to the descendants of any person to the utmost extent permitted by law, and with the usual limitations for the settlement of real estate, is called a strict settlement. *Mozley & W.*

A strict settlement limits an estate to the use of the husband for life, remainder to trustees to support contingent remainders, remainder to the wife for life, remainder to other trustees for raising portions for younger children, remainder to the first and other sons in tail male, remainder to the daughters, as tenants in common, with cross-remainders between them, remainder to the husband in fee. The usual course with conveyancers, where property of the wife is settled, is to confer on the wife a power of appointment, in the event of there being no issue, so as to give her the option of defeating the limitations over of her estate. The object of a strict settlement is to put it out of the power of parents to deal with the corpus of an estate to the prejudice of their issue. *Wharton.*

STRIKING. As to striking a jury, see STRUCK JURY.

Striking off the roll. Another term for disbarring. It denotes the removal of an attorney or solicitor from the roll of attorneys and solicitors. It may take place either at the party's own request, or as a consequence imposed by the court for his misconduct.

STRONG HAND. The words "with strong hand" imply a higher degree of criminal force than is meant by the words "with force and arms" (or *vi et armis*). The English statutes relating to forcible entries use these words, "with a strong hand," as describing that degree of force which makes an entry or detainer of lands criminal, and entitles the prosecutor, under circumstances, to restitution and damages; whereas the words *vi et armis* — with force and arms — are mere formal words in the action of trespass; and, if issue were taken upon them, the plaintiff would not be bound to prove any force. (Rex *v.* Wilson, 8 *Durnf. & E.* 362, 363; Lowe *v.* King, 1 *Saund.* 81; Harvey *v.* Brydges, 14 *Mee. & W.* 437, 440.) *Brown.*

STUFF GOWN. The professional robe worn by barristers of the outer bar; viz., those who have not been admitted to the rank of queen's counsel. *Brown.*

STREET. Implies highway, or an easement for public travel. Cox *v.* Louisville, &c. R. R. Co., 48 *Ind.* 178; Kelsey *v.* King, 33 *How. Pr.* 39.

Street is a portion of land set apart for passage or travel. The term does not include a park. Perrin *v.* New York Central R. R. Co., 36 *N. Y.* 120.

A resolution of city authorities that a designated street be macadamized and curbed, means only that the roadway shall be improved, and does not authorize macadamizing the sidewalks. Mayo *v.* Haynie, 50 *Cal.* 70.

That street means the cartway between the curbs, see Philadelphia *v.* Lea, 9 *Phila.* 106.

The term street does not include a chartered toll-road within a city. Wilson *v.* Allegheny City, 79 *Pa. St.* 272.

Nor a water-way in a lake running between water-lots into the bay, although the city has constructed thereon a macadamized causeway. Reed *v.* Erie, 79 *Pa. St.* 346.

Nor a road owned by a turnpike or other private corporation. Quinn *v.* City of Paterson, 27 *N. J. L.* 35.

STRICTUS. Strict; exact.

Strictum jus. Strict law. The rigor of the law as distinguished from equity. See STRICTISSIMI JURIS.

Strictissimi juris. Of the strictest right. Subject to the strictest construction and most rigorous application of the law. An expression applied to licenses and grants very advantageous to the licensee or grantee. Instead of the superlative form, the simple positive, *stricti juris*, is often used, with nearly the same meaning.

STRUCK JURY. In a class of cases in which peculiar and difficult questions are involved, rendering it proper that persons of peculiar knowledge and qualifications should form the jury, instead of its being composed by lot, what is called a struck jury is allowed. This is also sometimes called a special jury; but it seems that the term special is less definite, as there may be other special panels. See Cook *v.* State, 24 *N. J. L.* 843. In this country, the proceeding is rare; and the steps to be taken are regulated by statute or rule of court, which may vary in details in different jurisdictions. But its distinguishing features, according to old forms, are these: The clerk of court returns a list of a large number of selected names of men of known qualifications for the trial of such questions as are presented in the cause. Thus, if it is a cause involving difficult questions of banking and finance, he returns (in theory) the names of approved bankers, or men of like experience. From this list the attorneys of the parties alternately strike off names, until twenty-four are left. These constitute the panel returned to the court, from which

the jury for the trial of the cause is selected.

The essence of the plan consists in securing special qualifications in the jurors, by allowing the clerk to select, instead of summoning by lot; while impartiality is attained by the large liberty given to each party to strike off. In New York, this practice has been authorized for many years, in cases where the court shall deem it necessary, by reason of the importance and intricacy of the cause. Under this permission, applications have frequently been made, — sometimes granted, sometimes refused on the ground that the particular cause was neither intricate nor important in the sense of the statute. No general rule can be deduced from the reported decisions as to what sort of causes deserve this kind of jury; but the decisions are summed up in *Abb. N. Y. Dig.* tit. Trial, ¶ 196–208. That a large sum is at stake, or that the government is a party, are not reasons: there must be something in the nature of the controversy suggesting necessity for jurors of special qualifications. The proceeding is quite definitely regulated by 2 Rev. Stat. 418. It provides that, when it shall appear to the court "that a fair and impartial trial cannot be had without a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck." The party obtaining the order gives notice of the time when he will attend before the clerk of the county in which the venue is laid, for the purpose of having the jury struck. At the time appointed, the clerk selects, from the lists of jurors liable to serve, the names of forty-eight persons whom he deems most indifferent between the parties, and best qualified to try the cause. The party obtaining the order or his attorney then strikes out one name, the opposite party, &c., another, and so on alternately until each has stricken out twelve names. If either party does not attend, or does not strike, the clerk strikes for him. The striking being completed, the clerk makes out a list of the twenty-four persons not stricken out. They are summoned by the sheriff, and a jury to try the cause is selected from them, in the same manner as in ordinary cases.

The practice seems to have been materially modified and extended by recent legislation in England. The accounts given in recent books of special and of struck juries are not easily distinguished.

SUB. Under; upon. This Latin preposition is a component part of many phrases, among which are the following:

Sub conditione. Upon condition. The proper words to express a condition in a conveyance, and to create an estate upon condition.

Sub modo. Under qualification, subject to a condition. In a qualified manner or sense.

Sub pœna. Under penalty. A phrase from which is formed the word subpœna (*q. v.*), — the name of several writs requiring the attendance of a party or of a witness, under a penalty. As the phrase has become practically Anglicized as one word, it is presented again in its alphabetic place so considered.

Sub potestate. Under authority. Subject to the power of another, as is a child to his father.

Sub silentio. Under silence; in silence; without objection. From the fact that an act passed *sub silentio*, consent of a party present may be inferred.

SUBINFEUDATION. In feudal times, tenants manifested a disposition to carve smaller estates out of those which they held of their lords, to be held of themselves, as inferior lords; and this system began to be extended, proceeding downwards indefinitely, and deprived the lords of their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of him who occupied the land. It was restricted by Magna Charta, and substantially suppressed by the statute of *quia emptores*, or Westminster third (18 Edw. I.); and a system of alienation, by which the alienee should hold of the same lord as the alienor, was introduced in its place.

SUBJECT, *n.* An individual member of a nation, considered as owing obedience to its laws.

It corresponds, as used of monarchical governments, to citizen, as used of a

republic; or, as Bouvier expresses nearly the same idea, the term is used of an individual member of a nation who is subject to the laws, in contradistinction to citizen, which is applied to the same individual when considering his political rights. Compare CITIZEN. Thus the supreme court has held that, in the Spanish treaty of 1795, the terms "subjects," "people," and "inhabitants" are indiscriminately used as synonymous. When applied to persons owing allegiance to Spain, "subjects" must be construed in the same sense as "citizens" or "inhabitants," when applied to persons owing allegiance to the United States. The Pizarro, 2 *Wheat.* 227, 246.

SUBJECT, *n.*, or **SUBJECT-MATTER.** The thing spoken or written of; as the subject of a statute. Also, the thing in controversy; as the subject-matter in dispute.

In the latter connection, subject-matter has been deemed equivalent to cause of action. Borst *v.* Corey, 15 *N. Y.* 505.

Many of the state constitutions provide that no law shall contain more than one subject, which shall be expressed in its title. Numerous decisions have arisen upon the meaning of these provisions, as to the question when a law embraces more than one subject and when the subject may be deemed expressed in the title, adequately. Similar provisions exist, employing the word object instead of subject. See *U. S. Dig.* tit. Statutes.

SUBMIT. Applied to a controversy, means to place it before a tribunal for determination. Submission: the act or agreement of parties placing a controversy before a tribunal for its determination. Thus, counsel sometimes agree to submit a cause without argument; the New York code provides for a submission of controversies without action.

These words are particularly used of agreement of parties to a question of difference, that they will leave it to arbitrators for determination.

That an agreement "to submit" a creditor's claim on a decedent estate imports, presumably, an arbitration rather than a statutory reference, see Akely *v.* Akely, 17 *How. Pr.* 21.

Submission bond. The bond by which the parties agree thus to submit their matters to arbitration, and by which they bind themselves to abide by the award of the arbitrator, is commonly called a submission bond.

SUBORNATION. Or, more fully, subornation of perjury, is the offence of procuring another person to commit perjury.

Subornation of perjury is the offence of procuring another to take such a false oath as would constitute perjury in the principal. To render the offence of subornation of perjury complete, either at common law or on the statute, the false oath must be actually taken; and no abortive attempt to solicit the party to take it will bring the offender within its penalties. The punishment is the same as for perjury; viz., fine or penal servitude, for not more than seven nor less than five years. (3 Geo. IV. ch. 114; 20 & 21 Vict. ch. 3; 27 & 28 Vict. ch. 47.) *Brown.*

SUBPŒNA. A writ requiring the person served to attend before court at a time and place mentioned, *under penalty;* from which last two words it derives its name.

Three kinds of subpœna are in common use; others are known.

In chancery practice, subpœna serves the purpose of the writ to bring the defendant into court as a party. This is known as the subpœna to hear and answer.

The appearance of witnesses, in any court, is usually compelled by service upon him of a subpœna *ad testificandum*, — for testifying. Should it be desired to procure, in addition to his testimony, a production of papers which he has in possession, a subpœna *duces tecum* — that you bring with you — (here designating the papers required) is served.

Subpœna is a writ by which persons are commanded to appear at a certain place, at a certain time, under a penalty of one hundred pounds. This writ is used both in the courts of chancery and in the courts of common law, and is applied to various purposes. The subpœna most frequently in use, in chancery proceedings, was that by which parties were commanded to appear in court, and answer the plaintiff's bill, and which was thence called a subpœna to appear and answer. This subpœna was, however, abolished by the jurisdiction act, 1852. There are, however, other subpœnas still in use in chancery proceedings, and which are of the same nature as the above, though applied to

effect different objects. The subpœnas of most frequent occurrence in common-law proceedings are: those used for the purpose of compelling witnesses to attend in court to give their testimony on a trial, and which are thence called *subpœnas ad testificandum;* and those used for the purpose, not only of compelling witnesses to attend in court, but also requiring them to bring with them books or documents which may be in their possession, and which may tend to elucidate the subject-matter of the trial, and which are thence called *subpœnas duces tecum. Brown.*

The subpœna bears a close analogy to the citation, or *vocatio in jus,* of the civil and canon laws. There are several kinds; and, at common law, there are two to compel the attendance of witnesses. These are: *Subpœna ad testificandum,* — the common subpœna, — which is personally served upon a witness, in order to compel him to attend the trial or inquiry to give evidence. *Subpœna duces tecum;* this is personally served upon a person who has in his possession any written instrument, &c., which would be evidence. These subpœnas are also used in criminal proceedings. Four witnesses can be included in one subpœna, whether in civil or criminal cases.

There are several subpœnas used in the course of a chancery suit; but only three names can be included in one writ, — husband and wife counting as one. They are the following: *Subpœna ad testificandum; subpœna duces tecum;* subpœna to hear judgment; subpœna for costs; subpœna served upon an infant, on attaining majority, to give him an opportunity to show cause against a decree; subpœna to name a solicitor, where the solicitor of a party has died, and such party refuses to appoint another. The subpœna to rejoin and the subpœna to appear to and answer a bill, known in former practice, have been abolished. *Wharton.*

SUBROGATION. The substitution of one person in the place of another as a creditor, — the new creditor succeeding to the rights of the former; the mode by which a third person who pays a creditor succeeds to his rights against the debtor.

Bispham defines it as the equity by which a person who is secondarily liable for a debt, and has paid it, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others who are liable in the same rank as himself. Suppose, for example, A is a creditor of B, and that C is a surety for B towards A, and that A holds, as additional security, a mortgage on real property belonging to B. If, now, C pays the debt, he will be entitled, on the principle of subrogation, to have an assignment of the mortgage, and to enforce it, as standing in A's place, and succeeding to his right. The same doctrine is also frequently applied when a junior incumbrancer is compelled, for his own protection, to pay off a prior lien. This equity of subrogation is one eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is, therefore, much encouraged and protected. *Bisp. Prin. Eq.* § 335.

Subrogation denotes the putting a third person who has paid a debt, in the place of the creditor to whom he has paid it, so as that he may exercise against the debtor all the rights which the creditor, if unpaid, might have done. It is of two kinds, — either conventional or legal; the former being where the subrogation is express, by the acts of the creditor and the third person, the latter being (as in the case of sureties) where the subrogation is implied by the law. *Brown.*

SUBSCRIBE. To write underneath. Subscription: a writing under, or underwriting; a writing of the name under or at the bottom of an instrument by way of adoption, attestation, or ratification. Subscriber: one who writes his name underneath some engagement, by way of adopting or assuming it. Subscriber is used in a very different sense from underwriter, though the two words are so analogous in etymology.

Two questions as to the meaning of subscribe and its inflections are made in the cases, — whether they require a writing underneath the paper, or are satisfied by a writing of the name in the body; and whether they require a writing by the individual in person. The first question is partly presented under the word sign (*q. v.*); and the current of the decisions appears to favor maintaining the use of these words in their etymological meaning of a writing underneath. Thus, in New Hampshire, under a statute which required parties to a mortgage to make and subscribe an

affidavit, a case arose in which they swore to the affidavit, having personally written their names in the body of it, filling up the blanks left for the names in the printed form; but they had not signed it underneath. The court held this insufficient, declaring that the word "subscribed," when used with reference to the authentication of a writing, ordinarily implies that the name of the party who subscribes is set by him, or by his authority, at the bottom or end of it; and this meaning must be assigned to the term, in a statute, unless there is something requiring a different construction. Stone *v.* Marvel, 45 *N. H.* 481.

It seems impossible to reconcile the numerous cases on the question how far a requirement that a person shall subscribe demands an actual writing by his own hand, or whether it may be satisfied by an adoption of a signature written by another. These cases arise under various statutes; such as a statute of frauds, requiring a memorandum of agreement to be subscribed; procedure acts, requiring a summons to be subscribed; charters regulating subscription to stock of corporations; statutes of wills, directing a testator or witnesses to be subscribed. Many of the decisions depend on the context in which the word occurs in the statute; and the question can hardly be said to turn upon the meaning of the word. Two representative cases will illustrate the opposite views:

In Alabama, the statute expressly allows a will to be *signed* by another person for the testator; but the witnesses are required to *subscribe* their names. Accordingly, the court held that the difference in language raised a strong presumption that the legislature meant to require actual personal writing by each witness; and, while they declined to lay down a rule as to a case of a witness unable to write, they held that, where a witness is well able to write, the subscription of his name by another witness, without his participation in the act, ought not to be deemed a subscribing by him. To satisfy the word subscribe, the person (if able) should participate in the writing, at least to the extent of making his mark, or holding the pen while another guides his hand. Riley *v.* Riley, 36 *Ala.* 496. But under the New York code of procedure, which requires the summons in an action to be subscribed by the plaintiff or his attorney, a summons issued by an attorney, with his name printed at the end thereof, has been held to be subscribed by him, within the law, on the ground that there is no good reason why the general rule, that a statute requiring an instrument to be in writing and subscribed is satisfied by a signature adopted by the party to be bound thereby, should not apply to a statute prescribing the form of legal process. Barnard *v.* Heydrick, 49 *Barb.* 62.

To subscribe is to write the name under; to write the name at the bottom or end of a writing. Wild Cat Branch *v.* Ball, 45 *Ind.* 213.

Subscription is the act of the hand, while attestation is the act of the senses; to subscribe a paper published as a will is only to write on the same paper the name of the witness; to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication. Matter of Downie's Will, 42 *Wis.* 66, 76.

The word subscriber, in a statute imposing personal liability upon the subscribers to the capital stock of an incorporated company, was held to include stockholders of every description, in Gay *v.* Keys, 30 *Ill.* 413.

Subscribing witness. A person who puts his name to an instrument as attesting witness.

SUBSIDY. A pecuniary aid granted by the legislature to the crown; or, in modern American usage, to any enterprise believed to be of public benefit, and to deserve government assistance.

A subsidy is an aid, tax, or tribute granted by parliament to the king for the urgent occasions of the kingdom, to be levied of every subject upon his property, at such rate as parliament may think fit. (*Termes de la Ley*; *Cowel*; 1 *Bl. Com.* 308; 2 *Steph. Com.* 556.) Also, a species of custom payable upon exports and imports of staple commodities. (1 *Bl. Com.* 315; 2 *Steph. Com.* 561.) *Mozley & W.*

SUBSTANCE. This noun, and the corresponding adjective and adverb, substantial and substantially, are in frequent use. Thus, there are rules that the substance of the issue must be proved; that an order is appealable

which affects a substantial right; that a certificate of acknowledgment is valid if the statute is substantially complied with. These uses do not involve a departure from the vernacular meaning of "substance;" viz., the essential or important part; the material thing; that in and for which a thing chiefly exists; that which constitutes a thing what it is; its nature; its real essence. What is meant by the substance, in a given connection, is matter of construction varying with the nature of the subject-matter. The decisions involving these words will be found to turn, not upon any peculiar significance of substance as a law term, but on the question, what is of the substance of a given affair or transaction.

SUBSTANTIAL DAMAGES. Such damages given by the verdict of a jury as amount to a substantial sum, as opposed to merely nominal damages.

SUBTRACTION. The offence of withholding (or withdrawing) from another man what by law he is entitled to.

It is a term little used in this country, as will be apparent from Brown's account of the principal kinds, which is given below.

There are various descriptions of this offence, of which the principal are as follows:

1. Subtraction of suit and service, which is a species of injury affecting a man's real property, and consists of a withdrawal of (or a neglect to perform or pay) the fealty, suit of court, rent, or customary services, all of which in feudal times, and some of which at the present day, are reserved by the owner of the land to himself when he lets or leases it to another. For this neglect of duty on the part of the tenant, the law gives the landlord the peculiar remedy of distress; but the other remedies formerly in use for rent in arrear, and for subtraction of suit and service, were abolished by the Stat. 3 & 4 Wm. IV. ch. 27, which put an end to almost all kinds of real actions; the only actions which now lie for rent being of the personal class. But for the neglect to perform any customary service, such as the neglect or refusal to grind corn at the landlord's mill, an action on the case will lie to compensate the party injured in damages.

2. The subtraction of tithes is the withholding from the parson or vicar, whether the former be a clergyman or a lay impropriator, the tithes to which he is entitled, and this is an offence cognizable in the ecclesiastical courts; for though those courts have no jurisdiction to try the right of tithes (unless between spiritual persons), yet where only the fact, whether or not the tithes allowed to be due are really subtracted or withdrawn, is in dispute, this is a personal transient injury, for which the remedy (viz. the recovery of the tithes or their equivalent) may properly be had in the ecclesiastical court. But any dispute as to tithes in their original form is now rare, that species of property having been in the great majority of parishes already commuted into a corn rent-charge, under the provisions of the tithe commutation act (6 & 7 Wm. IV. ch. 71).

3. Subtraction of conjugal rights is the withdrawing or withholding by a husband or wife of those rights and privileges which the law allows to either party. This is an offence peculiarly within the cognizance formerly of the ecclesiastical courts, and now of the court for matrimonial causes, and the party injured seeks redress by bringing a suit to recover those rights of which he or she has been deprived, called a suit for the restitution of conjugal rights. Thus, where the husband leaves his wife, and lives separate from her, without any sufficient reason, the court in question will compel him to return to cohabitation.

4. Subtraction of legacies is the withholding or detaining of legacies by an executor; and as such act deprives the legatees of the benefit which the law gives to them, and which the testator intended them to have, it is an offence of which the courts which have a testamentary jurisdiction take notice. With them, however, the courts of equity hold a concurrent jurisdiction.

5. Subtraction of church rates is the last and most familiar class of "subtraction," and consists in the refusal to pay the amount of rate at which any individual parishioner has been assessed for the necessary repairs of the parish church; and this, like the other species of this offence, is cognizable by the courts ecclesiastical. *Brown.*

SUCCEED. It is difficult to give concise definitions of succeed, and of its derivatives, succession and successor, which shall embody the various meanings in which they are used, yet properly discriminate them from "inherit," "inheritance," and "heir."

Corporations are said to have perpetual succession; and it is one of their best-recognized and most important attributes. The successors of a corporation are spoken of as corresponding to the heirs of a natural person.

In Louisiana, succession is used technically and frequently in a large sense, embracing the whole subject of the right, and transmission of the rights and obli-

gations, of the deceased to his heirs; and including estate, rights, and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has left only charges without property. Suits involving the settlement of a decedent estate, or brought on behalf of a decedent estate, are entitled "The succession of So and So against ——;" and in like manner the succession is named as the defendant, when a creditor seeks to charge the estate. The succession not only includes the rights and obligations of the deceased as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. As thus employed, it seems to involve the whole right of the kindred of a deceased person to take his estate, whether real or personal, and their liability incident thereto.

In English laws of taxation, succession has a use quite analogous to this last. The succession — that is, the right of the heirs and next of kin to take — is liable to a duty or tax; and the provisions of the succession-duty act defining the terms (Stat. 16 & 17 Vict. ch. 51, §§ 2, 54) declare that every disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person; and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person, to any other person, — is to be deemed to confer a "succession" on the person entitled by reason of any such disposition or devolution; and the term successor is to denote the person so entitled; and the term predecessor is to denote the settlor, disponor, testator, obligor, ancestor, or other person from whom the interest of the successor is derived.

With reference to the crown of England, the two terms have been used almost interchangeably; it is common to say that a person succeeds to the throne, or inherits it.

With reference to real property held in one's own right, inherit is the proper term. The son is not said (when words are technically used according to common law) to succeed to his father's lands.

With reference to real property held in trust, inherit would be incorrect. Succession is the technical term for the transmission of trust property. Trustees succeed one another; and a trust-deed is properly drawn to the trustee named and his successors.

With reference to transmission of corporate existence and franchises, succeed is, again, the technical term.

The word successors is not necessary, in a deed, to convey a fee to a corporation aggregate. Congregational Society *v.* Stark, 34 *Vt.* 243.

In grants to corporations aggregate, the word successors, though usually inserted, is not necessary to convey a fee-simple; for, admitting that such a simple grant be strictly only an estate for life, yet as the corporation, unless of limited duration, never dies, such estate for life is perpetual. See Union Canal Co. *v.* Young, 1 *Whart.* 410, 425; Overseers of Poor of Boston *v.* Sears, 22 *Pick.* 122.

Succession to the crown. The law of succession in Anglo-Saxon times was a mixture of the hereditary with the elective principles, the crown descending within the royal family, but not invariably to the individual pointed out by the strict rules of descent; for in very many instances the wittenagemote seems to have approved as a successor an able uncle in preference to the infant son of his brother; *e.g.*, Alfred excluded the son of his brother Ethelred, and Athelstan (although illegitimate) excluded the sons of his brother Edward the elder; and, again, the sons of Edmund I. were postponed to their uncle Edred, and in their turn they excluded the sons of Edred. The frequency of these instances proves that the principle of election was as strong as that of hereditary descent, if, in fact, the former principle was not the stronger of the two.

This mode of succession survived into the Anglo-Norman times, although the elective principle was much impaired. Thus, upon the death of William I., his son William succeeded in exclusion of Robert; and, again, upon the death of William II., his brother Henry I. succeeded, in exclusion also of Robert. Subsequently, however, the rules of descent became fixed and strictly hereditary. It is true that John, who was the fifth son of Henry II., excluded his elder brother Geoffrey's son Arthur; but John appears to have done so with difficulty, and by means of artifice, for he claimed under a devise of the crown from Richard I., who was elder than Geoffrey, it being probably at that epoch a moot point whether the crown was or not

devisable. However, upon the death of John the crown descended upon Henry III., although he was a minor of nine years or so, and the subsidiary principle of a regency (under the Earl of Pembroke) was resorted to; so that the law of hereditary succession to the crown appears by a somewhat natural coincidence to have become established at the same time and in the same reign that the principles of primogeniture and representation were established in the matter of the succession to real property.

The crown of England has since descended according to the strictest rules of primogeniture and representation. However, the doctrine of the king's capacity to devise the crown was revived in the reign of Henry VIII., that monarch having attempted to devise the crown, and having also made a purported devise thereof in the twenty-eighth, thirty-second, and thirty-fifth years of his reign, under enabling statutes passed in those years, in such manner as that the same should descend upon his decease otherwise than the law of inheritance pointed out; that is to say, to the issue of Anne Boleyn (*i.e.* Elizabeth) in exclusion of the issue of Queen Catharine (*i.e.* Mary), and subsequently to his son by Jane Seymour (*i.e.* Edward VI.), with remainder to the issue of the younger daughter of Henry VII. (*i.e.* Mary of Suffolk, his sister), in exclusion of the issue of the elder daughter of Henry VII. (*i.e.* Margaret of Scotland, his sister). It is noteworthy, however, that all those attempts to alter the hereditary line of descent proved ineffectual, and that upon the death of Henry VIII. the crown descended successively to Edward VI., Mary, and Elizabeth, and afterwards to James I., who was the great-grandson of Margaret, according to the strict principles of primogeniture and representation, and notwithstanding that there were at the time of each descent persons in existence who might have claimed under the devises before mentioned.

However, although the principle of hereditary succession to the crown is now, and has long been, well established, still that principle is, or appears at any rate to be, subject to the constitutional maxim established at the revolution of 1688; namely, that the two houses of parliament may, with the consent of the people, but for reasons of overwhelming sufficiency, set aside or pass over the strict heir, and resort to the old principle of election within the royal family, and may even settle the descent of the crown by act of parliament, as was done, for example, in the bill of rights, 1689, and again in the act of settlement, 1701, the present Brunswick dynasty holding, and claiming to hold, under the last-mentioned act. *Brown.*

Succession duty. A duty, varying from one to ten per cent, chargeable, by English statutes, upon property not chargeable with legacy duty, *q. v.* It chiefly applies to real property and leasehold interests. See *Brown.*

SUE. To proceed judicially; to commence or to prosecute in court.

Burrill says, that to prosecute an action already commenced seems to have been the original meaning. As now used, it may mean, to commence a proceeding. See SUIT.

SUFFER. As used in an ordinance against suffering certain domestic animals to run at large in a town, means knowingly, and willingly or carelessly, to permit. Col linsville *v.* Scanland, 58 *Ill.* 221.

The word suffer, as used in section 39 of the bankrupt act of 1867, is different from the word procure. To suffer implies a passive condition. It is like "to allow," "to permit," and does not import a demonstrative, active course, like the word procure. It is an apt word to apply to the case of pressure and powerful motives brought to bear upon a party. Under the influence of this pressure, and the operation of these motives, he suffers a thing to be done; that is, allows or permits it. Campbell *v.* Traders' Nat. Bank, 2 *Biss.* 423.

Suffering a recovery. A recovery was a mode of conveyance effected by the party wishing to convey the land permitting a fictitious action to be brought against him by the party to whom the land was to be conveyed, and allowing a judgment to pass against him for the land in question. The vendor, or conveying party, in thus assisting or permitting the demandant so to recover a judgment against him was thence technically said to "suffer a recovery." See FINE; RECOVERY.

SUFFERANCE. Omission to object; negative permission; passive consent.

Sufferance should be distinguished from assent, consent, leave, and permission, which may import affirmative action, expressed volition, while sufferance is negative.

Thus a tenant by sufferance is one who came lawfully into possession of lands, but whose right has expired, and who is now occupying merely by the permission implied from the owner's not having given notice to quit.

A tenant at sufferance is one who holds over his term at first lawfully granted; one who continues after his estate is ended, and wrongfully holdeth against another, &c.; one who comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a

lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate; or, if a man maketh a lease at will, and dies, and the tenant continues in possession. *Jacob.*

Tenancy by sufferance is the least and lowest estate in realty which can subsist; it is in strictness not an estate, but a mere possession only. It arises when a person, after his right to the occupation, under a lawful title, is at an end, continues (having no title at all) in possession of the land, without the agreement or disagreement of the person in whom the right of possession resides. Thus, if A is a tenant for years, and his term expires, or is tenant at will, and his lessor dies, and he continues the possession, without the disagreement of the person who is entitled to the same, in the one and the other of these cases, he is said to have the possession by sufferance; that is, merely by permission or indulgence, without any right,—the law esteeming it just and reasonable, and for the interest of the tenant, and also of the person entitled to the possession, to deem the occupation to be continued by the permission of the person who has the right, till it is proved that the tenant withholds the possession wrongfully, which the law will not presume. As the party came to the possession by right, the law will esteem that right to continue either in point of estate or by the permission of the owner of the land, till it is proved that the possession is held in opposition to the will of that person. *Wharton.*

SUFFRAGAN. Signifies an assistant; or, a relation of rendering aid to a superior. Thus a bishop is, in a general sense, a suffragan to his archbishop.

But a bishop may also have an assistant or suffragan to assist him in conferring orders, and in other spiritual parts of his office within his diocese. These are especially called suffragan bishops. They must not be confounded with the coadjutors of a bishop, who are appointed in case of a bishop's infirmity to superintend his jurisdiction and temporalities.

A suffragan is a titular bishop ordained to aid and assist the bishop of the diocese in his spiritual function; or one who supplieth the place instead of the bishop, by whose suffrage ecclesiastical causes or matters committed to him are to be adjudged, acted, or determined. Some writers call these suffragans by the name of subsidiary bishops. *Tomlins.*

Bishops who in former times were appointed to supply the place of others during their absence on embassies or other business were termed suffragans. They were consecrated as other bishops were, and were anciently called *chorepiscopi*, or bishops of the county, in contradistinction to the regular bishops of the city or see. The practice of creating suffragan bishops, after having long been discontinued, has recently been revived; and such bishops are now assistants of the bishops generally and at all times. *Brown.*

SUFFRAGE. Aid; advice; assistance. Also,—and this has become by far the most important signification,—an advisory opinion; a vote. The right of suffrage is the right of the common people to vote upon the choice of officers and upon fundamental questions of government.

SUGAR REFINER. A person whose business it is to advance the quality and value of sugar, upon which a tax or duty has been paid, by melting and recrystallization, or by liquoring, claying, or other washing process, or by any other chemical or mechanical means; or who shall, by boiling or other process, advance the quality or value of molasses, concentrated molasses, or melado, upon which a tax or duty has been paid. Act of July 13, 1866, § 9, 14 *Stat. at L.* 129.

SUGGESTIO; SUGGESTION. The Latin and English words signifying intimation, representation, or statement, but not necessarily implying any high degree of positiveness, definiteness, or urgency in what is said. Such terms as averment, assertion, and declaration suggest the notion of a putting forward of ideas in a formal and definite manner; and "representation" and "statement" involve somewhat of the same element. Suggestion may mean an informal, indefinite communication, an intimation.

Suggestio falsi. Statement of what is false; false representations. An expression frequently contrasted with *suppressio veri*, q. v.

Suggestion on the record. This phrase refers to a common method of bringing to the knowledge of the court matters of fact important to the right conduct or decision of a cause, but which cannot, under the circumstances, be pleaded. Thus, if a party dies after the pleadings are all in, a representation of the fact is incorporated in the record by what is called a suggestion, in order that the proper regard may be had to it, in the further proceedings.

Suggestion is a surmise or representing

of a thing. Thus, by Magna Charta, no person shall be put to his law upon the suggestion of another, but by lawful witnesses (9 Hen. III. ch. 28). Suggestions upon record are grounds to move for prohibitions to suits in the spiritual courts; yet matters of record ought not to be stayed upon the bare suggestion of the party: there ought to be an affidavit made of the matter suggested to induce the court to grant a rule for staying the proceedings upon the record. *Jacob.*

In actions at law, whenever, by the provision of an act of parliament or otherwise, a person not a party to the record is to be affected by a judgment, or where the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is to enter a suggestion on the roll, so that the party to be affected by it may demur, if he thinks the facts suggested are insufficient in point of law, or plead, if he means to deny them. Thus, if there are two or more plaintiffs or defendants, and one of them dies, the action is not necessarily abated; but the death may be suggested on the record, and the action then continued by or against the survivors, with or without the representatives of the deceased party. A suggestion is also entered upon the record where a person not a party to the action is to be affected by the judgment, under the provisions of an act of parliament (as the members of a company by a judgment against the secretary), or where the judgment is to be such as would not be ordinarily warranted by the proceedings on the record, or where the sheriff to whom the *venire* is to be awarded is interested in the suit, or where, by the order of the court, the venue in a local action is removed to another county, and in many similar cases, where the circumstances involve a deviation from the ordinary course of proceeding. *Brown.*

SUI JURIS. Of one's own right. See SUUS.

SUICIDE. Killing one's self; the intention of taking one's own life.

Suicide is a crime, subject to substantially the same limitations as other forms of homicide. It is true that the successful attempt escapes penalty; but this is because the offender is practically beyond the reach of society, not because a voluntary act of self-destruction by a sane person is deemed other than criminal. Its criminality was expressed in the old rules under which forfeiture and disgrace in burial were imposed, as penal consequences of the act; also, in rules now recognized, that one who advises or aids another person in the commission of suicide is punishable, as accessory before the fact in murder; and that one who attempts suicide unsuccessfully is chargeable with a criminal attempt. See *Rep. N. Y. Penal Code*, §§ 227–235.

But the existence of insanity in the subject may take from self-destruction its criminal quality, just as it may from homicide.

It will be seen by the cases cited below that authorities differ whether the word suicide necessarily imports criminality. One view is, that, like homicide, and the other words of same formation, it merely alleges the act of killing, leaving the question of criminality to be determined when the circumstances and any alleged excuse are taken into account. The other view is that it imputes an intentional killing; a termination of one's own life by accident is not included; and this must be a competent, sane intention, the purpose of a sound mind. Hence, as self-destruction planned by a sound mind is always criminal; can have no excuses of self-defence or official duty, such as distinguish justifiable homicide; the word necessarily imports crime.

The term suicide has no technical or legal meaning. It clearly does not include an accidental or unintentional killing of one's self. Neither ought it to be construed, in an exception in a policy of life insurance, "if the insured shall commit suicide," as including death caused by the person's own act, committed while unable to distinguish between right and wrong, and to appreciate the nature and moral quality of the act, so as to be a responsible moral agent.

The word suicide is almost always used in a criminal sense, as importing a self-killing, which is criminal. Per Wrightman, J. Clift *v.* Schwabe, 3 *Com. B.* 437, 458.

The word suicide is not necessarily of the same import as *felo de se*, nor has it a fixed legal meaning imputing crime. As a person may commit homicide without involving crime, so, taking suicide as meaning homicide of one's self, it does not necessarily involve either guilt or moral responsibility; it may be used as designating the mere act of self-destruction. In common language, every act of self-destruction is described by the word suicide, if it is the intentional act of a party knowing the probable consequences of what he is about. Per Rolfe, B. *Ib.* 461.

The word suicide has not a technical meaning importing felony; it is not equivalent to self-murder; nor does it, in ordinary acceptation, import felony. It means

only killing one's self. The circumstances attending the act cannot affect the literal meaning of the word. No stronger meaning can be insisted on than this, that the deceased killed himself knowing the probable consequences of his act, and did that act voluntarily, intending such consequences to follow. Per Patteson, J. *Ib.* 464.

Suicide, in an exception in a life policy, includes all cases of voluntary self-destruction. It does not embrace cases in which the will is not exercised at all, as where death results from accident or delirium; but all where the self-destruction is voluntary, though the will may be perverted. It is proper to use the expression, "the causes of suicide are twofold, — insanity and crime." Per Alderson, B. *Ib.* 467.

The phrase "commit suicide" is not a legal technical term; an inquisition stating that the deceased committed suicide would be clearly informal and bad. In ordinary use, it includes any one who has purposely killed himself, whether from *tædium* of life, from grief, or in a fit of temporary insanity. It embraces all cases of voluntary self-destruction, and may well be so construed when used in an exception in a life policy. Per Parke, B. *Ib.* 468.

The word suicide, considered merely as an English word, fairly implies a criminal taking away of one's own life. It seems never to have been used, except in this sense, by legal writers. To couple it with "commit" strengthens the presumption that it is used of a criminal act; for commit is equivalent to perpetrate, and appropriate to a crime. And when the phrase "commit suicide" is found in an exception in a policy, coupled with death by duelling and death by the hand of justice, the reason is still stronger for believing that the parties intended only to except a criminal taking of one's own life. Per Pollock, C. B. *Ib.* 471.

The terms "suicide" and "dying by one's own hand" are generally used as synonymous. They have the same meaning. "Dying by one's own hand" is but another form of expression for suicide. Neither term, in an exception in a policy, ought to be construed as embracing all the cases in which the death of the assured is the consequence of his own act. Death by accident or mistake — as when one kills himself by drinking poison, not knowing that it is poison — is not suicide; neither is death self-caused by an insane person. Insanity is a disease; and death, the result of insanity, is death by disease. Eastabrook *v.* Union Mut. Life Ins. Co., 54 *Me.* 224.

Suicide does not, necessarily, imply a wrongful act, or self-murder. It means self-killing, just as "homicide" means killing any one else. But there may be excusable homicide, as well as felonious; and suicide was only cognizable at common law when the person was *felo de se*, or guilty of a felonious act. If *non compos mentis*, the actor in homicide or suicide commits no crime. In one sense, the man dies by his own hands who kills himself, whether sound or frenzied. But a condition in a policy will not be construed to cause a forfeiture for an act of self-destruction not involving an evil will. The clause forfeiting the insurance for self-destruction must be construed as a penal clause, when it is associated with other forfeitures which involve voluntary wrong-doing; such as death by duelling, or by the hands of justice, or in the violation of the laws, or impairing health by vice or intemperance. When an act which is to cause forfeiture is classed among such wrongful conduct, it is fairly to be inferred that it is regarded as *ejusdem generis*, and depending on the same reasons; and a construction which punishes a person who is not in fault is not to be favored, if it can be allowed at all. The very object of life insurance is to provide for death by disease or in the ordinary course of nature; and death by one's own hands, in the case of a person *non compos*, is as much the result of disease as death by fever or consumption. John Hancock Mut. Life Ins. Co. *v.* Moore, 34 *Mich.* 42.

The term suicide is sometimes used in a strict technical sense, as meaning, in a legal sense, an act of criminal self-destruction; to which is necessarily attached the moral responsibility of taking one's life voluntarily, and in the full exercise of sound reason and discretion. Dean *v.* American Mut. Life Ins. Co., 4 *Allen*, 96.

Suicide is the wilful and voluntary act of a person who understands the physical nature of the act, and intends by it to accomplish the result of self-destruction. Nimick *v.* Mut. Ins. Co., 10 *Am. L. Reg.* N. S. 101.

Suicide is the deliberate termination of one existence, while in the possession and enjoyment of his mental faculties. Self-killing by an insane person is not suicide. Breasted *v.* Farmers' Loan & Trust Co., 4 *Hill* (*N. Y.*), 73; 8 *N. Y.* 299.

SUIT. Is a very comprehensive, indefinite term for a judicial proceeding. It is largely used, in modern jurisprudence, to comprehend almost the whole body of proceedings arising in the exercise of original jurisdiction; and also, more narrowly, as an antithesis of action, and to denote a proceeding to obtain relief in equity, in contradistinction from an action at law. Thus, suit may include actions at law and bills in equity, as where the judiciary act of congress of 1789 speaks of jurisdiction over suits of a civil nature at common law or in equity, — or may be used as excluding actions at law, and intending an equitable proceeding only. Presumably, it does not extend to a proceeding of appeal, error, or review, if suggested

as a new and independent proceeding; but may include either, considered as a branch or continuation of a proceeding begun in original jurisdiction. Thus, a writ of error would not, ordinarily, be deemed a suit, if the intention was to depict it as a remedy, commencing in the application for the writ; yet such phrases as "costs of suit," "event of his suit," "prosecuting his suit to effect," might, in the connection, clearly embrace the ultimate determination on error or appeal. Presumably, suit is not appropriate to criminal proceedings; nor to petitions to which there are no adversary parties.

Moreover, what has been said above of the use of the word in opposition to action is little applicable, if at all, to the affiliated words sue, suitor, and lawsuit. Since to use the verb act in the sense of to proceed at law is quite inadmissible, and "actor," in the sense of plaintiff, has special associations, "sue" and "suitor" must often be used with reference to common-law jurisdiction; and lawsuit is a popular rather than technical term, which is quite as likely to be used meaning any resort to courts of justice as to mean strictly a suit in law, as opposed to one in equity.

And, upon the whole, "suit" is used so vaguely, and in such varied ways, that all which a work of this nature can do is to point out the uncertainty of its meaning. The context must determine how it is used in a given case.

Old books mention the word in many connections which are now disused, — at least, in the United States. Thus, suit was used of following any one, or in the sense of pursuit; as in the phrase making fresh suit. It was also used of a petition to the king or lord. *Suit of court* was the attendance which a tenant owed at the court of his lord. *Suit covenant* and *suit custom* seem to have signified a right to one's attendance, or one's obligation to attend, at the lord's court, founded upon a known covenant, or an immemorial usage or practice of ancestors. *Suit regal* was attendance at the sheriff's tourn or leet (his court). *Suit of the king's peace* was pursuing an offender, — one charged with breach of the peace. See *Jacob; Cowel.*

Suit, as applied to proceedings at law, originally signified a number of persons or witnesses, which a plaintiff produced to establish the truth of the allegations made in his declaration; and this practice of producing a suit gave rise to the very ancient formula, almost invariably used at the conclusion of a declaration, — *et inde producit sectam*, and therefore he brings his suit. Although the actual production of plaintiff's suit has, for many centuries, fallen into disuse, still the formula, until recently, remained. *Brown.*

Grant of administration is not the commencement of a suit, within the provision of a statutory saving clause of "actions and suits pending." Davis *v.* Livingston, 6 *Ohio*, 225.

The word suit literally includes a *certiorari;* that is, an action or prosecution by petition for recovery of a right. Hendrix *v.* Kellogg, 32 *Ga.* 435.

An attachment against a non-resident debtor is a suit, within the meaning of the judiciary act of congress, giving exclusive jurisdiction to the district courts of the United States of all suits against consuls. Matter of Aycinena, 1 *Sandf.* 690.

The term suit is applicable to a proceeding by *mandamus.* McBane *v.* People, 50 *Ill.* 503.

A petition by a creditor to a board of supervisors, for the allowance of a demand against the county, is not a suit. Gurnee *v.* County of Brunswick, 1 *Hugh.* 270.

The term suit includes a writ of prohibition. It is a very comprehensive one, and is understood to apply to any proceeding in a court of justice in which an individual pursues that remedy in a court of justice which the law affords him. Weston *v.* City Council of Charleston, 2 *Pet.* 449.

As used in a statute of limitations upon suits, does not include proceedings to review a decree in equity. The words "suit" or "action," in such statutes, apply only to proceedings had until judgment or decree. Wilt *v.* Stickney, 15 *Bankr. Reg.* 23.

That the word suit does not include a writ of error, see Overseers of Clayton *v.* Beedle, 1 *Barb.* 11.

That it does include a petition by a creditor of a decedent estate to liquidate and recover his demand, see Calderwood *v.* Calderwood, 38 *Vt.* 171.

A statute conferring jurisdiction of "every suit of a civil nature at law," will not include a statutory proceeding to enforce payment of a legacy. Suits for legacies were not of common-law jurisdiction. Woodruff *v.* Woodruff, 3 *N. J. L.* 413.

Suitors' fee fund. In English chancery, is understood to mean the fund formed from the payment of the fees of suitors in the court of chancery. It is realized from the sales made from the inland revenue, of adhesive stamps to be affixed to the documents to be used

by the court; and forms the primary fund from which are paid the salaries of some of the officers of the court, and other expenses connected therewith.

Suitors' fund. In English chancery, is understood to be the aggregate of moneys which, having been paid into the court of chancery, are placed out for the benefit and better security of the suitors of the court; including, also, interest arising from the same. Brown, however, seems to confine the term to the accumulation of interest on the deposits of suitors' moneys.

SUITABLE. An act authorizing letters to be granted to a suitable person, means proper, competent person,—one suitable in a legal view. Peters *v.* Public Administrator, 1 *Bradf.* 200.

A suitable bridge, in an act providing for a railroad viaduct, means such a bridge as, in the judgment of the board of railroad commissioners, the safety and convenience of the public and the interests of the railroad corporations require. Worcester *v.* Railroad Comm'rs, 113 *Mass.* 161.

SUMMARY, *adj.* Immediate; peremptory; speedy; without delay.

This word appears in the title of a number of legal proceedings, the general characteristic feature of which is, that they are designed to reach a decision quickly, in a simple and inexpensive manner, and without delay, even for formal pleadings and jury trial. The following are proceedings of this nature often mentioned in the books; there may be many others. Summary proceeding is a generic term, and may be employed for any remedy like those mentioned.

Summary action. In Scotch law, summary actions are those which are brought into court not by summons but by petition. They either relate to practitioners or parties already in court, or belong to a class which have been introduced by statute. (*Bell.*) They correspond to summary proceedings in English courts, whether by motion or petition in the superior courts, or by complaint before justices of the peace. (*Poterson.*) *Brown.*

Summary conviction. A trial of offenders, before a magistrate or bench of magistrates, without the intervention of a jury, is authorized by the statutes of many of the states, and by acts of parliament in England. These trials are authorized chiefly for the lesser offences. In these proceedings there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed to be his judge. A conviction reached on such a magistrate's trial is called a summary conviction. In state statutes of this kind the constitutional right of trial by jury is sometimes saved, if the statute would otherwise transcend it, by giving the accused a right to demand a transfer of the cause to a court having a jury; so that a summary conviction can occur only when he impliedly consents to that mode of proceeding.

Summary proceedings. By this phrase, which is of frequent recurrence in books on the jurisprudence of New York state, and those on the law of landlord and tenant, is generally meant a statutory proceeding for the prompt dispossession of a tenant who is holding over after default in payment of rent, or after expiration of his term, and designated in the statute as summary proceedings to recover possession of lands.

Summary procedure on bills of exchange. This phrase refers to the statute 18 & 19 Vict. ch. 67, passed in 1855, for the purpose of facilitating the remedies on bills and notes by the prevention of frivolous or fictitious defences. By this statute, a defendant in an action on a bill or note, brought within six months after it has become payable, is prohibited from defending the action without the leave of the court or a judge. See 2 *Steph. Com.* 118, note; *Lush Pract.* 1027.

SUMMING UP. An address, such as is usually incidental to a jury trial of a cause, reviewing the evidence and explaining the application of the law to the facts, is called the summing up of the cause, or, briefly, the summing up. Making this address is summing up, and to make it is to sum up. The expressions seem not inapplicable to the closing address or argument of either counsel, or to the judge's charge. Sometimes the entire, aggregate discussion by all three would be termed the summing up; as if one should say that the summing up, in a given case, occupied a week.

SUMMONERS, or *summonitores.* Were petty officers to cite and warn men to appear in any court; and these ought to be *boni homines,* &c. (*Fleta,* lib. 4.) They were,

properly, the apparitors, who warned in delinquents at a certain time and place, to answer any charge or complaint exhibited against them; and, in citations from a superior court, they were to be equals of the party cited; at least, the barons were to be summoned by none under the degree of knights. (*Paroch. Antiq.* 177.)

Summonitores scaccarii were officers who assisted in collecting the king's revenues, by citing the defaulters therein, into the court of exchequer. *Jacob.*

SUMMONS. The name bestowed by positive law upon various instruments having it for their object to notify a party of a suit commenced against him; to bring a defendant into court; to give a person sued opportunity to appear and answer.

Summons is a proper term for almost any notice to a person sued, to appear and defend.

By provisions of the New York code of procedure, which have been followed in more than half of the other states, civil actions in courts of record, both of legal and equitable cognizance, are commenced by a summons. This summons has not the characteristic incidents of a writ; and is nothing more than a notice in writing, addressed by the plaintiff or his attorney, to the defendant, informing him that he is summoned and required to answer the complaint, a copy of which may be annexed, or the summons may notify defendant where it may be filed. The weight of authority in the code states is, that this summons is not, in strictness, process; yet it takes the place and performs the function of mesne process, and is not unfrequently spoken of as process.

Summons is also, in New York, one of the modes by which actions in justices' courts are commenced.

In England, writ of summons is now the mode by which actions, both at law and in equity, in the high court of justice are commenced.

The first process to bring the tenant or defendant into court in all real actions, with one or two exceptions, as in assise of novel disseisin and writ of deceit, is a summons commanding the sheriff to summon the tenant to appear in court, according to the requisition of the writ. This command is contained in the original writ, and no separate writ of summons issued to the sheriff. *Roscoe Real Act.* 146.

Summons may be defined, generally, as a citation to appear before a judge or magistrate. The word is used variously, as follows:

1. The process used for bringing a party before a justice of the peace on summary conviction is termed a summons. This is also sometimes called a warrant; but the latter term commonly denotes that instrument which authorizes the apprehension of the accused, which a summons does not generally do.

2. An application to a judge at chambers, whether at law or in equity. Such an application in a suit in equity is often adjourned into open court; it is then called an adjourned summons.

3. A writ, in Scotch law, passing under his majesty's signet, signed by a writer to the signet, and containing the grounds and conclusions of the action, with the warrant for citing the defender. (*Bell.*) This writ corresponds to the writ of summons in English procedure. (*Paterson.*)

4. The writ of summons is likewise, in English law, the commencement of an action. It is a writ calling on the defendant to cause an appearance to the action to be entered for him within eight days after service, in default whereof the plaintiff may proceed to judgment and execution. There are different forms of it, according as the defendant does or does not reside within the jurisdiction; and, if he does not, the period of eight days may be enlarged, with reference to the distance he may be from England. (*Lush Pract.* 355.)

By the common-law procedure acts, six general forms of this writ were provided; viz., Where defendant is within the jurisdiction, and the writ bears no special indorsement; where defendant is within the jurisdiction, and the writ bears a special indorsement; where defendant, being a British subject, is out of the jurisdiction; where defendant, not being a British subject, is out of the jurisdiction; where the plaintiff seeks a *mandamus* (*C. L. P. Act*, 1854, § 68); and where the plaintiff seeks an injunction (*C. L. P. Act*, 1854, §§ 79–82.) And the summary procedure on bills of exchange is commenced by means of a writ of summons specially provided for the purpose.

Under the judicature acts, every action in the high court is to be commenced by writ of summons, which must be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and must also specify the division of the high court to which it is intended that the action shall be assigned. It is not necessary for the plaintiff, in the indorsement, to set forth the precise relief or remedy to which he considers himself entitled. *Brown; Mozley & W.*

Summons and order. In the progress of an action at law, it frequently becomes necessary to obtain the order of the court upon some matter of minor importance; and, as such matters are of very frequent

occurrence, it would be inconvenient in many respects to permit the party seeking such an order to make an application for the same in open court; in consequence of which, one of the judges usually sits at his own chambers for the purpose of hearing and disposing of such minor matters. The party who wishes to obtain a judge's order must usually summon the attorney or agent of the opposite party before the judge; which he does by obtaining a judge's summons, and serving it on such opposite party, which summons requires him to attend before the judge at a specified time, to show cause why the party applying for the order should not have it granted him. The order of the judge, when granted, usually orders or grants liberty to the applicant to have what he seeks. (2 *Arch. Pract.* 1598.) *Brown.*

Summons and severance. The proper name of what is distinguished in the books by the name of summons and severance, is severance; for the summons is only a process, which must, in certain cases, issue before judgment of severance can be given; while severance is a judgment, by which, where two or more are joined in an action, one or more of these is enabled to proceed in such action without the other or others. *Jacob.*

It was the only mode by which one of several plaintiffs in error, having been defendants in the court below, could prosecute a writ of error against the consent of the rest. But by the orders under the judicature act, 1875, where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the court to defend in such action, on behalf or for the benefit of all parties so interested; and proceedings in error are abolished. See *Lush Pract.*

SUMMUS. Highest; greatest. The initial or most emphatic word of several Latin maxims.

Summa ratio est quæ pro religione facit. An argument which is favorable to religion is of great weight. Where the laws of God and those of man directly and positively conflict, the former are to be obeyed in derogation of the latter. Thus a statute prohibiting the giving of alms to any person, however necessitous, would be void. So, of a law authorizing the commission of murder.

Summum jus, summa injuria. The extreme of right becomes extreme wrong. Right pushed to extremes becomes wrong.

SUMPTUARY LAWS. Are laws made to restrain excess in apparel, and prohibit costly clothes; of which there were once many in England; but they are all repealed by Stat. 1 Jac. I. ch. 25. 3 *Inst.* 199; *Jacob.*

SUNDAY. The first day of the week is designated by this name; also, as the Lord's day, and as the sabbath.

In computing the time of notices and rules in practice, where the last day falls on Sunday, it is usually excluded, and the party has the whole of the following Monday; but intermediate Sundays are included and counted as ordinary week-days. So, in computing time under ordinary contracts, which call for payment or performance within a definite term, if the last day is Sunday, it is excluded, and the debtor party has the whole of the last day. But if the contract is one on which grace is allowed (and the same principle is probably applicable where the term prescribed in the contract is in the nature of a grace, as in the thirty days' interest clause in a mortgage, or in a clause of a policy giving the insured thirty days after due for payment of premium), Sunday is not excluded; grace having been given the party, it is not to be extended on account of Sunday.

SUPER; SUPRA. Upon; over; above. This Latin preposition introduces several phrases used in law, and is an element in some compound words given below.

Super altum mare. Upon the high sea. See HIGH SEAS.

Super visum corporis. Upon view of the body. A phrase descriptive of the manner of holding a coroner's inquest.

SUPERCARGO. An agent on board ship, in charge of the cargo. He is employed by owners of merchandise sent abroad, to have charge of the cargoes exported while on the voyage, to sell them abroad to the best advantage, and to purchase proper commodities to relade the ship homewards. He goes out and returns home with the ship; thus differing from a factor, who has a residence in the country of exportation, and who only receives and deals with the goods after their arrival out.

SUPER-INSTITUTION. In ecclesiastical law, is a duplicate institution (*q. v.*) of a clergyman; an institution of one claimant of a benefice upon another.

This has sometimes taken place where two persons have claimed, by adverse titles, the right of making presentation to the benefice.

SUPERIOR. One who holds a position of authority; one having command, or vested with control.

The head of a monastery is called the superior; and the directress of a nunnery, the lady superior. In the feudal law, until the statute *quia emptores* precluded subinfeudations (*q. v.*), the tenant who granted part of his estate to be held of and from himself as lord was called a superior. In Scotch law, the word applies to one of whom lands are held; thus answering to a lord in the feudal system.

Superior court. A name frequently applied to courts of original jurisdiction, intermediate between the inferior courts and courts of last resort; to which a limited appellate jurisdiction is sometimes added; and more rarely the name is used as the title of a court of last resort.

In the United States, courts under this title exist in Connecticut, Delaware, Georgia, Massachusetts, and North Carolina, whose jurisdiction, respectively, extends throughout the whole of each state, or throughout all of the several counties or districts into which the state may be divided. In other states, the name is the title of a court or courts organized in a particular city or county, additional to the general judicial system. Such are the superior courts of Cook county, Illinois; of Marion county and Tippecanoe county, Indiana; of Cumberland county, Maine; of Baltimore city, Maryland; of Detroit and of Grand Rapids, Michigan.

The expression "superior courts" has long been used, in England, to denote the court of chancery, the courts of queen's bench, common pleas, and exchequer; but they are now merged in the supreme court of judicature.

SUPERSEDE. To annul; to stay; to suspend. Thus, it is said that the proceedings of outlawry may be superseded by the entry of appearance before the return of the exigent, or that the court would supersede a fiat in bankruptcy, if found to have been improperly issued.

SUPERSEDEAS. That you supersede; that you set aside. The name of a writ issued to a ministerial officer, commanding him to supersede or desist from proceeding under another writ, previously or subsequently delivered to him. The writ issued in several forms, according to the nature of the writ to be superseded. In all the Latin forms, the emphatic and distinctive word is *supersedeas*, which gives name to the writ. The object sought is always to relieve a party from the operation of the writ sought to be superseded. Thus, in the proper sense of the word, it is a distinct writ, to be sued out and served, and which in terms commands the suspension of some proceeding.

But it is very common in American books to see the expression used, that something is a *supersedeas*, when the meaning is only that it operates as a stay of proceedings; it has a legal effect like a *supersedeas*. Thus, in speaking of a writ of error granted by the supreme court of the United States, it is common to say that (if the security required is given) the writ is a *supersedeas*. The meaning in this connection only is, that the writ of error operates to stay proceedings. The stay is by force of the act of congress, not because the terms of a writ of *supersedeas* are incorporated in the writ of error, or because the latter can be said to be, in any strict sense, a writ of *supersedeas*. If, however, plaintiff in error should find that, notwithstanding his giving the required security, the stay of proceedings was not accorded, he might have relief by formal writ of *supersedeas*.

Supersedeas is a writ that lies in a great many cases, and signifies, in general, a command to stay some ordinary proceedings at law, on good cause shown, which ought otherwise to proceed. (*Fitz. Nat. Brev.* 236.) *Jacob.*

The word *supersedeas* is especially used with reference to the superseding of a commission of the peace, which suspends the power of the justices therein mentioned, but does not totally destroy it (*Termes de la Ley; Cowel;* 1 *Bl. Com.* 353; 2 *Steph. Com.* 647, 648); also, of the annulment of an adjudication in bankruptcy (*Robs. Bkcy.* ch. 29, § 2); and of an order to discharge a defendant from custody (*Smith Act. Law*, ch. 13). *Mozley & W.*

SUPERSTITIOUS USE. A phrase

which must not be confounded with either "charitable" or "religious use." It refers to English legislation of centuries ago, restricting endowments or gifts for disseminating or sustaining religious doctrines deemed false and dangerous.

A superstitious use has been defined as one which has for its object the propagation of the rites of a religion not tolerated by the law.

These religions were chiefly those of the Roman Catholics, of the dissenters, and of the Jews; and the statutes enacted in aid and enlargement of the common-law doctrine adverse to gifts for sustaining them were: 23 Hen. VIII. ch. 10, against assurances of lands to uses to have obits perpetual, or a continual service of a priest for ever; 1 Edw. VI. ch. 14, against giving lands to the finding or maintenance of any anniversary or obit, or other like thing, intent, or purpose; and 1 Geo. I. ch. 50, a statute appointing a commission to inquire into and confiscate to the king lands held on superstitious uses. By modern legislation, the stringency of these enactments has been relaxed. Dissenters were relieved of this interpretation by the toleration act of 1689; Roman Catholics, by the Stat. 2 & 3 Wm. IV. ch. 115; and Jews, by the Stat. 9 & 10 Vict. ch. 59. *Brown; Mozley & W.*

The doctrine adverse to superstitious uses is probably not in force, as such, in the United States, where all religions are entitled; so that the common peace, liberty, and morality are not infringed. But it is equally probable that the laws of many of the states would preclude uses of such character, on the ground that they were contrary to the rules against perpetuities (*q. v.*), and could not be exempted from it as charities, *q. v.*

SUPPLEMENTAL. Made in aid of and to supply defects in a previous paper or proceeding.

A supplemental differs from an amended pleading in this, that it is not complete or independent; the original pleading stands, and the new one merely supplies something omitted, — merely aids it. An amended pleading merges and takes the place of the original, — is complete in itself, while the original is superseded.

Supplemental affidavit. An affidavit made in addition to a previous affidavit, for the purpose of supplying some deficiency in it.

Supplemental answer. In chancery practice, also in civil actions under the codes of reformed procedure, matters of fact which have arisen since the answer was served, and which, therefore, are not proper to be introduced by an amended answer, may be brought to the knowledge of the court by an answer made in aid of the original answer, and therefore called supplemental. It answers the same end as the plea *puis darrein continuance* in actions according to common-law practice.

Supplemental bill. In a suit in chancery it frequently happens that new matter arises or is discovered since the filing of the original bill in the suit, or that some of the parties acquire a new interest, or that fresh parties acquire an interest in the subject-matter. Such matters must be brought to the knowledge of the court. They may, indeed, in some cases, be brought forward by amending; but not always. After the parties are at issue, and witnesses have been examined in the suit, the bill cannot usually be amended. Where amendment is not a proper mode, the defect may be supplied by a bill filed, which introduces the new matter, in aid of the original bill, and is called a supplemental bill. Under the modern English practice, the court will sometimes, on an *ex parte* application, by motion or petition, make an order to revive and carry on the proceedings in the original suit, without the necessity of filing any supplemental bill.

Supplemental complaint, or petition. As in the case of a suit in chancery, so in civil actions under the codes of reformed procedure, matters which arise after service of the original complaint or petition, and which, therefore, are not proper to be introduced by an amended one, may be introduced by a new one in aid of the original, and therefore called supplemental.

SUPPLETORY OATH. In the modern practice of the civil law, testi-

mony of at least two witnesses is required to constitute full proof (*plena probatio*); the testimony of one is called half full proof (*semi plena probatio*), and does not warrant a judicial sentence. But if a party who can produce only one witness is himself cognizant of the matter, the courts admit him to be examined in his own behalf; and the oath administered to him for that purpose is called the suppletory oath, because it supplies the necessary quantum of proof on which to found the sentence.

The expression has no use or application in this, its original sense, in American jurisprudence; it is sometimes employed, however, in a secondary way. In cases and text-books upon the rules which govern receiving a party's own books of account as evidence in support of his action for matters charged, it is sometimes said that the books must be accompanied or verified by plaintiff's suppletory oath; meaning that, while the books are the immediate evidence, the oath of the party supplies the proof proper to attest and corroborate them.

SUPPLICAVIT. He has besought. The name of an old English writ, which issued out of chancery for taking sureties of the peace, but now obsolete.

A *supplicavit* is a writ, issuing out of chancery, for taking surety of the peace, when one is in danger of being hurt in his body by another. It is directed to the justices of the peace and sheriff of the county, and is grounded upon the Stat. 1 Edw. III. st. 2, ch. 16, which ordains that certain persons shall be assigned by the chancellor to take care of the peace, &c. (*Fitz. Nat. Brev.* 80.) *Jacob.* And see 4 *Bl. Com.* 233.

SUPPLIES. The word "supplies," in parliamentary proceedings, signifies the sums of money which are annually voted by the house of commons for the maintenance of the crown, and the various branches of the public service. The right of originating a grant of supplies is vested in the house of commons; and the exercise of this right is practically a law for the annual meeting of parliament for redress of grievances. But a grant from the commons is not effectual in law, without the ultimate assent of the queen and of the house of lords. *May Parl. Pract.* ch. 21; *Brown.*

The hiring of a pier, for city uses, is not within a statute regulating contracts for city supplies. Farmers' Loan & Trust Co. *v.* Mayor, &c. of N. Y., 4 *Bosw.* 80.

SUPPLY. That forbidding any one to give liquor to a minor is synonymous with "furnish" or "supply," and includes selling, see Commonwealth *v.* Davis, 12 *Bush*, 240.

SUPPORT. The right of support is the right of a land-owner to rely upon the support naturally afforded to his land by the soil adjoining.

The general rule is, that every land-owner is entitled to have his land, in its natural state, supported by the adjoining land of his neighbor; hence, an action will lie against the latter, if, by digging on his own land, he removes that support. This right to lateral support from adjoining soil is not held to be an easement, but is a right of property, passing with the soil. It is often said to be founded on the principle *sic utere tuo ut alienum non lædas* (q. v.), — that is to say, the ownership of land is subject to this limitation, that one must not dig it away to the boundary line in such manner as will cause the adjoining soil to fall in. But if a person builds to the utmost extremity of his own land, and thereby increases the lateral pressure on the soil of his neighbor, and then the latter digs his own ground, so that the first person's land and buildings fall, an action will not lie for the injury occasioned to the buildings, unless he has, by grant or prescription, acquired a right to the support of the house by the soil of his neighbor. The common-law right of support extends only to the natural soil: one cannot claim it for artificial erections.

An undertaking "to support and take care of" a person does not imply that the person to be supported is not to use proper exertions to support himself. Bull *v.* McCrea, 8 *B. Mon.* 422.

A devise for the "support of the family" of the testator is a devise for the support of his widow, and the maintenance and education of his children. Addison *v.* Bowie, 2 *Bland*, 606.

How to construe a bequest of a comfortable support, or a reasonable support for testator's widow, — see Tolley *v.* Greene, 2 *Sandf. Ch.* 91; Thompson *v.* Carmichael, 3 *Id.* 120.

SUPPORTS. The word "supports," in a statute speaking of the supports of a bridge, refers to that upon which the bridge

stands or rests, and which supports it from beneath; such as the abutments on the banks or piers, or trestles standing between the abutments, and on which the string-pieces rest. Abbott *v.* Walcott, 38 *Vt.* 666.

SUPPRESSIO VERI. Suppression of truth; concealment of facts. The *suppressio veri*, as well as the direct *suggestio falsi*, with which it is often contrasted, is deemed fraud on the part of one bound to disclose the truth. This doctrine is expressed in the form of a maxim: *suppressio veri, suggestio falsi*, — suppression of truth is equivalent to the statement of what is false.

It is a rule of equity as well as of law, that a *suppressio veri* is equivalent to a *suggestio falsi;* and where either the suppression of the truth or the suggestion of what is false can be proved, in a fact material to the contract, the party injured may have relief against the contract. Fleming *v.* Slocum, 18 *Johns.* 403.

SUPRA. See SUPER.

Supra protest. Over protest. An acceptance of a bill of exchange by a person not a party to it, after protest for non-acceptance by the drawee, is termed an acceptance *supra protest*.

SUPREMACY. Sovereign dominion, authority, and pre-eminence; the highest estate. King Henry VIII. was the first prince that shook off the yoke of Rome here in England, and settled the supremacy in himself, after it had been long held by the pope. See 25 Hen. VIII. ch. 19, 20; 26 Hen. VIII. ch. 1; 1 Eliz. ch. 1. By these laws, the great power of Rome was suppressed; and the act of 1 Eliz., Sir Edward Coke says (in Caudrey's Case, 5 *Rep.* 9), was an act of restitution of the ancient jurisdiction ecclesiastical, which always belonged of right to the crown of England, and that it was not introductory of a new law, but declaratory of the old, and that which was, or of right ought to be, by the fundamental laws of this realm, parcel of the king's jurisdiction; by which laws the king, as supreme head, had full and entire power in all causes, ecclesiastical as well as temporal; and as, in temporal causes, the king doth judge by his judges in the courts of justice by the temporal laws of England, so, in causes ecclesiastical, they are to be determined by the judges thereof, according to the king's ecclesiastical laws. And, in this case, it was resolved by all the judges that, by our ancient laws, this kingdom is an absolute empire and monarchy, — consisting of one head, which is the king, and of a body politic, made up of many well-agreeing members; all of which the law divides into two several parts, — the clergy and the laity, — both of them immediately, under God, subject and obedient to the head. And the kingly head of this politic body is furnished with prerogative and jurisdiction to render justice and right to every part and member of this body, of what estate or degree soever; otherwise, he would not be at the head of the whole. *Jacob.*

SUPREME COURT. 1. This name is used as the title of a court of superior jurisdiction, in most of the United States. Usually, to designate the court of last resort in the state, this or a similar name — such as supreme court of appeals, supreme court of errors, or supreme judicial court — is employed. To the appellate jurisdiction, there is usually added power to issue writs of error, supersedeas, certiorari, habeas corpus, mandamus, prohibition, quo warranto, and other remedial writs. The supreme courts of New Hampshire and Vermont, the supreme courts of appeal of Virginia and West Virginia, and the supreme judicial courts of Maine and Massachusetts, in addition to their appellate powers, exercise a quité general original jurisdiction, varying somewhat in extent in the respective states. In New Jersey and New York, where a different name is given to the court of last resort, the title supreme court is applied in the former to the highest court of law of original jurisdiction, and, in the latter, to the court having general original jurisdiction, with some appellate powers, throughout the state. Besides the states mentioned, the name supreme court is applied to courts of last resort, — having the general characteristics above described in Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. In Connecticut, the court of last resort is the supreme court of errors.

2. The supreme court of the United States is established by the constitution, which vests in it original and exclusive jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, and appellate jurisdiction over all other cases within the judicial power of the United States, both as to

law and fact, — with such exceptions and under such regulations as congress may make. Its appellate powers extend, not only to inferior tribunals of the United States, but also to those of the several states. The court is composed of a chief justice of the United States, and of eight associate justices. It constitutes one of the three great co-ordinate departments of the federal government, deriving directly from the constitution a permanent existence, and to some extent independent and inherent powers; and is otherwise a tribunal of the highest importance, as the court of last resort, whose decisions are, in many cases, absolutely binding upon all other courts, federal or state, and in all entitled to the utmost consideration and weight as precedents.

3. In each territory a supreme court is established, under the statutes of the United States, having appellate jurisdiction; but their decisions are subject to review by the supreme court of the United States, by appeal or writ of error, in all cases involving more than one thousand dollars, or upon writ of habeas corpus, involving the question of personal freedom. They have a jurisdiction in bankruptcy cases, similar to that exercised by the district courts of the United States. Each of these courts consists of a chief justice and two associate justices, and holds one term annually.

4. Within the District of Columbia, the supreme court of that district has the same jurisdiction as the circuit courts of the United States; and any one of its justices, holding a special term, has the powers and jurisdiction of the district courts of the United States. The court has also jurisdiction of cases arising under the copyright and patent laws; of appeals from decisions of the commissioner of patents, refusing the issue or re-issue of a patent; and all the jurisdiction and powers of the district courts of the United States, in bankruptcy cases; as well as various other peculiar powers, conferred by acts of congress. The court consists of a chief justice and four associate justices.

Supreme court of judicature. The name of the English court, formed under the judicature acts of 1873 and 1875, by consolidating the former high court of chancery, the courts of queen's bench, of common pleas, of exchequer, of probate, for divorce and matrimonial causes, and the high court of admiralty, into one court, subdivided into two permanent divisions, termed the high court of justice and the court of appeal, *qq. v.* In this supreme court is vested all the former jurisdiction of the courts named, with the special jurisdiction of the master of the rolls, and of several inferior and local courts, including the courts created by commissioners of assise, oyer and terminer, and jail delivery, and also the former appellate jurisdiction of the queen in council, or of the judicial committee of the privy council in admiralty and lunacy matters. The lord chancellor and lord chief justice of England, with the other judges of the different courts thus consolidated, became judges of the two subdivisions of the supreme court of judicature. The modes and forms of procedure in actions in the consolidated court are greatly changed and simplified. See JUDICATURE ACTS.

SURCHARGE. An overcharge; an exaction, impost, or incumbrance beyond what is just and right, or beyond one's authority or power.

Surcharge may mean a second or further mortgage. *Wharton.*

Surcharge and falsify. These words are commonly used together, of a proceeding in equity, to obtain relief against an account alleged to be erroneous. They relate, however, to distinct kinds of relief. To surcharge applies to the balance of the whole account, and supposes credits to be omitted which ought to be allowed. To falsify applies to a wrong charge in the debits, and supposes that that item is, in whole or in part, erroneous.

The phrase surcharge and falsify denotes the liberty which the courts of chancery will occasionally grant to a plaintiff who disputes an account which the defendant alleges is settled, to scrutinize particular items therein without opening the entire account. *Brown.*

If, in an account stated, there is any mistake, omission, accident, or fraud, by which the account stated is vitiated, it has been held that a court of equity may interfere:

in some cases, by directing the whole account to be opened and taken *de novo;* in others, by allowing it to stand, with liberty to the plaintiff to surcharge and falsify. To *surcharge* is to show an omission of something for which credit ought to have been given; and to *falsify* is to prove an item among the charges to ave been wrongly inserted. *Smith Man. Eq.*

Surcharge of the forest, or of common, signifies the putting in the forest or on the common more beasts than one has a right to put. *Brown.*

SURETY. One who has become answerable for payment or performance of an obligation by another; one who has engaged that a debtor shall pay; a third person, who incurs an obligation to a creditor that he shall be paid by the principal debtor; one who undertakes for the act or debt of another. Suretyship: the relation in which one who has engaged to be answerable for another's debt or duty stands, as towards the creditor and the primary debtor; an undertaking to be answerable for another.

A surety is defined as a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have made payment or performed before the surety was compelled to do so. Smith *v.* Shelden, 35 *Mich.* 42.

Suretyship denotes the relation in which one person who is not primarily indebted stands towards two other persons; viz., the primary creditor whom he further assures in his debt, and the primary debtor whom he assists in obtaining credit. The relation is contractual in these respects, viz., the surety agrees with the creditor to pay him, failing the debtor; and the debtor agrees to repay the surety the amount which he may have paid on his account to the creditor. *Brown.*

The contract of suretyship has been defined to be a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another. It is an obligation accessorial to that of the principal debtor; the debt is due from the principal, and the surety is merely a guarantor for its payment. Hence it is of the essence of the contract that there should be a valid obligation of the principal debtor; also, that the surety may, in general, avail himself of any defence which his principal could make, while a defence which the principal has precluded himself from making, or has waived, cannot be made by the surety. Evans *v.* Keeland, 9 *Ala.* 42.

Under the Louisiana code, suretyship is an accessory promise to satisfy an obligation if the debtor does not (*Civ. Code*, art. 3004). The obligation of the surety is to pay the creditor in case the debtor himself does not satisfy the debt; and the property of the debtor must first be discussed or seised, unless the surety has renounced the plea of discussion, or has become bound *in solido* with the debtor. Judicial sureties are an exception to these rules; the judicial surety cannot exercise the privilege of discussion, but is bound absolutely. Alley *v.* Hawthorn, 1 *La. Ann.* 122.

Surety of the peace, or for good behavior. By the Saxon constitution, sureties for good behavior were always at hand by means of King Alfred's wise institution of decennaries or frank pledges, wherein the whole neighborhood of tithing or freemen were mutually pledges for each other's good behavior. But this great and general security being now fallen into disuse, and neglected, there has succeeded to it the method of making suspected persons find particular and special security for their future conduct. This security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court, or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required, with condition to be void and of none effect if the party shall appear in the court on such a day, and in the mean time shall keep the peace; either generally towards the king, and all his liege people; particularly, also, with regard to the person who craves the security. Or, if it be for the good behavior, then on condition that he shall demean and behave himself well (or be of good behavior), either generally or specially, for the time therein limited, as for one or more years, or for life. *Jacob.*

Surety of the peace is a species of preventive justice, and consists in obliging those persons whom there is a probable ground to suspect of future misbehavior, to stipulate with, and to give full assurance to, the public that such offence as is apprehended shall not take place, by finding pledges or securities for keeping the peace, or for their good behavior. *Brown.*

Surety of the peace is an acknowledgment of a bond to the crown, taken by a competent judge of record, for the keeping of the peace. Any justice of the peace may bind all those to keep the peace who, in his presence, make affray, or contend together with hot and angry words, or go about with unusual weapons, to the terror of the people. So, if a private man hath just cause to fear that another will burn his house, or do him a corporal injury, or will procure others to do so, he may demand surety of the peace against such person; and every justice of the peace is bound to grant it, if he who demands it will make oath that he is actually in fear of death or bodily harm from such other

person; and will also further swear that he does not require such surety out of malice or for mere vexation. This is called swearing the peace against another. (*Cowel*; 4 *Bl. Com.* 255; 4 *Steph. Com.* 293–295.) *Mozley & W.*

SURFACE. When a statute, making a lot-owner liable for damage from his excavating more than nine feet below the "surface of the adjoining lots," is to be applied to a place where there has been a change made by filling or grading, the word surface must be construed to mean the existing or artificial, and not the original or natural, surface. Burkhardt *v.* Hanley, 23 *Ohio St.* 558.

"Surfacing," in a contract for railway construction, does not include filling in between the ties, nor raising the road-bed. Snell *v.* Cottingham, 72 *Ill.* 161.

Surface water ceases to be such after entering between the banks of a watercourse. Jones *v.* Hannovan, 55 *Mo.* 462.

SURMISE. Commonly denotes to suspect, conjecture, or suggest. In former times, where a defendant in an action pleaded a local custom, it was necessary for him "to surmise" (that is, to suggest) that such custom should be certified to the court by the mouth of the recorder; and, without such a "surmise," the issue was to be tried by the country, as other issues of fact are. (1 *Burr.* 251; *Vin. Abr.* 246, G.) *Brown.*

A surmise is something offered to a court to move it to grant a prohibition, *audita querela*, or other writ grantable thereon. *Jacob.*

SURPLUSAGE. Matter in any written instrument which is extraneous, superfluous, or unnecessary. 116 B 139.

Surplusage of accounts. Signifies a greater disbursement than the charge of the accountant amounts unto. In another sense, surplusage is the remainder or overplus of money left. *Jacob.*

Surplusagium non nocet. Surplusage does not injure; mere surplusage may be rejected. This maxim is otherwise expressed, *superflua non nocent*, — superfluities do not injure; what is superfluous may be rejected.

SURPRISE. This word, as verb and noun, is used without material departure from its vernacular meaning, in treating of granting new trial or equitable relief on the ground of surprise. Proof that a party was surprised — that is, was taken unawares, by some act or event which he could not reasonably be expected to foresee, and for not preparing against which he is not in fault — is ground, in a proper case, on a motion for the purpose, for opening a verdict, and allowing a cause to be tried again; also, it will warrant a court of equity, much as proof of fraud or mistake might do, in relieving a party from a transaction into which he was betrayed by the surprise.

SURREJOINDER. The answer by the plaintiff to the defendant's rejoinder.

SURREBUTTER. The plaintiff's answer to the defendant's rebutter. It is the plaintiff's fourth pleading in the complete series of pleadings used at common law. But the pleadings very seldom reached the surrebutter, even in the palmy days of special pleading. In English practice, as under the reformed codes and practice acts of most of the states, the surrebutter is no longer known.

SURRENDER. Is a deed or instrument testifying that the particular tenant for life or years of lands and tenements doth yield up his estate to him that hath the immediate estate in remainder or reversion, that he may have the present possession thereof, and wherein the estate for life or years may merge or drown by the mutual agreement of the parties. (*Co. Litt.* 337.) It is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. Of surrenders there are three kinds, — a surrender properly taken at common law, a surrender of copyhold or customary estates, and a surrender improperly taken, as of a deed, a patent, rent newly created, &c.

The surrender at common law is the usual surrender, and is of two sorts; viz., a surrender in deed, or by express words in writing, where the words of the lessee to the lessor prove a sufficient assent to give him his estate back again; and a surrender in law, being that which is wrought by operation of law, and not actual; as, if a lessee for life or years take a new lease of the same land during the term, this will be a surrender in law of the first lease. *Jacob.*

Surrender is an assurance restoring or yielding up an estate, the operative verbs being "surrender and yield up." The effect of a surrender is to pass and merge the estate of the surrenderor to and into that of the surrenderee. The incidents of a good deed of surrender are: an able surrenderor, a capable surrenderee, and an actual vested estate in the surrenderor; that it be made to an immediate expectant, solely seised without any intervenient estate; a privity of estate between the parties; and that the surrenderee's estate be capable of sustaining a merger. (*Shep. Touch.* ch. 17, p. 300.) *Wharton.*

Surrender by bail. The act by bail

or sureties in a recognizance, of giving up their principal again into custody (which they are entitled to do, before the day at which they have engaged he shall appear), is called surrender.

Surrender by operation of law. This phrase is properly applied to cases where the tenant for life or years has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. Thus, when a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make the new lease; so that the acceptance of the new lease amounts in law to a surrender of the former one. The effect of a surrender by operation of law is expressly reserved in section 2 of the statute of frauds. (2 *Chit. Stat.* 147–149; 1 *Steph. Com.* 523; *Tudor Lead. Cas. R. P.* 22; *Fawcett Land. & T.* 279.) *Mozley & W.*

Surrender of copyhold. The mode of conveying or transferring copyhold property from one person to another is by means of a surrender, which consists in the yielding up of the estate by the tenant into the hands of the lord for such purposes as are expressed in the surrender. The process in most manors is for the tenant to come to the steward, either in court or out of court, or else to two customary tenants of the same manor, provided there be a custom to warrant it, and there, by delivering up a rod, a glove, or other symbol, as the custom directs, to resign into the hands of the lord, by the hands and acceptance of his steward, or of the said two tenants, all his interest and title to the estate, in trust, to be again granted out by the lord to such persons and for such uses as are named in the surrender, and as the custom of the manor will warrant. *Brown.*

Surrender of fugitive. When spoken with reference to extradition of fugitives from justice, surrender is the act by which the executive authorities deliver a person accused of a crime, and found in their jurisdiction, to the authorities within whose jurisdiction it is alleged the crime was perpetrated.

Surrender of a preference. Under the bankrupt law, a preferred creditor cannot, in certain cases, prove his debt, so as to have a dividend from the estate, until he surrenders to the assignee all that he has received under such preference. This is called surrendering the preference.

What amounts to a surrender of a preference, under the bankrupt act, see *Re* Richter, 1 *Dill.* 544.

Surrenderee, is properly a person to whom a surrender is made; but the word is frequently used to denote the person to whose use a copyhold is surrendered. *Mozley & W.*

Surrenderor. One who makes a surrender, as when the tenant gives up the estate and cancels his lease before the expiration of the term; one who yields up a freehold estate for the purpose of conveying it. *Bouvier.*

SURROGATE. The style or title of a judicial officer charged with probate of wills and superintendence of the settlement of estates, and cognate matters, such as guardianship. The surrogate and the surrogate's court, in some of the states, correspond to judge of probate and court of probate, or to ordinary and orphan's court, in others. See those titles.

Surrogate means one who is appointed or substituted in the place of another, most commonly in the place of a bishop or a bishop's chancellor. He usually presided in the bishop's diocesan court, and, as the representative of the ordinary, granted letters of administration where the spiritual court was not presided over by a judge. Upon the death of the judges of the ecclesiastical courts in the sees of Canterbury and London, the surrogates of such courts were by act of parliament directed to perform their duties until the appointment of their successors. (3 *Burn Ecc. Law*, 229, 667; *Stat.* 10 *Geo. IV.* ch. 53, § 13.) *Brown.*

A surrogate is one that is substituted or appointed in the room of another. The word is most commonly used of a person who is appointed by the bishop for granting marriage licenses. (*Termes de la Ley*; *Cowel*; 2 *Steph. Com.* 247.) *Mozley & W.*

SURVEY, *v.* To examine with reference to condition, situation, and value; also, to determine dimensions, form, &c., of lands, by measurements. Survey, *n.*: an examination or view, particularly an official or professional one, made to ascertain the condition or quantity of merchandise, the condition and value of buildings, or the dimensions, form, and topographical features of land; also, the act of making such an examination; also, the exhibit, paper, or report by which the results of such an examination are preserved and made known.

Surveying: the business of making surveys; also, the act of making one. Surveyor: a person whose office, profession, or vocation it is to make surveys for others.

To survey is to measure, lay out, or particularly describe a manor or estate in

lands; and to ascertain not only the bounds and royalties thereof, but the tenure of the respective tenants, the rent and value of the same, &c. On the falling of an estate to a new lord, consisting of manors, where there are tenants by lease and copyholders, a court of survey is generally held; and, at certain other times, to apprise the lord of the present terms and interests of the tenants, and as a direction on making further grants, as well as in order to improvements, &c. In this court, a survey, or particular in the nature of a rent-roll, is made out, specifying the tenants, and terms of their tenure, &c. A surveyor is one who has the overseeing or care of some person's lands or works. A court of surveyors was erected by Stat. 33 Hen. VIII. ch. 39, for the benefit of the crown. *Jacob.*

A survey, in insurance law, means only a plan and description of the existing state, condition, and mode of use of the property. It does not import that any statements or representations of a promissory or executory nature are embraced relating to contemplated alterations or improvements, or to the future occupation. "Survey," "plan," and "description" may be used as synonymous. Denny *v.* Conway Stock, &c. Ins. Co., 13 *Gray*, 492.

The noun survey does not necessarily mean a map or profile. The terms are sometimes used as convertible, but are not so always. A book filed by a railroad company, in the office of the secretary of state, containing a description (in words and figures) of the commencement of the road, the different stations made at the time of the survey, the courses and distances between those stations, and the number of stations, to the termination of the road, is "a survey," within the meaning of a charter provision that "a survey of such route and location shall be deposited in the office of the secretary of state;" at least, so far as to warrant the court in refusing an injunction on the ground that no survey whatever has been made. Attorney-General *v.* Stevens, 1 *N. J. Eq.* 369.

In insurance law, the term, "the survey," has acquired a general meaning, inclusive of what is commonly called the application, which contains the questions propounded on behalf of the company, and the answers of the assured. May *v.* Buckeye, &c. Ins. Co., 25 *Wis.* 291.

Surveyor of highways. A person elected by the inhabitants of a parish, in vestry assembled, to survey the highways therein. He must possess certain qualifications in point of property; and, when elected, he is compellable, unless he can show some grounds of exemption, to take upon himself the office; and, under the highway act, 1835 (Stat. 5 & 6 Wm. IV. ch. 50), he is subject to various penalties in case he neglects his duty. He is, however, permitted to appoint a deputy, who is subject to the same responsibility as his principal. His duty is to provide for the repair of the highways, and to levy the expenses of doing so on the occupiers of land. The office is not in general remunerated; but the vestry may, if they think proper, appoint a surveyor with a salary. (3 *Steph. Com.* 133; *Oke Mag. Syn.* 418, 419.) *Mozley & W.*

Surveyor of the port. An officer of the customs service. Under the United States duty laws, a surveyor is appointed for each of the larger ports of entry. His duties involve the various measures to be taken for ascertaining the quantity, condition, and value of merchandise brought into the port. *U. S. Rev. Stat.* § 2627.

SURVIVE. To live beyond; particularly to live beyond another person. Survivor: one who lives after death of another towards whom he stands related. Survivorship: the living of one of two related persons beyond the other; also, the right arising from such living beyond.

One of the incidents of joint estates is what is termed the doctrine of survivorship, by which, when two or more persons are seised of a joint estate of inheritance for their own lives, or *pur autre vie*, or are jointly possessed of a chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This incident does not attach to estates held by tenancy in common; but in the case of these latter tenancies it is not unusual to insert a clause of survivorship, or accrual, as it is called. There is this difference between the accrual in joint tenancies which is implied by law, and the accrual in common tenancies which is expressed in the words of the deed, that whereas the former takes place repeatedly, as often as the event arises, the latter is confined to the original shares only of the tenants, and does not extend also to the shares accrued by the accrual, it being a maxim of law as to the express clause that (in the absence of express words) there is "no survivorship upon survivorship." (Pain *v.* Benson, 3 *Atk.* 80.) *Brown.*

Suspendatur per collum. Let him be hanged by the neck. The form of entering judgment against a prisoner sentenced to be hanged, formerly in use in English practice. It was usually abbreviated to *sus. per coll.*

SUSPENSE. A temporal stop, or hanging up, as it were, of a man's right, for a time; and, in law, it is where a rent or other profit out of lands, by reason of the

unity of possession of the rent, &c., and the land out of which it issues, is not *in esse* for a certain time, but may be revived or awaked. And it differs from extinguishment, which is when it dies or is gone for ever. *Jacob.*

SUSPENSION. A cesser for a time; a temporary stopping of some authority, power, proceeding, right, &c.

Thus there may be a suspension of power of alienation; a suspension of the *habeas corpus;* a suspension of the running of the statute of limitations; a suspension of a right.

SUUS. His own; one's own.

Sui juris. Of one's own right. Not under the power of another.

1. In the Roman law. All persons were termed *sui juris* who were not under the authority of another, such authority, for instance, as the *patria potestas*, which the law gave to the *paterfamilias* over his descendants, or as a slave was subject to the power of his master, or a wife under the authority of the husband, &c. The distinction between persons *sui juris* and those *alieni juris* (q. v.) had reference chiefly to the paternal authority, termed *patria potestas* (q. v.), which was originally unlimited, over the persons and property of all descendants of the person entitled to such authority, termed the *paterfamilias;* which extended even to condemning a son to death, or selling him into slavery, and to absolute control over all property acquired by him, and which continued during the life of the *paterfamilias*, or until emancipation, without regard to age, or mental or physical capacity. A person subject to the *patria potestas* of his father or other ancestor was, in the view of the law, nearly in the condition of a slave as to rights of person and property. He remained *alieni juris* while he continued subject to such authority, although he might be a man of full maturity as to age, and as to mental and physical capacity. When, by his emancipation, or by the decease of all entitled to claim paternal authority over him, he was no longer subject to such authority, he became at once *sui juris*, though but a child a few years of age, and though he might be under a guardian.

2. In the modern law. The term is used by modern writers in the sense of having capacity to act in one's own right; as the capacity to contract, as affected by mental capability, coverture, infancy, or other disabilities. It is sometimes used in the sense of having sufficient capacity to take care of one's self, applied to children of tender years, lunatics, &c. This application of the words is of doubtful correctness, and is quite contrary to their classical meaning. Under our law, all persons may be considered *sui juris* in the original meaning of the term; the only similar distinction now existing seems to be between those who are legally incapacitated from acting in their own right, and for whom another has authority to act, as parent, guardian, committee, &c. These may be classed as *alieni juris;* all others being considered *sui juris.*

Suum cuique tribuere. To render to every one his own. One of the three fundamental maxims of the law laid down by Justinian. See *Alterum non lædere.*

SWAMP LANDS. Swamp and overflowed lands, within the act of congress of Sept. 28, 1850, granting such lands to the states, are such as are, by periodical overflow at seasons of sowing and harvesting, rendered unfit for the cultivation of the staple crops. The fact that some of such crops may be raised at some seasons does not exclude a tract of land from the description; the question is, whether the staple crops may usually be successfully cultivated. Thompson *v.* Thornton, 50 *Cal.* 142.

SWINDLING. Is defined to be cheating and defrauding grossly, with deliberate artifice. Wyatt *v.* Ayres, 2 *Port.* 157.

Swindling is a vague and indefinite term; it does not import a crime. Hall *v.* Rogers, 2 *Blackf.* 429.

The words "swindler," "swindling," &c., have been very lately adopted into the English language, and are as yet of indefinite meaning. They do not, with certainty, import an indictable offence. These terms were imported into this country from England, and into that from Germany. The word swindler means no more than cheat: cheat has always been holden not to be actionable, and swindler means no more. Stevenson *v.* Hayden, 2 *Mass.* 406. s. p. Chase *v.* Whitlock, 3 *Hill* (*N. Y.*), 139.

To call a merchant a swindler is actionable, when said of him in respect to his business, and with intent to charge obtaining goods under false pretences. Herr *v.* Bamberg, 10 *How. Pr.* 128.

SWINE. A statute exempting one

swine from attachment and execution, applies to the animal, whether alive or dead. Gibson *v.* Jenney, 15 *Mass.* 205.

SWORN. Having taken an oath.

Sworn clerks in chancery. Officers who had the custody of records, and made copies of pleadings, and performed other duties in connection with the court of chancery. Their offices were abolished in 1842, by Stat. 5 & 6 Vict. ch. 103, § 1, and their duties transferred partly to the record and writ clerks, and partly to the taxing masters.

SYMBOLIC DELIVERY. A delivery of any small thing, in token of a transfer of something else. Thus, with our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of lands. And to this day the conveyance of copyhold estates is usually made by the delivery, on the part of the vendor, of a rod or verge to the lord or his steward, and then by the redelivery of the same from the lord to the purchaser. (2 *Bl. Com.* 313–315; 1 *Steph. Com.* 507, 508.) *Mozley & W.*

SYNDIC. The assignee of an insolvent's or bankrupt's estate in France. Also, sometimes, the manager of the concerns of a corporation or company.

SYNDICATE. A university committee; also, a combination of persons or firms united for the purpose of enterprises too large for individuals to undertake; and sometimes a group of financiers who buy up the shares of a company in order to sell them at a profit by creating a scarcity.

SYNDICOS. An advocate or patron; a burgess or recorder of a town. *Tomlins.*

SYNGRAPH. The name given by the canonists to deeds of which both parts (that is to say, the copies corresponding to each party) were written on the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut in such a manner as to leave half the word on one part and half on the other. 1 *Bl. Com.* 296; 1 *Steph. Com.* 482, 483. It thus corresponded to the chirograph or indenture of the common law. See those titles. Hence it came to mean a deed or writing under the hand and seal of all the parties. See *Tomlins.*

SYNOD. A meeting or assembly of ecclesiastical persons concerning religion; it is the name derived from the Greek corresponding to convocation in Latin.

There are four kinds:

A general or universal synod or council, where bishops of all nations meet.

A national synod of the clergy of one nation only.

A provincial synod, where ecclesiastical persons of a province only assemble, being now what is called the convocation.

A diocesan synod, of those of one diocese.

A synod in Scotland is composed of three or more presbyteries. *Jacob.*

SYNODALES TESTES. Synodsmen; thence corrupted into sidesmen. They were the urban and rural deans, whose office at first was to inform and attest the disorders of the clergy and people in their respective synods. Afterwards they became a sort of grand jury, composed of a priest and two or three laymen of each parish, for informing of offenders. At length, two principal persons from each parish were annually chosen, till, by degrees, the office devolved upon the church-wardens. *Tomlins.*

T.

TABULA. A Latin word translated table or tablet; the name of a thin sheet of wood, which, when covered with wax, was used for writing. An instrument written on such a tablet was also called *tabula;* much as, in English, "table" is applied to a writing exhibiting many details, on one sheet, to be inspected at once.

Tabula in naufragio. A plank in a shipwreck. This phrase is sometimes used figuratively to denote something saved out of a general loss; as a small dividend out of a bankrupt's estate. But a more familiar application is to designate the preference obtained by a third mortgagee, who, having taken his mortgage without knowledge of the exist-

ence of a second mortgage, may, if he acquires the first incumbrance by tacking his third mortgage thereto, receive satisfaction of it before the second. This operation of tacking (*q. v.*) is compared by Sir Matthew Hale in the case of Marsh *v.* Lee, in which the doctrine was established, to the gaining by the third mortgagee of a plank in a shipwreck.

TACIT. Implied; silent.

Tacit relocation. Is the Scotch term for the implied reletting which arises when, on the expiration of a lease, neither lessor nor lessee expresses any intention to put an end to it, but the occupation continues. The tenancy thus arising corresponds very nearly to tenancy at sufferance.

TACK, *n.* Is a Scotch name for a lease; as in the following passage from Erskine: "Where neither the setter nor tacksman shall properly discover their intention to have the tack dissolved at the term fixed for its expiration, they are understood or presumed to have entered into a new tack, upon the same terms as the former."

TACK, *v.* To annex some junior lien to a first lien, thereby acquiring priority over an intermediate one. Tacking: a doctrine of equity jurisprudence, allowing the owner of a first and third or later incumbrance to connect his right arising out of the junior to the senior, and thereby gain priority over the intermediate incumbrance.

Bouvier lucidly defines tacking as the union of securities given at different times, so as to prevent any intermediate purchaser's claiming title to redeem or otherwise discharge one lien, which is prior, without redeeming or discharging other liens also, which are subsequent, to his own title.

The doctrine of tacking originated in the principle of equity jurisprudence, which allowed a purchaser of lands, in good faith and without any notice of a defect in his title at the time of the purchase, to buy any statute, mortgage, or incumbrance to sustain his title; and, if he could defend by those at law, his adversary would not be aided by equity to set aside the incumbrance or right afterwards purchased.

Then, since mortgagees are considered, in equity, in the light of purchasers *pro tanto*, the same doctrine was extended to them; and a mortgagee who had advanced his money without notice of any prior incumbrance might, by obtaining an assignment of a title, judgment, or recognizance, protect himself from any incumbrance subsequent to such statute, judgment, or recognizance, though prior to his mortgage. In exercising this privilege, he was said to tack, *i.e.* unite, his mortgage to the old security; and by that means he might recover all moneys for which such security was given, together with the money due on his mortgage, before the intermediate mortgagees could recover any thing. The privilege seems to have been further extended to other incumbrancers, such as judgment creditors.

The doctrine of tacking has not prevailed extensively in the United States, being inconsistent with the provisions and policy of the recording acts (*q. v.*), which require the rights of incumbrancers to be determined by the record of their incumbrances. It is said to have been abrogated in England in 1874, by the Stat. 37 & 38 Vict. ch. 78, § 7; but on this point Brown mentions the repeal of that section, in 1875, by the Stat. 38 & 39 Vict. ch. 87, § 129.

Tacking mortgages happens when a third or subsequent mortgagee of land, by getting a conveyance to himself of the legal estate of the first mortgagee, is enabled to obtain, for his own security, priority over the second mortgagee. He is then said to tack his mortgage to the first mortgage. This is permitted if the person who claims to tack has originally advanced his money without notice of the incumbrance or incumbrances over which he claims priority, notwithstanding that he might have had notice of the same before getting in the legal estate. For the person so claiming to tack is held to have an equity equal to that of the incumbrancer over whom he claims priority; and, having got in the legal estate, he obtains priority on the principle that, where the equities are equal, the law shall prevail; and mere priority of time is not regarded where there is any other ground of difference. *Brown.*

TAIL. See ENTAIL; FEE-TAIL.

Estate tail signifies an estate of inheritance, descendible to some particular heirs only of the person to whom it is granted, in contradistinction to an estate in fee-simple, which is an estate descendible to the heirs

general — *i. e.* without distinction — of the person to whom it is granted. An estate tail is of two kinds, general and special. When lands are given to a man and the heirs of his body, without any further restriction, this is called an estate tail general; because, how often soever such donee in tail be married, his issue by every such marriage is capable of inheriting the estate tail. But if the gift is restrained or limited to certain heirs of the donee's body, exclusively of others, as in the case of lands being given to a man and the heirs of his body on Mary his present wife to be begotten, this is an estate tail special, because the issue of the donee by any other wife is excluded. Estates tail are also distinguished into estates tail male and estates tail female. When lands are given to a person and the heirs male of his or her body, this is called an estate tail male, and to which the female heirs are not capable of inheriting. On the other hand, when lands are given to a person and the heirs female of his or her body, this is called an estate tail female, and to which the male heirs are not capable of inheriting. The person who holds an estate tail is termed a tenant in tail. And when a person grants land to a man and his particular heirs in the manner above described (*i. e.* when he creates an estate tail), such person is said to entail his lands. *Brown.*

Tail, or fee-tail, is from the French *tailler*, to cut; either because the heirs general are by this means cut off, or because this estate is a part cut out of the whole. An estate in fee-tail is a limited fee, as opposed to a fee-simple. It is that inheritance whereof a man is seised to him and the heirs of his body, begotten or to be begotten, limited at the will of the donor. He that giveth lands in tail is called the donor; and he to whom the gift is made, the donee. (*Litt.* § 18.) Estates in fee-tail are the offspring of the conditional fees at common law. Before the statute *de donis*, if lands were given to a man and the heirs of his body, it was interpreted to be a fee-simple presently by the gift, upon condition that he had issue; and if he had issue, the condition was supposed to be performed for three purposes; viz., to alien and disinherit the issue, and by the alienation to bar the donor or his heirs of all possibility of the reversion; to forfeit the estate for treason or felony; and to charge it with rent, &c. But, by the statute *de donis*, the will and intention of the donor is to be observed; as that the tenant in tail shall not alien after issue had, or before, or forfeit or charge the lands longer than for his own life, &c., and the estate shall remain to the issue of the donee, or to the donor or his heirs, where there is no issue; so that whereas the donee had a fee-simple before, now he has but an estate tail, and the donor a reversion in fee expectant upon that estate tail. (*Co. Litt.* 19.) *Jacob.*

Tail after possibility of issue extinct. This estate arises out of a special entail, when the express condition has become impossible by reason of death. Thus, if an estate is granted to husband and wife and their issue, and if either of them dies without their having issue, the survivor is tenant in tail after possibility of issue extinct; for it has become impossible that there should be such issue as will satisfy the entail. Only a donee in tail special can become such a tenant; if the entail is general, such a tenancy can never arise; for while he lives he may have issue, the law not admitting the impossibility of having children at any age. This estate is, in substance, a life-estate.

Tail general. Is where an estate is limited to a man and the heirs of his body, without any restriction at all; or, according to some authorities, with no other restriction than that in relation to sex. Thus tail male general is the same thing as tail male; the word general, in such case, implying that there is no other restriction upon the descent of the estate than that it must go in the male line. So an estate in tail female general is an estate in tail female. The word general, in the phrase, expresses a purely negative idea, and may denote the absence of any restriction, or the absence of some given restriction which is tacitly understood. *Mozley & W.*

Tail special. Is defined by Cowel as the limitation of lands and tenements to a man and his wife and the heirs of their two bodies. But the phrase need not be thus restricted. Tail special, in its largest sense, is where the gift is restrained to certain heirs of the donor's body, and does not go to all of them in general. *Mozley & W.*

TAILAGE. Another form of the word tallage, *q. v.*

TAILZIE. The term of Scotch law corresponding to entail.

TAKE. In addition to frequent use of to take and its inflections, in their vernacular senses, they have a quasi technical use, in reference to the law of eminent domain. The constitutions very generally provide that private property shall not be taken for public use without compensation, and shall not be taken without due process of law; and many decisions have arisen upon what constitutes a taking of property within these provisions. We give representative cases on this point; the subject will be found discussed extendedly in *Sedgw. Stat. & Const. Law*, 454.

As to the taking which will constitute larceny, see LARCENY.

An averment that "it will take" all of specified property to pay the debts of deceased, is a sufficient averment of a necessity for ordering a sale. "Take," in this connection, is equivalent to "require." The sentence means, all the property will be necessary. King *v.* Kent, 29 *Ala.* 542.

That a charter power to a bank to take real estate in payment of debts due to it, either by conveyance or purchase under judgments in its favor, includes the power of selling and conveying the same, see Jackson *v.* Brown, 5 *Wend.* 590.

The word take is as applicable to an agreement to become bailee as it is to one to buy. Norton *v.* Woodruff, 2 *N. Y.* 153.

The words "taking" and "converting," as used in a statute authorizing arrest in actions for taking or converting property, apply to personal property only. Merritt *v.* Carpenter, 3 *Abb. App. Dec.* 285.

A mere attempt to seduce is not a taking, within a statute upon abduction; there must be some positive act to get the female away. People *v.* Parshall, 6 *Park. Cr.* 129.

The issuing a treasury distress-warrant against a public debtor, and making a levy on his property under the warrant, do not constitute a taking of property "without due process of law." Den *v.* Hoboken Land &c. Co., 18 *How.* 272.

Entering upon lands for the purpose of making surveys, &c., preliminary to deciding the location of a road, &c., is not a taking of the lands themselves, such as entitles the owner to compensation for the fee. His right is no more than to have compensation for the temporary occupation or use. Bonaparte *v.* Camden, &c. R. R Co., *Baldw.* 205; Polly *v.* Saratoga & Washington R. R. Co., 9 *Barb.* 449.

The constitutional provision declaring that "private property shall not be taken for public uses without just compensation," does not prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual, as the incipient proceedings to the acquisition of a title to it, or to an easement in it, for a public use, although such occupation may be more or less injurious to the owner; but precludes the acquisition of any title, easement, or permanent appropriation of the land, from the owner, without an actual payment or tender of a just compensation. Cushman *v.* Smith, 34 *Me.* 247; Nichols *v.* Somerset & Kennebec R. R. Co., 43 *Id.* 356.

Blowing up or tearing down a building, to prevent spread of a conflagration, is not a taking of it as property for public use. Suroceo *v.* Geary, 3 *Cal.* 69.

Assessing upon lot-owners their just shares of the cost of a street improvement in front of their lots, is not taking private property such as requires compensation. Creighton *v.* Manson, 27 *Cal.* 613; Howell *v.* City of Buffalo, 37 *N. Y.* 267; People *v.* Lawrence, 36 *Barb.* 177.

An injury to land, which deprives the owner of the ordinary use of it, is equivalent to a taking of the land; and where no compensation is provided for or made to the owner for the injury sustained, he is entitled to recover damages for such injury. Hooker *v.* New Haven, &c. Co., 14 *Conn.* 146.

Where a railroad company having power by charter to take land, and being made liable for all damages to any person or persons, excavated an adjoining lot to plaintiff's, so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light, and render it otherwise unfit for use, it was held that this did not constitute a taking of plaintiff's land, within the meaning of the charter, and that the company was therefore bound, under the second branch of the act, to make compensation for the consequential damages. Bradley *v.* New York & New Haven R. R. Co., 21 *Conn.* 294. S. P. Richardson *v.* Vermont Central R. R. Co., 25 *Vt.* 465.

The destruction of private property takes it from the owner as truly as changing or devesting his title does Cash *v.* Whitworth, 13 *La. Ann.* 401.

Where a dam backs water upon lands so as to prevent the owner from using them, this is a taking. Wabash, &c. Canal *v.* Spears, 16 *Ind.* 441.

In the provision of the constitution that no man's property shall be taken by law without just compensation, the word "taken" is synonymous with "seized" or "destroyed" Evansville & Crawfordsville R. R. Co. *v.* Dick, 9 *Ind.* 433.

Prohibiting the land-owner, for reasons of public policy, from removing stones, sand, &c., from his land, does not involve a taking of property for which compensation must be provided. Commonwealth *v.* Tewksbury, 11 *Met.* 55.

An entry made in good faith upon land required for a city aqueduct, "by walking over its bounds," with the declaration that this is done for the purpose of entering under a statutory authority, and a filing of a description of the land in the registry of deeds, the description containing a statement that the land was taken under the statute, is a taking of the land. Chandler *v.* Jamaica Pond Aq. Co., 114 *Mass.* 575.

A partial destruction or diminution of value, is a taking of private property. Glover *v.* Powell, 10 *N. J. Eq.* 211.

The concurrent use of a highway by a railway and the public, is not a taking of private property for public uses, within the provision of the constitution. Morris & Essex Railroad *v.* Newark, 10 *N. J. Eq.* 352.

Injury to a mill privilege by a rise in the waters, caused by improvements in the navigation on the stream below, was held not a taking of private property, in Canal Appraisers *v.* People, 17 *Wend.* 571.

To convert a common highway into a railroad, is to impose an additional burden

upon the land to the injury of the owner in fee, and is a taking of his property, within the meaning of the provision of the constitution which forbids such taking without compensation. The state and municipal authorities combined cannot confer upon a railroad company the right to construct their road upon a highway, without the consent of the owner of the fee, or making him compensation. Williams *v.* New York Central R. R. Co., 16 *N. Y.* 97.

It is true that a franchise, such as the right to maintain a toll-bridge, is private property; but to diminish its value, as by opening of a free highway in the neighborhood of a bridge, is not a taking of the property. Matter of Hamilton Avenue, 14 *Barb.* 405.

Requiring a license fee to be paid; as where a state statute requires agents of foreign insurance companies to pay an annual tax, as a condition of making insurances within this state; can never be considered as taking private property. It is a charge for the privilege of doing an act which the party is not under any obligation to do, and the omission to do which will relieve him from the obligation. Fire Department *v.* Noble, 3 *E. D. Smith*, 440.

User by a railroad company of lands alongside of the strip taken for the road as a cartway, while they are constructing the road, is not a taking of such lands which must be embraced within the appraisal, but is at most a trespass for which the land-owner's remedy is an ordinary action of trespass. Sabin *v.* Vermont Central R. R. Co., 25 *Vt.* 363.

The making a public improvement in the vicinity of private property, which is incidentally injured thereby, but no part of which is taken or used for the construction of the work, is not a taking of that private property for public use, within the constitutional provision. Richardson *v.* Vermont Central R. R. Co., 25 *Vt.* 465; Alexander *v.* City of Milwaukee, 16 *Wis.* 247.

A corporation which, under act of parliament, had a right to take land for certain public works, gave notice to the owner of the inheritance of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some wagons and rails and other implements on the land, and there left them, but did not commence the works or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the wagons, &c., to remain on the land, and from taking possession of the land until they had complied with the provisions of the lands clauses consolidation act. It was held that, though the corporation were bound by the acts of their contractors, the acts done were not a taking possession, within the meaning of the act, and that the bill was improperly filed. Standish *v.* Mayor, &c. of Liverpool, 15 *Eng. L. & Eq.* 255.

Taking up. Is often used to signify the act of acquiring an instrument. Thus, taking up a lease signifies accepting a lease. A person liable on a bill of exchange, who pays the amount for which he is liable, and receives the bill back, is said to take up the bill. "Taking up a bill" is thus synonymous with "retiring a bill," in the legal effect of the transaction; but the notion prominently suggested by the phrase is not the payment nor the discharge of the obligation, but the reacquisition of the bill by the payor.

TALES. The name of a writ, derived from the plural of the Latin *talis*, such, *q. v.* It denotes a summoning of additional persons to serve as jurors upon a panel which has become exhausted. These additional jurors must be of like qualifications with the jurors on the deficient panel. They are either summoned by the sheriff, or selected from the by-standers or persons in court, the practice varying in different jurisdictions. The additional jurors, however selected, are called talesmen; if taken from the by-standers, that fact is sometimes expressed by terming them *tales de circumstantibus.*

When, by means of challenges or any other cause, a sufficient number of unexceptional jurors do not appear at the trial, either party may pray a *tales*, as it is termed; that is, a further supply of such men as were summoned on the first panel. For this purpose, a writ of *decem tales*, *octo tales*, and the like, used to be issued to the sheriff at common law, and must be still, at a trial at bar, if the jurors make default. But at the assises or *nisi prius*, by virtue of statutes, the judge is empowered by statute to award, at the prayer of either party, a *tales de circumstantibus*, *i.e.* of the by-standers or of persons present in the court, to be joined to the other jurors to try the cause, who, however, are liable to the same challenges as the principal jurors. This is usually done *toties quoties*, till the legal number of twelve is completed. *Brown.*

Talesman. An additional *venire* man; a man such as the persons already summoned to serve on a jury, brought in additionally, because the original panel

has become exhausted without forming a jury.

TALIO. Punishment of the same nature as the offence; retaliation by authority of law. See LEX TALIONIS.

TALIS. Similar; such; such a one as. Burrill says that in old books this word is used in the sense of "as follows," or "thus," though translated "such." As in the expression, "the form of the writ is such;" followed by the form set out.

Talis interpretatio semper fienda est, ut evitetur absurdum, et inconveniens, et ne judicium sit illusorium. Interpretation is always to be made in such a manner, that what is absurd and inconvenient is to be avoided, lest the judgment be illusory.

Talis non est eadem; nam nullum simile est idem. What is like is not the same; for nothing similar is the same.

Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite sed tantummodo est et consistit in consideratione et intelligentia legis, dixerunt talem rem vel tale rectum fore in nubibus. Such a thing, or such a right, which is not vested in a person then living, but merely exists and consists in the consideration and contemplation of law, such a thing or right they have deemed to be in the clouds, *i.e.* in abeyance.

TALITER PROCESSUM EST. When pleading the judgment of an inferior court, the proceedings preliminary to such judgment, and on which the same was founded, must, to some extent, appear in the pleading; but the rule is, that they may be alleged with a *taliter processum est, i.e.* with a general assertion that "such proceedings were had," instead of a detailed account of the proceedings themselves; thus, "that A B, at a certain court, &c., held at, &c., levied his plaint against C D, in a certain plea of, &c., for a cause of action arising within the jurisdiction, and thereupon such proceedings were had that afterwards, &c., it was considered by the said court that A B should recover against the said C D." A like concise mode of stating former proceedings in a suit is adopted at the present day in chancery proceedings upon petitions and in bills of revivor and supplement. *Brown.*

TALLAGE. This word is said to be used metaphorically for a share of a man's substance, paid by way of tribute, toll, or tax; being derived from the French *tailler*, which signifies a piece cut out of the whole. It extends to subsidies, taxes, customs, and, indeed, any charges imposed by the government for the purpose of raising a revenue. See *Cowel; Bouvier.*

TALLEY; TALLY. A stick cut in two parts, on each whereof is marked, with notches or otherwise, what is due between debtor and creditor, as now used by brewers, &c. And this was the ancient way of keeping all accounts, one part being kept by the creditor, the other by the debtor, &c. Hence the tallier of the exchequer, whom we now call the teller. There were two kinds of tallies formerly used in the exchequer: the one termed tallies of debt, which were in the nature of an acquittance for debts paid to the king, on the payment whereof these tallies were delivered to the debtors, who, carrying them to the clerk of the pipe-office, had there an acquittance in parchment for their full discharge; the other, tallies of reward or allowance, being made to sheriffs of counties, as a recompense for such matters as they had performed to their charge, or such money as was cast upon them in their accounts of course, but not leviable, &c. *Jacob.*

The use of tallies in the exchequer was abolished by Stat. 23 Geo. III. ch. 82, and the old tallies were ordered to be destroyed by Stat. 4 & 5 Wm. IV. ch. 15. *Wharton.*

TANGIBLE. That which may be touched; actual; corporal; material. Tangible property is property which may be touched, and is the object of sensation. The term includes lands and corporeal chattels generally, and is opposed to such rights as patents, copyrights, advowsons, rents, called intangible property.

TANISTRY. An ancient system of tenure, which prevailed in Ireland, and allotted the inheritance of lands, castles, &c., to the oldest and most worthy and capable person of the deceased's name and blood, without any regard to proximity. This, in reality, was giving it to the strongest, and naturally occasioned bloody wars in families; for which reason it was abolished under James I. See 3 *Hall. Const. Hist.* 377, ch. 18.

TARDE. Late; too late. The emphatic word in several forms of return by a sheriff upon writs coming to his hands so late that he could not execute them. Such returns are termed *tarde*, or *tarde venit*, — came late.

TARE AND TRET. The first word in the phrase signifies an allowance in merchandise made to a buyer for the weight of the box, bag, or cask wherein goods are

packed; and the last is a consideration in the weight, for waste in emptying and reselling the goods, by dust, dirt, breaking, &c. Tare is distinguished into *real* tare, *i.e.* the actual weight of the package; *customary* tare, its supposed weight, according to the practice among merchants; *average* tare, the medium deduced from weighing a few packages, and taking it as a standard for the whole. *Wharton.*

TARIFF. Originally, an enumeration, list, schedule, or table, setting forth numerous subjects in some systematic order, and so as to show charges, prices, or rates affixed to each item. Hence it has come to be used as the name of an act of legislation, or convention between states, containing the names of several kinds of merchandise, with the duties or customs to be paid for the same, as settled by authority.

TAVERN. Originally, a wine-shop; a house where liquor is sold in small quantities, to be drank there. It gradually became, when lodgings and meals came to be furnished at such places, nearly synonymous with inn; and, under legislation and usage relative to sale of intoxicating liquor, it has come to be used of a house of entertainment for travellers, irrespective of whether liquors are retailed or not. The phrase temperance tavern is not now deemed a contradiction in terms.

"Tavern" and "house of entertainment" are synonymous expressions, and mean nothing different from an inn, as understood at common law. A statute requiring every keeper of a tavern or house of entertainment to take out a license does not extend beyond innkeepers. "Hotel" no more indicates the business of tavern-keeping than the words mansion or palace; it is descriptive of the house. Hotel has no definite legal meaning; it is derived from the French, and means in France the dwelling of persons of rank. Bonner *v.* Welborn, 7 *Ga.* 296, 308.

The word tavern, in a charter provision authorizing municipal authorities to "license and regulate taverns," includes hotels. "Tavern," "hotel," and "public house" are, in this country, used synonymously; and, while they entertain the travelling public, and keep guests, and receive compensation therefor, they do not lose their character, though they may not have the privilege of selling liquors. St. Louis *v.* Siegrist, 46 *Mo.* 593.

The mere fact of carrying on the business of selling spirituous liquors by small measure in one's building does not constitute keeping a tavern, within a provision in a fire policy prohibiting that vocation. Rafferty *v.* New Brunswick Fire Ins. Co., 18 *N. J. L.* 480.

Tavern-keeper. Is clearly a housekeeper, in contemplation of Maryland statutes. State *v.* Fearson, 2 *Md.* 310.

A person who makes it his business to keep a house of entertainment for travellers is a tavern-keeper, though he does not keep liquor. Curtis *v.* State, 5 *Ohio*, 324.

TAX, *v.* 1. In public law, to assess or impose upon citizens or subjects a pecuniary contribution towards support of government.

2. In practice of courts, to assess, determine, or fix, as respects amount; to adjust; to scale or settle. Applied particularly to the costs of an action.

TAX, *n.*; **TAXES.** Almost any contribution exacted by a government from individuals, upon principles of professed equality, and to provide for the support or defray the expenses of government and its operations, may be called a tax, in the broad sense of the word; but it is very generally limited, in modern use, to mean a demand of money from persons or property subject to a legislature, levied according to some supposed uniform rule, for defraying the current general expenses of government, and payable absolutely. Thus understood, it does not embrace assessments, duties, or license fees. But compare the numerous and somewhat conflicting definitions quoted below.

A tax is an impost, a tribute imposed, an excise, tallage. A portion of the national wealth applied to public use, granted and controlled by the representatives of the people. *Wharton.*

Taxes are either direct or indirect. A direct tax is one that is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. (*Ad. Smith; Mill.*) *Wharton; Cool. Tax.* 5.

The most obvious division of taxes is into *direct* and *indirect*. A direct tax is demanded from the person who it is intended shall pay it. Indirect taxes are demanded from one person in the expectation that he will indemnify himself at the expense of others. In the class of direct taxes are included the poll-tax, labor on highways, military service, income tax, property tax, and, perhaps, the stamp tax. In the class of indirect taxes are embraced customs, or taxes upon importations or exportations, collected through the custom-houses, and paid by the importer or exporter; excise

duties, or duties laid upon articles of domestic production, and paid first by the producer; and license fees, or special taxes, paid for the privilege of exercising a particular avocation. *Burr. Tax.* § 3.

That duties, customs, imposts, excise duties, and tolls are kinds or species of taxes, see *Cool. Tax.* 3.

An examination of the decisions holding that a local assessment, labor on the highways, or a duty or impost on imported goods, is not "a tax," will show that they merely mean that the word tax, or taxes, as used in some particular statute or constitutional provision, was not there intended to include those kinds of charge. *Burr. Tax.* § 5.

A tax is a burden or charge imposed by the legislative power of a state upon persons or property, to raise money for public purposes. *Blackw. Tax T.* 1.

A tax is a pecuniary burden, imposed for the support of government. United States *v.* Railroad Co., 17 *Wall.* 322.

An impost, levied by authority of government upon its citizens or subjects, for the support of the state. Per Green, C. J., Camden *v.* Allen, 26 *N. J. L.* 398.

The noun tax means a burden, charge, or imposition, put or set upon persons or property for public uses. Mitchell *v.* Williams, 27 *Ind.* 62.

A complaint in replevin, instead of denying that the property had been taken "for any tax," &c., denied that it had been taken "for any legal tax," &c. It was held that the expressions were equivalent. Only legal taxes, &c., are intended by the statute prescribing the denial in such complaints. McPhelomy *v.* Solomon, 15 *Ind.* 189.

By the concurrent opinion of lawyers, judges, lexicographers, and political economists, as well as by the general and popular understanding, taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes, or to accomplish some governmental end. Hanson *v.* Vernon, 27 *Iowa*, 28.

Taxes are the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government, and for all public needs; portions of the property of the citizen, demanded and received by the government, to be disposed of to enable it to discharge its functions. Opin. of Justices, 58 *Me.* 590.

Taxes are laid for the purpose of obtaining a revenue. Within the definitions given, the burden is not taxation if revenue is not the purpose. *Cool. Tax.* 9.

Taxes differ from subsidies, in being regular and orderly. *Jacob; Bouvier.*

That the word imports a levy according to some order or proportion; a charge laid, upon principles of equality or uniformity; an adjusted impost, — see *Burrill*, citing *Spelman* and *Cowel.*

Taxes differ from the forced contributions, loans, and benevolences of arbitrary and tyrannical periods, in that they are levied by authority of law, and by some rule of proportion intended to secure uniformity of contribution and a just apportionment of burdens. The idea involved is, that a common burden shall be sustained by common contributions, regulated by some fixed general rule, and apportioned uniformly. *Cool. Tax.* 2, and note.

Taxes are those proportional and reasonable assessments and duties which may, by virtue of the constitution, be imposed from time to time, by the legislature, upon the inhabitants, for the necessary defence and support of the government, and for the protection and preservation of the rights, and to promote the interests, of the people. They do not partake of the nature of judgments. Nor are taxes contracts, either express or implied: they are the positive acts of the government, through its various agents, binding upon the inhabitants; and to the making or enforcing of which their personal consent, individually, is not required. Peirce *v.* City of Boston, 3 *Met.* 520.

The phrase "debt or demand" does not embrace taxes; and a statutory privilege of using as an offset any debt or demand on which a right of action exists does not entitle a town to set off its claim for taxes against its indebtedness to the person owing the tax, on an account for his services. The words "debt" and "demand" are often used as synonymous. The former is the more specific, and the latter the more general, term. Either may include a judgment. But taxes due are not a judgment. The imposition and collection of them are ministerial acts. No right of action is given for them; but payment is enforced by the positive acts of government. Hibbard *v.* Clark, 56 *N. H.* 155.

The nouns tax and taxes import an exercise of legislative authority. No person is a tax-payer till he has been officially so declared. Taxes are charges imposed by or under authority of the legislature, — contributions exacted by government from individuals. Any tax, to be properly so called, must have its origin in a law. *Hill. Tax.* § 22; People *v.* McCreery, 34 *Cal.* 432, 454.

The nouns tax and taxes do not include a license fee. Henry *v.* State, 26 *Ark.* 523; Anderson *v.* Doll, 27 *Cal.* 607.

The noun tax, in common acceptation, denotes some compulsory exaction which a government makes upon persons or property within its jurisdiction for the supply of the public necessities. It does not embrace a license fee, or charge which a person may pay or not at his option, according as he elects or declines to engage in some avocation, or to perform an act for which the fee is charged as a condition. It does not embrace a charge imposed on foreigners for working gold-mines within the state. People *v.* Naglee, 1 *Cal.* 232, 253.

The word taxes, in an agreement to pay

"the taxes upon a stallion," does not include a license fee paid for keeping him. Anderson *v.* Doll, 27 *Cal.* 607.

A license fee, charged for the privilege of transacting a business, is a tax, within Cal. Const. art. 6, § 6, though not within Id. art. 11, § 13. It is a tax in the large sense of that word, as being a charge or burden imposed upon a person's property or business, to raise money for public purposes. City of Santa Barbara *v.* Stearns, 51 *Cal.* 499.

The nouns tax and taxes do not include an assessment upon lands of a share of expenses of a local improvement. Chambers *v.* Satterlee, 40 *Cal.* 497; Rooney *v.* Brown, 21 *La. Ann.* 51; Matter of the Mayor, &c. of New York, 11 *Johns.* 77; Sharp *v.* Spier, 4 *Hill* (*N. Y.*), 76; Sharp *v.* Johnson, *Id.* 92; Longmore *v.* Tiernan, 3 *Pittsb.* 62.

A charge imposed by law upon the assessed value of all property, real and personal, in a district, is a tax, and not an assessment; although the purpose be to make a local improvement on a road. Williams *v.* Corcoran, 46 *Cal.* 553.

The word assessment has, however, been employed in two different senses, — sometimes as expressing the appraisement or valuation of the property, and entering it on the lists for the purposes of taxation; and sometimes as indicating the charge or special tax imposed on the land, as its portion of the expense of a benefit conferred by a local improvement. St. Paul, &c. R. R. Co. *v.* City of St. Paul, 21 *Minn.* 526. Consult ASSESS.

A statutory exemption of churches, &c., from being "taxed by any law of the state," has reference only to the general and public taxes for the benefit of the town, county, or state at large, and does not preclude assessments from being laid upon church property, in view of the benefit resulting from opening or improving streets, although laid under authority of a state law. Matter of the Mayor, &c. of New York, 11 *Johns.* 77.

That the nouns tax and taxes include an assessment under the betterment acts, though local and special, see Curtis *v.* Pierce, 115 *Mass.* 186; Blake *v.* Baker, *Id.* 188.

The nouns tax and taxes import a contribution in money, not one in labor, especially when coupled with "pay." If a settlement under the poor-laws is to be gained by paying taxes, it cannot be gained by working on the highways. Amenia *v.* Stanford, 6 *Johns.* 92. And see to nearly same effect, Pleasant *v.* Kost, 29 *Ill.* 490.

Taxes are generally demanded in money; and any tax law will be understood to require money, when a different intent is not expressed. But it is competent to the legislature to prescribe payment in produce, in bullion, in labor, or in gold or silver coin. In a highway tax, labor is required. *Cool. Tax.* 12.

A commutation fee imposed on ununiformed militia in lieu of doing military services, is not a tax, within a constitutional requirement of attendance of three-fifths to constitute a quorum on the passage of a bill to impose taxes. People *v.* Chenango, 8 *N. Y.* 317.

The nouns tax and taxes, in a covenant in a lease of New York city property that the lessee shall pay the "ordinary and yearly taxes," embrace the annual water-rent lawfully charged on the premises by the Croton department. Garner *v.* Hannah, 6 *Duer*, 262.

The nouns tax and taxes are not necessarily limited to moneys imposed by the legislature for the use of the state government. Those are "public taxes;" but the poor tax, the county tax, the town tax, and others imposed for special purposes, are all "taxes." Bank of Cape Fear *v.* Deming, 7 *Ired. L.* 55.

Tax-deed. The conveyance or officer's deed, given upon a sale of lands made for non-payment of taxes; the instrument whereby the officer of the law undertakes to convey the title of the proprietor to the purchaser at the tax sale.

This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government or deeds between man and man. Its operative character depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, every condition essential in its character, then the deed becomes conclusive evidence of the title in the grantee, according to its extent and purport. See *Blackw. Tax T.* 430.

Tax levy. The total sum to be raised by a tax. Also, the bill, enactment, or measure of legislation by which an annual or general tax is imposed.

Tax-payer. A person chargeable with a tax; one from whom government demands a pecuniary contribution towards its support.

Tax-payer does not necessarily mean one who actually pays or has paid taxes. In many connections it only signifies one from whom taxes are legally expected and collectible, as in saying that certain actions may be brought by any tax-payer.

Tax sale. A sale of property of a delinquent tax-payer, made by authority

of law, as a means of collecting or enforcing an unpaid tax.

TAXABLE. 1. Applied to persons or property, signifies subject to taxation; liable to some common exaction levied by government to provide a revenue.

A power contained in a city charter, to assess "all taxable" property, includes not only such as was taxable by law at the time when the charter was enacted, but also whatever should be made subject to taxation by any subsequent general statute. Buffalo *v.* Le Couteulx, 15 *N. Y.* 451.

2. Applied to costs in a cause, it means legally chargeable; warranted by law; allowable by officers appointed to adjust costs.

An order to pay "the taxable costs," means such as are allowable by law. Nichols *v.* Rensselaer County Mutual Ins. Co., 22 *Wend.* 125.

TAXATIO ECCLESIASTICA, or NORWICENSIS. A valuation of ecclesiastical benefices, made through every diocese in England, on occasion of Pope Innocent IV. granting to King Henry III. the tenth of all spirituals for three years. *Cowel; Tomlins.*

It is called Norwicensis, because Walter, delegated by the pope to make it, was bishop of Norwich. *Wharton.*

TAXATION; TAXING. 1. The power, act, or proceeding of levying, by or on behalf of government, a ratable or proportioned pecuniary charge on individuals or property subject to its authority, to provide revenue for its support and operations. See TAX, *n.*

The general principles of taxation are these: 1. The subjects of every state ought to contribute to the support of the government, as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation. 2. The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. 3. Every tax ought to be levied at the time or in the manner in which it is most likely to be convenient for the contributor to pay it. 4. Every tax ought to be so contrived as both to take out and keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state. (*Ad. Smith; Mill.*) *Wharton.* And see *Cool. Tax.* 6.

It is not "taxation" to take from one person the profits and gains of another. That is a taxation which compels one to pay for the support of government from his own gains and of his own property. Thus, a statute purporting to tax debtors upon interest accruing on their obligations to their creditors, and authorizing them to retain the amount of the tax paid in settlement with their creditors, is not, in reality, taxing the debtor, but is taxing the creditor; for it is the creditor's money which is taken; hence, if the creditor is not amenable to the taxing power, the imposition cannot be sustained. United States *v.* Railroad Co., 17 *Wall.* 322.

The power of taxation does not extend to authorize legislation which takes the property of one class of citizens and bestows it upon favored individuals to aid private enterprises and build up private fortunes. This is none the less a robbery because it is done under the forms of law, and is called taxation. This is not legislation. Nor is it taxation. It is a decree under legislative forms. Loan Assoc. *v.* Topeka, 20 *Wall.* 655, 664; Grim *v.* Weissenberg S. Dist., 57 *Pa. St.* 433.

The imposition of an assessment of the expenses of a local improvement upon adjoining lands benefited by it, although an exercise of the taxing power, is not "taxation," within provisions of a state constitution regulating or prescribing the manner of taxation. Chambers *v.* Satterlee, 40 *Cal.* 497, 513.

That "taxation" is not rightly applied to raising money for objects of a private nature, such as a bridge, manufactory, or foundry owned by individuals, see National Bank of Cleveland *v.* Iola, 9 *Kan.* 689.

The differences between taxation and taking property in right of eminent domain are, that taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden; while private property taken for public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share, and for which compensation must be made. Moreover, taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment; while eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual, or class of individuals. People *v.* Mayor, &c. of Brooklyn, 4 *N. Y.* 419. And see EMINENT DOMAIN.

Taxation is that tribute for the support of government imposed on property in return for the protection and advantages which the government affords to the owner. It is an essential and fundamental requisite in the exercise of the power of taxation that the burden should be imposed or apportioned with all practicable equality and justice. Exchange Bank *v.* Hines, 3 *Ohio St.* 1.

Taxing power. The power of any government to levy taxes.

The power to tax will not confer authority to license: the objects attained by the exercise of the respective powers are not one and the same thing. Curtis *v.* Smith, 42 *Iowa*, 665.

The provision of S. C. Const. art. 9, § 8, vesting cities and towns with power to tax for corporate purposes, includes a license fee for carrying on a business. State *v.* Columbia, 6 *Rich.* 404.

2. The adjustment of the lawful amount of the costs of a cause; determining what costs an attorney, &c., is entitled to receive from his client, or a successful party from the defeated one.

Burrill says that, in old English law, taxation was applied also to damages, — included almost any judicial adjustment of an amount. It is at the present day chiefly used of adjustment of costs, assessment being the proper term for adjustment of damages.

Taxation of costs is the settlement by the taxing master of the amount payable by a party in respect of costs in any action or suit. The allowance of particular items in the bill will, in a great measure, depend on the order directing the taxation. The taxation of costs may be made on either of two scales, — that is to say, either as between solicitor and client, which is the more liberal; or as between party and party, which is the less liberal scale. In a bill sent in by a solicitor to his client, items would be allowed which would not be allowed in the ordinary taxation of costs between parties in a suit or action. But, in some cases, even between the parties to a suit or action, costs are given on the higher scale, and then the costs are said to be taxed as between solicitor and client (or as between attorney and client), as opposed to the ordinary taxation as between party and party. *Brown; Mozley & W.*

Taxing master, or officer. There are certain officers in the courts of common law who are appointed to examine the items in attorneys' bills, and to make such deductions as they think proper to be made. This process of examining the bills and making the proper deductions is technically termed taxing costs. The officers who perform this duty are the masters of the respective courts; and when a master has so examined a bill (or taxed the costs, as it is termed), and has deducted the items which he has thought proper to disallow from the gross amount, he marks down the remaining sum which is to be allowed; and this remaining sum is thence called the master's *allocatur*. In the courts of chancery there are similar officers, called taxing masters, whose duties are the same in respect of chancery proceedings; and the result of their taxation is embodied in their certificate. *Brown.*

In actions at common law, the taxation of costs has hitherto been done by the masters of each court. But henceforth the taxation of costs will be effected by the taxing officers of the supreme court, and of its respective divisions. *Mozley & W.*

There is an officer appointed in each house of parliament to tax the costs of private bills, called the taxing officer. See *May Parl. Pract.* ch. 29.

TAXED. 1. Applied to persons or property, means subjected to a contribution for support of government. See TAX, *n.*

2. As applied to costs of a cause, it means adjusted; allowed; examined by the proper officers, and pronounced lawful, or reduced to conform to law.

TEAM. As used in a statute prescribing the mode of passing when any wagon, carriage, &c., shall meet or overtake a team on the highway, means a vehicle, with the animals drawing it, used for carrying loads, as distinguished from one used for carrying persons. Hotchkiss *v.* Hoy, 41 *Conn.* 568.

In a statute allowing recovery for damages to any person, or to his team or carriage, "team" is not confined to animals attached to and drawing a vehicle, but includes cattle or horses, in droves, driven along the highway. Elliott *v.* Lisbon, 57 *N. H.* 27.

A "team" by law exempt from execution may be either one or any number of animals, which a householder or head of a family uses in the business of providing for a family. Wilcox *v.* Hawley, 31 *N. Y.* 648; Becker *v.* Becker, 47 *Barb.* 497.

A single horse may be deemed a team, within a statute exempting a debtor's team from execution, when kept and used as such; and, if a debtor owns one horse and uses him with another which he does not own, his horse is exempt. Lockwood *v.* Younglove, 27 *Barb.* 505; Hoyt *v.* Van Alstyne, 15 *Id.* 568; Wheeler *v.* Cropsey, 5 *How. Pr.* 288.

A horse, harness, and cart, belonging to a public carman, are exempt from execution as a team. Harthouse *v.* Rikers, 1 *Duer*, 606; Eastman *v.* Caswell, 8 *How. Pr.* 75.

That "team" cannot include a cart, see Morse *v.* Keyes, 6 *How. Pr.* 18.

One horse or two horses, with their harness and the vehicle to which they are customarily attached for use, may be claimed exempt as a team. Brown *v.* Davis, 16 *N. Y. Supreme Ct.* 43.

Team work. In a statute exempting from execution two horses kept and used for team work, means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling, the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or

make collections, or to see persons for business purposes, and from family use and convenience, pleasure, exercise, or recreation. None of these uses of a horse are suggested by the expression. Hickok *v.* Thayer, 49 *Vt.* 372.

Teamster. A person is a "teamster" who is engaged with his own team or teams in the business of teaming,; *i.e.*, in the business of hauling freight for others for a consideration, by which he habitually supports himself, and his family, if he has one. Brusie *v.* Griffith, 34 *Cal.* 302.

TEINDS. Is the Scotch law term corresponding to tithes *(q. v.)* in English ecclesiastical law; and teind court is the designation of a court which has jurisdiction of questions of clergymen's stipends and enforcement of parishioners' tithes.

TELLER. The designation of persons appointed in various places, for duties requiring counting. The old form of the word is said to have been tallier, meaning a person whose function it is to keep tally. At the present day, they are most known in banks, where they count the money as received or paid out; and in legislative bodies, where they are appointed to count the members as they vote ay or no, on a division.

The teller is a considerable officer in the exchequer, of which officers there are four, whose office is to receive all money due to the king, and to give the clerk of the pells a bill to charge him therewith. They also pay to all persons any money payable by the king, and make weekly and yearly books of their receipts and payments, which they deliver to the lord-treasurer. *Cowel; Jacob.*

In the language of parliament, the "tellers" are the members of the house selected to count the members when a division takes place. In the house of lords a division is effected by the "non-contents" remaining within the bar and the "contents" going below it, a teller being appointed for each party. In the commons, the "ays" go into the lobby at one end of the house, and the "noes" into a lobby at the other end, the house itself being perfectly empty. The speaker then appoints two tellers for each party, and of each two there is one for the ays and one for the noes put together, in order that they may act as a check upon each other. On the return of the members into the house, their names are ascertained by the clerks, who, having in their hands alphabetical lists printed on large pieces of cardboard, put a mark against the name of each as he passes. *Brown.*

The office of the teller in a bank is implied in the word used to designate it, — to tell or count the moneys of the bank which are received or paid out. The office is often divided into two branches, that of receiving teller and of paying teller, where the business of the bank is large, and the duties cannot conveniently be united in one person. When united, the duty of the teller is to receive all moneys offered at the bank in payment of notes and bills previously discounted or lodged for collection, as they severally fall due, and all moneys offered by customers of the bank, to be deposited to their credit in account, whether arising from moneys brought by them to the bank or the proceeds of discounts made for them; to pay the checks of depositors, as the money is from time to time drawn out, or for notes discounted; and to redeem the bills of the bank with specie, when the same is demanded. This is his official employment. The powers annexed to the office do not extend to certifying that a check drawn by a depositor will be good at a future time. Mussey *v.* Eagle Bank, 9 *Metc.* (*Mass.*) 306.

TEMPLARS. A religious order of knighthood, instituted about the year 1119, and so called because the members dwelt in a part of the Temple of Jerusalem, and not far from the sepulchre of our Lord. They entertained Christian strangers and pilgrims charitably; and their profession was at first to defend travellers from highwaymen and robbers. The order was suppressed A.D. 1307, and their substance given partly to the knights of St. John of Jerusalem and partly to other religious orders. *Brown.*

TEMPLES. Two of the inns of court.

At the suppression of the order of knights templars, their dwelling was purchased by the professors of the common law, and converted into inns of court, in the year 1340. They are called the Inner and Middle Temple. Essex House, built in 1185, was formerly a part of the house of the templars, and was called the Outer Temple, because it was situated without Temple Bar. (*Haydn Dict. Dates.*) *Brown.*

TEMPUS. Time; a time; a limited period of time.

Tempus continuum. A continuous period of time. In the civil law, this term denotes a period of time which is reckoned continuously once it has begun to run, all the days being reckoned as they follow one another in the calendar, without regard to whether it be time in which a right may be exercised or not.

Tempus utile. Time which can be used. Time available for the exercise of a right. In the civil law, this term denotes a period computed by reckoning only the time in which a right or privilege could be legally exercised, as distinguished from *tempus continuum*. See ANNIS UTILIS.

TENANCY. Holding; ownership. Tenant: one who holds or owns property, particularly real property.

These words convey a more comprehensive idea in the language of the law than in popular language, where tenant is used more particularly as opposed to the word landlord, and seems to imply that the land or property is not the tenant's own, but belongs to some other person, of whom he immediately holds it. But, in the language of the law, every possessor of landed property is called a tenant with reference to such property; and this whether such landed property is absolutely his own, or whether he merely holds it under a lease for a certain number of years. The reason of this is historical. Almost all real property was, by the policy of former English law, supposed to be granted by, dependent upon, and holden of some superior lord, in consideration of some service to be rendered to the lord by the tenant or possessor of this property; and while this theory no longer prevails to any great extent as a practical doctrine of law, in America, the words and phrases which grew into use while it prevailed, centuries ago, are many of them retained, tenancy and tenant being among these. Tenants are distinguished according to the nature of the estate which they hold, by appropriate and corresponding terms. Thus a person who holds an estate in fee-simple is called, with reference to such estate, a tenant in fee-simple; if the estate which a person holds is an estate tail, he is then called, with reference to such estate, a tenant in tail; if it is an estate for years, he is then called tenant for years; and so on. The word tenant, therefore, when applied to a person, always presupposes such person to be the holder or possessor of an estate of some kind or other; but what kind of estate it is cannot be determined without some additional adjuncts being associated with the word tenant, as the words in fee-simple, in tail, for life, for years, &c., which at once define the extent of interest which the tenant has in the lands or tenements. See *Brown*.

That particular use of the word, so common in the vernacular, in which tenant designates a person who occupies lands, a house, or other real property, under a contract of hiring or lease from the owner, is recognized in jurisprudence; and the law of landlord and tenant, and rights and liabilities of tenants, in this sense, form an important branch of the law.

The various kinds of tenancies and tenants known to the law are described under the titles of the different estates; and it is not useful to say more here than to recount the principal designations.

A tenant is one that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will. The word in law is used with divers additions; thus, tenant in dower is she that possesses land by virtue of her dower; tenant by statute-merchant, he that holds land by virtue of a statute forfeited to him; tenant in frank-marriage, he that holds lands or tenements by virtue of a gift thereof made to him upon marriage between him and his wife; tenant by the curtesy, he that holds for his life, by reason of a child begotten by him of his wife, being an inheritrix, and born alive; tenant by *elegit*, that holds by virtue of the writ called an *elegit;* tenant in mortgage, that holds by means of a mortgage; tenant by the verge in ancient demesne, who is admitted by the rod in the court of ancient demesne; tenant by copy of court-roll, who is admitted tenant of any lands, &c., within a manor, which, time out of mind, had been demisable according to the custom of the manor; tenant by charter, that holdeth by feoffment in writing or other deed. There were also tenants by knight service, tenant in burgage, tenant in socage, tenant in frank-fee, tenant in villeinage. So there is tenant in fee-simple; tenant in fee-tail; tenant at the will of the lord, according to the custom of the manor; tenant at will, by the common law; tenant upon sufferance; tenant of estate of inheritance; tenant in chief, that holdeth of the king in right of his crown; tenant of the king's, he that holds of the person of the king, or has some honor; very tenant, that holds immediately of his lord; and tenant paravail. So there are also joint tenants, that have equal right in lands and tenements by virtue of one title; tenants in common, that have equal right, but hold by

divers titles; particular tenant, as tenant for years, for life, &c., that holds only for his term; sole tenant, he that hath no other joined with him; several tenant, as opposite to joint tenant, or tenant in common. So there is tenant to the *præcipe*, in case of fines and recoveries; tenant in demesne, which is he that holdeth the demesnes of a manor for a rent, without service; tenants on service, he that holdeth by service; tenants by execution, that hold lands by virtue of an execution upon any statute, recognizance, &c.; with divers others. *Jacob.*

One who holds land by any kind of title, whether for years, for life, or in fee, is tenant. Hosford *v.* Ballard, 39 *N. Y.* 147.

The term tenant does not apply to a mere lodger. White *v.* Maynard, 111 *Mass.* 250.

Tenant in capite. Is where one holds of the king, of his person, as being king, and of his crown. *Termes de la Ley.* See TENURE IN CAPITE.

Tenants in common. Persons who own lands by several and distinct titles, occupying it together, the only unity between them being unity of possession, are called tenants in common, because they have a common possession and enjoyment. It is the usual tenure where two or more persons own realty together. Compare JOINT TENANCY.

A tenancy in common differs from a joint tenancy in this respect: joint tenants have one estate in the whole, and no estate in any particular part; they have the power of alienation over their respective aliquot parts; and, by exercising that power, may give a separate and distinct right to their particular parts. Tenants in common have several and distinct estates in their respective parts; hence the difference in the several modes of assurance by them. Each tenant in common has, in contemplation of law, a distinct tenement and a distinct freehold. *Wharton.*

Tenant by the curtesy. A husband occupying, after his wife's death, lands of which she was seised, in virtue of the curtesy, *i. e.* custom, of England, which accords a life-estate to the husband who survives his wife in lands of which she was seised during the marriage, if they had issue. The husband, by the birth of issue, becomes "tenant by the curtesy *initiate*;" but it is not until the death of the wife that his estate becomes consummate. 2 *Bl. Com.* 128. See CURTESY.

Tenant in dower. A widow occupying lands of her husband's estate in virtue of her right of dower. See DOWER.

Tenant in fee, or fee-simple, or fee-simple absolute. Originally, one who held lands to himself and heirs, generally, for ever; now an absolute owner of lands. See FEE.

Tenant for life. One who holds property for his own life, or for the life of another person, having no interest or estate beyond. See ESTATE FOR LIFE.

Tenant paravail. In old English law, the under tenant of all; the actual occupant. See PARAVAIL.

Tenant to the præcipe. See COMMON RECOVERY; FINE; RECOVERY.

Tenant in severalty. One who holds real property in his own right, and without any other person being joined with him in interest.

Tenant at sufferance. A person who holds over by mere non-objection, after an estate in lands lawfully commenced has determined. See SUFFERANCE.

Tenant in tail. The holder or occupant of lands having an entailed estate in them. See ENTAIL; FEE-TAIL; TAIL.

Tenant in tail after possibility of issue extinct. One who has an estate tail in lands, but cannot, by reason of the death of the spouse named in the entail, have issue to take the estate, so that the estate has become for life only. See TAIL.

Tenant in tail ex provisione viri. Where an owner of lands, upon or previously to marrying a wife, settled lands upon himself and his wife, and the heirs of their two bodies begotten, and then died, the wife, as survivor, became tenant in tail of the husband's lands, in consequence of the husband's provision (*ex provisione viri*). Originally, she could bar the estate tail like any other tenant in tail; but the husband's intention having been merely to provide for her during her widowhood, and not to enable her to bar his children of their inheritance, she was very early restrained from so doing, by the Stat. 32 Hen. VIII. ch. 36. *Brown.*

Tenant at will. One who holds lands upon a consent of the owner which is revocable; so that he holds only during the owner's pleasure.

Tenant for years. One who holds real property, for a definite term agreed upon, usually a specified number of years.

Tenant from year to year. By the

modern law of landlord and tenant, if neither party determines the tenancy by the proper notice, at the end of a year, the tenant is, under many circumstances, considered in for another year; this is practically higher than an estate at will, for the landlord cannot determine it until at the end of another year; and is called a tenancy from year to year. The same principle is in some localities applied to quarterly and monthly lettings.

A tenancy from year to year is now fixed, by general usage, to signify a tenancy determinable at half a year's notice on either side, ending with the current year of the tenancy. If the tenancy commenced on one of the quarterly feast-days, the half-year may be computed from one of such feast-days to another; otherwise, the half-year must consist of 182 days. *Mozley & W.*

Tenant's fixtures. This phrase signifies things which are fixed to the freehold of the demised premises; but which the tenant may detach and take away, provided he does so in season. In this case, gas and water pipes put into the building by the tenant were held, under the circumstances of the case, to be tenant's fixtures. Wall *v.* Hinds, 4 *Gray*, 256, 270. See TRADE FIXTURES.

Tenantable repair. Such a state of repair in houses or buildings as renders them fit for the occupation of a tenant. A tenant from year to year of a house is bound to keep it wind and water tight, to use it in a tenant-like manner, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises. *Mozley & W.*

Tenant-right. 1. A kind of customary estate in the north of England, falling under the general class of copyhold, but distinguished from copyhold by many of its incidents.

2. The so-called tenant-right of renewal is the expectation of a lessee that his lease will be renewed, in cases where it is an established practice to renew leases from time to time, as in the case of leases from the crown, from ecclesiastical corporations or other collegiate bodies. Strictly speaking, there can be no right of renewal against the lessor without an express compact by him to that effect; though the existence of the custom often influences the price in sales.

3. The Ulster tenant-right may be described as a right on the tenant's part to sell his holding to the highest bidder, subject to the existing or a reasonable increase of rent from time to time, as circumstances may require, with a reasonable veto reserved to the landlord in respect of the incoming tenant's character and solvency. By section 1 of the Irish land act, 1870 (Stat. 34 & 35 Vict. ch. 46), the Ulster tenant-right custom, in the holdings proved to be subject thereto, is declared to be legal, and to be enforced, as mentioned in the act; and, by section 2, a similar enactment is made for the rest of Ireland. What the legislature does by these sections is to legalize as valid customs that had previously rested on mere usages; not attempting to define, modify, improve, or qualify them, but leaving them as matters of fact, to be examined by the tribunals appointed to try every such question as it arises. *Mozley & W.*

TENDER. A formal offer; a proffer made in such manner as to bind the party although he refuses it. Also, such currency or money as may by law be offered in payment of debts.

Tender may be applied to a proffer, either of money, or delivery of any thing, such as goods, &c., which have become due, or of services. It is most commonly used of money; but this is only because offer of money payment is most often drawn in question: chattels, services, almost any performance of an obligation, may be subject of tender.

In order to a valid tender of money, the money must be actually produced, unless the creditor dispenses with the production of it at the time. Thomas *v.* Evans, 10 *East*, 101. The word tender imports not merely readiness and ability to pay the money, or to deliver the deed or the property in question, but also the actual production and offer of the thing. Holmes *v.* Holmes, 12 *Barb.* 137. The tender must also be made unconditionally.

Much discussion has taken place in recent years, in the United States, upon the power of congress, under the constitution, to declare any thing except gold and silver legal tender, and upon the validity and effect of the enactments making treasury notes legal tender. The decisions upon this topic, and on other branches of the subject of tender, may be found in the *U. S. Dig.* tit. Tender.

Tender, in pleading, is a plea by defendant that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff, and now brings it into court ready to be paid to him, &c. The plea of tender must be accompanied by an actual payment of the amount

into court, such payment being, in fact, stated in the plea. The plea amounts to an admission of the cause of action, but stops the interest and costs. See *Brown*.

Tender of amends. An offer by a person who has been guilty of any wrong or breach of contract to pay a sum of money by way of amends. If a defendant in an action make tender of amends, and the plaintiff decline to accept it, the defendant may pay the money into court, and plead the payment into court as a satisfaction of the plaintiff's claim. *Mozley & W.*

Tender of isaue. If in the pleadings in an action the defendant traverses or denies some allegation of fact put forward by the plaintiff in his declaration or other pleading, it is evident that a question is at once raised between the parties as to the existence or non-existence, truth or falsehood, of the fact to which the traverse or denying is directed. A question being thus raised, or, in other words, the parties having arrived at a specific point or matter, affirmed on the one side and denied on the other, the defendant (as the party traversing) is obliged to offer to refer this question to the proper mode of trial, which he does by annexing to the traverse an appropriate formula indicative of such offer, and in so doing he is said to "tender issue." Where the question for trial is one of fact, the formula is simply as follows: "and of this the defendant puts himself upon the country," &c., meaning that, with regard to the question in issue, he throws himself upon a jury of his country. It must be observed, however, that other issues besides those of fact are frequently tendered. *Brown.*

Tender of satiafaction. Is allowed to be made in most actions for money demands. It need not be made by the debtor personally to the creditor personally: it may be done through an authorized agent; and a tender to one of several joint creditors is sufficient. A tender must be absolute and unconditional; and the money must be actually produced at the time of the tender, unless that be dispensed with by the act of the creditor. *Wharton.*

TENEMENT. This word has a very comprehensive signification in law, including within its compass every species of real property which may be held, or in respect of which a person may be a tenant. Its use in this manner originates in those theories of English law, according to which nearly all real property was supposed to be granted by, dependent upon, and holden of some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor. The thing holden, therefore, came to be styled a tenement. As thus used, the word extends to land and messuages of all three varieties, whether freehold, copyhold, or leasehold. It is the most general word for all real-property subjects.

In modern times, and very frequently in popular usage, it denotes simply a house; *e.g.*, in the phrase, "all that messuage or tenement." From its apparent analogy to tenancy and tenant, it is popularly used for a building or distinct portion of a building, particularly adapted to be let for short periods, and at moderate rent.

Tenement signifies: 1. A house or homestall.

2. Land holden of a superior lord; and in this sense tenement is one of the technical words applicable to all real estates, and includes offices and dignities which concern lands and profits issuing out of lands.

3. Especially such an interest in land within a parish as will enable a party to apply to such parish for poor-law relief, if in need thereof. *Mozley & W.*

The word tenements, in a will, has never, indepeodently of other circumstances, been construed to pass a fee. Wright *v.* Denn, 10 *Wheat.* 204.

Tenement is a word of extensive signification. When used in a statute directing the proceedings to be taken when goods and chattels cannot be found to discharge an execution, and the debtor has lands or tenements, it should be construed as referring to such interests in real estate as are connected with the freehold, and not included in the term chattels. Barr *v.* Binford, 6 *Blackf.* 335.

The word tenement is frequently used in a restricted sense, as signifying a house or building; but it is also used in a much more enlarged sense, as signifying land, or any corporeal inheritance, or any thing of a permanent nature which may be holden. When used in an act giving a landlord a summary remedy for possession, against a tenant holding over, which is a remedial statute, and is to be liberally construed, the word is to be understood in its most enlarged signification, so that the beneficial effects of this speedy remedy may be extended, as far as may be, consistently with the language of the statute. Sacket *v.* Wheaton, 17 *Pick.* 103.

Tenement, as used in the Cochituate water act (Stat. 1846, ch. 167), making "the occupant of any tenement" liable "for the use of the water in such tenement," and in certain cases "the owner thereof" liable also; and, in the Boston city ordinance, relating to model tenement houses, and prescribing the water rates "for each tenement having water fixtures within the same." The word includes a suite of rooms in a model tenement house, having separate water fixtures, and occupied by a

separate tenant with his family, and containing the conveniences of a common dwelling-house, although the corporation owning the building controls the passages and outer doors. Young *v.* Boston, 104 *Mass.* 95.

Tenement, as used in statutes against lewdness, liquor-selling, and other nuisances, may apply to rooms connected with a shop, and forming no part of a dwelling-house. Commonwealth *v.* Cogan, 107 *Mass.* 212. Compare Commonwealth *v.* Dam, *Id.* 210; Commonwealth *v.* Ackland, *Id.* 211.

A wharf or pier, reclaimed from tide-water by embankment, or by raising the bottom with stone, earth, or other material, is a tenement. People *v.* Kelsey, 14 *Abb. Pr.* 372.

The word tenement is sufficiently descriptive of land, the metes and bounds being given. Den *v.* Woodson, 1 *Hayw.* (*N. C.*) 24.

Tenemental, or tenementary land. Land distributed by a lord among his tenants, as opposed to the demesnes which he kept for his own enjoyment; the outland of manors, granted to tenants by the Saxon thanes, under arbitrary rents and services. See *Wharton.*

Tenementis legatis. An ancient English writ, lying to the city of London, or any other corporation, where, by old custom, men might devise lands and tenements, as well as goods and chattels, for the hearing and determining any controversy touching such devises. *Reg. Orig.* 244.

TENENDUM. To be held; to hold. The initial word in that clause of deeds in Latin which was formerly used in expressing the tenure by which the estate granted was to be held; which clause is also called the *tenendum.* After the statute of *quia emptores*, by the operation of which all freehold tenures were converted into socage, the clause became useless, and was dropped, the distinguishing word, *tenendum*, however, being retained, and annexed to the *habendum*, which thenceforth read, *habendum et tenendum*, — to have and to hold, — the form followed, by translation into English, in modern conveyances.

The *tenendum* was that formal part of a deed which was characterized by the words "to hold;" and was formerly used to express the tenure by which the estate granted was to be held. Since all freehold tenures have been converted into socage, the *tenendum* is of no further use, and is therefore joined in the *habendum.* 4 *Cruise Dig.* 30.

The *tenendum* is that clause in a deed wherein the tenure of the land is created and limited. The office of a *tenendum* in a deed is to limit and appoint the tenure of the land which is held, and how, and of whom it is to be held. Before the statute called *quia emptores*, the *tenendum* was usually of the feoffor and his heirs, and not of the chief lord of the fee, whereby lords lost their escheats, forfeitures, &c. But since that statute, the *tenendum*, where the fee-simple passes, must be of the chief lord of the fee, by the customs and services whereby the feoffor held; yet this statute does not extend to a gift in tail, for the donee shall hold of the donor. *Jacob.*

TENET; TENUIT. He holds; he held. These words were formerly used in stating the tenure in a writ of waste, for waste committed during tenancy. The writ was said to be brought in the *tenet*, where the particular estate was still subsisting, and recovery of the land was sought; in the *tenuit*, where the estate had expired, and damages only were expected.

Tenet may also mean a doctrine or article of faith; a position or precept of a creed.

TENOR. The language of a writing.

By the tenor of a deed, or other instrument in writing, is signified the matter contained therein, according to the true intent and meaning thereof. *Cowel.*

The action of proving the tenor, in Scotland, is an action for proving the contents and purport of a deed which has been lost. *Bell.*

The word tenor, in reference to writs and records, signifies a copy or transcript. *Tomlins.*

Tenor, in its technical sense, means an exact copy; but, in popular use, may mean the substance and effect of an instrument. Where a statute prescribing the mode of entering judgment on an instrument required the date and tenor to be entered, this was held satisfied by entering the substance of the instrument; for if an exact copy were intended, this would include the date, and calling for the date in addition was superfluous. Beeson *v.* Beeson, 1 *Harr.* 466.

Tenor, in pleading a written instrument, imports that the very words are set out. "Purport" does not import this, but is equivalent only to "substance." State *v.* Atkins, 5 *Blackf.* 458; Commonwealth *v.* Wright, 1 *Cush.* 46. S. P. People *v.* Warner, 5 *Wend.* 271.

Tenor, in an indictment for forgery of a bank-note, binds the pleader to a strict recital. Commonwealth *v.* Stevens, 1 *Mass.* 203.

Tenor est qui legem dat feodo. It is the tenor (of a feudal grant) which determines the estate. See MODUS.

Tenore indictamenti mittendo. For sending the tenor of an indictment. The name of a writ by which an indictment might be called from another court into the chancery. (*Reg. of Writs*, 214; *Cowel.*) *Holthouse.*

TENTERDEN'S ACT. The English Stat. 9 Geo. IV. ch. 14, understood to have been passed at the instance of Lord Tenterden. It is in the nature of an enlarged application of the principle of the statute of frauds, requiring contracts to be in writing. Its leading provisions, as now in force, are epitomized by Brown, thus:

In actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only is to be deemed a sufficient evidence of a new and continuing contract to take the case out of the statutes of limitations, unless such acknowledgment or promise be in writing, signed by the party chargeable thereby.

No action is to be brought whereby to charge any person upon or by reason of any assurance made concerning the character, conduct, credit, ability, trade, or dealings of any person, to the intent that such person may obtain credit, money, or goods, unless such representations be in writing, and signed by the party to be charged therewith.

Section 17 of the statute of frauds — by which it is provided that no contract for the sale of goods for the price of £10 sterling or upwards shall be good, except the buyer accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or some note or memorandum of the said bargain be signed by the parties to be charged by such contract, or their agents lawfully authorized — is extended to all such contracts, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, or provided, or be fit or ready for delivery.

TENTHS. Tenths and fifteenths were temporary aids issuing out of personal property, and granted to the king by parliament. They were formerly the real or actual tenth or fifteenth part of all the movables belonging to the subject; where such movable or personal estates were a very different and much less considerable thing than they are at present. Ecclesiastical tenths were of a somewhat different nature, being the tenth part of the annual profit of each living, which, with the first-fruits (or the first year's profit of the living), was claimed by the Holy See from the clergy of the English church, under the supposed authority of a precept of the Levitical law. At the time of the reformation, the clergy continued to pay the same tax, but then paid it to the king, who had become head of the church; but upon the accession of Queen Anne, that queen abandoned this source of revenue, and allotted it to trustees, for the purpose of augmenting poor livings. *Brown.*

TENURE. Holding. A term used in discussing and classifying the various rights in virtue of which a person may maintain, before the law, his occupancy and enjoyment of any thing.

The word is chiefly used of the various rights in real property; but does not exclusively belong to that field: tenure of office is an equally proper legal expression, and signifies both manner of holding the office, and the duration or term. See People *v.* Waite, 9 *Wend.* 58.

In real-property law, tenure is chiefly used of the English feudal tenures, or that system of holding lands or tenements in subordination to some superior, which, in the feudal times, was the leading characteristic of real property. The king, who was at once the source of property and the fountain of justice and honor, had bestowed large territories on the great barons who immediately surrounded the throne, and these again had distributed his bounty through the channels of their numerous dependants. In legal contemplation, at least, all the land-owners of the kingdom thus derived their estates. On this hypothesis, so consonant to the genius and history of feuds, the system of tenure was built, — a system which linked every feudatory, by a chain more or less extended, to the crown, and rendered his fief eventually liable to resumption by the sovereign power from which it had, or was assumed to have, originally emanated. The nature of the tenure, or, in other words, the manner in which lands were held, was characterized by appropriate terms; thus, lands held by the honorable tenure of military service — that is, in consideration of attending or assisting

the lord in the wars, &c. — were distinguished by the corresponding name of tenure by knight service (see *Brown*); lands held by rendering services in husbandry, or like services, or payments which could be made certain in amount (a privilege, in the estimation of many tenants, which outweighed the honor of the onerous and variable military service), were known by the name of tenure in socage; and there were other kinds, of less interest to American readers.

For some brief general explanations of the introduction and incidents of these tenures, see FEUD.

Wharton gives the following list of tenures which were ultimately developed:

Lay Tenures.

I. Frank tenement, or freehold. 1. The military tenures (abolished, except grand sergeanty, and reduced to free-socage tenures) were: Knight service proper, or tenure in chivalry; grand sergeanty; cornage. 2. Free socage, or plough-service; either petit sergeanty, tenure in burgage, or gavelkind.

II. Villeinage. 1. Pure villeinage (whence copyholds at the lord's (nominal) will, which is regulated according to custom). 2. Privileged villeinage, sometimes called villein socage (whence tenure in ancient demesne, which is an exalted species of copyhold, held according to custom, and not according to the lord's will), and is of three kinds: Tenure in ancient demesne; privileged copyholds, customary freeholds, or free copyholds; copyholds of base tenure.

Spiritual Tenures.

I. Frankalmoigne, or free alms; II. Tenure by divine service.

In England, the practical consequences and rules of law deduced from this theory of tenures have been largely modified in modern times; the system has been greatly simplified, and its burdens reduced; but the assumption or theory that every possessor of real property is a tenant in respect of that property, that he is to be considered as holding it of some superior lord, and therefore is a tenant in reference to such lord, still underlies the real-property law. To this system may also be referred the origin of the present freehold and copyhold tenures, into the one or the other of which nearly all the various tenures which existed during the feudal period have merged.

Throughout the United States, the strong and general tendency has been to disclaim this theory or fiction of a holding from a superior as a basis of real-property rights, and to re-establish the notion of allodial title, or absolute, independent ownership. The idea of tenure, in the feudal sense, however, pervades the law of landed property; and many of the terms derived from the English system are, with modified meanings, in general use.

Under the word tenure is included every holding of an inheritance; but the signification of this word, which is a very extensive one, is usually restrained by coupling other words with it: this is sometimes done by words which denote the duration of the tenant's estate; as, if a man holds to himself and his heirs, it is called tenure in fee-simple. At other times, the tenure is coupled with the words pointing out the instrument by which an inheritance is held; thus, if the holding is by copy of court-roll, it is called tenure by copy of court-roll. At other times, this word is coupled with words that show the principal service by which an inheritance is held; as, where a man held by knight service, it was called tenure by knight service. *Jacob.*

Tenure in capite, was an ancient tenure, whereby a man held lands of the king immediately as of the crown, whether by knight service or in socage. This tenure was likewise called tenure holding of the person of the king; and a person might hold of the king, and not in *capite;* that is, not immediately of the crown, but by means of some honor, castle, or manor belonging to it. According to Kitchen, one might hold land of the king by knight service, and not in *capite;* because it might be held of some honor in the king's hands, descended to him from his ancestors, and not immediately of the king, as of his crown. (*Kitch.* 129; *Dyer*, 44; *Fitz. Nat. Brev.* 5.) This ancient tenure in *capite* was of two sorts: the one principal and general, and the other special or subaltern. The principal and general was of the king, as *caput regni, et caput generalissimum omnium feodorum,* the fountain whence all feuds and tenures have their main original; the special was of a particular subject, as *caput feudi, seu terræ illius,* so called from his being the first that granted the land in such manner of tenure; from whence he was styled *capitalis dominus,* &c. But tenure in *capite* is now abolished; and by Stat. 12

Car. II. ch. 24, all tenures are turned into free and common socage; so that tenures hereafter to be created by the king are to be in common socage only, and not by *capite*, knight service, &c. (*Blount.*) *Jacob.*

TERM. 1. A fixed period of time; a determined or prescribed duration. Thus, a lease is said to be made for a term of years; courts are said to sit for terms.

The word term uniformly designates a fixed and definite period of time. Officers removable at the pleasure of another officer, or who must be removed on the occurrence of an uncertain event, do not hold office for a term, so as to bring them under the provision of the constitution authorizing their election "for such terms" as are prescribed by law. Speed *v.* Crawford, 3 *Metc.* (*Ky.*) 207.

Term of court. In English practice, the phrase term of court had a very definite, frequent, and important use, throughout nearly the whole period of the reports of cases; in which it often appears as signifying those four periods of the year during which the courts at Westminster have been accustomed to sit to hear and determine points of law, and transact other legal business of importance, and which are called respectively Hilary, Easter, Trinity, and Michaelmas terms.

Hilary term formerly began on the 20th of January, and ended on the 12th of February, unless that day were Sunday, and then the day after. Easter term began on the Wednesday fortnight after Easter day, and ended the Monday next after Ascension day. Trinity term began on the Friday after Trinity Sunday, and ended the Wednesday fortnight after. Michaelmas term began on the 6th of November, and ended the 28th of November, unless that day were Sunday, and then the day after.

But by Stat. 11 Geo. IV. & 1 Wm. IV. ch. 70, the terms were rearranged, since which they have stood as follows:

Hilary term begins on the 11th, and ends on the 31st of January. Easter term begins on the 15th of April, and ends on the 8th of May, — except any of the days intervening between Thursday before Easter and Wednesday in Easter week fall in Easter term; in which case, the sittings *in banc* were, on those days, suspended, — the term being prolonged for such number of days of business as might be equal to the intervening days, exclusive of Easter day. Trinity term commences on the fourteenth day after the end of Easter term, — generally, the 22d of May, — and continues for twenty-two days (generally, until the 12th of June). Michaelmas term begins on the 2d of November, and ends on the 25th of November. If a term would otherwise end on a Sunday, the Monday is to be deemed the last day of term.

Recently, by the judicature act, the division of the legal year into terms is abolished, so far as relates to the administration of justice; and the terms are to be superseded, for this purpose, by the "sittings" of the court of appeal, and the "sittings," in London and Middlesex, of the high court of justice. Brown, however, considers that the proposed abolition is rather nomiual than real, — like most of the other proposed changes of that act. See also *Mozley & W.*

In American practice, the theory of terms of court is retained, quite extensively. A court is said to lose its power of amending and controlling its judgments after the expiration of the term at which they are rendered; and like expressions are common. But the word does not seem to designate any fixed months or days, but rather to correspond with "session." Any continuous, authorized sitting of the court is probably known, in most of the states, as a term. In New York practice, terms are understood to correspond with the calendar months; so much of the month of May or June, &c., as the court occupies by a session is the May or June term of that court.

For the purpose of computing term-fees, the "term" is considered as including the following vacation; so that, if any step in the cause is taken between one term and another, — as, for instance, between Michaelmas and Hilary terms, *i.e.* in Michaelmas vacation, — the attorney will be entitled to his fee for Michaelmas term, the same as if the step had been actually taken in the term itself. *Brown.*

Term-fee. A small fee or allowance which an attorney in a cause is entitled to, for every term in which any step is taken in the cause, from the time of the delivery of the declaration until final

judgment. It forms part of the costs in the cause, and also usually enters into the attorney's bill against his client.

Term of lease. The word term, when used in connection with a lease, means the period which is granted for the lessee to occupy the premises, and does not include the time between the making the lease and the tenant's entry. Young *v.* Dake, 5 *N. Y.* 463.

Term of office. Refers to the tenure of office, and not to the incumbent. Baker *v.* Kirk, 33 *Ind.* 517.

Term probatory. The period of time allowed to the promoter of an ecclesiastical suit to produce his witnesses, and prove the facts on which he rests his case. *Coote Eccl. Pr.* 240, 241.

Term to propound, or to conclude. In English ecclesiastical practice, a designation of a fixed time by the judge of a court, at which both parties are to exhibit (propound) all the acts and instruments which make for their respective causes, and one at which they shall be understood to renounce all further exhibits and allegations.

Term of years. This phrase may very well be used to denote any fixed period of time, extending over several years; but in the law of real property, it is especially used to signify an estate or interest in land to be enjoyed for a fixed period.

An estate for years is denominated a term, because its enjoyment is strictly fixed; for by "term" is meant, not only the interest which passes, but also the period for which it is held.

When a man holds an estate for any limited or specific number of years, it is called his term, and he himself is called, with reference to the term he so holds, the termor, or tenant of the term. A term of years, considered as an estate or interest in lands, is a chattel interest, and goes, on the death of its owner, to his executors or administrators, and not to his heirs. It is considered as a "particle," or portion, of some larger or greater estate or interest in the same lands, and hence is, with reference to such larger estate, termed a particular estate.

It is to be observed that every estate of a determinate duration is a term, and of the nature of a term of years, though for a less period than a year; a year being the shortest time which the law, in this case, takes notice of. Hence, every term must have a certain beginning, from which the computation is to be made, and a certain period beyond which it cannot endure. See *Brown; Wharton.*

A term of years is said to be either outstanding, *i.e.* in gross, or attendant upon the inheritance. It is outstanding or in gross when it is unattached or disconnected with the estate or inheritance, as where it is in the hands of some third party having no interest in the inheritance; it is attendant when vested in some trustee in trust for the owner of the inheritance. Thus, supposing A to be the owner of the inheritance, and to have occasion for a loan of £1,000, which B is willing to advance; A leases the land to B for a term of one thousand years, not reserving any rent, or reserving only a nominal rent, the lease containing a clause that if A repays the sum of £1,000 with interest to B on a given day, the term shall cease; the payment is not, in fact, made on the day, so that the clause of cesser becomes wholly nugatory; but on a subsequent day A pays B the principal and interest. What is now to become of the term? The purpose for which it was granted has been satisfied, but still the term continues to exist, and resides in B, who by virtue thereof is entitled in a court of law to recover the possession of the land for the remaining portion of the term. In point of conscience, it is true that B ought to restore, and in a court of equity he would be compelled to restore, the land to A. The only mode, therefore, of withdrawing from B the legal ownership in the land, which he has now, in an equitable point of view, no longer any right to enjoy, is either to induce B to surrender the term to A, by which, by the operation of a legal doctrine termed "merger," the term would be absorbed in the inheritance, and would cease to have any continued existence; or to procure him to make a transfer or assignment of his interest in the term to some third party as a trustee for A, to the intent that such third party shall hold the term solely for the benefit of A's inheritance. This latter course is that which for many reasons is frequently had recourse to in preference to the former; and when a term has been thus transferred or assigned, it is technically said to "attend upon the inheritance," because whosoever becomes entitled to the inheritance would be equitably entitled to such term as belonging to it, and the term itself is thence called an "attendant term." Such attendant terms were frequently of great use in protecting the estate of a purchaser against prior unknown incumbrances; but they being also liable to abuse, it has been provided by the satisfied terms act (8 & 9 Vict. ch. 112), that terms already attendant on the 31st of December, 1845, and also terms becoming attendant subsequently to that date, shall absolutely

cease; but as to the former, where they are attendant by express declaration only, they are to continue (although non-existing) to afford the old protection. *Brown.*

In every lease for years there are four times to be considered:

1. The time of computation. This marks the period whence the continuance of the estate is to be calculated. The time of computation may be either from: a day past, as to hold from the 25th of December last; the present time, as to hold henceforth, or from the making of the lease; a day to come, as to hold from the 29th of next September; an event which is to arise, as a grant to B that when he pays £20 he shall thenceforth have and occupy, &c.; or it may be referred to a third person to name the time, as to hold for so many years as A shall name.

2. The time of commencement in interest. This marks the period at which the lessee or termor is to have the enjoyment of the property under the lease or limitation. This time must not be beyond the period allowed by the rule preventing perpetuity, *i.e.* beyond a life or lives in being and twenty-one years afterwards; but it may be made to commence *in futuro*, as the estate does not affect the feudal seisin, but only the possession. The times of computation and commencement may be the same, or they may be different; the first running from a day past, whilst the last must begin from a day to come, which is determined by the form of the limitation. No agreement can confer a title to an estate on a tenant for any period prior to the time when he actually acquired the estate. The time of commencement in interest, or the right of enjoyment, must be either from: the time present, as to hold from a day past, or henceforth, or generally, without naming a time; a fixed future day, as to hold from the 25th of December next; or a given event, as to hold from the time of paying £20. A lease to hold generally, without particularizing any time, or from a day that is passed or henceforth, commences from the instant in which the deed is delivered, or other act, which evidences the lease, is perfected. When the time of commencement is to begin from the present time, or from a fixed future day, it is absolute; if it depend upon a given event, it rests upon a contingency.

The usual forms of leases limit the time according to some one of the following circumstances:

Generally, without specifying any time of computation or commencement, when the term commences from the delivery of the lease, according to the inferred intention of the parties.

From the day of the date or writing, which contains the lease of the term, or some evidence thereof, or from the making or sealing of the deed, or by the word henceforth, — all of which phrases refer to the delivery of the lease.

From the day of the date, which, of course, excludes the day of the date (for the word from is privative, and excludes the day), or from some day in particular.

From the end of the term in particular, or from the end of the time comprised in a term. The word term refers to the continuance of the interest under the lease; the word time, to the space of the term. This distinction is important, for if a man make a lease for twenty-one years, and after make a lease to begin *a fine et expiratione prædicti termini annorum dimiss* (from and after the end and expiration of the aforesaid term of twenty-one years demised), and after the first lease is surrendered, the second lease shall begin presently; but if it had been to begin *post finem et expirationem prædict.* 21 *annorum* (after the end of the said twenty-one years), in that case, although the first term had been surrendered, yet the second lease would not begin till after the twenty-one years be ended by effluxion of time, and so note the diversity between the term of twenty-one years and the time of twenty-one years.

From an event, or one of several events.

When the time of computation is to run from the date of the deed, and it bears an impossible date, as the 34th day of November, or the 31st day of February, the words referring to the date will be rejected, and the time begin from the delivery of the deed. So, when a lease is made for years, to commence and be computed from the determination of a former lease supposed to be subsisting, when in truth there is no such lease, the lease thus granted will commence immediately, and the computation of the term made from the time of the delivery. But a distinction is drawn between an impossible date and one which is possible, and may happen in some year, though it will not happen in every year, as the 29th of February. In the first case, the estate commences immediately; in the last, the time referred to will happen in a bissextile or leap-year, the computation will then run from the first 29th of February after the making of the lease.

3. The time of continuance.

This must be for a period of certain duration, to be calculated by a given space of time, of arithmetical import, and measured by number. It is ascertained either: by an enumeration of years, months, weeks, or days; by a reference to them; or by passing a right which before it vests in interest is to be reduced to a certainty by a reference to these periods.

4. The time for the determination of the estate.

This must be certain.

Terms for years are divided into three kinds: absolute, upon condition, and with collateral determinations.

A term for years is absolute when it is for a certain and fixed number of years, without any condition or collateral deter-

mination, the end being to happen by efflux-ion of time.

A term for years upon condition may be terminated before it arrive at the period to which the limitation has extended it; *e.g.*, an estate to A for five hundred years, provided that if B should pay to A £1,000 on the 1st of next January, the term shall cease. It is obvious, then, that a condition annexed to the estate, to defeat it before the end of the term by the effluxion of time, if the event pointed out by the clause of condition shall arise within the term, the estate is on condition, and not an absolute estate.

A term for years with collateral determinations may continue under the limitation till the time at which the term or space for which it is granted will expire. Collateral determinations may be moulded in any manner, according to the agreement of the parties. By these means that may be effected which cannot be accomplished by express and direct limitations, as is evident from the following cases: a lease by a parson for twenty-one years, determinable on his ceasing to be a parson, and a lease for so many years as he shall continue parson; and of a lease for twenty-one years, if a man shall so long live, and a lease for so many years as a man shall live, without ascertaining the number of these years. *Wharton.*

The phrase, term of years, as used in a statute relating to imprisonment for crime, was held to mean imprisonment for a period of not less than two years; and not, as when used with respect to leases, any certain length of time, in distinction from an uncertain one. *Exp.* Seymour, 14 *Pick.* 40.

2. In discussions concerning language, "term" seems to mean a word, compound, or even phrase, which represents some notion, — some distinct entity or existence. But in the plural, terms is used more indefinitely, and is in many connections equivalent to "language" or "words." Thus, law terms are the technical words of the law. A contract is said to be fulfilled according to its terms when it is literally performed; an instrument is said to be expressed in vague terms, — meaning language of doubtful meaning. This use of the word must be distinguished from the one next mentioned. It means the language or wording, not the obligations imposed, in their substance.

3. Terms (*plural*) is also used in the sense of conditions; obligations assumed or imposed. Thus parties are said to contract upon certain terms; a covenant for renewal, or to make repairs, may be said to be one of the terms of a lease; and a court is often said to grant an order, such as leave to answer, after a default, upon terms. This use of the word must be distinguished from the one last above mentioned: it does not mean the mere language, but the substantial obligations.

A party in an action or other legal proceeding is said to be under terms, when an indulgence is granted to him by the court in the exercise of its discretion, on condition of his observing certain things. Thus, when an injunction is granted *ex parte*, the party obtaining it is put under terms to abide by such order as to damages as the court may make at the hearing. So, a defendant at law neglecting to plead in proper time, and applying for leave to do so, has, according to the hitherto received practice, been put under terms to plead issuably, &c. *Mozley & W.*

TERMES DE LA LEY. Terms of the law. Also, the name of a notable lexicon of the law-French words and other technicalities of legal language in old times.

TERMINATION. A voyage is terminated when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours. But the termination of the voyage as to the ship does not necessarily terminate a risk on the cargo. Gracie *v.* Marine Ins. Co., 8 *Cranch*, 75.

TERMINUM QUI PRETERIIT. An old English writ which lay for the reversioner, when the possession was withheld by the lessee, or a stranger, after the determination of a lease for years.

TERMINUS. Boundary; a limit, either of space or time. The word sometimes denotes an estate for a term of years. See INTERESSE TERMINI.

Terminus a quo. The limit from which. The point of beginning of a private way is so called.

Terminus ad quem. The limit to which. The point of termination of a private way is so called.

TERMOR. He that holds lands or tenements for a term of years or life. (*Cowel.*) But we generally confine the application of the word to a person entitled for a term of years. (2 *Bl. Com.* 142.) *Mozley & W.*

TERRA. Earth; soil. Occurs in many Latin phrases found in old English law, in most of which it means arable land, cultivable soil, the earth considered as a subject of property.

Terra affirmata. Land let to farm.

Terra boscalis. Woody land.

Terra culta. Cultivated or tilled land.

Terra debilis. Weak or barren land.

Terra dominica, or indominicala. The demesne land pertaining to a manor.

Terra dominicalis regis. Demesne land belonging to the crown.

Terra excultabilis. Land which may be ploughed.

Terra extendenda. Land to be valued. This phrase was the name of a writ addressed to an escheator, &c., that he inquire and find out the true yearly value of any land, &c., by the oath of twelve men, and to certify the extent into the chancery. *Reg. Orig.* 293.

Terra frisca, or frusca. Fresh land; land not lately ploughed.

Terra hydala. Land subject to the payment of hydage.

Terra lucrabilis. Land gained from the sea, or enclosed out of a waste.

Terra manens vacua occupanti conceditur. Land lying unoccupied is given to the occupant.

Terra Normanorum. Land of Normans. This phrase is said to have been employed, during a period about coincident with the reign of Henry III., to designate lands which had escheated to the crown by any Norman who had incurred forfeiture by adhering to the French king.

Terra nova. Land newly cleared; recently converted from wood ground to arable.

Terra putura. Land in forests, held by the tenure of furnishing food to the keepers therein.

Terra sabulosa. Gravelly or sandy ground.

Terra Salica. Salic land. The land of the house; the land within that enclosure which belonged to a German house. No portion of the inheritance of such land passed to a woman; but the sons were preferred in the inheritance. See SALIC LAW.

Terra sterilis, ex vi termini, est terra infœcunda, nullum ferens fructum. Sterile land, by force of the term, is barren land; or bearing no fruit.

Terra testamentalis. Gavelkind land; so called from being formerly devisable by will, when other lands were not so devisable.

Terra transit cum onere. Land passes with its incumbrance.

Terra vestita. Land sown with corn.

Terra wainabilis. Tillable land.

Terra warennata. Land having appurtenant to it a liberty of free warren.

TERRE-TENANT. The holder of land; the person who is in actual possession or occupation of land. Sometimes the term is used in a more technical sense, signifying he who is seised of land, though not personally occupying any part of it.

It is sometimes spelled ter-tenant, but unadvisably.

The terre-tenant is he who hath the actual possession of the land; for example, a lord of a manor has a freeholder, who letteth out his freehold to another, to be possessed and occupied by him, such other is called the ter-tenant. *Jacob.*

The terre-tenant is he who is literally in the occupation or possession of the land, as distinguished from the mere owner of the same. The phrase also denotes sometimes the owner of the legal estate, *e.g.* the trustee's estate; and in that sense, although the *cestui que trust* should die without heirs, the lands will not escheat to the lord for want of a tenant (*per defectum sanguinis*), for the trustee is the terre-tenant. (Burgess *v.* Wheate, 1 *Eden*, 177.) *Brown.*

TERRIER. A land-roll, or survey of lands, either of a single person or of a town, containing the quantity of acres, tenants' names, and such like; and in the exchequer there is a terrier of all the glebe lands in England, made about 11 Edw. III. *Tomlins.*

In general, an ecclesiastical terrier contains a detail of the temporal possessions of the church in every parish. *Cowel.*

TERRITORY. A part of a country organized distinctly from the rest, and subjected or subordinated in government or jurisdiction.

In American constitutional law, after any region of the continent ceded to the United States has become settled sufficiently to require some form of government, and while the population has not yet become sufficiently numerous to call for admission to the Union, such region has usually been organized and governed as a "territory." This has been done under authority of that clause of the

federal constitution which declares that the congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property of the United States. (*Const.* art. 4, § 3.) Although it has been doubted whether this clause was ever designed to warrant the extensive acquisitions of territory which have been made, and the important jurisdiction which has been exercised, yet the doctrine has become firmly settled that congress has power to acquire territory, and to exercise general legislation over it and its inhabitants from the time of acquisition till, by the inhabitants, with the consent of congress, a state government shall be created. The regions thus provisionally governed by congress are called the territories.

The Cherokee Nation is a "territory" within the meaning of the word in Battle's N. C. Rev. ch. 35, § 8, regulating acknowledgments of deeds in another state or territory. Whitsett *v.* Forehand, 79 *N. C.* 230.

Territorial courts. The territories are not states, within the meaning of that word as generally used in the statutes relative to the jurisdiction and powers of the courts of the United States, Campbell *v.* Read, 2 *Wall.* 198; accordingly, the distinction between the federal and state jurisdictions, under the constitution of the United States, does not exist as to the territories, either in respect to the jurisdiction or the subjects submitted to the cognizance of their courts. They are legislative governments, and their courts legislative courts. Congress, in the exercise of its powers in the organization and government of the territories, combines the powers of both the federal and state authorities. Scott *v.* Jones, 5 *How.* 343. The jurisdiction of these courts, therefore, is not restricted by the limits of the judicial power of the United States as defined in the constitution, Benner *v.* Porter, 9 *How.* 235; and they are courts of the United States only in the sense that they are created by the government of the United States, and derive all their powers from the acts of congress.

In the organized territories (except Arizona), the judicial power is vested in a supreme court, district courts, probate courts, and justices of the peace. *Rev. Stat.* § 1907.

By the revised statutes, the supreme court of each territory consists of a chief justice and two associate justices, appointed for four years, who are required to hold an annual term at the seat of government of the territory.

Each territory is divided into three judicial districts, and a district court is prescribed to be held by one of the justices of the supreme court, at a time and place prescribed by law; and terms for causes in which the United States are not a party are held in the counties fixed by the laws of the territory. The supreme and district courts, respectively, possess chancery as well as common-law jurisdiction. Writs of error, bills of exceptions and appeals, are allowed in all cases from the final decisions of the district courts to the supreme court, under such regulations as may be prescribed by the territorial legislature. Justices of the peace are not given jurisdiction of any matter in controversy when the title of land may be in dispute, or where the debt or sum claimed exceeds one hundred dollars. The district courts have the same jurisdiction, in all cases arising under the constitution and laws, as is vested in the circuit and district courts of the United States; and the first six days of every term of the district courts, or as much as may be necessary, is required to be appropriated to the trial of causes arising under the constitution and laws; and writs of error and appeal in all such cases are to be made to the supreme court of such territory, as in other cases. A marshal and attorney are appointed, as are the judges, by the president and senate, and a clerk by each supreme court judge in his district. Many other details of organization and powers are prescribed by the revised statutes. Some embarrassment has been caused by questions of jurisdiction arising upon the change of the government of a territory into a state government. It is competent for congress to provide for the transfer of causes, whether civil or criminal, which are pending at the termination of the territorial government, to the national courts, with authority to proceed therein

to a final disposition. Without such authority, cases pending in the territorial courts abate when the courts cease to exist by the change of organization. Forsyth *v.* United States, 9 *How.* 571. And see act of congress of June 12, 1858.

What is known as the Indian territory must be excepted from the above general sketch of the organized territories of the United States: it is a region devoted to Indian reservations.

Territory of a judge. An expression in old English jurisprudence for the district within which he has right of jurisdiction, and of deciding the causes proper to him, beyond which his acts as a judge are null.

TEST ACT. An act of parliament which prescribed that all officers, civil and military, should take the oaths of allegiance and supremacy, with the oath of office, and make declaration against transubstantiation, in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their appointment, and also within the same time should receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and deliver into the court a certificate thereof, signed by the minister and church-warden. It was repealed in 1828, by Stat. 9 Geo. IV. ch. 17, so far as relates to receiving the sacrament according to the rites of the church of England.

TESTA DE NEVIL. An ancient document, in two volumes, in the custody of the king's remembrancer in the exchequer of England, otherwise called *liber feodorum*, supposed to have been compiled by John de Nevil, a justice itinerant in the 18th and 24th of King Henry III., or, as others imagine, by Ralph de Nevil, an accountant in the exchequer. But it appears that the volumes were not compiled till near the close of the reign of Edward II. or the beginning of Edward III.; and then partly from the inquests taken on the presentments of jurors of hundreds before the justices itinerant, and partly from inquisitions upon writs awarded to the sheriffs for collecting of scutages, aids, &c. These books contain principally accounts of fees holden either immediately of the king, or of others who held of the king *in capite*, and, if alienated, whether the owners were enfeoffed *ab antiquo* or *de novo*, as also fees holden in frankalmoigne, with the values thereof respectively; of sergeanties holden of the king, distinguishing such as were rented or alienated, with the values of the same; of widows and heiresses of tenants *in capite* whose marriages were in the gift of the king, with the values of their lands; of churches in the gift of the king, and in whose hands they were; of escheats, as well of the lands of Normans as others, in whose hands the same were, and by what services holden; of the amount of the sums paid for scutage and aid, &c., by each tenant. *Tomlins.*

TESTAMENT. The formal document by which one may make disposition of his property to take effect at his death; a will. Testamentary: connected with or pertaining to wills. Testator: the maker of a will.

As to the distinctions which have been taken between "testament" and "will," see *Burrill.* At the present day, the words are used interchangeably; but the frequent recurrence of the phrase, "last will and testament," indicates a vague idea that the two are different in some features, and that an instrument which combines the characteristics of both should have the double name.

Testament is the true declaration of a man's last will as to that which he would have to be done after his death. It is compounded, according to Justinian, from *testatio mentis;* but the better opinion is, that it is a simple word formed from the Latin *testor*, and not a compound word. *Mozley & W.*

In the strict sense of a testament, it concerns personal property merely. Conklin *v.* Egerton, 21 *Wend.* 430, 436.

Testamentary capacity. That measure of mental ability which is recognized in law as sufficient for the making a will.

A perfect capacity is usually tested by this, that the individual talks and discourses rationally and sensibly, and is fully capable of any rational act requiring thought, judgment, and reflection. Weakness of mind, however, may exist in many different degrees, without making a man intestable. If he be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as the reason for his actions. Duffield *v.* Robeson, 2 *Harr.* (*Del.*) 379.

Testable capacity amounts to nothing more than a knowledge by the testator of what he is about, and how he is disposing of his property, with the purpose so to do it. Sutton *v.* Sutton, 5 *Harr.* (*Del.*) 459.

The definition of a sound and disposing mind and memory, given by Judge Washington in Stevens *v.* Van Cleve, 4 *Wash.* 262 (see SOUND AND DISPOSING MIND), ap-

proved as a definition of testamentary capacity. Stackhouse *v.* Horton, 15 *N. J. Eq.* 202.

Testamentary cause. A suit or proceeding involving proof, validity, or construction of a will, and brought in a court of probate or ecclesiastical jurisdiction.

Testamentary causes now belong to the ecclesiastical jurisdiction. They were originally cognizable in the courts of common law, viz. the county courts, and afterwards transferred to the jurisdiction of the church by the favor of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects. *Jacob.*

These causes that were cognizable formerly in the ecclesiastical courts are now cognizable in the court of probate. *Brown.*

Testamentary causes are causes relating to the validity and execution of wills. The phrase is generally confined to those causes which were formerly matters of ecclesiastical jurisdiction, and are now dealt with by the court of probate. *Mozley & W.*

Testamentary guardian. A person appointed by a father, in his last will and testament, to be the guardian of his child, until he or she attains the age of twenty-one years. The power of appointing such a guardian was first conferred on the father by Stat. 12 Car. II. ch. 24. See GUARDIAN.

Testamentary matters. This phrase, as used in Ohio Const. art. 4, § 8, defining the jurisdiction of the probate court, does not include the right of a child, born after the execution of the will of its parent, to contribution. McGarry *v.* Smith, 22 *Ohio St.* 190.

Testamentary paper. A document which is not in form a will, but is of that nature, and may, if allowed and acted on, regulate the disposal of the writer's property after death. Under modern statutes of wills, which preclude a paper from being admitted to probate at all unless fully and formally a will, the phrase has lost importance.

TESTATUM. Witnesseth.

In conveyancing, the witnessing part of a deed, — beginning, in the English form, "Now this indenture witnesseth," — is termed, from the characteristic Latin word, the *testatum* clause.

The testatum clause in a writ was a recital that defendant was reputed to have absconded, rendering necessary a second writ. This recital was in general untrue, the allegations of fact on which the writ was supposed to be based being purely fictitious. 3 *Bl. Com.* 283. The practice was indirectly abolished by the common-law procedure act, 1852, which allowed execution to issue at once into any county, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county.

In former English practice, when a writ of execution had been directed to a sheriff of a county, and that sheriff returned that there were no goods of the defendant in his bailiwick, then a second writ, reciting this former writ and the sheriff's answer to the same, might be directed to the sheriff of some other county wherein the defendant was supposed to have goods, commanding him to make execution of the same; and this second writ was called a *testatum* writ, from the words in which the writ was concluded; viz., "Whereupon, on behalf of the said plaintiff, it is testified in our said court that the said defendant has goods, &c., within your bailiwick." *Brown.*

TESTE. Witness.

This was the initial word of the concluding clause of common-law writs in Latin, which was added in attestation of the fact that the writ was issued by authority; and to that end such clause usually set forth the attestation of the sovereign, or of the chief justice of the court out of which the writ issued, the place at which and the day on which it was issued or granted. The corresponding clause in the English form is commonly called the *teste;* and a writ with such clause is said to be *tested.*

Teste is a word commonly used in the last part of every writ, wherein the date is contained, beginning with the words *teste meipso,* meaning the sovereign, if the writ be an original writ, or be issued in the name of the sovereign; but, if the writ be a judicial writ, then the word *teste* is followed by the name of the chief judge of the court in which the action is brought, or, in case of a vacancy of such office, in the name of the senior puisne judge. *Mozley & W.*

TESTES. Witnesses.

When the validity of a will is contested, the executor, instead of proving it in the common form, — *i.e.* upon his own oath simply, — before the registrar of the court of probate (which is deemed sufficient, where no opposition is made), is expected to make proof by producing the witnesses in open court; and this is called, in the lan-

guage of the ecclesiastical courts, making proof *per testes* (by witnesses), and in open court. When a will is so proved, two witnesses are, by the civil law, indispensable; although it does not appear to be necessary that they should have read the will, or even heard it read, provided they can depose on oath that the testator declared that the writing produced was his last will and testament, or that he duly executed the same in their presence.

A trial had before a judge, without the intervention of a jury, in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined, is called, in the language of the civil-law courts, a trial *per testes*. The phrase was applied especially to trials according to the method of the Roman civil law, and, in this strict sense, is now obsolete, though the trial of questions of fact by the judge and without a jury has always been common in admiralty and equity, and has been introduced by statute in a number of causes and proceedings in courts of common-law origin. But there is no force in terming such trials "trials *per testes*." The distinction marked by that phrase was that between trial by witnesses, and such sorts of trial as combat, oath of parties, or ordeal. Trial by the court and trial by jury are in their nature equally trials by witnesses.

TESTIMONIAL. Besides its ordinary meaning of a written recommendation to character, testimonial has a special meaning, under Stat. 39 Eliz. ch. 17, § 3, passed in 1597, under which it signified a certificate under the hand of a justice of the peace, testifying the place and time when and where a soldier or mariner landed, and the place of his dwelling or birth, unto which he was to pass, and a convenient time limited for his passage. Every idle and wandering soldier or mariner not having such a testimonial, or wilfully exceeding for above fourteen days the time limited thereby, or forging or counterfeiting such testimonial, was to suffer death as a felon, without benefit of clergy. This act was repealed, in 1812, by Stat. 52 Geo. III. ch. 31. *Mozley & W.*

TESTIMONY. Declarations of witnesses; evidence by statements of persons conversant with the fact to be proved.

The word testimony is not synonymous with "evidence." Lindley *v.* Dakin, 13 *Ind.* 388; Downs *v.* Downs, 17 *Id.* 95; Harvey *v.* Smith, *Id.* 272; McConaha *v.* Carr, 18 *Id.* 443.

THANAGE. That portion of the king's land of which a thane (*q. v.*) was the ruler or governor was termed "thanage of the king." *Cowel.*

THANE. One of those who attended the English-Saxon kings in their courts, and who held their lands immediately of those kings. Those that served the king immediately in places of eminence, either in court or commonwealth, were called *thani majores* and *thani regis*. Those that served under them, as the first did under the king, were called *thani minores*, or the lesser thanes. Not long after the conquest, the word was disused, and instead thereof the *thani majores* were called *barones regis*, who, as to their dignity, were inferior to earls, and took place next after bishops, abbots, barons, and knights. The *thani minores* were likewise called barons. These were lords of manors, who had a particular jurisdiction within their limits, and over their own tenants in their courts, which to this day are called courts-baron. *Jacob; Tomlins.*

Thane-lands. Such lands as were granted by charter of the Saxon kings to their thanes, which were held with all immunities, except the threefold necessity of expeditions, repairs of castles, and mending of bridges. *Jacob.*

THEATRE. Any edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance-money is received, not including halls rented or used occasionally for concerts or theatrical representations. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 126.

The word theatre does not import, *ex vi termini*, a place where valuable goods which may be the subject of larceny are stored. It does not necessarily import any thing more than a stage on which actors play, and a room in which acting is done and seen. Lee *v.* State, 56 *Ga.* 477.

THEFT. An unlawful felonious taking away of another man's movable and personal goods, against the will of the owner. *Jacob.*

Theft is the fraudulent taking of corporeal personal property belonging to another, from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking. Quitzow *v.* State, 1 *Tex. App.* 65.

Theft-bote. The receiving a man's goods again from a thief, after stolen, or other amends not to prosecute the felon, and to the intent the thief may escape; which is an offence punishable with fine and imprisonment, &c. *Jacob.*

THELLUSSON ACT. The Stat. 39 & 40 Geo. III. ch. 98, passed in 1799, in consequence of objections entertained to

the will made by a Mr. Thellusson. He was a person of great wealth; and by his will, after providing for his immediate descendants, he left the bulk of his property to be accumulated until his descendants living or in *ventre sa mère* at the time of his death should be dead. The act called the Thellusson act was passed to prevent a repetition of a bequest of this kind. By its provisions, a grantor or testator is forbidden to direct the accumulation of his property for a period exceeding twenty-one years from his death, subject to certain exceptions mentioned in the act. The principle of thus restricting the power to create a perpetuity, or to suspend the power of alienation of property given by will, has been widely adopted, by legislation, throughout the United States.

THELONIUM. A writ that formerly lay for the citizens of any city, or burgesses of any town that had a charter or prescription to free them from toll, against the officers of any town or market who would constrain them to pay toll of their merchandise, contrary to their said grant or prescription. *Fitz. Nat. Brev.* fol. 226. Abolished by Stat. 3 & 4 Wm. IV. ch. 27, § 36. *Tomlins.*

THEN. A clause in a lease, providing that, if the farm was sold, "then and in that case" the orchard should be appraised, and the tenant allowed therefor, was held to mean, not at the time of the sale, but in the event of a sale. Pintard *v.* Irwin, 20 *N. J. L.* 497, 505.

See a similar interpretation in Ash *v.* Coleman, 24 *Barb.* 645.

Then and there. Cannot be replaced by immediately, as a substitute, in an indictment for murder. State *v.* Reakey, 1 *Mo. App.* 3.

THIEF. The term "thieves" is broad enough in law to cover both compound and simple larceny. When used in a policy upon cargo of a vessel, it is not restricted in its application to pirates, rovers, &c., but covers a simple larceny, committed by a stranger to the ship. American Ins. Co. *v.* Bryan, 1 *Hill* (*N. Y.*), 25.

THIRDS. Where a testator devises all his property, both real and personal, "after his just debts and funeral expenses are paid, and his wife's thirds are taken out," the wife is entitled to one-third of both the real and personal property after the debts, &c., are paid, the same as she would take under the intestate law. Horsey *v.* Horsey, 1 *Houst.* 438.

A testator directed that his widow, in case of her second marriage, should be "thirded." It was held that, on such second marriage, she was entitled to one-third of the estate, and that the remainder should go to the heirs and distributees. Baker *v.* Red, 4 *Dana*, 158.

Thirds, in a will, was construed as equivalent to dower, in O'Hara *v.* Dever, 2 *Abb. Pr. N. S.* 418. And see 30 *How. Pr.* 278.

THIRLAGE. A servitude in Scotland, by which the possessor of lands was bound to carry all his grain to a certain mill to be ground, for which he was bound to pay a proportion of the flour or meal, varying in different places from a thirtieth part to a twelfth part, termed multure. Besides this, which was due to the miller or proprietor of the mill, smaller perquisites were due to the servants, termed sequels, called knaveship, bannock, lock, or gowpen, uncertain in their amount, and ascertained only by the practice of the mill; and services were due to the mill, such as carrying home mill-stones, and repairing the mill-house, mill-dam, &c. Stat. 39 Geo. III. ch. 55, authorized commuting this servitude for an annual payment in grain, to be ascertained by the verdict of a jury, after proof, before the court of session, of the nature and extent of the servitude in each particular instance. *Jacob.*

This day six months. An expression used in parliament, to mean "never." Thus, a proposal to read a bill "this day six months" is a proposal to reject it, because parliament would not be sitting six months hence. "This day three months" has the same meaning. The term fixed in either case is one beyond the probable duration of the session. If, however, the session should last to the time so nominally specified, it seems that the bill or bills will appear amongst the orders of the day. *May Parl. Pract.* 463.

THREAT. A threat has been defined to be any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent.

But it is not every threat in this broad sense that is distinctly cognizable by legal remedies. The employment of threats is, upon principle, a tort at common law; and when threats are employed successfully to induce a party to make a contract or conveyance, they may, under circumstances, afford ground for equitable relief. But the criminal jurisdiction of threats, as a punishable offence, is chiefly statutory; and whether given threats are punishable must be determined by recourse to the statute of the jurisdiction. By the Stat. 4 Geo. IV. ch. 54, § 3, knowingly to send any letter or writing, with or

without a name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of the king's subjects, or to burn or destroy their houses, out-houses, barns, stacks of corn or grain, hay or straw, was made felony, and punishable with penal servitude for life, or for any term not less than three years, or imprisonment, with or without hard labor, for any term not more than seven years; and, by subsequent enactments, the principle was much extended. It has also been widely adopted in the various states of the Union. Thus, in New York, the sending a letter threatening to accuse a person of crime, or to do an injury to person or property, with intent to extort or gain any money or property of another, is made punishable by imprisonment not exceeding five years. 2 *Rev. Stat.* 678, § 58.

Threatening letters. Sending threatening letters is the name of the offence of sending letters containing threats of the kinds recognized by the statute as criminal. These are such as threatening to libel a person, or to charge him with a crime, or to kill him, or perhaps any demanding of property with threats. Sending such letters has been made punishable, irrespective of any intention or attempt to do the thing threatened.

Threatening letters, as cognizable in criminal courts, are of various kinds:

1. Letters threatening to publish a libel, with a view to extort money. This is punishable, under Stat. 6 & 7 Vict. ch. 96, § 3, with imprisonment not exceeding three years, with or without hard labor.

2. Demanding money or other property with menaces, with intent to steal the same. This offence is felony, and punishable, under the larceny act of 1861 (Stat. 24 & 25 Vict. ch. 96), with two years' imprisonment, with or without hard labor.

3. Letters demanding of any person, with menaces and without reasonable and probable cause, any property, chattel, money, valuable security, or other valuable thing. Any person sending such a letter, or causing the same to be received, knowing its contents, is liable, under the same statute, to penal servitude for life, or to imprisonment not exceeding two years, with or without hard labor.

4. Letters threatening to accuse any person of a heinous or infamous crime. Any person guilty of sending any such letter, or causing the same to be received, knowing its contents, with a view to extort money, &c., is liable to penal servitude for life, as in the former case.

5. Letters threatening to kill or murder any person. The punishment for this of fence is, by Stat. 24 & 25 Vict. ch. 100, § 16 penal servitude for five years, or imprisonment for two years, with or without hard labor. *Mozley & W.*

A false statement, that a warrant is issued to arrest a person for a crime, and that it will be served unless money is paid to stay the process, is a threat to accuse a person of a crime. Commonwealth *v.* Murphy, 12 *Allen*, 449.

To constitute the offence created by the New York statute against sending threatening letters, the letter must be sent with a view or intent to obtain that which belongs to another. A letter demanding the payment of a debt due to the writer, and threatening, on refusal, to burn the debtor's property, is not embraced. People *v.* Griffin, 2 *Barb.* 427.

THROAT DISEASE. The words throat disease, as one of the questions to be answered in a proposal for life insurance, which, with the policy, contained a stipulation that, in case of false answers to any of the questions in the proposal, the policy should be void, — means something more than a temporary inflammation, which, at the time the proposal was made, was completely cured. Eisner *v.* Guardian Mut. Life Ins. Co., 22 *Int. Rev. Rec.* 152.

TICKET. What the legislature has meant by the word ticket, in a statute to prohibit the circulation of tickets, must be matter of construction, to be gathered from the terms employed in the act; the word itself has no legal or other fixed and determinate meaning. There are tickets of various descriptions and for various purposes, such as lottery tickets, play-house tickets, admission tickets at public exhibitions or private parties, or to a seat in a stage, or for a passage in a steamboat, and others. Allaire *v.* Howell Works Co., 14 *N. J. L.* 21.

Ticket of leave. Under English laws, a convict, particularly one of those sent to the penal settlements abroad, may, upon continued good conduct, have granted to him a license to be at large; which amounts, in some instances, to a practical remission of the sentence, within the limits and conditions prescribed. This license is called a ticket of leave. It is forfeited by subsequent misconduct.

Ticket of leave is a written license to a convict sentenced to penal servitude, to be at large before the expiration of his sentence, and is granted under the hand or seal of one of her majesty's principal secretaries of state (generally the home secretary). The conditions of the license usually

expressed are: The holder shall preserve his license, and produce it when called upon to do so by a magistrate or police-officer; he shall abstain from any violation of the law; he shall not habitually associate with notoriously bad characters; he shall not lead an idle and dissolute life, without visible means of obtaining an honest livelihood. These licenses are revocable at any time before the term of the sentence has expired: and, if a license is revoked in consequence of the party's conviction for any offence, he will be liable to undergo a term of penal servitude equal to the portion of his term which remained unexpired when the license was granted. *Mozley & W.*

Ticket-of-leave man. A convict who has obtained a ticket of leave.

TIDE. The ebb and flow of the sea.

Tide-lands. The term tide-lands, as used in the California act of May 14, 1861, means lands covered and uncovered by the tides, and does not include lands lying below low-tide mark, and permanently covered by the navigable waters of the bay or ocean. Walker *v.* Marks, 2 *Sawyer*, 152.

Tidesmen. Are certain officers of the custom-house, appointed to watch or attend upon ships, till the customs are paid; and they are so called because they go aboard the ships at their arrival in the mouth of the Thames, and come up with the tide. *Jacob.*

Tide-water. Water which ebbs and flows with the tide; usually applied to waters near or partially enclosed by the land. The open sea is not so often spoken of as tide-water, as are creeks, coves, and mouths of rivers.

The term tide-water includes a place where the fluctuation is only two feet, and caused by river-water meeting the sea. Attorney-General *v.* Woods, 108 *Mass.* 436.

The term shore is not limited to the mere water-line, but includes the land immediately adjacent to it. Lacy *v.* Green, 84 *Pa.* St. 514. Consult SHORE.

TIE. When the votes cast for and those against a question submitted to a deliberative body are equal in number, so that no result is reached, there is said to be a tie. See CASTING VOTE.

TIGNUM. A civil-law term for building material; timber.

Tigni immittendi. In the civil law, a servitude consisting in the right of inserting a beam or timber from the wall of one house into that of a neighboring house, in order that it may rest on the latter, and that the wall of the latter may assist in bearing the weight. *Wharton.*

TIMBER. Wood fitted for building, or other like uses. The statement in earlier English books, that timber means oak, ash, and elm, will probably be found, on tracing it back to its source, to originate in the fact that acts of parliament protecting timber particularly designated those three kinds. Oak, ash, and elm are doubtless timber everywhere; but even in England, by the custom of some particular counties, within which other kinds of trees were generally used for building, such kinds have also, for that reason, been considered as timber. And generally whatever trees are used in building and the mechanic arts ought to be deemed timber, within the legal meaning of that word, except when it may be limited by special connection.

The term timber, in the acts of congress of March 2, 1831, relative to the lands of the United States, signifies the standing and felled trees prepared for transportation to a vessel or saw-mill, such as saw-logs, or timber in bulk; but does not embrace any article manufactured from the tree, as shingles or boards. The trees are those the wood of which is generally used in ship and house building. United States *v.* Schuler, 6 *McLean*, 28, 38.

A contract for the purchase of timber does not pass title to trees which are only useful for firewood. Nash *v.* Drisco, 51 *Me.* 417.

The word timber, in a statute allowing the owner of land taken for a highway a reasonable time to take off his "timber, wood, and trees," includes buildings and parts of buildings. Commonwealth *v.* Noxon, 121 *Mass.* 42.

That the word timber may include fencing stuff by local usage, see Hunter *v.* Hunter, 17 *Barb.* 25.

TIME. As to the calendar, see CALENDAR.

As to computation of days or months, see DAY; MONTH.

The meaning of the phrase "apt time" sometimes depends upon lapse of time, as when a thing is required to be done at the first term, or within a given time, it cannot be done afterwards. But it more usually refers to the order of proceedings, as fit or suitable time. Pugh *v.* York, 74 *N. C.* 383.

The words "at the time of executing this my last will" were held to mean the time when its provisions should be carried into effect, and not the time of its technical execution, in Scott *v.* Guernsey, 60 *Barb.* 163.

Time of the bankruptcy, in the United States bankrupt act, means the time of the filing of the petition. Matter of May, 7 *Ben.* 238.

Time-bargain. A contract for sale and delivery of stocks at a future day.

A time-bargain is a contract for the sale

of a certain amount of stock at a certain price on a future day, the vendor not in general having such stock to sell at the time of the contract, but intending to purchase it before the time appointed for the execution of the contract. Time-bargains were forbidden by Sir John Barnard's act (7 Geo. II. ch. 8), under a penalty of £500; and, while that act was in force, such contracts could not, therefore, be enforced by the courts of law; but the disgrace attending upon a breach secured their general observance. (*Keyser.*) And Sir John Barnard's act is now repealed by Stat. 23 & 24 Vict. ch. 28, passed in 1860. *Mozley & W.*

Time the essence of the contract. An expression particularly common in equity jurisprudence, relating to the question whether, in the construction of an agreement, punctual performance — performance on the very day named — can be claimed as matter of right, or whether some moderate delay may be overlooked. Where a contract specifies a time for its completion, or something to be done towards it, then, if time is of the essence of the contract, the non-performance by either party of the act in question by the time so specified will entitle the opposite party to regard the contract as broken. On the other hand, if time is not of the essence, some delay may not warrant a rescission. Whether time be or be not of the essence of the contract, must, in the absence of express words, be gathered from the general character of the contract and the surrounding circumstances.

Time immemorial, or **out of mind.** Beyond legal memory. See MEMORY.

Time-policy. A policy of marine insurance in which the risk is limited, not to a given voyage, but to a certain fixed term or period of time. In such policies the risk insured is entirely independent of the voyage of the ship.

TIPSTAFF. An officer appointed by the marshal of the king's bench to attend upon the judges with a kind of rod or staff tipped with silver, who take into their custody all prisoners, either committed or turned over by the judges at their chambers, &c. *Jacob.*

Tipstaves were formerly appointed by the marshal of the king's bench prison, or by the warden of the fleet prison, but now, under queen's prison discontinuance act, 1862 (Stat. 25 & 26 Vict. ch. 104), are appointed by the respective chiefs of the chancery, queen's bench, common pleas, and exchequer divisions of the court. They attend the king's courts with a staff or rod tipped with silver, and take into their charge all prisoners committed by the court. *Brown.*

TITHES. The tenth part of the annual product of the labor of the community, accorded to the clergy as their compensation.

In early books, tithes seem to have been regarded as an ecclesiastical inheritance or property which the clergy had in the earth's produce, as collateral to their estate in the lands. A more modern view is that they are to be deemed a fixed part of the year's wealth, which the law of England assigns to the clergy.

Tithes are a species of incorporeal hereditaments, defined to be the tenth part of the increase yearly arising and renewing from the profits of the lands, from the live-stock upon lands, and from the personal industry of the inhabitants. The first species of tithe is usually called *predial*, and consists of corn, grass, hops, wood, and the like; the second, *mixed*, as of wool, milk, pigs, &c., consisting, it will be observed, of natural products, but nurtured and preserved in part by the care of man; the third, *personal*, as of manual occupations, trades, fisheries, and the like. The distinction between predial and mixed tithes is, that predial tithes (so called from *prædium*, a farm) are those which arise immediately out of the soil, either with or without the intervention of human industry; and mixed are those which arise immediately through the increase or produce of animals which receive their nutriment from the earth and its fruits. Personal tithes are so called because they arise entirely from the personal industry of man.

In addition to this distinction, tithes have been divided into two classes; viz., *great* and *small*, — the former comprehending, in general, the tithes of corn, peas, beans, hay, and wood; the latter, all other predial, together with all mixed and personal, tithes. Tithes are great or small, according to the nature of the things which yield the tithe, without reference to the quantity. Thus clover grass made into hay is of the nature of all other grass made into hay, and consequently is a great tithe; but, if left for

seed, its nature becomes altered, and, like other seed, it becomes a small tithe. *Brown.*

Great tithes having generally belonged to the rector, and small tithes to the vicar, the former have been called parsonage tithes, the latter vicarage tithes.

Almost all the tithes of England and Wales are now commuted into rent-charges, under the tithes commutation act, Stat. 6 & 7 Wm. IV. ch. 71, and the various statutes since passed for its amendment. See *Brown; Jacob;* 2 *Bl. Com.* ch. 3.

Tithe rent-charge. A rent-charge established in lieu of tithes, under the tithes commutation act, 1836 (Stat. 6 & 7 Wm. IV. ch. 71), as between landlord and tenant, the tenant paying the tithe rent-charge is entitled, in the absence of express agreement, to deduct it from his rent, under section 70 of the above act. And a tithe rent-charge unpaid is recoverable by distress as rent in arrear. *Mozley & W.*

TITHING. One of the civil divisions of England, being a portion of that greater division called a hundred. It was so called because ten freeholders with their families composed one. It is said that they were all knit together in one society, and bound to the king for the peaceable behavior of each other. In each of these societies there was one chief or principal person, who, from his office, was called teothing-man, now tithing-man. *Brown.*

Tithing-man. During the Saxon times, the officer who was appointed to preside over tithings and to examine and determine all causes of small importance between the inhabitants of adjacent tithings was so called. In the present day, however, tithing-men are a kind of constables, elected by parishes, and sworn in their offices in the court-leet, and sometimes by justices of the peace, &c. *Brown.*

TITLE. 1. In its application to property, is a term very difficult of definition. In modern use, it is nearly interchangeable with ownership, and not far removed in meaning from right (the noun) and interest (in its sense of a right); yet the constant association of the three words in the one phrase, "right, title, and interest," evinces a general feeling that each adds something to the sense conveyed by the other. See INTEREST. A definition very commonly given in the old books was, in substance: the means whereby the owner of land has enjoyment of it. *Co. Litt.* 345 *b*; 2 *Bl. Com.* 195; *Cruise Dig.* tit. 29, ch. 1, § 2. But this definition would be unsatisfactory at the present day, both because it embraces ownership of real property only, whereas title is now applied very readily to personalty, and because the word "means" seems to point to remedies or acts for obtaining possession, whereas title, in modern usage, points to the right rather than the actuality of ownership.

To say that title is such a claim to the exclusive control and enjoyment of a thing as the law will recognize and enforce, perhaps expresses the idea conveyed by the modern use of the word.

A person's claim to the exclusive control and enjoyment of a thing may be unquestionably clear; or open to question, yet sustainable; or defective and unwarrantable. These grades are, respectively, distinguished by the phrases, "a *good* title," which is really little else in meaning than title emphasized or presented as unembarrassed by any defects or objections; "a *doubtful* title," which imports a claim the grounds of which are not certain, or which is subject to objections by which it may perhaps be overthrown; and "a *bad* title," which is much the same as saying "no title," and imports a claim attended by some indicia of lawful grounds, but really unsustainable, when challenged or examined. Moreover, there is the expression "a *marketable* title," which means, originally, such a title as can ordinarily be sold, will be accepted by a purchaser; but has come, under the practice of courts of equity in compelling specific performance and enforcing judicial sales, to mean such a title as a purchaser ought to accept, such an one as a court of equity, making due allowance for reasonable objections and overruling frivolous ones, will compel a buyer to take.

Title is when a man hath lawful cause of entry into lands whereof another is seised; and it signifies also the means whereby a man comes to lands or tenements, as by feoffment, last will and testament, &c. The word title includes a right, but is the more general word. Every right is a title, though every title is not a right for which an action lies. *Jacob.*

The lowest and most imperfect degree of title consists in the mere naked possession or actual occupation of the estate, without any apparent right, or any shadow or pre-

tence of right, to hold and continue such possession; which naked possession, by length of time, and negligence of him who hath the right, may by degrees ripen into a perfect and indefeasible title; and, at all events, without actual possession, no title can be completely good. The next step to a good and perfect title is a right of possession, which is either actual or apparent, and which may reside in one man while the actual possession is in another. This actual possession may be recovered by him who has the right of possession, if sued for within a competent time; otherwise, he will have nothing left in him. There was formerly a third stage or degree; viz., the mere right of property, without even possession, or the right of possession. By the recent changes that have been effected in the laws relating to real property, under the provisions of 3 & 4 Wm. IV. ch. 27, by the abolition of all real and mixed actions, with the exception of *quare impedit* and actions for dower, the stages or degrees requisite to complete the title to lands and tenements are reduced to two, — viz., possession and a right of possession; for where the latter does not exist, or where, in other words, there is not a right of entry upon which an ejectment may be maintained, there are not only no means by which land may be recovered, but the above statute extinguishes with the remedy all right and title to the lands. *Tomlins.*

Title may be defined generally to be the evidence of right which a person has to the possession of property. The word title certainly does not merely signify the right which a person has to the possession of property; because there are many instances in which a person may have the right to the possession of property and at the same time have no title to the same. In its ordinary legal acceptation, however, it generally seems to imply a right of possession also. It therefore appears, on the whole, to signify the outward evidence of the right, rather than the mere right itself. Thus, when it is said that the "most imperfect degree of title consists in the mere naked possession or actual occupation of an estate," it means that the mere circumstance of occupying the estate is the weakest species of evidence of the occupier's right to such possession. The word is defined by Sir Edward Coke thus: *Titulus est justa causa possidendi id quod nostrum est* (1 *Inst.* 34); that is to say, the ground, whether purchase, gift, or other such ground of acquiring, *titulus* being distinguished in this respect from *modus acquirendi*, which is the *traditio*, *i.e.* delivery or conveyance of the thing. *Brown.*

The word title, as applied to lands or goods, signifies either a party's right to the enjoyment thereof, or the means whereby such right has accrued, and by which it is evidenced; or, as it is defined by Blackstone, the means whereby an owner hath the just possession of his property. (2 *Bl. Com.* 195–199; 1 *Steph. Com.* 384–387; *Wms. R. P.* Pt. V.) When persons speak of a man having a good title to his property, they mean that the evidence of his right is cogent and conclusive, or nearly so; and when a bad title is spoken of, the meaning is, that the evidence is weak and insufficient. A forty years' title is now, in general, sufficient, in the case of sale of lands, under the vendor and purchaser act of 1874 (Stat. 37 & 38 Vict. ch. 78). *Mozley & W.*

There are three modes of acquiring a title to realty, — by operation of law, by purchase as contradistinguished from law, and by law and purchase. Title by operation of law is either by descent or prescription; title by purchase is either by forfeiture or alienation; title by law and purchase is by escheatage. The text-writers also mention occupancy, which is described as the taking possession of property which did not at the time belong to anybody; but this is now entirely exploded. 1 *Vict.* ch. 26, §§ 3, 6.

The title to things personal may be acquired or lost by occupancy, invention, prerogative, forfeiture, custom, succession, marriage, judgment, gift or grant, contract, bankruptcy or insolvency, testament, administration. *Wharton.*

There are, at least, three species of doubtful titles: 1, Where the title is doubtful by reason of some uncertainty in the law itself; 2, where the doubt is as to the application of some settled principle or rule of law; and, 3, where a matter of fact upon which a title depends is either not in its nature capable of satisfactory proof, or, being capable of such proof, is yet not satisfactorily proved. It may be safely asserted that there is no defect which more frequently renders it impossible for a person who has a good title to prove it, or enables a party who has a bad title fraudulently to exhibit a colorable ownership than the want of evidence of the identity of the parcels. A good title is produced whenever it appears that, upon certain acts done, the legal and equitable estates in the property contracted for will become vested in the purchaser; those acts being such as the vendor either himself can perform, or cause to be performed. *Wharton.*

An obligation to make a "lawful title" to lands binds the obligor for a perfect title, with a general warranty. A tender of a deed without the signature of the obligor's wife was held not sufficient, in Clark *v.* Redman, 1 *Blackf.* 379.

Title, in a contract to convey a title, means the legal estate in fee, free from all valid claims, liens, &c. Jones *v.* Gardner, 10 *Johns.* 266.

In a statute excluding from jurisdiction of justices actions wherein the title to lands, &c., shall come in question, the term title is to be understood in a strict technical sense. An action wherein the title comes in question is, in the meaning of the statute, one in which something more is brought

into controversy than the actual occupation, or mere *pedis possessio* It is one which involves the *justa causa possidendi.* Gregory *v.* Kanouse, 11 *N. J. L.* 62.

The word title, in such a statute, means right to the possession. The statute intends to forbid a justice from trying the title which was drawn in question in the common-law action of ejectment. It does not extend to the mere right of property, on the one hand, nor to the mere actual possession, on the other. If an action of trespass to lands is brought and contested on the mere question of which party was in possession, a justice may entertain it. Ehle *v.* Quackenbos, 6 *Hill*, 537.

Title-deed. Deeds evidencing a person's right or title to lands, are called his title-deeds, otherwise muniments of title. The possession of the title-deeds is of importance, as the land cannot be sold without them. Thus, what is called an "equitable mortgage" is generally effected by a deposit of title-deeds. Moreover, any mortgagee who negligently allows his mortgagor to retain the title-deeds, and to raise money on a second mortgage of the land by fraudulently concealing the first mortgage, will have his security postponed to that of the second mortgagee. *Mozley & W.*

Title of entry. Is when one seised of land in fee makes a feoffment thereof on condition, and the condition is broken; after which the feoffor hath title to enter into the land, and may do so at his pleasure; and by his entry the freehold shall be said to be in him presently. And it is called title of entry, because he could not have a writ of right against his feoffee upon condition, for his right was out of him by the feoffment, which cannot be reduced into entry; and the entry must be for the breach of the condition. (*Cowel.*) *Jacob.*

2. Applied to persons, a title is an addition to a person's name, signifying that he holds some dignity, honor, or office. Titles, in this sense, are, throughout the United States, matters of mere courtesy and custom, except that a public officer may probably have the legal right, while in office, to connect with his name a designation of his office; and, if so, a title may be to that extent a matter of right. In England, titles are hereditary, and involve important privileges and precedence.

Title of a clergyman. This expression signifies some certain place where a clergyman may exercise his functions. A title, in this sense, is the church to which a priest was ordained, there constantly to reside. And there are many reasons why a church is called *titulus.* One is because in former days the name of the saint to whom the church is dedicated was engraved on the porch, as a sign that the saint had a title to that church; from whence the church itself was afterwards denominated *titulus.* (*Concil. Lond. anno* 1025.) Anciently, a title of clergy was no more than entering their names in the bishop's roll; and then they had not only authority to assist in the ministerial function, but had a right to the share of the common stock or treasury of the church; but since, a title is an assurance of being preferred to some ecclesiastical benefice, &c. *Jacob.*

Before a candidate for holy orders can be ordained, he must obtain what is termed a title (which is either an appointment to a benefice actually vacant, or to a curacy), and also a letter from the clergyman who gives the title, signifying the reason which obliges him to appoint a curate. *Eccl. Leg. Guide*, 4.

Title to orders. In English ecclesiastical law, a title to orders is a certificate of preferment or provision required by the thirty-third canon, in order that a person may be admitted into holy orders, — unless he be a fellow or chaplain in Oxford or Cambridge, or master of arts of five years' standing in either of the universities, and living there at his sole charges; or unless the bishop himself intends shortly to admit him to some benefice or curacy. 2 *Steph. Com.* 661.

3. In application to books, documents, statutes, and the various works involving any literary arrangement, title has two meanings. It signifies the caption, designation, heading, or name of the work as a whole, and also denotes one of the larger or general divisions in which the more extended works are arranged. "The title" of a statute is that caption or heading which indicates its general nature and purpose, and by which it is distinguished from other acts, or other chapters of the statute-book. Moreover, some of the more extended and complex statutes are divided into parts, titles, and chapters, as well as sections. Treatises on the law have each a title, or title-page, by which the work as an entirety is known; and it is also common, after dividing the work into books or parts, to make a second division (before coming to chapters and sections), into titles. In lesser writings, not requiring extended and marked subdivisions, title is only used as the caption or heading of the document.

In so far as title is employed, as to statutes, to denote a subdivision, its use is purely a matter of literary judgment; but, in its sense of a heading or name to the entire act, it has acquired a somewhat definite legal character, under con-

stitutional provisions, in many of the states, that acts of the legislature generally, or acts of specified kinds, such as special acts, shall contain but one subject, which shall be expressed in the title. The title to an act is, by custom, placed at the head of all its provisions, and usually reads thus: An act to incorporate the city of ——; an act to amend an act entitled an act to regulate highways; or the like. And, under such a constitutional requirement as is above mentioned, the title may exercise an important influence over the construction and validity of the act as a whole; the courts may feel compelled to adjudge an important provision unconstitutional, although its subject-matter is within the power of the legislature, simply because it is not indicated in the title. But, until these constitutional rules were prescribed, the courts did not consider themselves bound by the title of an act in construing it. They would look at the title to aid in understanding the legislative intent; but the title was considered not to be any part of the act, and was not controlling, in construction.

The title of an act of parliament is its heading, and sometimes it has also a "short title," more condensed than the heading, mentioned in the body of the act, as the name by which it is to be known. *Mozley & W.*

Title of a cause. This phrase signifies the individual designation by which any particular suit or proceeding in the courts is known and distinguished from all others. The title of a cause usually consists of the name or style of the court, the venue, and some designation of the parties. If the proceeding is on behalf of one party only, the title is usually formed by following the name of the court, with the name of the petitioner or actor, — having some such prefix as, In the matter of, or *In re*. In the more common case of an action or suit between adversary parties, the title embraces, after the name of the court, the names of the plaintiffs and defendants; but the manner of arranging these varies in different jurisdictions. In New York state, for example, under the former practice and usage, the party who was the actor in each step or proceeding in the cause, entitled that paper, placing his own name first, and his adversary's afterward. Thus, if the action were brought by Kent against Story, the declaration would be entitled: Supreme court, county of ——. JAMES KENT, plaintiff, against (*versus*) JOSEPH STORY, defendant. But the plea would be served, entitled (after the court): JOSEPH STORY, defendant, at the suit of (*ad sectam*) JAMES KENT. This explains why, in the New York reports, a case is sometimes seen with *ads.* between the parties' names instead of *vs.*; the particular proceeding reported came before the court, the defendant being actor. Moreover, a writ of error to review a judgment was entitled as a new action; the party seeking review — whether he was plaintiff or defendant below — being plaintiff in error in the court of errors. Hence, where plaintiff recovered judgment below, and defendant sought a review, the names of the parties appeared reversed in the proceedings on error; and they were entitled (after naming the court): JOSEPH STORY, plaintiff in error, against JAMES KENT, defendant in error. This is the reason why, in the New York reports, so many cases appear reported in the supreme court under names given in one order, and in the court of errors under the same names, but reversed in order. Thus, the decision in the case of *Kent* v. *Story*, in one volume of Wendell (supreme court), might be found reversed (or affirmed) in a later volume (court of errors), under the title, *Story* v. *Kent*. This system may probably prevail, in most of its details, in other states, where the incidents of the old practice are preserved. But it has been entirely changed, in New York, under the code of procedure of 1848 and 1849. That enactment introduced the rule that the title of a cause should, from the outset, and through all the proceedings, present the plaintiff's name first, and the defendant's last. Whether the particular pleading or paper served emanates from the plaintiff or from the defendant, and whether the cause is pending in the court of original jurisdiction, or has been carried up by appeal, makes no difference, — the same title is used

throughout. This has, in civil actions, dispensed with the refinements and niceties formerly observed in entitling papers. The like principle of employing the same title for a cause throughout has been adopted in most of the states which have enacted codes of procedure.

The expression, title of an affidavit, title of a pleading, &c., means simply the title of the cause or proceeding written at the head of the document.

The title of an affidavit embraces its entire heading. Bowman *v.* Sheldon, 5 *Sandf.* 657.

The title of an affidavit consists of two parts: the style of the court (or division of the high court of justice) in which the affidavit is to be used; and the names of the parties to the action or other proceeding. *Lush Pr.* 879, 880.

4. In the law of trade-marks, a title may become a subject of property; as one who has adopted a particular title for a newspaper, or other business enterprise, may, by long and prior user, or by compliance with statutory provisions as to registration and notice, acquire a right to be protected in the exclusive use of it. See TRADE-MARK.

TITULAR. Entitled. Seems to be used both as adjective and noun.

Titulars of erection. Persons who in Scotland, after the reformation, obtained grants from the crown of the monasteries and priories then erected into temporal lordships. Thus the titles formerly held by the religious houses, as well as the property of the lands, were conferred on these grantees, who were also called lords of erection and titulars of the teinds. *Bell.*

They are the same as "impropriators" in England. *Wharton.*

TITULUS. 1. The civil law and old law-Latin words for title (*q. v.*), as in the following extract from Lord Coke: *Titulus est justa causa possidendi id quod nostrum est; dicitur a tuendo.* 8 *Coke*, 153. A title is the just right of possessing that which is our own; it is so called from *tuendo*, defending.

2. Also, in old ecclesiastical law, *titulus* signified a church, in the sense of a building, an edifice devoted to religious uses.

TO. The word "to" (also "from") has not a precise, fixed, legal meaning, but may signify within or into; as where a railroad is chartered to run to a city designated. Hazlehurst *v.* Freeman, 52 *Ga.* 244.

Where a railroad company, by its charter, is authorized to bring its road to a city, and acquire property within it, the right to enter the city is also conferred. Moses *v.* Pittsburgh, &c. R. R. Co., 21 *Ill.* 516.

But generally "to" (as well as "from") is a word of exclusion, unless the context clearly shows a different sense intended. Bradley *v.* Rice, 13 *Me.* 198.

A boundary "on" a stream, or "by" a stream, or "to" a stream, includes the flats at least to low-water mark, and in many cases to the middle thread of the river. There may, however, be a distinction when the boundary is "to the bank;" that in such cases the boundary is or may be limited to the very bank, and may not extend into the stream, or the flats thereof. 3 *Sumn.* 178.

TO WIT. That is to say; namely; scilicet; videlicet, *qq. v.*

TOBACCO. The term granulated tobacco, as used in internal revenue laws, is not synonymous with snuff, but refers to certain kinds of chewing and smoking tobacco. Venable *v.* Richards, 1 *Hugh.* 326.

Tobacconist. Any person, firm, or corporation whose business it is to manufacture cigars, snuff, or tobacco in any form. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 120.

TOFT. A place or piece of ground where a house formerly stood, but which is decayed or casually burnt, and not re-edified. *Jacob.*

TOKEN. 1. A material visible sign of the existence of a fact. Thus, cheating by false tokens is perpetrating a fraud by employment of some material device, some cunningly devised false thing, in corroboration of one's lying representations.

Token, as used in a statute punishing false pretences, signifies "a sign," "a mark," "a symbol." And the term "written token" will include matter printed or lithographed. Jones *v.* State, 50 *Ind.* 473, 476.

2. Token is also applied to small coins, such as used to be privately struck (this is now generally disallowed), and to some extent passed current as money.

TOLERATION. In a strict or legal sense, seems to mean that permission to exist, which, in a state where one form of religion is established and upheld by law, may, from motives of state policy, be accorded to other forms of belief and worship. This is quite different from that equality of right which, throughout the United States, all sects enjoy.

Toleration act. The Stat. 1 Wm. & M. st. 1, ch. 18, passed in 1688–89. By this act (which was confirmed by Stat. 10 Anne, ch. 2), persons dissenting

from the church of England, except Papists, and persons denying the Trinity, were allowed freely to assemble for religious worship according to their own forms, and in places of meeting duly certified, on condition of their taking the oaths of allegiance and supremacy, and making a declaration against transubstantiation, and (in the case of dissenting ministers) subscribing also to the Thirty-nine Articles. By subsequent statutes, the principle of the act has been extended.

TOLL, *v.* To bar, defeat, or take away; thus, to toll the entry, means to deny or take away the right of entry. Tolled: barred; taken away.

TOLL, *n.* A Saxon word, signifying, properly, a payment in towns, markets, and fairs for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the same. The word is used for a liberty as well to take as to be free from toll. *Jacob.*

Toll means an excise of goods; a seizure of some part for permission of the rest. It has two significations: A liberty to buy and sell within the precincts of the manor, which seems to import as much as a fair or market; a tribute or custom paid for passage. *Wharton.*

There were several kinds of tolls. Toll-*traverse* was a claim to take toll for every beast driven across one's ground; or a toll which a man paid for passing over the soil of another in a way not a high street. *Thorough*-toll was where a town prescribes to have toll for such a number of beasts, or for every beast that goeth through their town, or over a bridge or ferry maintained at their cost. But the words toll-thorough and toll-traverse were used promiscuously. *Turn*-toll was toll paid for beasts driven to market to be sold, and brought back unsold. *Jacob.*

Toll is a Saxon word, originally signifying a payment in towns, markets, or fairs for goods and cattle bought and sold there, and now popularly applied to the charges which canal and railroad companies require for the transportation of goods. It does not necessarily import an immediate payment, — only a compensation for the privilege or service granted: the period of payment depends on the understanding of the parties. Pennsylvania Coal Co. *v.* Delaware & Hudson Canal Co., 29 *Barb.* 589; 1 *Keyes*, 72.

The expression "immediate toll" signifies a charge made for travel upon a turnpike between two toll-gates, or, in other words, against one who comes upon the road, travels upon it, and turns off without requiring to pass through any toll-gate. Hollingworth *v.* State, 29 *Ohio St.* 552.

TOLLAGE. A charge in the nature of a toll. Apparently, the noun toll had, in its earliest use, the sense of a franchise or liberty to keep a fair or market, for resort to and trade in which a payment might be exacted (see *Burrill*); and then tollage was the term formed, in accordance with many analogies (such as poundage, postage, &c.), for the charge imposed. Afterwards, toll came to be used for the charge itself, as well as for the franchise of taking it.

TOLLBOOTH. 1. A house or booth for collection of tolls or market charges; a custom-house; also, a prison.

Dr. Jamieson conjectures that the word tollbooth, originally signifying a place of custom, was transferred in its application to the place of confinement for those who refused to pay custom, and thence to prisons generally. The Tollbooth of Edinburgh was built by the citizens in the year 1561, for the accommodation of the parliament and courts of justice, and for the confinement of debtors and malefactors. From the year 1640 this building was used solely for a jail, till its removal in 1817. (*Arnot; Eng. Encycl.*) *Mozley & W.*

TOLT. An old English writ, whereby a cause depending in a court-baron is taken and removed into the county court. As this writ moves the cause to the county court, so the writ *pone* removes a cause from thence into the court of common pleas, &c. *Jacob.*

TON. A measure of weight, somewhat differently fixed by different statutes, at two thousand pounds avoirdupois (see 1 *N. Y. Rev. Stat.* 609, § 35); or at twenty hundredweight, each hundredweight being one hundred and twelve pounds avoirdupois (see act of congress of Aug. 30, 1842, ch. 270, § 20).

It is not true that tons in weight and tons in measurement are the same thing; that the expressions are simply different terms to indicate the same idea. A ton, in measurement, is forty cubic feet. A ton, in weight, is 2,240 pounds. A vessel having the capacity of 1,000 tons measurement has space to the extent of 40,000 cubic feet. This has nothing to do with the question of the weight she can carry. Roberts *v.* Opdyke, 40 *N. Y.* 259.

The word ton, when used in a contract, without explanation, means 2,000 lbs. So held, under statute, in Many *v.* Beekman Iron Co., 9 *Paige*, 188. Compare The Miantinomi, 3 *Wall. Jr.* 46.

Two thousand pounds avoirdupois constitute a ton, in Pennsylvania. Weaver *v.* Fegely, 29 *Pa. St.* 27.

TONNAGE. The capacity of a ves-

sel for cargo; determined with remote reference to the actual carrying capacity, and by a mode of measurement prescribed by positive law.

The tonnage of a vessel is by no means a synonymous term with the number of tons in weight which she may carry. It is an official mode of measurement of the cubical contents, the carrying capacity in bulk, of the ship, prescribed for the purpose of aiding the administration of the registration and shipping laws. Ships are classed and ranked, for many legal purposes, according to their tonnage, which is ascertained by an official measurement, which does not profess to give the carrying capacity by weight at all; and is not understood to give it by measurement accurately, but according to an artificial system. Still, all vessels of a nation being measured upon the same system, they can be rated by it with advantage, although it does not attain accuracy.

The tonnage of a vessel is her internal cubical capacity, in tons. Inman Steamship Co. *v.* Tinker, 94 *U. S.* 238.

Tonnage duty, or **tax**. A charge or pecuniary exaction, estimated at a given rate per ton.

There seem to have been customs or imposts granted to the crown, in England, upon merchandise imported or exported, which were reckoned upon the tons in weight of the goods, and which bore the name of tonnage, or tunnage, duty. In America, the term is generally used for a tax imposed on vessels according to their cubical tonnage.

The term tonnage duty, as used in the constitutional prohibition upon state laws imposing tonnage duties, describes a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it is not to be taken in this restricted sense in the constitutional provision. The general prohibition upon the states against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. The prohibition extends to any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty. Steamship Co. *v.* Portwardens, 6 *Wall.* 31.

A tonnage duty is a duty imposed on vessels in proportion to their capacity. The vital principle of a tonnage duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry or the actual weight of the thing itself. Inman Steamship Co. *v.* Tinker, 94 *U. S.* 238.

A tonnage tax is defined to be a duty levied on a vessel according to the tonnage or capacity. It is a tax upon the boat as an instrument of navigation, and not a tax upon the property of a citizen of the state. The North Cape, 6 *Biss.* 505.

The duty imposed by the ordinance of the city council of Charleston, which provides that steam-packets and other vessels trading steadily and performing regular successive voyages to that port from the adjoining states of North Carolina and Georgia, shall pay to the harbor-master one cent per ton once every three months, or every quarter, is a tonnage duty; and the ordinance is in violation of section 10, article 1, of the constitution of the United States, by which it is ordained that "no state shall, without the consent of congress, lay any duty of tonnage." Alexander *v.* Wilmington, &c. R. R. Co., 3 *Strobh.* 594.

A city ordinance imposing a wharfage tax each trip upon every boat or vessel landing or anchoring at or in front of the landing or wharf of the city, measured by the capacity of the boat or vessel, not to exceed $20 a trip, is void; because in conflict with that clause of the constitution of the United States which forbids a state to levy any duty of tonnage without the consent of congress. North-western, &c. Co. *v.* City of St. Paul, 3 *Dill.* 454.

Although a city cannot levy a tax in the nature of a tonnage duty, or by way of discrimination, upon vessels or commerce, yet a city, under legislative authority, or a riparian owner as such, may charge reasonable compensation for the use of expensive and artificial conveniences which a vessel may use at its option; there being ample space elsewhere for it to land within the harbor where no artificial or expensive improvements have been made. North-western Union Packet Co. *v.* City of St. Louis, 23 *Int. Rev. Rec.* 33.

A municipal corporation having, by its charter, an exclusive right to make wharves on the banks of a navigable river upon which it is situated, collect wharfage, and regulate wharfage rates, can, consistently with the constitution of the United States, charge and collect from the owner of enrolled and licensed steamboats, which moor and land at a wharf constructed by it, wharfage proportioned to their tonnage. Packet Co. *v.* Keokuk, 95 *U. S.* 80.

Wharfage fees thus levied do not constitute a tax, but are to be regarded simply as compensation exacted for the use of the wharves. An ordinance requiring the payment of wharfage fees is not unconstitutional, even though it exacts payment from vessels when they are moored at places where no wharves have been provided. The fact that the wharfage fee is graduated by the tonnage of the vessel does not constitute a duty on tonnage, within the mean-

ing of the constitution of the United States forbidding the levying of such an impost. Keokuk *v.* Keokuk Packet Co., 45 *Iowa*, 196.

TONTINE. A species of life annuity, the invention of which is ascribed to Lorenzo Tonti, an Italian, by whom it was propounded at about the middle of the seventeenth century, as a mode by which the governments of the day might obtain loans. There seem to be several forms in which, from time to time, tontines have been arranged; but the general idea is that property is loaned or owned or invested for the benefit of a number of persons, who at first receive its income divided among all; but, when any one dies, his share goes not to his heirs or representatives, but to increase the sum divisible among the surviving members. As the number of members diminishes by successive deaths (no new members are created), the annuity of each is increased, until at length the last survivor takes the whole income, or, it may be, the whole principal, if such were the terms of the foundation.

TOOL. The statutes of many states contain provisions exempting from execution the tools of a debtor's trade; or otherwise securing one's tools. This has given rise to some decisions as to the meaning of the word.

An apparatus for printing, consisting of a printing-press, cases, types, &c., may be "tools" exempted from execution under the statute; but, in order to be thus exempted, they must be necessary for the upholding of life; and whether they are of such description is a question of fact for the jury. Patten *v.* Smith, 4 *Conn.* 450.

A lawyer's library is not exempt from sale on execution under the act of 1822, exempting the common tools of a debtor used in his trade. Lenoir *v.* Weeks, 20 *Ga.* 596.

Implements of husbandry necessary for tilling land (as wheels of a cart, and the gear used in moving it with oxen), are not "tools," within the exemption law. Daily *v.* May, 5 *Mass.* 313.

The word tools, in a statute exempting the tools of a mechanic from execution, means simple instruments, such as are used by hand, and does not include large articles, such as printing-presses, looms, forges, &c. Buckingham *v.* Billings, 13 *Mass.* 82.

A printer's press, types, cases, &c., are not tools, and therefore not exempt. *Ib.*; Danforth *v.* Woodward, 10 *Pick.* 423.

The "tools" exempt are such as are necessary to enable the debtor to carry on his trade conveniently, and in the usual manner. Tools used by an apprentice or journeyman in jewellers' business were exempt, though the master (the debtor) worked principally on watches; his principal business being that of a jeweller. Howard *v.* Williams, 2 *Pick.* 80.

A violin and bow of a debtor, whose sole business is that of a musician, as a member of a military and quadrille band, and who obtains most of his support by playing upon his violin, are exempt from attachment, if the value of all his musical instruments is less than $100. Goddard *v.* Chaffee, 2 *Allen*, 395.

Dental instruments are within the meaning of "mechanical tools," and are therefore exempt from execution, upon a judgment rendered for the purchase-money thereof. Maxon *v.* Perrott, 17 *Mich.* 332.

A dentist's instruments are not within the terms of the statute, exempting from execution the "tools of a mechanic necessary for carrying on his trade." Whitcomb *v.* Reid, 31 *Miss.* 567. See also Grimes *v.* Bryne, 2 *Minn.* 89.

A daguerreotype apparatus, which the owner has ceased to use for taking likenesses, and is using only to teach the art to another, is not exempt from attachment as a "tool of his occupation." Norris *v.* Hoitt, 18 *N. H.* 196.

A threshing-machine five rods long, and requiring eight horses and ten men to work it, is not a "working tool," within Stat. April 11, 1842. Ford *v.* Johnson, 34 *Barb.* 364.

The surgical instruments of a physician are his "tools," and therefore exempt from execution. Robinson's Case, 3 *Abb. Pr.* 466.

So is a watch or clock, where necessary to the prosecution of the debtor's business. Bitting *v.* Vandenburgh, 17 *How. Pr.* 80.

The printing or stamping blocks of a painter of oil-cloths, which cost from $1,000 to $1,500, used in a business requiring peculiar and extensive buildings, numerous workmen, and some capital, are not "necessary tools of a tradesman" exempt from execution. Richie *v.* McCauley, 4 *Pa. St.* 471.

In construing a statute which exempts from attachment, in favor of a housekeeper, "the working tools necessary for his usual occupation," to the value of $50, and in favor of any debtor, "his working tools," to the same value, the same meaning is to be attached to the language in both instances, and should be construed to include not only all tools which are indispensably necessary to the mechanic, or even such as are in use by individuals of the same craft, but also such as the mechanic has adopted to ease and diminish his labor, and not only his working tools, so called in the dictionary and by learned men, but such as are so called by the craft, such as he uses, and has set apart for the advantageous prosecution

of his business. Healy *v.* Bateman, 2 *R. I.* 454.

Under the statute exempting from attachment "such suitable apparel, bedding, tools, &c., as may be necessary for upholding life," a farmer may have, exempt from attachment, such simple mechanic tools as are indispensable for repairing farming implements, and which he procures for his own use, and which he in fact uses as a mechanic. Garrett *v.* Patchin, 29 *Vt.* 248.

TORT. A civil or private wrong; an injury not involving a breach of contract. Tortious: having the qualities of a tort; unlawful and injurious to individuals; wrongful.

The word tort is especially used to signify a civil, actionable wrong, such as libel, assault, trespass, &c. An action for such a wrong is called an action of tort. Torts are such wrongs as are in their nature distinguishable from mere breaches of contract, and are often mentioned as of three kinds; viz. nonfeasance, being the omission to do some act which a person is bound to do; misfeasance, being the improper doing of some act which he may lawfully do; or malfeasance, being the commission of some act which is positively unlawful. Actions founded upon tort are sometimes described as actions *ex delicto*, in distinction from actions *ex contractu*, which are founded upon contract. The common-law forms of action generally founded upon tort are trover, detinue, trespass, trespass on the case, and replevin; whilst debt, assumpsit, and covenant belong to the class of actions founded upon contract.

The general modern law upon torts, which has become one of the most important branches, will be found compactly and lucidly summed up in *Bigelow on Torts.*

Addison adopts Justice Bayley's statement (8 *Barn. & C.* 362) of the essential elements of a tort: To constitute a tort, two things must concur, — actual or legal damage to the plaintiff, and a wrongful act committed by the defendant. Actual loss sustained by plaintiff is not, upon modern views, invariably necessary to sustain an action; if the plaintiff's legal right is clear, and defendant has unlawfully violated it, the law will presume damage, — that is, loss, — so far as to allow an action, and refer the question of an allowance in damages to the sound judgment of a jury. Thus a recovery may be had on the ground of tort, although no actual, mensurable damage has ensued. But the converse cannot be asserted. A wrongful act or omission, a violation or neglect of a legal right, is an essential element; if no legal right is infringed, no action is maintainable, however great the loss. A loss sustained through a rightful or innocent act or omission of another, is *damnum sine injuria. Add. Torts*, 2.

According to the explanations of Collett, tort is a term of art in English law, and means that which is wrested or crooked; consequently, that which is contrary to right. The word has been described as a wrong independent of contract; an invasion of rights, either of person, property, liberty, or reputation. The civil law called such wrongs delicts, and defined them as spontaneous; that is, free or voluntary actions or omissions contrary to law. The wrong being an act which is against right or law, the obligation to make reparation for the damage arises from the fault and not from the intention; and conversely, a thing which is not a legal injury or wrong is not made actionable by being done with a bad intent. In many cases, to constitute an act a legal wrong or injury, the existence of a malicious intent is essential. The principle pervading the law of torts is, that all persons are responsible for all the natural and legal consequences resulting from acts or omissions by them in violation of the rights of others. Thus there are two ingredients in a tort: the *injury* or legal wrong, which is always necessary; and the *damage*, which is generally present, and sometimes said to be essential. Damage without injury is never actionable. But injury, though without damage, is actionable; or rather an injury imports damage, though there is no pecuniary loss, and actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to show the violation of a right, in which case the law will presume damage. *Collett Torts*, 1.

Tort, which is from the Latin *tortus*, is a French word for injury or wrong. A wrong

or injury is properly called tort, because it is something wrested or crooked, and contrary to that which is right and straight. (*Co. Lit.* 158.) *Jacob.*

Tortious operation of a feoffment. When a tenant for life made a feoffment in fee of the lands of which he was tenant for life, a freehold of inheritance passed to the feoffee, but it was a freehold by wrong, devesting the person in reversion or remainder of his estate, and leaving him a right of entry, of which he might avail himself at once.

But feoffments by tenants in tail (or discontinuances, as they were called) operated to take away not merely the estate of the party entitled in remainder, but also his right of entry without action; so that he was driven to his action to recover his estate when the time came. This effect of a discontinuance was abolished, in 1833, by Stat. 3 & 4 Wm. IV. ch. 27, § 39; and such meaning as was left in the doctrine of the tortious operation of a feoffment was abolished, in 1845, by section 4 of the act to amend the law of real property (8 & 9 Vict. ch. 106). *Mozley & W.*

Tort-feasor. A wrong-doer; one who has committed a tort.

TORTURE, *n.* Corporal suffering, inflicted to extort confession from suspected criminals, or in the indulgence of cruel and malevolent motives.

The word recurs in the history of jurisprudence, denoting pain inflicted on persons by authority now obsolete; also in statutes of modern introduction, relative to prevention of cruelty to animals. The verb "to torture" is seldom met in connection with the first-mentioned meaning, but it is found in the statutes prohibiting cruelty.

The torture, in legal history, signifies the rack, or question, or other mode of examination by violence to the person, to extort a confession from supposed criminals, and a revelation of their associates. It is distinguishable from punishment, which usually succeeds a conviction for offences; while the torture was inflicted as a part of the introductory process leading to trial and judgment. Though probably disallowed by the earlier common law, the rack was occasionally used, in England, as a police measure for compelling confessions, but Wharton says that it was used in judicial proceedings only once in the reign of Elizabeth, its last infliction having been in 1640; and that when, upon the assassination of Villiers, Duke of Buckingham, by Felton, the proposal was made in the privy council to put the assassin to the rack to discover his accomplices, the judges declared that no such proceeding was allowable. It is wholly contrary to the criminal law as administered in America.

In statutes to protect animals from cruelty, "torture" seems used as interchangeable with abuse, cruelty, ill-treatment, and the like.

Thus, as an example, a statute of New York (1 Laws 1867, 834, cl. 375), the principle of which has been enacted in some other states, provides, that if any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, any living creature, such offender shall be guilty of a misdemeanor; and a subsequent act (Laws, 1874, ch. 12) declares, that the word "torture," "torment," or "cruelty" shall be held to include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.

The earlier but somewhat narrower English statute (12 & 13 Vict. ch. 92, § 2) enacts, that if any person shall cruelly beat, ill-treat, overdrive, abuse, or torture, &c., any animal, he shall be subject to a penalty.

Few decisions have been noticed turning particularly upon the force of the word torture in these enactments. In Budge *v.* Parsons, 3 *Best & S.* 382; 7 *Law J.* N. S. 624; 9 *Jur.* N. S. 796, it was held that a person who set a fighting-cock to fight another after the other had been disabled, by its thigh being broken, committed an offence under the English act; but the opinions do not show that any question was made as to which of the words used in the act to define the punishable cruelty was the one applicable: the question chiefly discussed was whether a fighting-cock was to be deemed an animal, within the protection of the statute. In Bates *v.* McCormick, 9 *Law T. Rep.* N. S. 175, 12 *Irish Com. L.* 577, the point was made and decided that setting cocks to fight one another was an offence, within the English statute above mentioned.

In State *v.* Pugh, 15 *Mo.* 509, — un-

der a statute punishing "every person who shall maliciously and cruelly maim, beat, or torture any horse, &c., — the court held that an indictment charging that defendant did unlawfully, maliciously, and cruelly torture horses, by tying brush and boards to their tails, was too loose and vague. The torture was charged to consist merely in tying brush and boards to the tails of the animals. This act, though very reprehensible, might have been done without producing any torture. If the circumstances attending and consequences produced by the act were such as to produce pain or torture, they should have been averred. In such an indictment, the means of producing the torture must be alleged, so that the court can see that such means have the inevitable and natural tendency to produce the effect in which the crime consists. Torture is pain, anguish, extreme pain or anguish of body or mind, pang, agony, torment. Torture, then, in the statute, must consist in some violent, wanton, and cruel act necessarily producing pain and suffering to the animal. The acts described in this indictment might or might not produce extreme pain; the mere act of tying described is not necessarily torture.

TOTAL LOSS. Originally and literally, this phrase, used in insurance law, imports the entire destruction of the thing insured. But in the development of that branch of law, rules have become established, entitling the insured to collect the whole insurance money in various other cases, where the property is so injured as to render it of little value; where it is taken from him, and so lost to him, though not destroyed; where he elects to abandon or relinquish to the insurer all that is left; and thus "total loss" has come practically to mean that degree of injury which is recognized as sufficient to entitle the insured to receive the whole insurance money.

Total loss is either actual or constructive, — actual, when the thing is actually destroyed, or so damaged that it cannot ever arrive *in specie* at the port of destination; constructive, when the injury, though short of actual loss, is yet so great as to make the subject of it useless to its owner. When the subject of the insurance, though not wholly destroyed, is placed in such peril as to render the successful prosecution of the venture improbable, the insured may treat the case as a total loss, and demand the full sum insured. In such case, however, he must, within a reasonable time, give notice to the insurer of his intention, and of his abandonment to the insurer of all right in the thing insured. See 2 *Steph. Com.* 132, 133; *Arn. Mar. Ins.* (Perk. ed.) 993; *Crump Mar. Ins.* § 330; 3 *Kent Com.* 318.

Total loss, in marine insurance, signifies the total destruction of the thing insured, or such damage to the thing insured as renders it, though it may specifically remain, of little or no value to the owner. Livermore *v.* Newburyport Marine Ins. Co., 1 *Mass.* 264.

An embargo or detention by a foreign friendly power constitutes a total loss, and warrants an immediate abandonment. And where there is a complete capture, at sea, of a neutral vessel by a belligerent, who takes full possession of the vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss; and the act of abandonment vests the right to the thing abandoned in the underwriters, and the amount of insurance in the assured. Rhinelander *v.* Ins. Co. of Pennsylvania, 4 *Cranch*, 29.

Damages to a vessel by any perils of the sea, on the voyage insured, which could not be repaired at the port to which such vessel proceeded after the injury, without an expenditure of money to an amount exceeding half the value of the vessel at that port, after such repairs, constitute a total loss. And the value of the vessel at the time of the accident, and at the place where the accident occurs, is the true basis of calculation. Patapsco Ins. Co. *v.* Southgate, 5 *Pet.* 604. S. P. Bradlie *v.* Maryland Ins. Co., 12 *Pet.* 378.

The words total loss, in their literal sense, mean complete physical annihilation and destruction of the thing; but in a sense adopted in insurance, they signify a loss which is total to the owner; as where the goods are seized and taken away, or have been rendered worthless for the uses or purposes for which they are designed. Wallerstein *v.* Columbian Ins. Co., 3 *Robt.* 528.

Totidem verbis. In so many words; in those precise words.

Toties quoties. As often as; as often as it may happen.

TOTTED. A good debt to the king (*i. e.* a debt paid to the sheriff, to be by him paid over to the king) was formerly

noted as such by an officer, called the "foreign apposer," writing the word *tot* opposite to it, in the estreat-roll in the exchequer, to indicate that for so much (Lat. *tot*) the sheriff must account to the king. The accounts given of this usage indicate that, from time to time, "tot" was written against the sum charged in the exchequer books against a solvent or paying debtor, to denote that the demand was esteemed worth its face, — good for so much as the sum set down. Hence, "totted debts" came to mean good, solvent demands.

Totted is a term used in Stat. 42 Edw. III., ch. 2, and signifies a note to be made in the estreat-roll that goes out of the exchequer to the sheriff of all such debts as are paid unto the sheriff so that they be not again demanded of the party, nor the king deceived. *Termes de la Ley.*

TOUCH. Policies of marine insurance have frequently given the vessel leave to touch and stay at designated ports. It seems formerly to have been held that the insured vessel thus empowered to touch and stay at a place in the course of the voyage must confine herself strictly to the terms of the liberty so given; for any attempt to trade at such a port during such a stay — as by shipping or landing goods — will amount to a species of deviation which will discharge the underwriters, unless the ship have also liberty to trade as well as to touch and stay. More recently, a more liberal view has been urged. It is said that the insured may trade at the designated port, when consistent with the object and the furtherance of the adventure, by breaking bulk, or by discharging and taking in cargo, provided it produces no unnecessary delay, nor enhances or varies the risk. Consult *Marsh. Ins.* 275; 3 *Kent Com.* 314; *Am. Ins.* (Perk. ed.) 370.

Toujours et uncore prist. Always and still ready. A law-French name of a plea of tender. In general, one who relies upon a tender must allege that he has always been ready to pay.

TOURN. In old English law, was a court of criminal jurisdiction in each county, held before the sheriff, in one place after another, following a certain circuit or rotation.

Tout temps prist. Always ready. A law-French name for a plea of tender. It was used where a defendant set up, by way of defence to an action brought by a plaintiff whose claim had never been disputed, a plea to the effect that the defendant is, and always has been, ready to satisfy the plaintiff's demand.

TOWAGE. 1. The labor or service of drawing a vessel from one place to another, through the water.

2. The compensation or price paid for drawing a vessel.

When it becomes especially desirable to distinguish these two, the drawing the vessel is termed towage service.

Towage is the drawing a ship or barge along the water by another ship or boat, fastened to her, or by men or horses, &c., on land. It is also money which is given by bargemen to the owner of ground next a river, where they tow a barge or other vessel. *Jacob.*

Towage service is aid rendered in the propulsion of a vessel, &c., irrespective of any circumstances of peril. The H. B. Foster, *Abb. Adm.* 222, 228.

In the absence of a contract, the towing of a vessel, in peril or disabled, is salvage; but, as a convenient word to distinguish an ordinary case of contract from one of salvage, "towage" is often used. Baker *v.* Hemenway, 2 *Low.* 501.

TOWN. This term is differently used in different parts of the United States, in some regions signifying a civil division of a county, irrespective of incorporation or powers of government, such as is elsewhere called a township; in others, denoting a species of municipality more highly organized than a village, and less so than a city.

What would best harmonize the varying usage as to the word would probably be to say, that counties throughout the United States are generally divided into townships, which are divisions of territory, made irrespective of settlement or local government; these townships adjoin each other, and completely fill the county. Then, when the number of inhabitants in any distinct settlement becomes large enough to require formation of a political municipality, one is erected; and this will be either a village, a town, or a city, according to the number and needs of the inhabitants, — a city being, in general, characterized by entire delegation of local government, municipal policy, and business to chosen

officers, while a town is marked by a reservation of power to the inhabitants to decide general questions in public meeting of the voters, execution of their will, in matters of detail, being the chief function of the corporate officers. But this is only a very general outline, and cannot be applied in all the states, without consideration of the local law and usage.

By scanning the points from American decisions, given below, which are chiefly from recent reports, selected to indicate present usage, it will be seen that "town" is generally used in connections evincing that a body politic, an incorporated municipality, is meant; and "township" very frequently may mean only a territorial division, a unit of survey. Yet instances occur in which "town" has the meaning of a territorial division only; and it is sometimes thought necessary to avert that construction, when a municipal government is mentioned, by using the phrase "incorporated town."

Town is a walled place or borough: the old boroughs were first of all towns; and upland towns, which are not ruled and governed as boroughs, are but towns, though enclosed with walls. (*Finch*, 80.) There ought to be in every town a constable or tithing-man; and it cannot be a town unless it has, or had, a church, with celebration of sacraments and burials, &c. But if a town is decayed so that it hath no houses left, yet it is a town in law. (1 *Inst.* 115.) Under the name of a town or village, boroughs, and, it is said, cities are contained; for every borough or city is a town. *Jacob.*

A village and a town are not identical. A village is ordinarily less than a town, and more occupied by agriculturists; yet the two cannot be definitely distinguished by the size of the place or employment of the inhabitants. Truax *v.* Pool, 46 *Iowa*, 256.

"Town," in a general statute, may well include cities, where that meaning is indicated by the general purpose of the enactment. Commissioners *v.* McGurrin, 6 *Daly*, 349.

It is sometimes employed to designate a township. Harris *v.* Schryock, 82 *Ill.* 119.

In Arkansas, there is no precise legal definition of the term town, and it is supposed to have been used in the statute in its popular sense. At "Cadron," the courts for the county were held from 1826 to 1828, but never afterwards; it was never incorporated; it was abandoned in 1831, and continued abandoned until 1845 or 1846; in 1855, there was one store, doing business to the amount of $4,000 per annum; there was a dwelling-house for two families, and out-houses; the population consisted of two families, numbering six persons; there was one warehouse, from which produce was shipped, varying in value from $200 to $1,500 per annum. It was held that to call this a town would be an obvious misapplication of the term. Murray *v.* Menefee, 20 *Ark.* 561.

A township voted stock in a company, which afterwards was merged in a new one by consolidation; and it was held that a subsequent subscription by the township to the new company was unauthorized. Harshman *v.* Bates County, 3 *Dill.* 150.

A town which, as a corporation, has voted and issued bonds, is estopped, when sued by an innocent holder of such bonds, from setting up as a defence that it was never incorporated. Aller *v.* Cameron, 3 *Dill.* 198.

The constitution of Illinois, which came into operation July 2, 1870, annulled the power of any city, town, or township to make donations or allow its credit to a railroad company; and, after that date, rendered ineffective the act of 1867, authorizing towns acting under the township organization law of the state to appropriate money to aid in the construction of a certain railroad. Concord *v.* Portsmouth Sav. Bank, 92 *U. S.* 625.

Notwithstanding an incorporated town is changed to a city, the municipality remains the same under its new organization as in its former condition; and any debt incurred while a town continues to be the debt of the corporation as a city. Olney *v.* Harvey, 50 *Ill.* 453.

Townships are incorporated not as cities and villages are, for their own benefit, and by their assent, but like counties, as mere civil divisions of the state; hence are not liable for neglect to keep highways in repair, except for such penalty as may be expressly imposed. Waltham *v.* Kemper, 55 *Ill.* 346.

A town is bound to take notice of the manner in which the sidewalks are constructed in the first place. Alexander *v.* President, &c. of Mt. Sterling, 71 *Ill.* 366.

Provisions of a town charter, passed subsequent to the passage of a general law, must, as far as such town is concerned, prevail over any inconsistent provision of the general law. Brackett *v.* People, 72 *Ill.* 593.

A town, having control of its streets, with power to improve them, may allow property-holders to adorn them. Baker *v.* Normal, 81 *Ill.* 108.

Where a special charter of a town confers power upon the corporate authorities to impose penalties, they are not limited to imposing the same penalties as are imposed by the general law. Baldwin *v.* Murphy, 82 *Ill.* 485; State *v.* Ludwig, 21 *Minn.* 202.

A city is included within the word town, as used in a statute making "shooting within a town or village" a misdemeanor. Flinn *v.* State, 24 *Ind.* 286.

A civil township is a corporation capable of suing and being sued. Sebrell *v.* Fall Creek, 27 *Ind.* 86.

In Indiana, the civil township and the school township, though they have the same limits, are not the same corporation. Heizer *v.* Yohn, 37 *Ind.* 415.

A township trustee, on a complaint in which he sues only as trustee of the civil township, cannot recover money due to the school township. Steinmetz *v.* State, 47 *Ind.* 465.

Under Ind. Rev. Stat. 1876, 780, § 4, which constitutes each incorporated town and city a distinct corporation for school purposes, an action for services rendered by the plaintiff, in the erection of school buildings, cannot be maintained against a city in its ordinary municipal capacity. The two incorporations are distinct, and the one liable must be sued. Huntington *v.* Day, 55 *Ind.* 7.

Power may be conferred on a town to order the vacating of a street. Gray *v.* Iowa Land Co., 26 *Iowa*, 387.

Town, as used in a stipulation not to resume business in the same town, may, by local usage, mean the town and its vicinity. Steyer *v.* Dwyer, 31 *Iowa*, 20.

An incorporated town may have the power to regulate and license auction sales, &c., and to pass ordinances to exercise that power. Decorah *v.* Dunstan, 38 *Iowa*, 96.

No action will lie against a town in a matter founded upon its vote, unless the claim is brought strictly within the terms of that vote. Warren *v.* Durham, 61 *Me.* 19.

The liability of the town for defective ways is commensurate with the right and obligation of the town to construct or repair them. Willey *v.* Ellsworth, 64 *Me.* 57.

Bounding a township on a river carries the grant to the middle thread of the river, above tide-waters. Granger *v.* Avery, 64 *Me.* 292.

Selectmen's contracts in arranging to prosecute and defend pauper suits in which their towns are interested will bind the towns. Industry *v.* Starks, 65 *Me.* 167.

The power of selectmen to establish a fire department is not derived from the town. Long *v.* Sargent, 101 *Mass.* 117.

A constitutional prohibition on creating a municipal government in any town not containing 12,000 inhabitants does not forbid the annexation of a smaller town to a city already existing. Chandler *v.* Boston, 112 *Mass.* 200.

A town in its corporate capacity has no property in the land under a highway. Cheshire *v.* Adams, &c. Reservoir Co., 119 *Mass.* 356.

A vote of a town, determining a compensation for officers, may constitute an implied contract to pay the same. Parks *v.* Waltham, 120 *Mass.* 160.

A selectman cannot maintain an action against a town for official services for which no compensation has been provided, either by statute or by express contract or vote of the town. Farnsworth *v.* Melrose, 122 *Mass.* 268.

Fractional townships, "as surveyed by the United States," are "townships," under art. 10, § 2, of the Michigan constitution, — providing that counties shall not embrace less than sixteen townships, as surveyed by the United States, unless the act which provides therefor shall be adopted by the people. Rice *v.* Ruddiman, 10 *Mich.* 125.

The supervisor of a town is not, in the ordinary acceptation of the word, the agent of the town, and the town is not liable for his errors in judgment. Davis *v.* Kalamazoo, 1 *Mich. N. P.* 16.

The legislature may invest the supervisors of a municipal township, though a quasi corporation only, with exclusive power and authority to grant licenses, and to regulate dealing in intoxicating liquors. State *v.* Dwyer, 21 *Minn.* 512.

In Minnesota, towns have a corporate capacity as respects the laying out and opening of highways; and the supervisors, as respects the same, are merely officers and agents of their towns. Woodruff *v.* Town of Glendale, 23 *Minn.* 537.

The power to authorize a town to aid a railroad may be exercised by allowing the town to issue and deliver interest-bearing bonds, as a donation. New Orleans, &c. R. R. Co. *v.* McDonald, 53 *Miss.* 240.

An unincorporated place, if inhabited, and if the inhabitants are required to pay taxes, is a town; but not, if it is taxed and not inhabited. Russell *v.* Dyer, 40 *N. H.* 173.

A practical location of a town under a charter, with lines and monuments well defined, may supersede the boundaries laid down by the charter. Wells *v.* Jackson Iron Manuf. Co., 48 *N. H.* 491.

A town acquires no title, by virtue of its act of incorporation, to land within its limits not before granted. South Hampton *v.* Fowler, 52 *N. H.* 225.

The health officers of a town have no authority to make the town liable for medicines and medical services furnished to inhabitants who are not paupers. McIntire *v.* Pembroke, 53 *N. H.* 462.

Where a town is divided by the legislature, part of its territory and inhabitants being created a new town, none of the property, real or personal, of the original town belongs to the new corporation, except as expressly provided. Greenville *v.* Mason, 53 *N. H.* 515.

A town may take by bequest and hold in trust a sum of money. Sargent *v.* Cornish, 54 *N. H.* 18.

In a statute restricting alterations of streets in cities, towns, and villages, the word town is not synonymous with township. The whole state is divided into counties, and the counties subdivided into townships, so that, if town be construed to mean the township, the whole act would be defeated. It was obviously the intention of the legislature to protect the established

streets in the settled towns and villages of the state from the operation of the act. The mere fact of fifty or a hundred acres of land being mapped out into streets and building lots, cannot make a town. Holmes *v.* Mayor, &c. of Jersey City, 12 *N. J. Eq.* 299.

Upon the failure of a town to provide means for the payment of its bonds lawfully issued, the holder of the bonds may maintain an action against the town thereon. Marsh *v.* Little Valley, 64 *N. Y.* 112.

The word town, in a statute, may be construed to apply to incorporated villages. Peck *v.* Weddell, 17 *Ohio St.* 271.

Brooklyn (N. Y.) was held not a town, in Rafter *v.* Sullivan, 13 *Abb. Pr.* 262.

Towns and cities are parcels of the state; their corporate powers are emanations from the state, for purposes of convenience. Weith *v.* Wilmington, 68 *N. C.* 24.

The directors of a township are the proper judges, in the first instance, to determine when and to whom to pay bounties and raise taxes for the purpose. Cunningham *v.* Mitchell, 67 *Pa. St.* 78.

The words any town, in that portion of the liquor law exempting constables of any town from giving recognizance for costs on making a complaint for a violation of the fourth section, include cities. State *v.* Glennon, 3 *R. I.* 276.

Although a statute forbids purchases of liquors to be made upon account of towns, except by a particular class of officers, yet a town may be chargeable for the price of liquors sold and delivered on purchases made by another class of persons on behalf of the town, and afterwards ratified by the officers in whom the power to purchase is vested. Topsham *v.* Rogers, 42 *Vt.* 189.

Town officers are not deemed personally liable on contracts made in behalf of their towns, merely because they transcended their authority as such officers. Leet *v.* Shedd, 42 *Vt.* 277.

Where a town has made a contract through one of its selectmen, and has received the benefit, it will not be allowed to repudiate the stipulations, merely because the remainder of the selectmen were not cognizant of the contract. Earle *v.* Wallingford, 44 *Vt.* 367.

Authority to an agent of a town to prosecute and defend suits does not imply authority to settle them. Clay *v.* Wright, 44 *Vt.* 538.

Towns are not liable for the unlawful acts of their overseers of the poor, when acting without the scope of their authority. Town of Chelsea *v.* Town of Washington, 48 *Vt.* 610.

Notice to any member of the town board of supervisors, of a defect in a bridge, is notice to the town. Jaquish *v.* Ithaca, 36 *Wis.* 108.

Tax-payers of a town may maintain an action against the town, its officers, and a railroad company, to restrain the issue of bonds in payment of a stock subscription by which the town is no longer bound. Nœsen *v.* Port Washington, 37 *Wis.* 168.

The word town, in a statute, may, when the context or intention of the act requires it, be construed to include cities or wards. State *v.* Goldstucker, 40 *Wis.* 124.

Whether and when the word towns includes cities, see Kittredge *v.* Milwaukee, 26 *Wis.* 46; Beaudette *v.* Fond du Lac, 40 *Id.* 44.

Town clerk. One of the officers of a town charged with calling the town meetings, keeping the records of their action, and other cognate duties.

Town collector. One of the officers of a town charged with collecting the taxes assessed for town purposes.

Town commissioner. One of the board of officers in whom, under the laws of some of the states, the management of the business of a town is vested.

Under general power conferred on "town commissioners" to acquire land as sites for buildings for the use of the town, the commissioners have full power to acquire, regulate, and dispose of a town-hall, public squares, &c., in such manner as to them may seem best for the interest of the town. Shaver *v.* Commissioners, 68 *N. C.* 291.

Town-hall; town-house. The building maintained by a town for town meetings and transaction of municipal business.

Power to erect a town-house is not limited to a hall for town meetings, but may include offices for all the town officers, and for the keeping of all the records and documents of the town. And as towns increase in population and in business, and it becomes necessary, separate rooms may be provided for some or all of the offices. A town may construct a lock-up in the town-house, or a library, or a school, or a hospital, or an almshouse, or a market-house, or, so far as it has occasion to provide for protection against fires, or for the military service, it may set apart a portion of its town-house in aid of the purpose. This enumeration of particulars might be extended to every object for which a town has authority to provide a building. French *v.* Inhabitants of Quincy, 3 *Allen*, 9.

A town may let its town-house for public entertainments, when not wanted for town purposes, in consideration of money to be expended by the lessees in enlarging and repairing the building. Jones *v.* Sanford, 66 *Me.* 585.

Town meeting. In many of the states, the inhabitants of a town assemble in public meeting to choose officers and discuss and determine questions of expenditure and town policy. These

assemblies of voters are termed town meetings.

Except when engaged in the election of officers, the functions of a town meeting are, in general, those of a deliberative body; and, where its proceedings are not regulated by statute, the general rules of parliamentary law, so far as applicable, will govern its proceedings. State *v.* Davidson, 32 *Wis.* 114.

The moderator has the power to prescribe rules for the government of the meeting over which he presides, subject to be altered by the town. The rules of parliamentary law (so called) are not in force for the government of town meetings, except so far as prescribed by the moderator, subject to alteration by the town. Hill *v.* Goodwin, 56 *N. H.* 441.

If the general subject-matter intended to be acted upon at a town meeting is fairly and plainly disclosed in the warrant calling the meeting, the notice is sufficient. The meeting may act upon any details necessarily included in such subject-matter, without their being specifically mentioned in the warrant. Pittsburg *v.* Danforth, 56 *N. H.* 272.

Town order, or warrant. An official direction in writing by the auditing officers of a town, directing the treasurer to pay a sum of money.

Without any authority expressly given by statute to selectmen to issue negotiable orders, yet town orders made payable to the order of the payee, and accepted by the treasurer and indorsed by the payee, may be sued in the name of the indorsee. Such orders, when payable to order and indorsed, are not, in the purview of the law, regarded as commercial paper in the hands of *bona fide* indorsees for value, so as to exclude evidence touching the legality of their inception; and whoever receives them is subject to the same defence that would be good against the payee. Emery *v.* Mariaville, 56 *Me.* 315.

Town plat. An official delineation, plan, or survey of the lands embraced within a town, depicting the streets and public places, and the lots as privately owned, with accuracy, as a standard for determining questions of right and ownership.

Recording a plat of lands laid out as a town does not constitute the place a town; but houses and inhabitants are necessary. Milarkey *v.* Foster, 6 *Oreg.* 378.

Town pound. A place of confinement maintained by a town for estrays.

An enclosed piece of land secured by a firm structure of stone, posts, and timber, &c. A grant, or a reservation in a grant, of a town pound, carries the land as parcel of the subject-matter granted, not merely the structure by which the piece of land is enclosed, or the right to maintain it in its place. Wooley *v.* Inhabitants of Groton, 2 *Cush.* 305.

Town purpose. The expression town purposes is used in the decisions as to the proper application and expenditure of town funds as meaning the corporate purposes of a town, — the objects for which it may lawfully levy taxes and expend funds.

Town tax. Such tax as a town may levy for its peculiar expenses, as distinguished from a county or state tax; also, under some systems, the share of a general tax collected in one sum for all three purposes which is allotted to the towns.

Town treasurer. One of the officers of a town charged with receipt and custody of funds belonging to a town and the payment of orders and warrants drawn upon them, and other cognate duties.

Towns improvement clauses act. The name of an English statute, passed in 1847 (the Stat. 10 & 11 Vict. ch. 34), containing clauses in a convenient form for incorporation by reference in future acts of parliament applicable to particular towns. This act deals with the following subjects: town surveyors, inspectors of nuisances, and health officers; the taking of lands without consent of owners; public sewers and house drains; paving, cleansing, and improving streets, and laying out new streets; ruinous and dangerous buildings, nuisances, smoke, fire, and ventilation; supply of water; slaughter-houses; execution of works; rates; by-laws; the recovery of damages and penalties. *Mozley & W.*

Towns police clauses act. The name of an English statute, passed in 1847 (the Stat. 10 & 11 Vict. ch. 89), and similar to the above-mentioned act. It deals with the following subjects: the appointment, duties and expenses of constables; obstructions and nuisances, pound-breach, drunken persons, fires, places of public resort, hackney carriages, public bathing, recovery of damages and penalties. *Mozley & W.*

TOWNSHIP. In the most convenient use of this word, it signifies a territorial division; one of the units of survey into which a county is divided. This is particularly true in those states in which the lands have been largely subject to survey as United States public lands; for that system, as established in 1796, prescribed a survey of the public lands into townships six miles square, which again were divided into sections,

each a mile square, and containing 640 acres. But township is, in some parts of the Union, employed as designating a species of political corporation. See TOWN.

Township trustee. One of a board of officers to whom, in some states, affairs of a township are intrusted.

For a township trustee to repay himself out of town funds coming into his charge, for what he has advanced in goods or credits, with effect to obtain a release of the town from a corporate indebtedness, is not a conversion of the funds. State *v.* Parker, 33 *Ind.* 285.

The township trustees cannot, without the petition filed of a majority of all the resident owners of lots, &c., pass an ordinance and make a contract for the improvement of the sidewalks of the town. Covington *v.* Nelson, 35 *Ind.* 532.

A township trustee is liable on his bond, not as a mere bailee of the money that comes to his hands by virtue of his office, and therefore held to only reasonable care, but is liable to account for it and pay it over, whether stolen or burned, without his fault, or whatever may have become of it. Rock *v.* Stinger, 36 *Ind.* 346.

Where a township trustee deposits the public funds in a bank, in his individual name, and overdraws his account, and uses the money so obtained to replace public funds which he has misapplied, the bank has no claim against the township. Steinback *v.* State, 38 *Ind.* 483.

Any contract which a township trustee executes should show in which capacity he acted. If it describes him as acting for "the township," this will be taken to mean the civil township. Jackson Township *v.* Home Ins. Co., 54 *Ind.* 184.

A trustee of a civil township may employ a physician to attend paupers of the township, if no medical attendance has been provided by the county authorities. Conner *v.* Commissioners of Franklin, 57 *Ind.* 15.

Township trustees of a town are authorized to establish the grades of streets. Burr *v.* Town of Newcastle, 49 *Ind.* 322.

Township trustees cannot make a contract for building bridges without the sanction of the county commissioners. Paine *v.* Caldwell, 65 *N. C.* 488.

TRACT. Does not imply any thing as to the size of the parcel of land denoted. Edwards *v.* Derrickson, 28 *N. J. L.* 39.

TRADE, *n.* An occupation, employment, or business carried on for gain or profit. This is the sense in which the word is used in the coasting and fisheries act of congress of 1793. The cod fishery is a trade within that act, and so is the mackerel fishery. The Nymph, 1 *Sumn.* 516.

The obvious and most usual sense in which the word trade is employed, is to express traffic, commerce, exchange dealing, and not the voyage or destination of a ship, although sometimes the term may be allowed that meaning when the voyage or destination is named from the use or purpose to which it leads or is designed. Higginson *v.* Pomeroy, 11 *Mass.* 104.

The phrase trade or business, in a statute exempting necessary tools, &c., from execution, was held not to apply to the keeping of a meat market and grocer's shop. Wallace *v.* Bartlett, 108 *Mass.* 52.

Contracts in restraint of trade are regarded with disfavor by the law; and if the restraint is general, the contract is wholly void; and if it is partial, it is only good when the restraint is reasonable, and a valuable consideration has been given by way of purchasing the restraint. (Mitchell *v.* Reynolds, 1 *Smith Lead. Cas.* 508.) A reasonable restraint may be either in respect of locality or of time, or of both combined; and in every trade, what is reasonable in these respects varies with the character of the trade. It is from the like disfavor which the law bears towards such restraints that the Stat. 54 Geo. III. ch. 96, § 1, repealed the prohibitions contained in 5 Eliz. ch. 4, whereby persons who had not served an apprenticeship were forbidden to be employed as journeymen, or to otherwise exercise their particular trades or occupations; and that the 7 & 8 Vict. ch. 24, repealed a variety of other ancient acts which operated in restraint of trade. There are, nevertheless, certain restraints which the law favors, and that chiefly from a regard to the public health. Thus, the 11 & 12 Vict. ch. 63, § 64, forbids the establishment of new offensive trades unless with the consent of the local board of health; and the 16 & 17 Vict. ch. 128, § 1, renders liable to summary conviction persons carrying on offensive trades within the metropolis, when they do not use the best means of preventing annoyance to the neighborhood. *Mozley & W.*

Any person engaged in business requiring the purchase of articles, to be sold again, either in the same or in an improved shape, must be regarded as "using the trade of merchandise," within the intent of the bankrupt law of 1841. Wakeman *v.* Hoyt, 5 *Law Rep.* 309.

Trader. Joint contractors for building a railroad are not traders, within the provision of the bankrupt law as to dishonor of commercial paper. The most usual meaning of "trader" is one who buys and sells goods. In a writ or deed or indictment, it would not be regular to describe one as a trader whose business it was to build or undertake works upon the land of other people. A trader is one who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. "Trade" has a secondary sense, by which almost any occupation is called a man's trade; as in the proverb, "two of a trade can never

agree;" but this latitude has not been extended to "trader." *Re* Smith, 2 *Low.* 69.

The owner of oil lands, who divides it into leaseholds, and receives the rent in oil, is not a trader, within the meaning of the provision, inasmuch as he deals only in the products of his lands. Hence he does not commit an act of bankruptcy by any suspension of payment of his negotiable paper for a period of fourteen days. *Re* Woods, 7 *Bankr. Reg.* 126.

The following classes of persons are enumerated as traders, within the operation of the English bankrupt law of 1869: Alum-makers, apothecaries, auctioneers, bankers, bleachers, brokers, brick-makers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cow-keepers, dyers, fullers, keepers of inns, hotels, or coffee-houses, lime-burners, livery-stable keepers, market-gardeners, millers, packers, printers, share-brokers, ship-owners, ship-wrights, stock-brokers, stock-jobbers, victuallers, warehousemen, wharfingers; persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody; persons insuring ships or their freight or other matters against perils of the sea; persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or buying and letting for hire, goods or commodities, or by the workmanship or the conversion of goods or commodities. *Mozley & W.*

Tradesman. As used in U. S. Rev. Stat. § 5110, forbidding a discharge in bankruptcy to certain classes of persons, if the applicant has not kept proper books of account, should not be deemed to include all persons who buy and sell, but the persons habitually in a business of buying and selling, such as is usually understood to require keeping books of account. As this section is penal, it should be confined to persons clearly within its objects and policy. A discharge should not be refused to a farmer because he occasionally bought stock or produce to sell again, and did not keep systematic books. *Re* Coté, 14 *Bankr. Reg.* 503; 2 *Low.* 374.

The term trading, in the rule of prize law which subjects property employed in trading with the enemy to capture, is not employed in the sense of negotiation or contract, but includes any intercourse inconsistent with the pending hostilities. The object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has therefore no necessary connection with the offence. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed. The Rapid, 8 *Cranch*, 155, 162.

The term, a trading voyage, does not include a freighting voyage. Brown *v.* Jones, 2 *Gall.* 477.

That "trading corporation" is an expression of narrower meaning than "business corporation," see Adams *v.* Boston, &c. R. R. Co., 1 *Holmes*, 30.

Trade dollar. A silver coin of the United States, of the weight of 420 grains, troy. *Rev. Stat.* § 3513.

Trade fixture. Under fixture (*q. v.*), the ambiguity in the use of that word is explained, and that it is often employed as signifying something of a chattel nature, which has been connected with the land, but only in a qualified way, and reserving the right to remove it when the purpose of the connection has been served. The rule as to what are fixtures, taking the word in this sense of a chattel which is not fully and permanently a part of the realty, but only affixed to it, varies according to the relations of the parties between whom it is to be applied; and is most favorable to removal, when the question arises between landlord and tenant, and relates to things which the tenant has brought into the demised premises, for use in carrying on his trade. Hence the phrase trade fixtures. It denotes a variety of things more or less definitely connected with the freehold, and such as a tenant who brought them in may remove within his term, though the same things, as between heir and executor, vendor and purchaser, or mortgagor and mortgagee, might be deemed permanently part of the realty.

Authorities differ in the reason they assign for recognizing this right of removal: some consider that the chattel nature of the thing is preserved notwithstanding its annexation; others consider it a part of realty while annexed, but that the tenant has the right to sever it. The latter view seems preferable; for it is difficult to say that one and the same article — a steam-engine, for example — is at one and the same time a chattel or real property, varying with the person who raises the question; but easy to say that the tenant who brought the engine into the building has a right, which other persons have not, to sever and remove it. On one ground or the other, however, tenants

have a large liberty of removing the chattels they have affixed to demised premises, especially such as they have brought in for purposes of trade; and the exposition of this right is the doctrine of trade fixtures. It comprises a great variety of exceptions, which the courts, yielding to the necessities of modern business, have introduced to the old maxim, *quicquid plantatur solo, solo exedit*, from the desire that the administration of the law should be such as to promote trade and encourage industry. The authorities seem unwilling to lay down precise rules of general application as to what shall be deemed removable under the term trade fixtures, and say that cases as they arise must be determined upon their own circumstances. The probable intent with which the tenant brought the thing within the premises, its nature and adaptedness to purposes of trade, and the effect which a removal may have to injure the realty, are the leading criteria. See *Ewell Fixt.* 76; *Tyler Fixt.* 240.

Trade union. A combination or association of persons pursuing a particular trade, formed for the purpose of mutual aid, particularly in securing the highest prices for their labor. Such combinations on the part of either employers or of employes to regulate the price of labor are, within certain limits, valid by the common law (Rex *v.* Batt, 6 *Car. & P.* 329); if, however, they are carried to lengths involving violence in any phase or shape, they are illegal.

In England, the Stat. 6 Geo. IV. ch. 129, placed such combinations, on the part of employes chiefly, under a most rigorous restraint; and, under that statute, any thing in the nature of a threat, put forward with a view to forcing or endeavoring to force a workman to leave his employment, was made a criminal offence. Walsby *v.* Anley, 3 *El. & El.* 516. Of recent years, the Stat. of Geo. IV. has been thought too rigorous, and under the Stats. 22 Vict. ch. 34, 32 & 33 Vict. ch. 61, and 34 & 35 Vict. ch. 31, combinations on the part of employes, or, as they are usually called, trades unions, are recognized as legal associations, with legitimate objects, and which objects they may endeavor to secure (if so advised) by pecuniary and other means of supporting strikes, &c., so long as they do not resort to open or secret violence, or to threats, intimidation, rattening, and the like.

Trade-union act. The Stat. 34 & 35 Vict. ch. 31, passed in 1871, for the purpose of giving legal recognition to trades unions, is known as the trade-union act, or trades-union funds protection act. It provides that the members of a trade union shall not be prosecuted for conspiracy merely by reason that the rules of such union are in restraint of trade; and that the agreements of trades unions shall not on that account be void or voidable. Provisions are also made with reference to the registration and registered offices of trades unions, and other purposes connected therewith.

TRADE-MARK. Something affixed by a manufacturer or merchant to goods which he offers for sale, to distinguish them from like goods of other dealers.

The right of a manufacturer to his own particular trade-mark is thus analogous to that of the owner of a patent or a copyright, with this difference, viz., that the value of a trade-mark is independent of the article itself, and consists in the reputation of the particular individual who makes or sells the goods. Equity does not recognize a complete property either in trade-names or in trade-marks; nevertheless, it will not suffer a fraud or deception, but recognizes the right of every one who has adopted a particular mode of designating his own manufacture to say that other persons shall not sell the same article in such a way as to make purchasers believe that the article is his manufacture. This protection is, therefore, only a particular application of the general rule of law, that it is a fraud to represent what the party knows to be untrue, where such representation is calculated, from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, or where such representation will prejudice the reasonable profits of another man, from his superior industry or invention. Upon these principles, trade-marks have long

received a protection from courts of equity; which has never been rested exclusively on the idea of the manufacturer's acquiring a right of property in his trade-mark, by priority of adoption and use, but largely on the ground of protecting the public from being imposed upon by the use of false and simulated marks. The two elements of protecting the manufacturer in his legitimate trade, and guarding the public from imposition by his competitors, are combined. Accordingly, in equity, one who has, by long use, appropriated a distinctive mark of his devising to distinguish his meritorious wares, by which they have become known in the market, may have an injunction to prevent a rival manufacturer from using the same mark, or any imitations of it, by which the public may probably be deceived or misled into purchasing the goods of the imitator, under a supposition that they are purchasing those of the originator of the mark, to the loss and injury of the latter. If the marks are so different that ordinary buyers will not be deceived, one of the essential elements does not exist; and if the plaintiff does not show a prior adoption and continued use of the mark, and an injury to his business by the imitation, the other element is wanting. The doctrine is fully presented in the recent digest by Coddington, devoted to this subject, or in Browne's treatise on Trade-marks. For the American decisions, see *U. S. Dig.* tit. Trade-marks. Coddington's Digest contains extended information on the French, as well as the British and American, decisions.

One grave difficulty in the exercise of general equitable jurisdiction over trade-marks has been the want of any distinct means of tracing the prior use and consequent title to the mark in litigation in any particular cause. Recent statutes have been passed to remove this difficulty, by providing a system of registration, under which whoever adopts a trade-mark may, if he chooses, register it, and thus preserve record means of establishing its identity and his priority in the use of it, when an infringement takes place. In the United States there has been some state legislation of this character. But a more important enactment is that first passed by congress, July 8, 1870, and now embodied in the U. S. Revised Statutes, tit. 60, ch. 2. The constitutionality of such legislation by congress may be doubtful, if it rests upon the power granted "to secure to authors and inventors the exclusive right to their respective writings and discoveries." It is not clear that the persons protected by the trade-marks law are "authors or inventors," or that the subject-matter can be deemed within the phrase "writings and discoveries." If, however, a national law is sustained and continued, the probability is that state legislation will not be extended.

The act of congress provides that any person or firm domiciled in the United States, and any corporation created by the authority of the same, or of any state or territory thereof, and any person, firm, or corporation resident of or located in any foreign country, which, by treaty or convention, affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such trade-mark, by complying with the following requirements:

1. By causing to be recorded in the patent office the names of the parties, and their residences and place of business, who desire the protection of the trade-mark.

2. The class of merchandise and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated.

3. A description of the trade-mark itself, with fac-similes thereof, and the mode in which it has been or is intended to be applied and used.

4. The length of time, if any, during which the trade-mark has been used.

5. The payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents.

6. The compliance with such regulations as may be prescribed by the commissioner of patents.

7. The filing of a declaration, under the oath of the person, or of some member of the firm, or officer of the corporation, to the effect that the party claiming protection for the trade-mark has a right to the use of the same, and that no other person, firm, or corporation has a right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the trade-mark sought to be protected. The oath must also state the domicile and citizenship of the person desiring registration.

The petition for registration is to be accompanied by a distinct statement or specification, setting forth the length of time the trade-mark has been used, the mode in which it is intended to apply it, and the particular description of goods comprised in the class by which it has been appropriated, and giving a full description of the design proposed, particularly distinguishing between the essential and the non-essential features thereof.

The protection for such trade-mark will remain in force for thirty years, and may, upon the payment of a second fee, be renewed for thirty years longer, except in cases where such trade-mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of any foreign country for a shorter period, in which case it shall cease to have force in this country, by virtue of the registration, at the same time that it becomes of no effect elsewhere.

No proposed trade-mark will be received or recorded which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons, or which is identical with a trade-mark appropriate to the same class of merchandise and belonging to a different owner, and already registered or received for registration, or which so nearly resembles such last-mentioned trade-mark as to be likely to deceive the public; but any lawful trade-mark rightly used at the time of the passage of the act relating to trade-marks may be registered.

By further provisions of the same statute, any person who shall reproduce, counterfeit, copy, or imitate any recorded trade-mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such wrongful use of such trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy, according to the course of equity, to enjoin the wrongful use of his trade-mark, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use. But no such action is maintainable by any person claiming the exclusive right to any trade-mark which is used or claimed in any unlawful business, or upon any article which is injurious in itself, or upon any trade-mark which has been fraudulently obtained, or which has been formed and used with the design of deceiving the public.

It has been held (under the act of 1870) that the certificate of the registry of a trade-mark issued to the claimant by the commissioner of patents, under the law, is not conclusive evidence that the device claimed as a trade-mark is or can become a lawful trade-mark, or that the claimant is the first appropriator, and entitled to its exclusive use. Moorman *v.* Hoge, 4 *Am. L. T. U. S. Cts.* 217; 14 *Int. Rev. Rec.* 155. And a certificate of the deposit for registration of a trade-mark, of which a copy is given, and of the filing of a statement, of which a copy is annexed to the certificate, but not containing the declaration mentioned in the statute, and that the party depositing the trade-mark has otherwise complied with the statute, and that the trade-mark has been registered and recorded, and will remain in force for a period named in the certificate, was held not to be evidence of the filing of such declaration. Smith *v.* Reynolds, 10 *Blatchf.* 85.

The still more recent act of Aug. 14, 1876, prescribes stringent punishments,

by fine and imprisonment, for counterfeiting the goods sold under a registered trade-mark; counterfeiting any such trade-mark; fraudulently filling any package bearing such trade-mark with spurious goods; and other kindred offences. And it authorizes proceedings of search and seizure, in aid of the execution of the law.

In English legislation on this subject, two statutes are important: the merchandise-marks act, 1862 (Stat. 25 & 26 Vict. ch. 88), and the trade-marks registration act, 1875 (Stat. 38 & 39 Vict. ch. 91). The general principle of the first of these consists in imposing criminal penalties enforceable by indictment, for the protection of the public, upon all sorts of counterfeiting and simulation of trade-marks; it provides efficient and stringent means of punishing the fraud upon the public, but leaves the question of prior adoption and superior right to use a trade-mark to be ascertained, in each case, by evidence as to its use. The second-mentioned act provides a system of registration of trade-marks, under superintendence of the commissioners of patents, declaring registration to be *prima facie* evidence of proprietorship.

With reference to what is a trade-mark, regard must be had to the difference between rules of equity jurisprudence and those established by the modern statutes. Independent of statute, a trade-mark has been said to be a name, symbol, figure, letter, form, or device, adopted and used by a manufacturer or merchant, to designate the goods he manufactures or sells, and to distinguish them from the goods of another. Ferguson *v.* Davol Mills, 7 *Phila.* 253; 2 *Brews.* 314.

It must be something so clear and well defined as to give notice to others, and must not be deviated from at the suggestion of whim or caprice. It must be attached to the article manufactured, in such a way as to be reasonably durable and visible. The mere declaration of a person, however long and extensively published, that he claims property in a word, as his trade-mark, cannot even tend to make it his property. It is the *actual use* of the trade-mark affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property. Candee *v.* Deere, 54 *Ill.* 439.

It is the name, figure, symbol, letter, form, or device adopted and used by a manufacturer or merchant, in order to designate the goods that he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise. It may be any sign, mark, symbol, word or words, which others have not an equal right to employ for the same purpose. *Upton Tradem.*; Newman *v.* Alvord, 51 *N. Y.* 189.

It was held, in Burke *v.* Cassin, 45 *Cal.* 467, that a label at common law is not a trade-mark, although a manufacturer is entitled to the exclusive use of one adopted by him to distinguish his goods.

Browne, W. H. (*Tr. on Tradem.* 53), draws a strong distinction between a trade-mark and a label; although his review of the decisions involving the point indicates that there is some difficulty in harmonizing the adjudged cases with the distinction suggested, and some ground to doubt whether it is practically tenable. He says that a trade-mark may consist in the name of the manufacturer or the merchant (provided it be written, printed, branded, or stamped in a mode peculiar to itself), in a seal, letter, cypher, monogram, or any other sign or symbol that can serve to distinguish the products of one man from those of another. It may be any symbol or emblem, however unmeaning in itself; as a cross, a bird, a quadruped, a castle, a star, a comet, a sun; or it may, and frequently does, consist of a combination of various objects, copied from nature, art, or fancy; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to affix it to goods of a similar description. It may be adhesive or non-adhesive. It may be put inside of the article, or on the outside. It may be written, printed, stamped, painted, stencilled, branded, or otherwise, and

either on the article itself or on its case, covering envelope or wrapper.

Lord Westbury says that it denotes some name or symbol, applied to a particular manufacture (Hall *v.* Barrows, 33 *L. J. Eq.* 204), or marks or symbols, when applied to a vendible commodity (Leather Cloth Co. *v.* American Cloth Co., 35 *L. J.* 53). These ideas are more fully embodied in Adams' definition, which is: any symbol, or mark, or name, or other indication, which, when affixed to goods offered for sale in the market, would convey to the minds of purchasers the impression that these goods were the manufacture of some person or firm, or some particular place. *Adams Tradem.* 8. Darrill strongly approves this definition, adding that it is the manner by which the trader or manufacturer conveys to purchasers of his product that the article is manufactured and sold by him, or is the production of some particular place, and is sold by him, with the reputation of his name or the place of manufacture pledged to them, that constitutes the trade-mark.

The act of congress of 1870 does not purport to establish a definition of a trade-mark. It provides for registration of trade-marks, using that term as well understood, and leaving it to the commissioner of patents to determine what marks may lawfully be registered. Definitions are given by the English merchandise-marks act and trade-marks registration act. These are, of course, obligatory only in proceedings under those statutes, but are instructive.

According to the merchandise-marks act, "the word mark shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other description; and the expression trade-mark shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark, as aforesaid, lawfully used by any person to denote any chattel or (in Scotland) any article of trade, manufacture, or merchandise to be an article or thing of the manufacture, workmanship, production, or merchandise of such person, or to be an article or thing of any peculiar or particular description, made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign, which, in pursuance of any statute or statutes for the time being in force, relating to registered designs, is to be put or placed upon or attached to any chattel or article, during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes, or any of them."

According to the trade-marks registration act, "a trade-mark consists of one or more of the following essential particulars: A name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner; or a written signature or copy of a written signature of an individual or firm; or a distinctive device, mark, heading, label, or ticket; and there may be added, to any one or more of the said particulars, any letters, words, or figures, or combination of letters, words, or figures. Also, any special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of the act, may be registered as such."

Upon the whole, it seems that any thing in the nature of a designation, device, or symbol, affixed to goods to show by whom they are put in market, not to make known their character and qualities, may be a trade-mark. The right to protection has not, as yet, become part of the definition of the word. A trade-mark will be entitled to protection in equity, if priority of adoption and continued use in good faith can be shown, or under statute, if registered after its originality and propriety have been officially ascertained. Without such right, however, a symbol may be called a trade-mark.

The owner of goods may have a trade-mark, used on the goods, although they are manufactured by another, and the trade-mark includes the name of the manufacturer. Walton *v.* Crowley, 3 *Blatchf.* 440.

Terms in common use to designate a trade or occupation, in connection with other words indicating that a particular class of merchandise of the same general description is specially dealt in, cannot be exclusively appropriated by any one as a

trade-mark. Choynski *v.* Cohen, 39 *Cal.* 501.

A trade-mark is a word or device, used by a manufacturer or vendor of goods, to designate the origin or ownership of his goods. A word, figure, &c., in common use, which indicates the name, nature, kind, quality, or character of the article cannot be appropriated as a trade-mark. The name of the manufacturer or seller may be used; and the adoption of the same name as a trade-mark for goods of the same kind, by a person bearing a different name, is a clear case of piracy. A slight change in the name, such as cutting off the final letter, or prefixing "von" or "van" to it, does not prevent its use from being piracy. A label, at common law, is not a trade-mark; but when a manufacturer or seller of goods adopts a label to distinguish his goods from those of another, he will be protected in its use, and others enjoined from using even a colorable imitation thereof. Burke *v.* Cassin, 45 *Cal.* 467.

That a trade-mark, composed of such devices as denote simply quality of an article, may be protected, if it has become established, see Sohl *v.* Geisendorf, 1 *Wilson*, 60.

Names and devices, which are adapted to point out the true source and origin of a manufactured article, possess the requisite characteristics of a trade-mark; and property therein may be acquired by adoption and use. Filley *v.* Fassett, 44 *Mo.* 168.

It is essential to the idea of a trade-mark, by which any particular manufactured article is designated, that the mark should be annexed to or stamped, printed, carved, or engraved upon the article, as the same is offered for sale; and, if the article has not been thus distinguished, its manufacturer cannot be said to have appropriated any particular trade-mark. St. Louis Piano Manuf. Co. *v.* Merkel, 1 *Mo. App.* 305.

Words or phrases in common use, and which indicate the character, kind, quality, and composition of an article of manufacture, cannot be appropriated by the manufacturer exclusively to his own use as a trade-mark; and this is so, although the form of the words and phrases adopted also indicate the origin and maker of the article, and were adopted by the manufacturer simply for that purpose. The combination of words must express only the latter to authorize its protection as a trade-mark. Thus, where plaintiffs prepared a medicine, the principal ingredients of which were iron, phosphorus, and elixir of calisaya bark, to which they gave the name of "ferro-phosphorated elixir of calisaya bark," and so labelled the bottles containing it, it was held that this phrase could not be protected as a trade-mark. Caswell *v.* Davis, 58 *N. Y.* 223.

Where one has adopted a word from the French language to designate an article which he is engaged in manufacturing and selling by that name, he acquires, by such adoption, a property in the use of the word, as applied to the article he has made and introduced into the market, although the article was previously sold in France, by the same name; and an injunction will lie to restrain the use of the name by another manufacturer. Rillet *v.* Carlier, 61 *Barb.* 435; 11 *Abb. Pr.* N. S. 186.

A name may be protected as a trade-mark only when the name is used merely as indicating the true origin or ownership of the article offered for sale; never where it is used to designate the article itself, and has become, by adoption and use, its proper appellation. All who have an equal right to manufacture and sell an article have a right to designate it, and sell it by its appropriate name, — the name by which alone it is distinguished and known, — provided each person is careful to sell the article as prepared and manufactured by himself, and not by another. Fetridge *v.* Wells, 4 *Abb. Pr.* 144.

No distinction should be made between a common word or term used for an original or new purpose which has accomplished its object, and a new design adopted by a manufacturer. Messerole *v.* Tynberg, 4 *Abb. Pr.* N. S. 410.

A manufacturer cannot acquire a special property in an ordinary term or expression, as his trade-mark, the use of which, as an entirety, is essential to the correct and truthful designation of the particular article or compound, such as "desiccated codfish." It is only by the prefix of some other word not previously applied in that connection, and not essential to the truthful designation of the article produced, that he can be protected in its exclusive use. Town *v.* Stetson, 5 *Abb. Pr.* N. S. 218; 3 *Daly*, 53.

An injunction lies, at the suit of the owner of a peculiar product of nature, to protect him in the exclusive use of a name belonging to it alone, and properly employed by him as his trade-mark in its sale. And no distinction is made between artificial products and those which are natural and spontaneous. Where a spring having peculiar medicinal and curative qualities had been known as the "Congress Spring" for more than seventy years, and that name had never been applied to any other spring, or any other water, and no other possessed the same qualities, it was held that the words "Congress water" and "Congress Spring water" appropriately indicated the origin of the water flowing from the spring in question, and that the proprietors of the spring had an exclusive right to the use of the word "congress," as their trade-mark, in connection with the sale of such water. Congress, &c. Spring Co. *v.* High Rock, &c. Spring Co., 10 *Abb. Pr.* N. S. 348.

Although the name adopted by a dealer for his article is not one to the exclusive use of which he is entitled, yet the peculiar style of the package in which he puts up the article, and the combination constitut-

ing the label, may be protected. And where a peculiar device is applied to a box or barrel especially prepared to display it, the special preparation of the box or barrel constitutes a part of the trade-mark, and may participate in its protection. Cook *v.* Starkweather, 13 *Abb. Pr.* N. S. 392; Lea *v.* Wolf, *Id.* 389.

Words, as used in any language, cannot be appropriated by any one, to his exclusive use, to designate an article sold by him similar to that for which they were previously used. No person can acquire a right to the exclusive use of words, applied as the name of an article sold by them, if, in their ordinary acceptation, they designate the same or a similar article. Thus, if the word schnapps is used in Schiedam to designate gin, Schiedam schnapps cannot be appropriated exclusively as a trade-mark. Wolfe *v.* Goulard, 18 *How. Pr.* 64.

A trade-mark may consist of any thing — marks, forms, symbols — which designate the true origin or ownership of the article, but cannot consist of any thing merely denoting name or quality. Godillot *v.* Hazard, 49 *How. Pr.* 5.

A trade-mark must, as the term imports, be one consisting of a word, an expression, a device, or a mark, invented or adopted by the owner, which designates and distinguishes his production from the general manufacture of the same article; and it cannot be the appropriation of words belonging to the general public which describe truly a known product. Yet a particular process of manufacture may be owned, when the legal steps to acquire such ownership have been taken; or a particular mark or name, designating the manufacturer, may, by use, become the subject of protection; but words and phrases in common use, describing truly an article offered to the public, cannot become individual property any more than those generally employed in life, which must be used to make speech intelligible. Helmbold *v.* Helmbold Manuf. Co., 53 *How. Pr.* 453.

A trade-mark, to be capable of an exclusive use, must be such as will identify the article to which it is affixed, and distinguish it from others. Phalon *v.* Wright, 5 *Phila.* 464.

A sign, symbol, word, or device, which does not indicate origin or ownership of articles manufactured or sold, is not a legal trade-mark, and will not be protected by injunction. Ferguson *v.* Davol Mills, 7 *Phila.* 253.

To entitle a name to equitable protection as a trade-mark, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it; and this is so, although the use by a second producer, in truthfully describing his product, of a name or a combination of words already in use by another may have the effect of causing the public to mistake as to the origin or ownership of the product. Hence no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation. Canal Co. *v.* Clark, 13 *Wall.* 311.

Manufacturers of a commodity at a certain village, the name of which village has been used by them exclusively as a trade-mark for a number of years, have a property in the name of a trade-mark as against new-comers at the same place manufacturing a similar commodity. Newman *v.* Alvord, 51 *N. Y.* 189.

As a general rule, geographical names cannot be appropriated as trade-marks; and their use by another will not be enjoined. But the rule has its exceptions, where the intention in the adoption of the descriptive word is not so much to indicate the place of the manufacture as to entrench upon the previous use and popularity of another's trade-mark. Lea *v.* Wolff, 1 *Thomp. & C.* 626; 15 *Abb. Pr.* N. S. 1.

Generally, the name of a town or city cannot be exclusively appropriated as the trade-mark of any one. Thus, where a corporation adopted the trade-mark "Glendon" on their iron, and the locality of their furnaces was afterwards made a borough by the name of "Glendon," it was held that a second company there located could lawfully use the same mark. Glendon Iron Co. *v.* Uhler, 75 *Pa. St.* 467.

Where a man has given his own name to a particular manufacture, and sells the use of his name in the manufacture of those particular goods, a court of equity will restrain him from advertising goods of the same quality under his own name, though actually made by him. Thus, where one named "Oakes" sold the exclusive right to manufacture and sell "Oakes's candies," he was restrained from manufacturing and selling candies made by him as "Oakes's candies." Probasco *v.* Bouyon, 1 *Mo. App.* 241.

A manufacturer has the right to put or stamp his own name, in gold, gilt, or other letters, on the goods made by him, and on the bands, wrappers, or covers in which they are put up; and any injury which another manufacturer of the same surname has suffered or may suffer therefrom is to be considered an injury without a remedy. Faber *v.* Faber, 49 *Barb.* 357.

The name of an inventor, discoverer, or manufacturer may be employed as a trade-mark. Thus the words "Dr. J. M. Lindsey's improved blood searcher" were held entitled to protection as a legitimate trade-mark, in Fulton *v.* Sellers, 4 *Brews.* 42.

Figures indicating numbers, associated with the name of the manufacturer, upon labels of a certain form, color, and general arrangement, and, in connection with such labels, used by him to indicate his own manufacture, may form an important part

of a trade-mark. Boardman *v.* Meriden Britannia Co., 35 *Conn.* 402.

If the man who uses the street or number as a part of his trade-mark has the exclusive use of the building indicated by the number, he may use it as a part of his trade-mark against persons who have no right to or interest in the building indicated by the number, but who use it as a part of their trade-mark, in order to pirate on the one justly entitled to use it. Glen, &c. Manuf. Co. *v.* Hall, 6 *Lans.* 158.

The name established for a hotel is a trade-mark, in which the proprietor has a valuable interest, which a court of chancery will protect. But a tenant appropriating a certain name to a hotel does not thereby inseparably connect the name with the building, so that, like a fixture, it will pass to the landlord. Woodward *v.* Lazar, 21 *Cal.* 448.

A court of equity will protect a person in the use of a trade-mark, — *e.g.* the name of a newspaper, — although the name adopted is one that belongs to the language of the country. A firm who had long published a newspaper, entitled "The National Police Gazette," were held entitled to preliminary injunction in an action to restrain defendants from continuing the publication of a paper entitled the "United States Police Gazette," and printed in a way actually to deceive purchasers and readers. Matsell *v.* Flanagan, 2 *Abb. Pr.* N. S. 459.

Where the coal of one person, who had long mined coal in a valley of Pennsylvania known as the Lackawanna Valley, had been designated and become known as "Lackawanna coal," it was held that miners who came in afterwards and mined in another part of the same valley could not be enjoined from calling their coal "Lackawanna coal," it being in fact and in its general character properly so designated, although more properly described when specifically spoken of as "Scranton coal," or "Pittston coal," and usually so called. Canal Co. *v.* Clark, 13 *Wall.* 311.

Injunction granted to restrain defendants from using the trade-mark, "The * Shirt," of the plaintiffs. Morrison *v.* Case, 9 *Blatchf.* 548.

The symbol ½, printed in a special and unusual manner, may be registered as a trade-mark, and be protected so far as to enjoin an imitator from using it printed in the like manner. Kinney *v.* Allen, 1 *Hugh.* 106.

The word "Eureka" sustained and protected as a trade-mark; applied to a fertilizer. Alleghany Fertilizer Co. *v.* Woodside, 1 *Hugh.* 115.

An exclusive right cannot be acquired to the use of the words "gold medal," as a trade-mark upon the wrappers of a manufactured article. The words so used do not indicate ownership or origin, but quality, and that in some competitive exhibition a gold medal had been awarded to the article for its excellence, and so they cannot be appropriated as a trade-mark. Taylor *v.* Gillies, 59 *N. Y.* 331.

Title to property in the name "Keystone Line," acquired by many years' certain, exclusive possession thereof, by shippers of merchandise who did not own the vessels employed by them, will be protected in equity. Winsor *v.* Clyde, 9 *Phila.* 513.

The name of "Roger Williams long cloth" is capable of being appropriated by a manufacturer to cotton cloth of his manufacture, to distinguish it from cloth of the same general description manufactured by others; and if, to the knowledge of the public, it is so appropriated by the plaintiff, a person who stamps the name of "Roger Williams" on his cloth of similar description, with the design and effect of fraudulently passing it upon the market as and for cloth manufactured by the plaintiff, to the lessening of his gains and credit as a manufacturer of the latter, is liable to him for the injury caused thereby. Barrows *v.* Knight, 6 *R. I.* 434.

TRADITIO. Delivery; transfer of possession.

Traditio loqui facit chartam. Delivery makes a deed speak. Delivery gives effect to the words of a deed; until delivered, a deed is without effect.

TRAIL-BASTON. Justices of trail-baston were justices appointed by King Edward I., during his absence in the Scotch and French wars, about the year 1305. They were so styled, says Hollingshed, for trailing or drawing the staff of justice. Their office was to make inquisition, throughout the kingdom, of all officers and others, touching extortion, bribery, and such like grievances of intruders into other men's lands, barrators, robbers, breakers of the peace, and divers other offenders. *Cowel; Tomlins.*

TRAITOR. One chargeable with treason; also, more generally, one who betrays a trust. Traitorous: treasonable; betraying. Traitorously: in the manner of traitors.

TRANSACTIO; TRANSACTION. The civil law and French terms corresponding to compromise. They import an agreement to surrender the residue (if any) of an unascertained debt, in consideration of the payment of an agreed sum; or some other settlement of a suit or matter in controversy, by the contesting parties, made between themselves, without referring it to any tribunal.

TRANSACTION. The term transaction, in a statute limiting counterclaims to demands arising out of the same transaction, intends some commer-

cial or business negotiation, and not a wrong of violence or fraud. In an action for an assault and battery, the defendant cannot set up an assault and battery committed upon him by the plaintiff, just before the time of the assault complained of. Barhyte *v.* Hughes, 33 *Barb.* 320.

TRANSCRIPT. A copy; anything written from an original.

Burrill says it means a copy, particularly, of a record. This has always been the import of the word, it rarely or never being applied to copies of other writings.

While the report of an auditor of the treasury department of a balance due from a person accountable for public money is a guide to the comptroller of the treasury as to the amount to be sued for, it is not "a transcript" from the books of the treasury, such as is made by the act of March 3, 1797, evidence of the debt in an action against such person. United States *v.* Patterson, *Gilp.* 44.

TRANSFER, *v.* To assign; to convey. Also, to remove; to change the location, place, or relation of. Transfer, *n.*: an act or transaction by which property of one person is by him vested in another, or by which any thing is removed from one location, place, or relation to another.

The term transfer, in a declaration, when applied to notes, implies a passing of the beneficial interest, but not necessarily of the legal title. Montague *v.* King, 37 *Miss.* 441.

Transfer of a cause. The removal of a cause from one court or judge to another by lawful authority.

Under the judicature acts, 1873, in England, any cause or matter may be transferred, with or without the consent of the parties thereto, as may be directed by rules of court; and any action or actions may be transferred from one division to another, or from one judge of the chancery division to another, by an order of the lord chancellor; but no transfer shall be made from or to any division, without the consent of the president of that division.

In the United States, removal of causes is the phrase more commonly used to express this idea; particularly with reference to carrying a cause from a state court to a court of the United States.

TRANSFERENCE. In Scotch law, is the term applied to an action by which a suit which was pending at the time that a party died is transferred from the deceased to his representatives, in the same condition in which it stood formerly. If it be the pursuer who is dead, the action is called a transference active; if the defender, it is a transference passive.

A party who desires the transference of a cause may now, under Stat. 31 & 32 Vict. ch. 100, § 96, enrol the cause before the lord ordinary, and lodge a minute, craving a transference of the cause as against the party specified in the minute. The corresponding English practice is that the court or a judge may, in case of the marriage, death, bankruptcy, or devolution of estate by operation of law of any party to an action, order that the husband, representative, trustee, or other successor in interest of such party be made a party to the action. See *Bell; Wharton; Mozley & W.* In the United States this is generally called the continuance, or the revival of an action.

TRANSGRESSIO. In old English law, a violation of law. Also, trespass, and the action of trespass.

TRANSIRE. To go across; to pass over; to pass from one thing, person, or place to another; to become changed from one thing into another.

Transit in rem judicatam. It passes into a matter adjudged; it becomes a judgment. This expression is applied to a contract upon which a judgment is obtained, and which has thus passed *in rem judicatam.*

Transit terra cum onere. The land passes with the burden; the land is transferred with its incumbrances. The owner of land must bear all the burdens attaching to it, or to the ownership of it, whether he receive any advantage from the land or not. Thus, at common law, the burden of repairs has always been thrown on the tenant. As between grantor and grantee, covenants running with the land pass with it; so do customs, such as the custom of gavelkind, which is held to be a custom by reason of the land. Compare the maxim, *Qui sentit commodum, sentit et onus.*

TRANSITORY ACTION. Actions are said to be either local or transitory; an action is local, when the principal facts on which it is founded pertain to a particular place. See LOCAL ACTION. An action is termed transitory, when the principal fact on which it is founded is of a transitory kind, and might be supposed to have happened anywhere; and, therefore, all actions founded on debts, contracts, and such like matters relating to the person or personal property, come under this latter denomination.

Another aspect of the question is indicated in some of the cases, that an action should be deemed local, when the judgment can be executed, or the relief sought can be given, only in some particular place; thus, an action for personal damages, which may be collected anywhere, would be, in this view, transitory; while an action to obtain possession of lands, which can be given only where they lie, would be local. One view looks backward to the origin of the right of action, to determine its class; and this is the test most frequently presented. The other rule looks forward to the relief sought.

Still a third distinction is made, as between actions founded on privity of estate, and those founded on privity of contract: the former are deemed local in their nature, the latter, transitory.

The importance of the distinction lies chiefly in application of the rules as to laying venue. If the action is local, the venue is local; if the action is transitory, so is the venue.

Actions of trespass on lands are classed with those actions which demand the possession of land, and with actions of waste, which are local. Actions founded on contracts respecting lands are transitory, and may be sustained wherever the defendants are found. Livingston *v.* Jefferson, 1 *Brock.* 203.

An action of account for rents and profits of land is transitory. Lewis *v.* Martin, 1 *Day*, 263.

An action against a railroad company for killing stock, commenced by summons, is transitory. Illinois, &c. R. R. Co. *v.* Swearingen, 33 *Ill.* 289.

A bill for rescinding a contract for land is transitory. Lewis *v.* Martin, 5 *T. B. Mon.* 3.

An action by a purchaser of land for compensation on account of a deficiency in quantity, by mistake, is transitory. Williams *v.* Barnett, 6 *T. B. Mon.* 322.

An action on a judgment of another state, where the plaintiff is not an inhabitant of the state in which suit on the judgment is brought, may be brought in any county. Mitchell *v.* Osgood, 4 *Me.* 124.

An action against a town, to recover damages caused by defects in a highway, is a transitory action. Titus *v.* Frankfort, 15 *Me.* 89.

Actions for assault and battery are transitory. Watts *v.* Thomas, 2 *Bibb*, 458; Redgrave *v.* Jones, 1 *Har. & M.* 195.

All actions for wrongful injuries to the person or to personal property, are, in general, transitory. Northern, &c. Co. *v.* Scholl, 16 *Md.* 331.

In Massachusetts, actions against a sheriff, constable, &c., for any matter concerning their offices, are transitory; the English statute, 21 Jac. I. ch. 12, not being in force there. Poster *v.* Baldwin, 2 *Mass.* 569; Marshall *v.* Hosmer, 3 *Id.* 23; French *v.* Judkins, 7 *Id.* 229; Pearce *v.* Atwood, 13 *Id.* 324.

An action of debt or covenant between the lessor and lessee, for the recovery of rent, being founded on privity of contract, is transitory. Lienow *v.* Ellis, 6 *Mass.* 331; Birney *v.* Haim, 2 *Litt.* 263; Henwood *v.* Cheeseman, 3 *Serg. & R.* 500.

So is covenant by assignee of the reversion, under the Stat. 32 Hen. VIII. ch. 34. But debt at common law by such assignee, being founded solely on privity of estate, is local. Henwood *v.* Cheeseman, 3 *Serg. & R.* 500.

The operation and effect of a deed of real estate are local, and determinable only where the estate is situate; but covenants collateral to the title, for the purchaser's assurance, and the implied engagement, if any, concerning the consideration paid, are transitory. Phelps *v.* Decker, 10 *Mass.* 267.

Trover for conversion of timber cut and carried away is transitory, though trespass for cutting it would be local. Greeley *v.* Stilson, 27 *Mich.* 153.

An action for an escape is transitory. Jones *v.* Pemberton, 7 *N. J. L.* 350.

Actions on contracts, and for personal injuries, and for injuries to personal property, are generally transitory. Glen *v.* Hodges, 9 *Johns.* 67; Gardner *v.* Thomas, 14 *Id.* 134; Shaver *v.* White, 6 *Munf.* 110.

An action for an injury to the person, done beyond the limits of New York, but prosecuted there, is transitory. Smith *v.* Bull, 17 *Wend.* 323.

Actions for damages for negligence are personal and transitory. Barney *v.* Burnstenbinder, 64 *Barb.* 212.

An action against a sheriff is deemed local only when founded upon an affirmative act. An action for his mere omission to perform a duty is transitory. Wilson *v.* Jenkins, 1 *Edm. Sel. Cas.* 384. See also People *v.* Tweed, 13 *Abb. Pr.* N. S. 419.

In Ohio, all personal actions are transitory. Genin *v.* Grier, 10 *Ohio*, 209.

That replevin is a transitory action, see Powell *v.* Smith, 2 *Watts*, 126.

The right of property in a chattel that has become such by severance from the freehold cannot be tried in a transitory action. Powell *v.* Smith, 2 *Watts*, 127; Brown *v.* Caldwell, 10 *Serg. & R.* 114; Mather *v.* Ministers of Trinity Church, 3 *Id.* 509; Baker *v.* Howell, 6 *Id.* 476.

An action to recover damages of a town, or other corporation, for an injury happening through the insufficiency of a road, which it is made their duty, by statute, to repair, is not local. Hunt *v.* Pownal, 9 *Vt.* 411.

If, by the law of a place where a wagering contract is made and executed, money lost upon it can be recovered by the loser, his action is transitory. Flanagan *v.* Packard, 41 *Vt* 561.

TRANSLATION. 1. In ecclesiastical law, the removal of a bishop from one see to another.

2. In copyright law, the making a version of a literary work in another language, presenting, however, as nearly as possible, the same thoughts in the same order.

3. Used with reference to legacies, it means the bestowing a legacy previously given to one person upon another; a species of ademption.

Translation, in the common sense of the word, signifies a version out of one language into another; but, in a more confined acceptation, it denotes the removing from one place to another; so the removal of a bishop to another diocese, &c., is called translating. *Jacob.*

TRANSPORTATION. 1. In the law relative to carriers. The carriage of persons or movable property from one place to another.

Driving cattle was held not to be within the true meaning of an act prohibiting transportation of such cattle. United States *v.* Shelden, 2 *Wheat.* 119.

Transportation of property, in a statute relating to common carriers, includes towage. White *v.* Steam Tug, 6 *Cal.* 462.

2. In criminal law. The carrying a convict to another country as a measure of punishment. It differs from "banishment" or "exile," in suggesting the idea that the person is kept under confinement or restraint, or surveillance, at least, abroad; while the other terms mentioned merely import that he is expelled from the home country to go elsewhere at large.

Transportation is the banishing or sending away a criminal into another country.

It appears that exile was first introduced as a punishment by the legislature in the thirty-ninth year of Queen Elizabeth, when a statute (39 Eliz. ch. 4) enacted, that such rogues as were dangerous to the inferior people should be banished the realm. *Barr. Ant. Stat.* 445 (5 Edw.). And that the first statute in which the word transportation is used was the 13 & 14 Car. II. § 23, by which justices at sessions were authorized to transport such rogues, vagabonds, and sturdy beggars, as should be duly convicted and adjudged to be incorrigible, to any of the English plantations beyond the seas. Transportation was first brought into general use as a punishment in 1718, by Stat. 4 Geo. I. ch. 11; which allowed the court a discretionary power to order felons, who were by law entitled to their clergy, to be transported to the American plantations. From the great difficulty of finding any situation after the independence of America, where the services of convicts could be rendered productive or profitable to merchants who would undertake to transport them, arose the idea of making an establishment for these outcasts of society on the eastern coast of New South Wales, more generally known by the name of Botany Bay, from a bay on the coast so named by Captain Cook, and where the first convicts were landed; to which remote region it was at length determined to transport atrocious offenders. Accordingly, in the year 1787, an act passed, 27 Geo. III. ch. 2, authorizing the establishment of a court of judicature for the trial of offenders who should be transported thither. The Stat. 5 Geo. IV. ch. 84 (amended by the 11 Geo. IV. and 1 Wm. IV. ch. 39), was afterwards passed to consolidate the law upon the subject. *Tomlins.*

Transportation is the banishing or sending away a person convicted of crime,—either pursuant to the express terms of a judicial sentence, or as a condition of pardon by the crown, to some place out of the United Kingdom, there to remain during the term for which he is ordered to be transported. It has been held, therefore, that a convict under such circumstances is not restored to his civil rights till after the expiration of the term for which he is ordered to be transported. (Bullock *v.* Dodds, 2 *Barn. & Ald.* 258.) And more recently, in the case of the Tipperary election petition, decided by the Irish court of common pleas, on the 26th of May, 1875, it was laid down emphatically that transportation is not merely exile, and that a person ordered to be transported does not complete his sentence by merely remaining out of the country, nor purge himself thereby of the disabilities created by his conviction. In order that he may do this, he must remain in the place to which he is sent, and there suffer his sentence, unless, of course, he receive a pardon from the crown before

the expiration of his term. (*Ir. Rep.* 9 *C. L.* 217.)

Transportation is now superseded by penal servitude, under Stat. 16 & 17 Vict. ch. 99 (passed in 1853), and Stat. 20 & 21 Vict. ch. 3 (passed in 1857). See also 27 & 28 Vict. ch. 47. *Mozley & W.*

TRAVEL. To go from one place to another at a distance; to journey; spoken of voluntary change of place.

Traveller. One engaged in voluntarily journeying from one place to another. Travelled: followed or used as a road or way for journeys. Travelling: journeying.

The term traveller, in the highway acts, does not include one going from his dwelling to his water-closet by passing into the highway around the end of a drain in process of excavation. Leslie *v.* Lewiston, 62 *Me.* 468.

Traveller, as used in a statute declaring a right of action in favor of a traveller upon a highway injured by defects therein, may well be construed as embracing every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure, irrespective of the motive or object with which a street or way is thus used, if it be not unlawful. But it is limited to persons having occasion to pass over the highway. A gymnast who should occupy a portion of a road for the display of his feats, or a boy who should resort to it for the amusement of sliding down hill, ought not to be deemed a traveller, within such a statute. Blodgett *v.* City of Boston, 8 *Allen*, 237.

By "the travelled part" of the road is intended that part which is usually wrought for travelling. A traveller is not obliged, because a track happens to have been made on one side of the part so wrought, to turn to the right of the centre of this track. If he turns to the right of the centre of the wrought part, so that there is room on the wrought part for the other traveller to pass, it is sufficient, and the penalty is not incurred. Clark *v.* Commonwealth, 4 *Pick.* 125. See *Rev. Stat.* ch. 51, § 1.

The word travelling, in the exception in the Ala. Rev. Code, § 3555, touching the carrying of concealed weapons, applies to a person taking a two days' journey on a river raft. Baker *v.* State, 49 *Ala.* 350.

But not to a person's daily return home to the country from his place of business in the city. Eslava *v.* State, 49 *Ala.* 355.

It applies, as there used, to the act of a passenger going on a railway train, twenty-eight miles, to seek employment. Lockett *v.* State, 47 *Ala.* 42.

It means going to a distance from home, and beyond the circle of one's acquaintances. Gholson *v.* State, 53 *Ala.* 519.

A person who fastens his horse and wagon at the side of a highway is not "travelling," within the rules of law as to liability for defective highways, while leaving them there unattended. Cummings *v.* Center Harbor, 57 *N. H.* 17.

TRAVERSE. Is used in law for the denying of some matter of fact alleged to be done, in a declaration or pleading; upon which the other side comes and affirms that it was done; and this makes a single and good issue for the cause to proceed to trial. Pleas in bar are divided into pleas by way of traverse and pleas by way of confession and avoidance. Of traverses there are various kinds. The most ordinary kind is that which may be called a common traverse. It consists of a tender of issue; that is, of a denial, accompanied by a formal offer of the point denied for decision; and the denial that it makes is by way of express contradiction in terms of the allegation traversed. Besides this, the common kind, there is a class of traverses which requires particular notice. In most of the usual actions there is a fixed and appropriate form of plea for traversing the declaration, in cases where the defendant means to deny its whole allegations or the principal fact on which it is founded. This form of plea or traverse has been usually denominated the general issue in that action; and it appears to have been so called because the issue that it tenders, involving the whole declaration, or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a common traverse.

There is another species of traverse which varies from the common form, and which, though confined to particular actions and to a particular stage of the proceedings, is of frequent occurrence. It is the traverse *de injuria sua propria absque tali causa*, or, as it is more compendiously called, the traverse *de injuria*. It always tenders issue; but, on the other hand, differs (like many of the general issues) from the common form of a traverse, by denying, in general and summary terms, and not in the words of the allegation traversed. There is still another species of traverse, which differs from the common form, and is known by the denomination of a special traverse. It is also called a formal traverse, or a traverse with an *absque hoc*. The affirmative part of the special traverse is called its inducement; the negative part is called the *absque hoc*, — those being the Latin words formerly used, and from which the modern expression, "without this," is translated. The different parts and properties here noticed are all essential to a special traverse, which must always thus consist of an inducement, a denial, and a conclusion to the country. The formal words of a special traverse are, in our French, *sans ceo;* in Latin, *absque hoc;* and in English, *without this,* — that such a thing was done or not, &c. The conclusion to the country in a special traverse is a novelty introduced by the rules of court (H. T. 4 Wm. IV.); for

previously it always concluded with a verification, the effect of which was to postpone the issue to one stage of the pleading later than it would have been arrived at in the common form. *Tomlins.*

Traverse, in the language of pleading, signifies a denial. Thus, where a defendant denies any material allegation of fact in the plaintiff's declaration, he is said to traverse it, and the plea itself is thence frequently termed a traverse. Besides the common traverse, as explained above, there is one of occasional occurrence termed a special traverse, or traverse with an *absque hoc.* This, instead of being framed in the shape of a simple denial, consists ordinarily of two branches, — one involving the introduction of new affirmative matter, which, inferentially or argumentatively, denies the disputed allegation of fact upon which the defendant purposes raising an issue; the other, being the *absque hoc* clause, consisting of a direct denial of such allegation of fact. *Brown.*

Traverse of indictment, or presentment The taking issue upon, and contradicting or denying some chief point of it. *Jacob.*

The word traverse, as applied to an indictment, has the same import as when applied to a declaration, signifying to contradict or deny some principal matter of fact therein; *e.g.*, in a presentment against a person for a highway overflowed with water, for default of scouring a ditch, &c., he may allege that there is no highway, or that the ditch was sufficiently scoured. *Cowel.*

Traverse of office. The proving that an inquisition made of lands or goods by the escheator is defective and untruly made. *Tomlins.*

It is the challenging, by a subject, of an inquest of office, as being defective and untruly made. *Mozley & W.*

Traversing note. This is a pleading in chancery, and consists of a denial put in by the plaintiff on behalf of the defendant, generally denying all the statements in the plaintiff's bill. The effect of it is to put the plaintiff upon proof of the whole contents of his bill, and is only resorted to for the purpose of saving time, and in a case where the plaintiff can safely dispense with an answer. A copy of the note must be served on the defendant. *Brown.*

The traversing note does not appear to be abolished under the judicature acts, but will probably be rendered unnecessary. *Mozley & W.*

Tread-mill, or **tread-wheel,** is an instrument of prison discipline, being a wheel or cylinder with a horizontal axis, having steps attached to it, up which the prisoners walk, and thus put the axis in motion. The men hold on by a fixed rail, and as their weight presses down the step upon which they tread, they ascend the next step, and thus drive the wheel. *Encycl. Brit.*

TREASON. In modern law, embraces certain breaches of allegiance, by a subject, which his government has declared shall be punished under that name.

The original idea of the word is betrayal of trust; breach of faith towards one's superior; treachery. And there were, in early English law, two kinds: high treason, which, as expounded by the courts, embraced a great variety of breaches of the allegiance due from a subject towards the crown; and petit treason (*q. v.*), or treacherous killing of one's civil superior. Petit treason having been long ago abolished, treason is commonly used for what was formerly distinguished as high treason.

In early English history, while the courts retained the power of adjudicating what conduct should be deemed treasonable, the question was one of great uncertainty, and the influence of the crown over the determination of it was often very great, so that it seems as if almost any conduct obnoxious to the government could sometimes be brought under punishment, by aid of the doctrine of constructive treason, or construing the acts or words of a suspected person, as aimed in some indirect way at injuring the sovereign or embarrassing the government. But as early as 1350 the principle was introduced of limiting prosecutions for the offence, by some distinct statutory enumeration of the acts which should be deemed treason. The Stat. 25 Edw. III. ch. 2, contained a formal enumeration, which, as set forth in substance by recent English writers (see *Mozley & W.*), made treason to consist in either of the following acts:

When a man doth compass or imagine the death of the king (or queen regnant), of our lady his queen, or of their eldest son and heir.

If a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir.

If a man do levy war against our lord the king in his realm.

If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere.

If a man counterfeit the king's great or privy seal.

If a man counterfeit the king's money; and if a man bring false money into the realm counterfeit to the money of England, knowing the money to he false, to merchandise and make payment withal.

If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assise, and all other justices assigned to hear and determine, being in their places doing their offices.

Since this statute, the doctrine of constructive treason has lost practical importance.

By subsequent enactments, passed at different times, counterfeiting the privy seal, or the "king's money," were reduced to the rank of ordinary felony; and the following acts seem to have been added (*vide* Brown) to the list given in the 25 Edw. III.:

Hindering from his accession to the crown any one entitled next in succession under the act of settlement (Stat. 1 Anne, st. 2, ch. 17, § 3).

Declaring that the sovereign, with the authority of parliament, could not direct the devolution of the crown (Stat. 6 Anne, ch. 7).

Imagining the death, bodily harm, or imprisonment of the sovereign, and expressing the same in writing or by overt act (Stat. 36 Geo. III. ch. 7).

In America, the law of treason has to be considered in two aspects: treason against the United States, and treason against a state; for the citizen owes a double allegiance, and may be guilty of treason to either of the two governments under which he lives. But the scope of the subject, in either of these aspects, is very much narrowed by the existence of brief constitutional and statutory definitions of the offence. For the definitions given in the state constitutions and laws, the reader is referred to those authorities; it is believed, however, that the state definitions almost uniformly follow, in substance, the national definition; and that, as a general rule, the same misconduct which would be treason as towards the United States would be, when waged against a state, treason against that.

With respect to treason against the national government, the constitution gives a definition in the following words:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." *Const.* art. 1, § 3, 1.

In order to bring this definition into effective operation, — for, as it stands in the constitution, it is only a limitation upon the power of congress to punish treason, — congress has enacted (act of April 30, 1790, ch. 9, § 1, re-enacted Rev. Stat. § 5331) that every person owing allegiance to the United States, who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. The constitution and the statute, taken together, limit the discussion practically to the question whether the acts of defendant amount to "levying war," or to "adhering" to the enemies of the government, giving them aid and comfort. In explanation of the first of these phrases, it has been decided, and has become a familiar rule, that overt acts are necessary. An intention to commit treason is an offence entirely distinct from the actual commission of that crime. War can only be levied by the employment of actual force; troops must be embodied, men must be assembled, in order to levy war. *Exp.* Bollman, 4 *Cranch*, 75; United States *v.* Burr, 1 *Burr's Trial*, 14; Charge to Grand Jury, 2 *Wall. Jr.* 134.

But these acts need not amount to complete war, in the popular sense of that term. For, first, active preparations for hostilities may amount to war in the constitutional sense. An assemblage of men for the purpose of revolutionizing by force the government established by the United States in any of their territories, as a step to or as the means of executing some greater projects, amounts to levying war, and is treason. The travelling of individuals to the place of rendezvous is not sufficient; but the meeting of particular bodies of men, and their marching from places of partial to a place of general

rendezvous, is such an actual assemblage as constitutes a levying of war. *Exp.* Bollman, 4 *Cranch*, 75. Again, while a person who performs no act in the prosecution of the war, who only counsels and advises it, or who, being engaged in the conspiracy, fails to perform his part, may not be deemed to have committed the act of levying war, yet, if war be actually levied, — that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, — all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. United States *v.* Burr, 2 *Burr's Trial*, 405. It is not necessary to prove that the individual accused was a direct personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Although he may have been absent at the time of the actual perpetration, yet, if he directed the act, devised or knowingly furnished the means for carrying it into effect, and instigated others to perform it, he shares their guilt. Charge to Grand Jury, 2 *Wall. Jr. C. Ct.* 134. And where a body, large or small, of armed men is mustered in military array for a treasonable purpose, every step which any one of them takes, in part execution of this purpose, is an overt act of treason in levying war. *Exp.* Bollman, 4 *Cranch*, 75; United States *v.* Greiner, 14 *Monthly Law Rep.* N. S. 91; 4 *Phila.* 396. Again, the object of the offenders need not be the entire overthrow of the government, in order to constitute war within the constitutional sense. Thus the occupation of a fortress by a body of men in military array, in order to detain it against a government to which they owe allegiance, is treason on the part of every one concerned, either in the occupation or subsequent detention of the post, although no hostile resistance may have been encountered in the capture or detention. United States *v.* Greiner, 14 *Monthly Law Rep.* N S. 91; 4 *Phila.* 396; Charge to Grand Jury, 4 *Blatchf.* 518. So the union of men in arms to commit acts of violence for the purpose of wholly preventing the execution of a law of congress, and suppressing a public office created by it, by compelling the resignation of the officer, and resisting all measures for the enforcement of the law, amounts to treason, within the constitution. Western Insurgents' Case, *Whart. St. Tr.* 102–182; Northampton Insurgents' Case, *Id.* 458–584; Fries' Case, *Id.* 610, 636.

But breach of allegiance is essential to constitute treason. United States *v.* Wiltberger, 5 *Wheat.* 76, 97. Thus an alien whose oath of allegiance to the United States is void, because the statute under which it was taken had been previously repealed, cannot be guilty of treason. United States *v.* Villato, 2 *Dall.* 370. And to constitute treason in resisting the execution of an act of congress, there must be conspiracy to resist it generally, and publicly, and by force; carried out in an actual resistance by force, or by intimidation of numbers. A conspiracy to resist by force the execution of such a law in particular instances only, and for a personal or private purpose, is not treason, however great the violence or force of numbers of the conspirators may be. United States *v.* Hanway, 2 *Wall. Jr. C. Ct.* 139. And see United States *v.* Hoxie, 1 *Paine*, 265. The expression "levying war" embraces not merely the act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the constitution, or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination. Treason cannot be committed without a pre-existing conspiracy to oppose the law by force, followed by actual violence; but the conspiracy may be deduced from the actions occurring at the time, afterwards or before, or from other facts. Charge to Grand Jury, 5 *Pa. L. J. R.* 55.

Treason consisting in adhering to the enemies of the United States has been discussed in two of the reported cases, which are, however, rather instances of the application of the constitutional rule than adjudications of a general

principle. In United States *v.* Pryor (3 *Wash. C. Ct.* 234), the defendant was indicted for treason in adhering to the enemies of the United States, in going from an enemy's squadron to the shore for the purpose of peaceably procuring provisions for the enemy. It was held that the act did not constitute an overt act of treason. But the rule, it was said, would be otherwise, if the defendant had carried provisions towards an enemy with an intention of supplying him, although he might have been defeated therein; or if the prisoner's intention had been to procure provisions for the enemy by uniting with him in acts of hostility against the citizens of the United States. In United States *v.* Hodges (2 *Wheel. Cr. Cas.* 477), the act of delivering up prisoners and deserters to the enemy was held to be such an adhering to them and giving them aid and comfort as constitutes the crime of treason against the United States.

It would naturally be supposed that the course of events connected with the secession of states from the Union in 1861 would have led to a new body of decisions on what is punishable as treason against the United States; but this has not been the case. The question was incidentally touched in some civil cases, such as that of Shortridge *v.* Macon (*Chase Dec.* 136; 1 *Abb. U. S.* 58), which arose upon a question of suspension of interest during the civil war, and in which Chief Justice Chase, in the circuit court, held that war levied against the United States by citizens of the republic, under the pretended authority of the new state government of North Carolina, or of the so-called confederate government, was treason against the United States; and that while the word "only," in the constitutional definition of treason, was used to exclude the odious doctrines of constructive treason, and limits the definition to plain overt acts, yet it brings these acts into conspicuous relief, as being always and in essence treasonable.

But the proceedings on the motion to quash the indictment against Jefferson Davis (*Chase Dec.* 1) barely alluded to the question of what is treason, and, moreover, never went beyond making a certificate of division of opinion. It is believed that the only reported conviction of treason for co-operation in the rebellion or civil war of 1861–65 was the case of United States *v.* Greathouse (2 *Abb. U. S.* 364). In this case, the subject received extended and careful consideration by Justice Field, with reference both to the constitutional definition of the offence, and to the provisions of the act of congress of July 17, 1862 (12 *Stat. at L.* 590), prescribing the punishment. And it was in that case held that rebels, being citizens, are not "enemies," within the meaning of the constitution; hence a conviction for treason in promoting a rebellion cannot be sustained under that branch of the constitutional definition which speaks of "adhering to their enemies, giving them aid and comfort." But aid rendered to a rebellion may sustain a conviction under that clause of the definition which relates to levying war. To constitute a levying of war there must be an assemblage of people with force and arms to overthrow the government or resist the laws; but, where war has been levied, all who aid in its prosecution, by performing any part in furtherance of the common object, however minute, or however remote from the scene of action, are guilty of treason. The purchase of a vessel, guns, and ammunition; the preparing her for sea, and making her ready for service in aid of the rebellion of citizens of the United States against the government thereof, and, after war has been levied, with the purpose of attacking and destroying American vessels, — are overt acts of treason; and such acts, done in furtherance of the common designs of the insurgents, give "aid and comfort to the rebellion," is a conclusion of law which follows the acts, whether the vessel actually sails, or whether its cruise be successful or not. It is not essential to constitute giving aid and comfort that the effort should be successful, and actually render assistance. Overt acts, which, if successful, would advance the interests of the rebellion, amount to aid and comfort. Nor can a letter of marque, issued by a self-styled government, erected by some of the states or the people thereof, in

rebellion against the authority of the United States, constitute any defence to a judicial trial for treason in acts of levying war, done under such letter, so long as the legislative and executive departments have not recognized the existence of such self-styled government and its authority to issue letters of marque.

It may be important to consider, in connection with the definition of treason, that all parties to the crime are principals. Every act which, in the case of felony, would render a man an accessory, will, in the case of treason, make him a principal. It is material here to consider whether the persons charged are of the same party, upon the same pursuit, and under the expectation of mutual defence and support. All persons present, aiding, assisting, or abetting any treasonable act, are principals. All persons who are present and countenancing, and are ready to afford assistance, if necessary, to those who actually commit any treasonable act, are also principals. If a number of persons assemble, and set out upon a common design, as to resist and prevent by force the execution of the law, and some of them commit acts of force and violence, with intent to oppose the execution of the law, and others are present to aid and assist, if necessary, they are all principals. 'Fries' Case, *Whart. St. Tr.* 610, 636; Charge to Grand Jury, 5 *Pa L. J R.* 55.

While congress cannot, of course, extend the guilt of treason, by that name, to misconduct not embraced within the definition, they may enact (and in several instances have enacted) laws to punish offences not amounting to treason, but which have a tendency towards the subversion of the government. Crimes which have for their object the subversion of the laws and institutions which have been ordained in order to secure the peace and happiness of society, may receive such punishment as the legislature shall prescribe, although they do not amount to treason. *Exp.* Bollman, 4 *Cranch*, 75.

The principal offences of this character which have been made punishable under laws of the United States are: misprision of treason (*Rev. Stat.* § 5333); inciting or engaging in rebellion or insurrection (*Id.* § 5334); criminal correspondence with foreign governments (*Id.* § 5335); seditious conspiracy (*Id.* § 5336); recruiting soldiers or sailors to serve against the United States (*Id.* § 5337); enlistment to serve against the United States (*Id.* § 5338).

Treason, in its very name, imports a betraying, treachery, or breach of faith. It therefore happens only between allies; for treason is a general appellation, made use of by the law to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, civil, or even a spiritual relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord; and for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary, — these, being breaches of the lower allegiance, of private and domestic faith, were formerly denominated petit treasons; but by the 9 Geo. IV. ch. 31, § 2, they are now declared to be murder only, and no greater offence. But when disloyalty attacks majesty itself, the offence is called, by way of eminent distinction, high treason, *alta proditio*, being equivalent to the *crimen læsæ majestatis* of the Romans, as Glanville denominates it also in our English law. (4 *Bl. Com.* ch. 6.) *Tomlins.*

As treason is the highest crime which (considered as a member of the community) any man can commit, it ought to be the most precisely ascertained. And yet, by the ancient common law, there was a great latitude left in the breast of the judges to determine what was treason, or not so; whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason, which never were suspected to be such. But, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the Stat. 25 Edw. III. st. 5, ch. 2, was made, which defines what offences only for the future should be held to be treason.

Nothing can be construed to be treason under this statute which is not literally specified therein; nor may the statute be construed by equity, because it is a declarative law, and one declaration ought not to be the declaration of another; besides, it was made to secure the subject in his life, liberty, and estate, and admitting constructions to be made of it, might destroy all. *Jacob.*

By the Stat. 7 Wm. III. ch. 3, no prosecu-

tions for treason were to be brought but within three years from the alleged commission of the offence; and by the same statute, coupled with that of 7 Anne, ch. 21, there must, in order to secure a conviction, be two witnesses to one and the same act of treason, or to different acts of the same treason. Moreover, by these two statutes a list of the witnesses for the prosecution, together with a copy of the indictment, is to be delivered to the prisoner ten days before the trial; also a copy of the panel of jurors two days before the trial. The prisoner is also allowed to make his defence by counsel.

Under the Stat. 39 & 40 Geo. III. ch. 93, when the treason consists in an attempt to assassinate the sovereign, the offence is made triable as murder, but continues punishable as treason; under the Stat. 11 & 12 Vict. ch. 12, it is made a felony to intend to depose the sovereign, or to place duress upon her in order to compel her to change her counsels, or to intimidate either house of parliament, or to incite any foreigner to invade the kingdom; lastly, under the Stat. 5 & 6 Vict. ch. 51, § 2, it is made a high misdemeanor to strike at the sovereign, or to discharge fire-arms near her person with intent to alarm her; and it makes no difference whether the pistol is loaded or not. *Brown.*

Men convicted of high treason were formerly sentenced to be drawn on a hurdle to the place of execution, and to be there hanged and disembowelled alive, and then beheaded and quartered. Women, for all kinds of treason, were sentenced to be burned alive. By Stat. 30 Geo. III. ch. 48, passed in 1790, hanging was substituted for burning, in the case of women convicted of high or petty treason; and by Stat. 54 Geo. III. ch. 146, passed in 1814, men convicted of treason were to be drawn to the place of execution, and hanged till dead, and then beheaded and quartered. And now, by Stat. 33 & 34 Vict. ch. 23, § 31, passed in 1870, the punishment of treason is reduced to hanging (in public). (*Termes de la Ley; Cowel;* 4 *Bl. Com.* 74–93; 4 *Steph. Com.* 149–164; *Cox & Saunders Cr. Law,* 448.) *Mozley & W.*

Every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason, shall, moreover, be incapable of holding any office under the United States. *U. S. Rev. Stat.* § 5332.

Treason-felony. Under the English statute 11 & 12 Vict. ch. 12, passed in 1848, is the offence of compassing, devising, &c., to depose her majesty from the crown; or to levy war in order to intimidate either house of parliament, &c.; or to stir up foreigners by any printing or writing to invade the kingdom. This offence is punishable with penal servitude for life, or for any term not less than five years, &c., under statutes 11 & 12 Vict. ch. 12, § 3; 20 & 21 Vict. ch. 3, § 2; 27 & 28 Vict. ch. 47, § 2. By the statute first above mentioned the government is enabled to treat as felony many offences which must formerly have been treated as high treason. *Mozley & W.*

TREASURE-TROVE. Money or coin, gold, silver, plate, or bullion, found hidden in the earth or other private place, the owner thereof being unknown. In such case, the treasure belongs to the king, and is part of his ordinary revenue; but if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. (3 *Inst.* 132; *Dalt. Sheriffs,* ch. 16.) Also, if it be found in the sea or upon the earth, it doth not belong to the king, but to the finder, if no owner appears. (*Brit.* ch. 17; *Finch L.* 177.) So that it is the hiding, and not the abandoning of it, that gives the king a property. This difference clearly arises from the different intentions which the law implies in the owner. A man that hides his treasure in a secret place evidently does not mean to relinquish his property, but reserves a right of claiming it again when he sees occasion; and if he dies, and the secret also dies with him, the law gives it to the king, as part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property. Formerly, all treasure-trove belonged to the finder. (*Bract.* l. 3, ch. 3; 3 *Inst.* 133; *Kitch.* 80.) Afterwards, it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king, which part was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder. *Jacob.*

TREASURER. The style or title of an officer to whom funds are committed, to be kept or disbursed.

Officers bearing this title are numerous under various governments, in corporations, and in private associations. The function is much the same in all cases, — to take charge of the funds or revenue as they come in, to keep them safely, and make payments from them, as required from time to time.

The lord high treasurer of England was a lord by his office, and one of the greatest men of the kingdom. He held his place *durante bene placito*, and was instituted by the delivery of a white staff to him by the king; and in former times he received his office by delivery of the golden keys of the treasury; he was also treasurer of the exchequer by letters-patent. Under the charge and government of the lord treasurer was all the king's wealth contained in the exchequer; he had the check of all the officers employed in collecting the customs and royal revenues; all the offices of the customs in all ports of England were in his gift and disposition; escheators in every county were nominated by him; and he made leases of all the lands belonging to the crown, &c. (See 4 *Inst.* 104.) The chancellor of the exchequer is under-treasurer, and a check on the treasurer. *Tomlins.*

TREASURY. An establishment, office, or place for the safe keeping of moneys. And the word is often used metaphorically for the supply of money at command for an enterprise or association, without meaning to import that there is any distinct place for keeping them; thus, one might say of a corporation that there were ample funds in its treasury, meaning under its control, though perhaps kept in an ordinary bank account.

As a branch of the United States government, the department of the treasury under the general charge of the secretary of the treasury has the collection, custody, and disbursement of the national revenues.

Under the British government, the lords commissioners of the treasury form the department of state under whose control the royal revenue is administered.

TREATY. An agreement or compact between nations; a formal written engagement or league between independent powers or tribes.

By the general law of nations, a treaty is, in its nature, a contract, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infra-territorial; but waits to be carried into execution by the sovereign power of the respective parties to the instrument. In the United States, however, a different principle is established. The constitution declares a treaty to be the law of the land; and it is, consequently, regarded in courts of justice as equivalent to an act of the legislature, whenever it is of a nature to operate of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract; when either of the parties engages to perform a particular act; the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court. Foster *v.* Neilson, 2 *Pet.* 232, 314.

TREBLE. Is used, somewhat technically, to denote increase of costs or of damages.

Treble costs. There have been statutes authorizing in certain actions a recovery of "treble costs;" but the books do not seem agreed whether these are to be literally three times the costs, or are to be computed according to a conventional rule. Burrill (citing 2 *Tidd Pr.* 988) says that the phrase means a rate of costs, consisting of the common costs, half of these, and half of the latter; that the word treble, in this application, is not understood in its literal sense of thrice the amount of single costs, but signifies merely the addition together of the three sums fixed as above. Brown, however, says it means three times the amount of the costs incurred by a party in an action, and that payment of such costs is by various statutes imposed as a punishment upon persons violating the provisions of those statutes; that, for instance, under Stat. 29 Eliz. ch. 4, the sheriff, for extortion on final process, is liable to pay not only treble damages (or three times the amount of the sum which he has extorted), but also treble costs, which is the amount of the plaintiff's costs reckoned three times over. It is believed, however, that any allowance of treble costs has now been very generally abrogated.

Treble damages. There have been some statutes, allowing, by way of quasi penalty, a recovery of treble damages. No suggestion has been noticed but that this expression means literally three times the amount of the damages.

TREBUCKET. A certain engine of correction, in which persons convicted of

the offence of being common scolds were placed; it was also called the castigatory or cucking stool, which latter is said to signify in the Saxon language scolding stool, though frequently corrupted into ducking stool, from the circumstance of the offender placed therein being plunged in the water for her punishment. *Brown.*

Tres faciunt collegium. Three make a corporation. At least three members are requisite to constitute a corporation. This was a rule of the Roman law. A similar rule has been adopted in some of the United States, in general acts authorizing the creation of corporations, in which a certain number of persons, usually three, are required as the minimum to constitute the corporation.

TRESPASS. The comprehensive name of a variety of wrongs having the common element of a use of force; also, of a number of actions maintainable in courts proceeding according to the course of the common law, to recover damages for wrongful use of force.

I. WRONGS KNOWN BY THE NAME OF TRESPASS.

Used as the name of a substantive wrong, not as that of a remedy, trespass signifies a private injury committed with force; a hurtful use of violence, which is wrongful, not felonious. The books also say that in a broad sense it signifies the voluntary transgression or violation of any moral law or duty; and that *transgressio*, in the law Latin, was the old equivalent. But this is not a use of it, common in practical jurisprudence of the present day. In its usual legal acceptation, it means a wrong done with force. Upon the one hand, it excludes all varieties of wrongs in which force can be neither perceived nor implied; such as conversion, negligence, slander. Force, actual or implied, is a distinguishing element. Upon the other hand, it does not include violence rising to the grade of crime. Murder, rape, and robbery cannot be properly called trespasses. Or, if the same act may in one aspect be punishable as an offence, and in another actionable as a wrong, the word trespass presents only the tortious aspect, and excludes the criminal one.

General principles governing the application of the word to various injuries are, that an act of force is necessary; and it must be wrongful, and must produce loss to another, as its natural or actual consequence. Mere words do not constitute a trespass. Wheeler *v.* Moore, *Wright*, 408. There must be some act which can at least be regarded as supplying the element of force, though actual force, gross violence, is not required. This act must be, in the legal sense, wrongful. It must not be criminal, or, if it is, that feature is kept out of view; and it need not be malicious in the sense of actually designing to hurt another. The familiar case of Guille *v.* Swan (19 *Johns.* 381) illustrates this feature. Guille, an aeronaut, having ascended in a balloon, came down within Swan's garden, followed by a large number of persons, to whom, being in a situation of some peril, he called for help. Some damage was done to the garden by the balloon, but much more by the crowd, in treading down the vegetables and flowers. Guille was held liable for the entire damage, both for what the balloon had caused and for what the crowd did in following it by Guille's request. Here the circumstances quite preclude any idea of a wilful purpose to beat down the garden as an injury to its owner, yet he was charged because the intrusion on his lands without permission was unlawful.

Any unlawful interference with, or act of ownership over, property of another may be a trespass, without actual malice. Dexter *v.* Cole, 6 *Wis.* 319. But there must be some blame, some breach of duty or default; a pure accident, an act unintended or done involuntarily and by compulsion, and not attributable to a previous wrongful act of the party as its cause, will not be deemed a trespass. Then, the loss of which plaintiff complains must be the natural and proximate consequence of the wrongful act; for the liability for trespass will not be extended to consequences which could not have been foreseen. But this is rather a restriction on the action than an element in the tort.

Although the force involved in trespass is one which is tortious, not criminal, yet the trespass may be a crime, and punishable as such, upon indictment in

the criminal courts. This is the rule by statute in many states; the more aggravated trespasses — those actuated by actual malice, or perpetrated by gross violence, or resulting in necessary and grievous injury — have been made criminally punishable.

Trespass is any transgression of the law less than treason, felony, or misprision of either. But the word is most constantly used for wrong or damage done by one private man to another; in which signification it is of two sorts: trespass general, otherwise called trespass *vi et armis*; and trespass special, or upon the case. In its largest and most extensive sense, trespass signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. It supposes a wrong to be done with force. *Jacob.*

Trespass, in its most comprehensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; and this, whether it relates to a man's person or to his property. In its more limited and ordinary sense, it signifies an injury committed with violence, and this violence may be either actual or implied; and the law will imply violence though none is actually used, when the injury is of a direct and immediate kind, and committed on the person or tangible and corporeal property of the plaintiff. Of actual violence, an assault and battery is an instance; of implied, a peaceable but wrongful entry upon a person's land. *Brown.*

The word trespass, in the criminal code of Arkansas, is descriptive of offences of a lower grade only, such as misdemeanors, and does not mean crimes of a deeper dye. United States *v.* Flanakin, *Hempst.* 30.

A seizure of property as prize is no trespass, though it may be wrongful. The authority and intention with which the act is done deprives it of that character. Juando *v.* Taylor, 2 *Paine*, 652.

Trespass to lands, or to real property. This phrase includes all the various injuries to or intrusions upon or occupations of the realty of another person, which cannot be justified by showing a legal right to do them. The plaintiff's property in the land may be remote and the intrusion slight, and yet a trespass be established; as in the case of Adams *v.* Rivers (11 *Barb.* 390) where defendant, passing along the sidewalk in a town, stopped opposite plaintiff's house, and remained there, using insulting language towards the plaintiff; and defendant was held a trespasser, because plaintiff owned the fee to the centre line of the street, subject only to the public right to use the land as a highway, and plaintiff's right to be upon the sidewalk was limited to passage or travel along it. The motive may have been innocent; yet if the intrusion is without right or legal excuse, a trespass is committed; as in Newsom *v.* Anderson (2 *Ired. L.* 42), where defendant was cutting trees on his own land, and one of them, without design on his part, fell upon the plaintiff's land adjoining.

Trespass to the person. This phrase includes the various wrongs involving force which injure another in his rights of person, absolute or relative. Prominent examples are: assault and battery, and false imprisonment, affecting absolute rights; and seduction of a wife or female servant, affecting relative ones.

Trespass to personal property. This phrase includes the various wrongs involving force which injure another in his ownership of personal property; either in damaging the things themselves, or in taking them from their owner. Malice towards the owner is not involved: the wrong may be complete, although the act was done in the exercise of a supposed right, if the right did not in truth exist; as where one seizes goods of A on process against B, or on process void for want of jurisdiction, though supposed to be valid. But there must be a wrongful injury or taking: where the taking is lawful, as where the defendant finds the property, and takes it in charge innocently and rightfully, but afterwards misappropriates it, the wrong is not trespass. An apparent but not a real exception to this principle is in the doctrine of trespasser *ab initio* (q. v.), where some subsequent act of defendant is considered to relate back, and render a taking wrongful as against him, which in its original aspect might not have been so considered.

Trespass in a limited and confined sense, as relates to land, signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry,

therefore, thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression, for satisfaction of which an action of trespass will lie. *Jacob.*

The backing of water on the plaintiff's land by the dam of the defendant is a trespass, within the sense of that word, as used in a statute to prevent abatement of actions for trespass. It is obvious that in its widest scope the word trespass signifies every injury to property. Its synonym in law Latin was *transgressio*, a term which, in its comprehensive signification, embraced every infraction of a legal right. In this sense, it comprehends not only forcible wrongs, where the damages were direct and immediate, but also acts the consequence of which makes them tortious. In this broad acceptation of the word, wrongful flowage is a trespass; and being such, it clearly falls within the letter of the statute. It is just as clearly embraced in the general scope or spirit of the statute. The act is remedial in its character; its intent was to relieve against the harsh injustice of the old rule, *actio personalis moritur cum persona.* It therefore is to be liberally construed, so as to advance the remedy for this imperfection. To hold that the act is operative only with regard to torts remediable by the action of trespass, would be, certainly, to leave one half of the evil of the old law unaffected by the remedial provision. The word trespass, as used in the statute under consideration, must be received as equivalent in meaning to the word tort; so that the effect of the provision is to give a right of suit against the personal representatives of a deceased wrong-doer for any injurious act of a suable nature, without reference to the form in which the remedy must be sought. Ten Eyck *v.* Runk, 31 *N. J. L.* 428.

Trespass vi et armis. This phrase distinguishes those trespasses to the person or to personal property which are characterized by actual direct force, as distinguished from those in which it is constructive or indirect. Its chief use is in discriminating the action allowed for this class of trespasses, termed the action of trespass *vi et armis*, from the action for trespasses in which the damage is the indirect result of the force, or constructive, known as the action of trespass on the case. See *infra.*

II. Actions known by the name of Trespass.

As a name of remedy, trespass designates the following:

Trespass, or trespass vi et armis. This is that form of action which, according to common-law procedure, was appropriate to redress a trespass to the person or to personal property, in cases where the injury done was the immediate result of the wrongful force.

Trespass de bonis asportatis. This is that form of action which, according to common-law procedure, was appropriate where the wrong complained of consisted in carrying away the goods of the plaintiff with force. It extended to a class of cases in which the defendant was not chargeable with wrongful use of force in the original taking, but was held liable on the ground of relation (*q. v.*) from after acts, such as his ratifying a forcible taking committed in his behalf, but without original authority. See Trespasser ab initio.

Trespass on the case. This is that form of action which, according to common-law procedure, was appropriate to redress a trespass to the person or to personal property in cases where the injury done was the indirect or remote result of the wrongful force.

Trespass on the case is the form of action adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied with direct or immediate force. Thus, if a man, in throwing a log into the highway, strikes a passer-by, he may sue in an action of trespass simply so called, and only in that action for damages for the injury he may have sustained; but if, after the log has fallen and rested on the ground, he stumbles over it, and so receives an injury, then "trespass on the case," or, as it is commonly called, an action "on the case," would be his appropriate remedy. It is called an action upon the case, because the original writ by which this action was formerly commenced was not conceived in any fixed form, but was framed and adapted to the nature and circumstances of the case by virtue of the statute *de consimili casu* (13 Edw. I., statute of Westminster the Second), ch. 24. (See Scott *v.* Shepherd, 2 *Bl. Rep.* 892; 1 *Smith L. C.* 210; 1 *Chit. Pl.* 127, 6th ed.; *Com. Dig.* tit. Action upon the Case (a).) *Brown.*

Trespass for mesne profits. An action which lay after recovery of possession of lands by means of an action of ejectment, to recover damages for the dispossession; that is to say, to recover for the loss of the rents and profits of the land between the time when the plaintiff was ousted (or such later time as the statute of limitations permitted), and the time of his being reinstated in

the possession under the recovery in ejectment. By modern practice, recovery of mesne profits has been, in many jurisdictions, allowed in the action of ejectment itself, without putting plaintiff to an independent action.

Trespass quare clausum fregit. That form of action which, according to common-law procedure, was appropriate to recover damages for an unlawful entry or intrusion upon land. It derived its name from the emphatic words of the old Latin form of the writ, by which the defendant was summoned to show why he broke plaintiff's enclosure.

Trespass to try title. An action which, in a few of the states (chiefly South Carolina, Alabama, Arkansas, and Texas), has been authorized as a substitute for the action of ejectment. According to Bouvier's explanation, the action is in much the same form with trespass *qu. cl. fr.*, except that the writ must be accompanied with a notice to defendant that action is brought to try the title, as well as for damages; and it proceeds upon the theory of recovering damages for defendant's trespass on plaintiff's lands; but, on recovery of judgment for such damages, the plaintiff is entitled to a writ of *hab. fac. poss.*

TRESPASSER. One who has committed trespass; particularly, one who has entered, without right, upon lands of another; or who has forcibly taken, without right, the personal property of another.

Trespasser ab initio. Wrong-doer from the beginning. Sometimes an act which does not appear wrongful, as against the party charged, when originally done, is treated as such, by the doctrine of relation, in view of facts afterwards occurring, or afterwards ascertained. Should a plaintiff's agent direct a wrongful levy of plaintiff's execution, and plaintiff afterwards ratify the direction given; or should an officer levy an execution, supposing it to be valid, and the courts afterwards adjudge it to be void; — the wrong might be imputed to the original act. In such cases, a person is said to be a trespasser *ab initio*.

TRIAL. The judicial determination of an issue. See *N. Y. Code of Pro.* § 252.

Trial is the examination of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. More strictly, it is the examination of the matter of fact in issue: of this there are many different species, according to the difference of the subject to be tried; as, for example, trial by record, by inspection or examination, by certificate, by witnesses, and by jury. The first four of these species of trial are only had in certain special and eccentrical cases, where the trial by the country, *per pais*, or by jury, would not be so proper or effectual. There were formerly two other kinds of trial, — by wager of battle and by wager of law; but the former was abolished by the 57 Geo. III. ch. 46, and the latter by the 3 & 4 Wm. IV. ch. 42. *Tomlins.*

By the term trial is generally intended, in the criminal law, the actual trial of the prisoner by the jury, and not the arraignment and pleading preparatory to such trial. United States *v.* Curtis, 4 *Mas.* 232, 237.

In act of congress of March 2, 1867 (Rev. Stat. § 639, subd. 3), authorizing removal of cause from state to federal court, on petition before trial or final hearing of the cause, the trial meant is the final trial, not a trial the verdict on which is set aside, and a new trial granted. The adjective final applies to trial as well as to hearing. Insurance Co. *v.* Dunn, 19 *Wall.* 214; Vannevar *v.* Bryant, 21 *Id.* 41; Minnett *v.* Milwaukee, &c. Ry. Co., 3 *Dill.* 460.

In its general sense, the word trial means the investigation and decision of a matter in issue between parties before a competent tribunal. Jenks *v.* State, 39 *Ind.* 1.

As used in the bankrupt law, it means a trial by jury. Gordon *v.* Scott, 3 *Pittsb.* 109.

In acts of congress of 1866 and 1867, regulating removal of causes, "trial" appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and "final hearing," in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity. Galpin *v.* Critchlow, 112 *Mass.* 339.

The terms "jury," and "trial by jury," as used in the constitution, mean twelve competent men, disinterested and impartial, not of kin, nor personal dependants of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impanelled and sworn to render a true verdict according to the law and the evidence. State *v.* McClear, 11 *Nev.* 39.

A court which refers a cause to a referee for trial, and afterwards receives his report and renders judgment upon it, may be said to try the cause, within a statute requiring a certificate to facts warranting execution

against the person to be made by the court of justice before whom the action is tried. Cooley *v.* Eastman, 57 *N. H.* 503.

The expression "trial of an issue" does not include an assessment of damages by a sheriff's jury. Randolph *v.* Foster, 3 *E. D. Smith*, 648; 4 *Abb. Pr.* 262.

The word trial, in a statute relative to costs, may include a nonsuit voluntarily submitted to after evidence is put in. Allaire *v.* Lee, 1 *Abb. Pr.* 125.

The opening of the cause, introduction of evidence, and summing up by counsel to the jury, or submitting of the cause to the court or referee, on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact; and the trial is not completed until the cause is finally submitted to the court, referee, or jury. Mygatt *v.* Willcox, 35 *How. Pr.* 410.

Trial at bar. A trial which takes place before all the judges at the bar of the court in which the action is brought. Before the Stat. Westm. 2 (13 Edw. I. ch. 30), civil causes were tried either at the bar of the court, or, when of no great moment, before the justices in eyre. When the justices in eyre were superseded by the modern justices of assise, it was enacted by the above statute "that inquisitions to be taken of trespasses pleaded before the justices of either bench shall be determined before the justices of assise, unless the trespass be so heinous that it requires great examination; and that inquisitions of other pleas pleaded in either bench, wherein the examination is easy, shall be also determined before them: but inquisitions of many and weighty matters, which require great examination, shall be taken before the justices of the benches, &c.; and, when such inquests are taken, they shall be returned into the benches, and there judgment shall be given, and they shall be enrolled." Since the making of this statute, causes in general are tried at *nisi prius*, trials at bar being only allowed in ejectment, and other causes which require great examination.

When the crown is immediately concerned, the attorney-general has a right to demand a trial at bar. In all other cases it is entirely in the discretion of the court, governed by the circumstances of the case; even if the parties consent, such a mode of trial cannot be had without leave of the court. The grounds on which this trial ought to be granted are, the great value of the subject-matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it.

A trial at bar is had upon the *venire facias* or *distringas*, &c., as at common law, without any clause of *nisi prius;* and it is mostly by a special jury of the county where the action is laid. *Tomlins.*

A trial at bar, which is a species of trial now seldom resorted to excepting in cases where the matter in dispute is one of great importance and difficulty, is a trial which takes place before all the judges at the bar of the court in which the action is brought. The recent case of Reg. *v.* Castro, otherwise Tichborne or Orton (1872–73), was an example of trial at bar. *Brown.*

Trial by certificate. A form of trial, allowed in cases where the evidence of the person certifying was the only proper criterion of the point in dispute. As such evidence, if given to a jury, must have been conclusive, the law, to save trouble and circuity, permitted the fact to be determined upon such certificate merely. See *Tomlins*, tit. Certificate.

Trial by proviso. A proceeding allowed where the plaintiff in an action desists from prosecuting his suit, and does not bring it to trial in convenient time. The defendant, in such case, may take out the *venire facias* to the sheriff, containing these words: *proviso quod*, &c., *i.e.* provided that. If plaintiff take out any writ to that purpose, the sheriff shall summon but one jury on them both. This is called going to trial by proviso. *Jacob*, tit. Proviso.

In all cases where the plaintiff, after issue joined, does not proceed to trial, where, by the course and practice of the court, he ought to have done so, the defendant may, if he wish, have the action tried by proviso; that is, he may give the plaintiff notice of trial, make up the *nisi prius* record, carry it down and enter it, and proceed to the trial as in ordinary cases, as if he were proceeding as plaintiff. This, however, can be done only in cases where the plaintiff has been guilty of some laches or default after issue joined, — except in replevin, prohibition, *quare impedit*, and error in fact; in which cases, both parties being plaintiffs, the defendant may make up the *nisi prius* record, and thereupon proceed to trial, although no laches or default be imputable to the plaintiff. The court have also allowed a defendant to carry down the record of an issue directed by the court of chancery to trial by proviso, upon its being suggested to them that the plaintiff wished to delay the cause. *Wharton.*

Trial before the sheriff. Formerly, trials were only at bar or at *nisi prius;* but by the 3 & 4 Wm. IV. ch. 42, § 17, in any action depending in any of the said superior courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed twenty pounds, it shall be lawful for the court in which such suits shall be pending, or any judge of any of the said courts (if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do), to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any

court of record, for the recovery of debt in such county; and, for that purpose, a writ shall issue, directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues. The verdict of the jury is "as valid and of like force as a verdict of a jury at *nisi prius;* and the sheriff or his deputy or judge presiding at the trial of such issue or issues has the like powers with respect to amendment of such trial as are thereinafter given to judges at *nisi prius.*" *Tomlins.*

Trial by witnesses. The name trial *per testes* (see TESTIS) has been used for a trial without the intervention of a jury, is the only method of trial known to the civil law, and is adopted by depositions in chancery. The judge is thus left to form, in his own breast, his sentence upon the credit of the witnesses examined. But it is very rarely used at common law. *Tomlins.*

TRIBE. Whether any particular class of Indians are still to be regarded as a tribe, or have ceased to hold the tribal relation, is primarily a question for the political departments of the government; and, if they have decided it, the courts will follow their lead. United States *v.* Holliday, 3 *Wall.* 407.

TRIBUNAL. Originally, an elevated seat, occupied by the prætor, while engaged in judging causes; now used in the general sense of any court or forum.

TRIBUNAUX DE COMMERCE. In French law, are courts consisting of a president, judges, and substitutes, elected in an assembly of the principal traders. No person under thirty years is eligible as a member of the tribunal; and the president must be forty years of age, at the least. The tribunal takes cognizance of all cases arising between merchants, and also of all disagreements arising among partners. The course of procedure is, as in civil cases, subject to an appeal to the courts of justice. *Brown.*

TRIERS, or TRIORS. Persons appointed by the court, to determine some incidental question; particularly, persons called to determine the truth of a cause assigned for challenge to a juror.

Triors are the lords selected to try a peer, when indicted for felony, in the court of the lord high steward. Also, two indifferent persons, named by the court to try the reasonableness of an objection taken by a party to a juror, on the ground of some alleged probable circumstances of suspicion, as acquaintance and the like; or to the whole panel of jurors, on account of a like objection to the sheriff. *Mozley & W.*

Triors of jurors are persons selected by the court to examine whether a challenge, made to the panel of jurors, or any of them, be just or not. A challenge to the panel is grounded on some probable cause of suspicion, — as an acquaintance, or the like, — the validity of which is determined by these triors. These, if the first juror be challenged, are two indifferent persons, named by the court. If they find one man indifferent, he shall be sworn; and he, with the two triors, shall try the next, and, when another is found indifferent and sworn, the two triors shall be superseded; and the two first sworn on the jury shall try the rest. *Brown.*

TRINITY HOUSE. This society was incorporated by Henry VIII., in 1515, for the promotion of commerce and navigation, by licensing and regulating pilots, and ordering and erecting beacons, light-houses, buoys, &c. A similar society, for the like purposes, was afterwards established at Hull, and also another at Newcastle-upon-Tyne, in 1537; which three establishments, says Hakluyt, were in imitation of that founded by the Emperor Charles V. at Seville, in Spain, who, observing the numerous shipwrecks in the voyages to and from the West Indies, occasioned by the ignorance of seamen, established, at the Casa de Contratacion, lectures on navigation, and a pilot major for the examination of other pilots and mariners, having also directed books to be published on that subject for the use of navigators. Henry VIII., by his charter, confirmed to the Deptford Trinity House society all the ancient rights, privileges, &c., of the shipmen and mariners of England, and their several possessions at Deptford; from which it is plain that the society had existed long previously. The corporation was confirmed, in 1685, in the enjoyment of its privileges and possessions, by letters-patent of the 1st of James II., by the name of the master, wardens, and assistants of the guild or fraternity of the most glorious and undivided Trinity, and of St. Clements, in the parish of Deptford Strand, in the county of Kent. At first, the corporation seems to have consisted of seamen only; but many gentlemen and some noblemen are now amongst its members or elder brethren. It is governed by a master, four wardens, eight assistants, and thirty-one elder brothers. But the inferior members of the fraternity, named younger brethren, are of an unlimited number; for every master or mate, expert in navigation, may be admitted as such. Besides the power of erecting light-houses and other sea-marks on the several coasts of the kingdom, for the security of navigation, the master, wardens, assistants, and elder brethren are invested by charter with the following powers; viz., the examination of the mathematical scholars of Christ's Hospital, and of the masters of his majesty's ships; the appointment of

pilots to conduct ships into and out of the Thames; the amercement of such unlicensed persons as presume to act as masters of ships-of-war or pilots, in a pecuniary fine; settling the several rates of pilotage; granting licenses to poor seamen, not free of the city, or past going to sea, to row on the river Thames for their support; preventing aliens from serving on board English ships without license; hearing and determining the complaints of officers and seamen of British ships, subject to an appeal to the lords of the admiralty. *Tomlins.*

TRINITY TERM. One of the former terms of the English law courts. See TERM.

TRINODA NECESSITAS. A threefold necessity; a threefold burden. This expression denoted the three public necessities to which all lands were liable under Saxon law; which were: the repair of bridges; the building of castles; and military service against an enemy.

TRIPARTITE. Of three parts. Applied to an indenture executed between three parties; hence made in three counterparts or copies.

TRITHING; TRIDING; or TRIHING. In England, each county was formerly divided into three jurisdictions, each of which was called a trithing, triding, or trihing.

These divisions still subsist in the large county of York, where, by an easy corruption, they are denominated ridings. *Cowel.*

Trithing mote. The court held for a trithing or riding.

Trithing reeve. The officer who superintended a trithing or triding.

TROUBLE. As used in a statute giving a land-owner damages for the trouble and expense he is put to by proceedings to lay out a city street upon his land, refers to trouble from which some material or pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience to the owner in the use and occupation of the land. Mental troubles, so difficult to estimate by any pecuniary standard, and which may vary in different individuals, according to their temperament or health, do not come within the meaning of the word. Whitney *v.* City of Lynn, 122 *Mass.* 338.

TROVER. The name of that form of action among the common-law forms which was appropriate for recovering damages to compensate a plaintiff for loss of property through a wrongful conversion of it by defendant. It is called trover, because it is founded upon the supposition, which, however, is in general a mere fiction, that the defendant found the goods in question, and converted them to his own use. This conversion is the true gist of the action, and for this the plaintiff claims damages.

In substance, therefore, the action is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes that the plaintiff was the lawful owner of the goods, either in virtue of a general or special property in them; that he was entitled to possession; yet the defendant came into possession of them, — as, for instance, by finding them, — and that the defendant then wrongfully converted them to his own use. The action is only appropriate when these general facts exist, except that no literal finding need be shown; and it seeks only a recovery of damages, not of possession.

The action was originally an action of trespass on the case for recovery of damages against such person as had actually found another's goods, and refused to deliver them on demand, but converted them to his own use; from which finding and converting it is called an action of trover and conversion. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue, that, by a fiction of law, actions of trover were at length permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion; for any man may take the goods of another into possession if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown; and, therefore, he must not convert them to his own use, which the law presumes him to do if he refuses to restore them to the owner; for which reason, such refusal alone is, *prima facie*, sufficient evidence of a conversion. The fact of the finding or trover is, therefore, now totally immaterial; for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he proves that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved; and then, in this action, the plaintiff shall recover damages equal to the value of the thing converted, but not the thing itself, which nothing will recover but an action of

detinue or replevin. (3 *Bl. Com.* ch. 9.) *Jacob.*

In trover, the plaintiff cannot recover the specific chattel, but only damages for its conversion. The fictitious suggestion of the "finding" was abolished by the common-law procedure act, 1852, by which a simple form of declaration was introduced for such cases. *Mozley & W.*

TRUCE. An armistice; an agreement between belligerents to suspend hostilities for a time, but without terminating the war.

Truce of God. A suspension which the church, during the middle ages, secured, in private hostilities and warfare, during holidays and other fixed times. See *Burrill.*

TRUCK SYSTEM. A name given to the practice of paying the wages of workmen in goods instead of money. The plan has been for the masters to establish warehouses or shops, and the workmen in their employment have either got their wages accounted for to them by supplies of goods from such depots, without receiving any money, or they have got the money, with a tacit or express understanding that they were to resort to the warehouses or shops of their masters for such articles as they were furnished with. *M'Cull. Comm. Dict.*

This system of dealing being considered open to grave abuses, was abolished in 1831 by Stat. 1 & 2 Wm. IV. ch. 37, commonly called the truck act. By its provisions, contracts for the hiring of artificers in certain trades are to be made in the current coin of the realm, and without any stipulations as to the manner in which the wages shall be expended, otherwise they are declared to be illegal and void; and any employer entering into such a contract, or making any illegal payment, is liable to be fined as therein mentioned. *Mozley & W.*

TRUE BILL. Upon finding an indictment, the grand jury usually indorse upon it, by their foreman, the words, "A true bill."

TRUE VALUE. The words true value, in section 11 of the supplementary act of congress of April 20, 1818, — authorizing the collector to direct an appraisement when there is ground to suspect that goods have been invoiced below their true value at the place from which they were imported, — mean the actual cost of the goods to the importer at the place from which they were imported, and not the current market value of such goods at that place. United States *v.* Tappan, 11 *Wheat.* 419. Compare Tappan *v.* United States, 2 *Mas.* 393.

TRUST. In its most general sense, is confidence reposed in a person that he will act in certain matters for the benefit of another; but, technically, it signifies a holding of property, subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived.

Trustee: is the person who holds property in trust. The correlative, trustor, is not in use. The person from whom the property is derived is generally called the donor; and, if the purpose of the trust is the support or benefit of a person, he is called the beneficiary, or *cestui que trust.* Judge Story recommended the employment of the first of these terms in preference to the second and older one.

For a careful review of early definitions of "trusts," see *Burrill.*

Trusts are variously called *express*, *implied*, and *constructive* or *resulting* trusts; which terms are explained under their respective titles.

There is also a distinction of *active* or *special* trusts, as contrasted with *simple* trusts. An active or special trust is one where the machinery of a trust is introduced for the execution of some affirmative purpose, and the trustee is not a mere passive depositary of the estate, but is expected to take active steps to carry into effect the general intention. A trust to executors to sell property, and apply the proceeds according to certain dispositions contained in the will, is an example. A passive or simple trust is a trust which requires no act to be done by the trustee except conveyance or transfer to his *cestui que trust* on request by the latter. Such a trust corresponds very closely to the ancient use; indeed, the modern law of trusts is, as appears from the accounts given below, a development and expansion of the law of uses.

A distinction is also made between *executory* and *executed* trusts, which, as explained in English books, is somewhat different from the ordinary employment of the words "executed" and "executory." An executed trust is said to be one which the person creating it has fully and finally declared, whence also it is called a complete trust; while an executory trust is one which the person creating it has not fully or finally declared, but

has given merely an outline of it by way of direction to the conveyancer, whence also it is called sometimes an incomplete and sometimes a directory trust. See *Brown.*

Voluntary trusts are trusts in favor of a volunteer, *i.e.* of a person as to whom the trust is a pure bounty or gift, for which he pays or gives nothing as the price thereof; on the other hand, trusts *for value* are trusts in favor of purchasers, mortgagees, or others, whom the courts of equity regard as valuable claimants.

Trust is a confidence which one man reposes in another; but, as generally used in law, it is a right to receive the profits of land, and to dispose of the land itself (in many cases), for particular purposes, as directed by the lawful owner, or pointed out by settlement, &c., or by that deed of conveyance which created the trust. Trust is but a new name given to a use. *Jacob.*

Uses having existed previously to the statute of uses (27 Hen. VIII. ch. 10), as confidences which the court of chancery upheld and enforced, these early confidences were the earliest form of trusts; but after that statute, these uses became transmuted into legal estates, and the jurisdiction of equity over trusts promised to cease, or at any rate to become unnecessary, until the refusal of the law courts to recognize any second use upon a first use, *i.e.* a use upon a use, revived or restored, and even increased, the former equitable jurisdiction over trusts. In regulating the qualities and incidents of trust estates, equity followed the law in its leading principles, construing, for example, words of limitation in the like manner as the same were construed at law, and generally (although with some exceptions hereinafter mentioned) adopting the rules of law with little or no variation. Thus, in fact, in every estate, there came to exist, by possibility at least, and in general in actual fact as well, two estates of equal quality and duration, existing side by side, — a union which is called the union of the equitable with the legal estate in fee.

Two statutes are all important in their bearing upon trusts: the first of the two being the statute of uses already mentioned, and the other of them the statute of frauds (29 Car. II. ch. 3); and, in distinguishing these two statutes, it is essential to note, that the statute of uses, on the one hand, extends to freehold hereditaments only, and neither to leaseholds nor to copyholds, and, *a fortiori*, not to pure personal estate; and that the statute of frauds, on the other hand, extends to freeholds, leaseholds, and copyholds indifferently, requiring for the creation of a trust thereof respectively the use of writing, but as the latter statute does not extend to pure personal estate, it follows that a trust of pure personal estate may be created without writing.

Trusts are manifold, but are commonly arranged under the following heads:

1. Express trusts, being trusts which are created in so many fit and appropriate terms, and which are subdivided into express private trusts, or trusts affecting individuals only, which are, executed and executory trusts, trusts voluntary and for value, trusts in favor of creditors; and express public trusts, called also charitable trusts.

2. Implied trusts, being trusts founded on the presumable, although unexpressed, intention of the party who creates them, which are: trusts resulting from a purchase in the name of a stranger; trusts resulting from an incomplete disposition of the equitable estate, including trusts of the undisposed-of surplus of personal estate for the next of kin, or of real estate for the heir at law; trusts under conversions that fail; trusts in cases of joint tenancies, whether for purchasers or for mortgagees.

3. Constructive trusts, being trusts founded neither on an expressed nor on any presumable intention of the party, but raised by construction of equity without any regard to intention, and simply for the purpose of satisfying the demands of justice and good conscience, which are: vendor's lien, also vendee's lien, in respect of purchase-money either unpaid or prematurely paid; renewal of leases by trustee in his own name; permanent improvements to an estate which were unavoidable; heir of mortgagee in respect of mortgage loan for next of kin of mortgagee.

A trust may be an executed trust in either of two ways. By *declaration of trust*, which is a simple and informal mode of creating it, requiring, however, writing (although not a deed) in the case of land (whether freehold, copyhold, or leasehold), but not even requiring any writing in the case of pure personal estate. The court of chancery is bound to enforce a trust that is completely created in this simple manner. *Exp.* Pye, *Exp.* Dubost, 18 *Ves.* 140. If the person should be both legal and equitable owner of the property of which he declares the trust, he declares himself the trustee thereof; if, on the other hand, he is the equitable owner only, he directs his own trustee (who is the legal owner) to hold the property upon the trusts which he then and there specifies in the direction; and such latter direction, although it has not (nor any notice of it) been sent to the trustee, and although the trustee refuses his assent to it, is binding and effectual against the party giving it; but notice to the trustee is necessary to give the new *cestui que trust* a right *in rem* over the trust property which shall protect him in it against third persons claiming without notice thereof. Bill *v.* Cureton, 2 *Myl. & K.* 503.

Or by *assignment* or *conveyance* of the trust

property, according as it is personal or real estate, to a trustee, accompanied with a limitation or declaration of the trusts thereof; but many difficulties have arisen with reference to this second mode of creating a trust, which manifestly is a mere technical or formal mode of doing so.

The words "trust" or "trustee" are usually and properly employed, in creating a trust. But there is no magic in particular words. In construing devises, no positive rule can be laid down as to what terms will carry the beneficial interest, and what will create a trust. The court will examine the whole will, and carry out the intention. Saylor *v.* Plaine, 31 *Md.* 158.

Although called trustees, the officers of religious corporations do not hold the property in trust. Their name is simply a title of office, and their position the same as if they were called directors or managers. Their possession is the possession of the corporation; and their right to intermeddle is an authority, not an estate or title. This would be so upon general principles, relating to the legal nature of corporations, apart from the particular language of the act concerning religious corporations. People *v.* Fulton, 11 *N. Y.* 94.

Trust-deed. By the general English and American law, this expression signifies a deed creating a trust, usually an active one. In some of the western states, it is used as substantially the equivalent of mortgage, — that is, a conveyance of land by a debtor to a creditor, to secure payment of a debt, containing a power, on default, to sell the land, upon a trust to apply the net proceeds first to payment of the debt, the surplus, if any, to be repaid to the grantor, is commonly called a trust-deed.

Trustee acts. The Stats. 13 & 14 Vict. ch. 60, passed in 1850, and 15 & 16 Vict. ch. 55, passed in 1852, enabling the court of chancery, without bill filed, to appoint new trustees in lieu of any who, on account of death, lunacy, absence, or otherwise, are unable or unwilling to act as such; and also to make vesting orders by which legal estates and rights may be transferred from the old trustee or trustees to the new trustee or trustees so appointed. *Mozley & W.*

Trustee relief acts. The Stat. 10 & 11 Vict. ch. 96, passed in 1847, and Stat. 12 & 13 Vict. ch. 74, passed in 1849, by which a trustee is enabled to pay money into court, in cases where a difficulty arises respecting the title to the trust fund. *Mozley & W.*

Trustee process. A statutory remedy existing in several of the states, corresponding very closely to garnishment, and resembling one branch of foreign attachment, as it has been, in some of the states, extended. By the trustee process, a creditor who cannot collect his demand from his debtor directly, but can find a third person who has effects of the debtor or owes him money, may proceed against such third person to have him adjudged to hold such effects or money as a trustee. This being obtained, the creditor's demand, when established against the debtor, by default or proof, is ultimately satisfied out of what may be forthcoming from the third person.

TUMBRELL. Is an engine of punishment which ought to be in every liberty that hath view of frank-pledge, for the correction of scolds and unquiet women. (*Kitchin*, 13.) *Jacob.*

TUNGREVE. Town-reeve. The chief officer of a town. See REEVE.

TURBARY. Turbary, or common of turbary, is the right or liberty of digging turf upon another man's ground. *Brown.*

TURNPIKE; TURNPIKE ROAD. A road whose constructors are authorized to exact tolls.

The term is generic, and embraces roads of various materials and construction, such as plank roads, gravel roads, &c., as well as those made in the manner of ordinary high-roads.

The chief distinction between a highway and a turnpike is that the first is constructed at public expense, and is free to all; the latter is made at private cost, repaid by tolls.

Plank-road companies may be deemed embraced by an act regulating, by name, bridge, turnpike, railroad, and canal companies. A turnpike company is one that owns and receives tolls on a turnpike road. A road is termed a turnpike road, not because of its form, or of the material of which it is composed, but because of the form and character of the gates placed on the road to obstruct the passage of travellers, until they have paid the tolls, always collected on such roads. The word turnpike does not mean road, but it means gates, such as are used to throw across the road to obstruct travellers' carriages, and the like, until the tolls are collected. The charters usually granted to what are commonly termed turnpike companies and those granted to plank-road companies, with regard to their duties, powers, and privileges, are substantially the same. Their right to erect gates and receive tolls is precisely the same, as is also the mode of using them. The only perceptible difference between the two is the material of which the surface is usually composed. But it is believed that,

whether the surface be earth or stone, or gravel or wood, if they are constructed by a private company under public authority, dedicated to public travel, with gates erected thereon, and tolls collected as a condition of such travel, such companies are turnpike companies, whether the surface of the road be earth, gravel, stone, or wood. State *v.* Haight, 30 *N. J. L.* 443; 32 *Id.* 449.

A road on which toll-gates are erected and tolls taken is a turnpike road. Northam Bridge & Roads *v.* London & Southampton Railway Co., 6 *Mee. & W.* 428; 1 *Railw. C.* 653; Regina *v.* East & West India Docks, &c. Railway Co., 22 *Eng. L. & Eq.* 113; 22 *Law J.* N. S. *Q. B.* 380; 17 *Jur.* 1181; 5 *El. & B.* 466.

A turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance; and the cost of construction and maintenance is reimbursed by a toll, levied by public authority for the purpose. Commonwealth *v.* Wilkinson, 16 *Pick.* 175.

That turnpike acts are not within the general operation of the English highway law, see *Wharton.*

TURPI CAUSA. From a base consideration. See EX TURPI CAUSA.

TUTELA. A species of guardianship in the Roman law; tutelage. See *Burrill.*

Tutela legitima. Tutelage created by law, in the absence of any appointment by will.

Tutela testamentaria. Tutelage created by will.

TUTEUR. In French law, a kind of guardian.

Tuteur officieux. In French law, a person over fifty years of age may be appointed a tutor of this sort to a child over fifteen years of age, with the consent of the parents of such child, or in their default the *conseil de famille.* The duties which such a tutor becomes subject to are analogous to those in English law of a person who puts himself *in loco parentis* to any one. *Brown.*

Tuteur subrogé. In French law, in the case of an infant under guardianship, a second guardian is appointed to him, the duties of the latter (who is called the *subrogé tuteur*) only arising where the interests of the infant and his principal guardian are in conflict. *Brown.*

TUTOR. A species of guardian, in the Roman and Scotch systems of law; also in Louisiana.

U.

UBERRIMA FIDES. The most abundant good faith. This phrase expresses the entire sincerity and good faith in which parties should act in negotiating contracts; and which is deemed peculiarly necessary, and is explicitly required, in particular classes of contracts, especially that of marine insurance.

UBI. Where; when. The initial word of several Latin maxims.

Ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest. When any thing is granted, that also is granted without which the thing granted cannot exist. See *Quando aliquid conceditur*, &c.

Ubi aliquid impeditur propter unum, eo remoto, tollitur impedimentum. Where any thing is impeded by some one particular cause, that cause being removed, the impediment is taken away.

Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium. Where a common remedy ceases, there recourse must be had to an extraordinary one.

Ubi culpa est, ibi pœna subesse debet. Where there is culpability, there punishment ought to be submitted to.

Ubi damna dantur, victus victori in expensis condemnari debet. Where damages are given, the losing party should be condemned in costs to the victor.

Ubi eadem ratio, eadem jus. Where the reason is the same, the law is the same. Where the reason of a rule established in one case is found to be applicable to another case, the same rule will be established in the latter. *Broom Max.* For the converse proposition, see the maxim, *Cessante ratione, cessat ipsa lex.*

Ubi factum nullum, ibi fortia nulla. Where there is no principal fact, there can be no accessory. See *Burrill.*

Ubi jus, ibi remedium. Where there is a right, there is a remedy. The law gives a remedy for the enforcement of every right. It is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. The law will provide a suitable remedy where none before existed; as in the instance of the origin of the form of action called an action on the case. *Broom Max.* 192. The novelty of the cause of action is no objection, provided an injury cognizable by law be shown, in which case, although there be no precedent, the common law will judge according to the law of nature and the public good. *Id.*

Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est. Where the law is special, and the reason of it general, it ought to be taken as being general.

Ubi lex non distinguit, nec nos distinguere debemus. Where the law distinguishes not, we ought not to distinguish.

Ubi major pars est, ibi totum. Where the greater part is, there the whole is.

Ubi non est annua renovatio, ibi decimæ non debent solvi. Where there is no annual renovation, there tithes should not be paid.

Ubi non est cogendi auctoritas, ibi non est parendi necessitas. Where there is no authority for compelling, there is no necessity of obeying.

Ubi non est directa lex, standum est arbitrio judicis, vel procedendum ad similia. Where there is no direct law, it (the question awaiting decision) rests in the discretion of the judge, or should follow precedents.

Ubi non est lex ibi non est transgressio, quoad mundum. Where there is no law there is no transgression, as towards society.

Ubi non est principalis, non potest esse accessorius. Where there is no principal, there cannot be an accessory.

Ubi nullum matrimonium, ibi nulla dos. Where there is no marriage, there is no dower. Marriage is essential to create a right of dower.

Ubi quid generaliter conceditur, inest hæc exceptio, si non aliquid sit contra jus fasque. Where any thing is granted in general terms, this exception is implied, that there shall not be any thing contrary to law and right.

ULTIMATUM. The last. The last proposition made in negotiating a treaty or a contract, or the like; which may be accepted or rejected by the other party, but which will not be modified or withdrawn to be replaced by another.

ULTRA VIRES. Beyond the powers. This phrase is much used in the modern law of corporations to indicate the invalidity of acts done in the name of corporations which exceed the corporate powers. It is found used in a twofold way. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it, under any circumstances or for any purpose. An act is, also, sometimes said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose. And the rights of strangers dealing with corporations may vary, according as the act is *ultra vires* in one or the other of these senses. See Miners' Ditch Co. *v.* Zellerbach, 37 *Cal.* 543; McPherson *v.* Foster, 43 *Iowa*, 48, 65.

UMPIRE. A person selected by two arbitrators, to decide between them in case they do not agree.

The word is sometimes applied to a single person chosen by two parties to a controversy to decide their difference; but this is not its usual sense. It commonly implies that the parties have selected each an arbitrator, and that the umpire is chosen to decide in case of a disagreement between them. A submission to arbitration usually provides that, in case of arbitrators not agreeing in an award, the matters shall be decided by a third person, to be appointed by the arbitrators, or named in the submission itself. This appointment is very generally made a condition precedent to the

proceeding in the reference at all. The appointment of an umpire must be the act of the will and concurring judgment of both the arbitrators. The umpire's authority commences from the non-agreement of the arbitrators; but, if there be a time limited for the award, his authority then absolutely commences from such limit. The umpire, when called upon to act, is generally invested with the same powers as the arbitrators, and bound by the same rules, and has to perform the same duties. It has been sometimes considered, however, that when arbitrators are called upon to award a sum, and differ as to the amount, the umpire must fix upon a sum within those named by the two arbitrators; he cannot award more than the largest sum or less than the smallest.

UNASCERTAINED DUTIES. Payments in gross, on an estimate as to amount, and where the merchant, on a final liquidation, will be entitled by law to allowances or deductions which do not depend on the rate of duty charged, but on the ascertainment of the quantity of the article subject to duty. Moke *v.* Barney, 5 *Blatchf.* 274.

UNAVOIDABLE. To constitute an unavoidable accident, within a stipulation in a bill of lading that vessel shall not be liable for losses by such accidents, there must be a *vis major;* the interfering clause must be irresistible. A loss occurring from breakage of an appurtenance of the vessel is not excluded, although the thing broken was tested and appeared sound, and broke in consequence of a hidden flaw. Central Line of Boats *v.* Lowe, 50 *Ga.* 509.

The expression unavoidable casualty, used in a lease to limit the lessee's liability to pay rent, does not mean a mere want of repair arising from lapse of time, or improper use of the premises; nor from trespasses or nuisances occasioned by acts of the lessee or third persons. It comprehends only damage or destruction arising from supervening and uncontrollable force or accident; events or accidents which human prudence and foresight cannot prevent. Welles *v.* Castles, 3 *Gray,* 323.

UNCERTAINTY. Is where a deed or will is so obscure and confused that the judges can make nothing of it, which sometimes occurs in wills made by testators without legal advice. Any disposition or conveyance to which it is impossible to affix a meaning is said to be void for uncertainty.

UNCIA. In the Roman law, signified the twelfth part of any thing; and, standing alone, often stood for the twelfth part of an *as,* or pound. See *Bouvier; Burrill.*

Uncia agri; uncia terræ. These phrases often occur in the charters of the British kings, and signify some measure or quantity of land. It is said to have been the quantity of twelve *modii;* each *modius* being possibly one hundred feet square. (*Mon. Angl.* iii. 198.) *Jacob.*

UNCONSCIONABLE. Contrary to good conscience. Applied to a contract or an exaction which no fair-minded, honest man would enforce or make.

UNCONSTITUTIONAL. Contrary to the constitution, either of a state or of the United States. When this can be clearly established of a legislative act, the judiciary has power to declare the act null and void.

UNDE NIHIL HABET. Whereof she has nothing. One name of a writ of dower, in old English law, which issued for a widow to whom no dower had been assigned within the period fixed by law.

UNCORE PRIST. The plea of a defendant, in nature of a plea in bar; where, being sued for a debt due on bond at a day past, to save the forfeiture of the bond, he says that he tendered the money at the day and place, and that there was none there to receive it, and that he is also still ready to pay the same. *Jacob.*

UNDER. Occurs in some compounds, sometimes in its literal sense of below in position; more frequently in its secondary meaning of inferior or subordinate. "Under" a law or jurisdiction means "subject to" the law, &c. Mills *v.* Stoddard, 8 *How.* 345, 366.

Under-chamberlain. The under-chamberlain of the exchequer cleaved the tallies written by the clerk of the tallies, and read the same, that the clerk of the pell, and comptrollers thereof, might see their entries were true. He also made searches for all records in the treasury, and had the custody of Domesday Book. There are said to have been two officers of this name (*Cowel*); but the office is now abolished. *Jacob.*

Underlease. A grant by a lessee of a part of his whole interest under the original lease to another person, reserving to himself a reversion. It differs from an assignment, which conveys the

lessee's whole interest, and devolves upon the assignee the responsibility of the covenants in the original lease.

An underlease is a lease granted by one who himself is only a lessee of the premises which he underlets. Thus if A grants a lease of land to B for twenty-one years, and B afterwards grants a lease of the same land to C for fourteen years, here C would be termed the underlessee, and the lease, by virtue of which C held the land, an underlease. In this respect an underlease differs from an assignment, which is a transfer of the entire term, or residue thereof. The underlessee has no privity with the original lessor, and is liable for rent to his immediate lessor only. But it is different with the assignee. *Brown.*

Under legal disability. This phrase, as used in a statute of limitations providing that "any person being under legal disabilities when the cause of action accrues may bring his action within two years after the disability is removed," includes married women, persons under the age of twenty-one years, or of unsound mind, or imprisoned, or out of the United States. Banman *v.* Grubbs, 26 *Ind.* 419.

Under-sheriff. An officer who acts directly under the sheriff, and performs all the duties of the sheriff's office; a few only excepted where the personal presence of the high-sheriff is necessary. He differs from a deputy in that he has general charge of the business in the sheriff's office, while the deputy is intrusted with the service or execution of particular process. He represents the sheriff; and the sheriff is civilly responsible for the acts or omissions of his under-sheriff.

Under-tenant. One who holds lands by a lease from one who is himself only a lessee.

Understood. The phrase "it is understood," when employed as a word of contract in a written agreement, has the same force as the words "it is agreed." Higginson *v.* Weld, 14 *Gray*, 165.

Undertake. To promise. Undertaking: a promise or unilateral engagement. Undertook: he promised.

Undertook is the proper technical word for a declaration in assumpsit, to aver the defendant's engagement or promise.

"Undertaking" does not necessarily imply a consideration. Thompson *v.* Blanchard, 3 *N. Y.* 335.

Under-tutor. Coupled with the appointment of a tutor for a minor, in Louisiana, is usually a designation of some one as under-tutor, whose duty it is to act for the ward, if ever the interests of ward and tutor become opposed.

Underwriter. Before the formation of insurance companies, and while marine insurance was yet the only kind known, contracts were generally formed in this way. The applicant for insurance posted in a place of resort for merchants a description of his vessel, with a statement of the sum he wished insured; or sent such paper to individuals accustomed to make insurances, for their consideration. Any person willing to take a part of the risk would write underneath the application the sum or portion for which he was willing to be answerable. Hence the terms "to underwrite" and "underwriter."

UNDIVIDED. As used in a resolve of proprietors of common lands, that a certain tract shall remain undivided, means that it shall not be subject to partition and allotted to individual proprietors in severalty, but shall be held in common, for public use; not that the tract cannot be set off in distinct enclosures for separate public uses. To fence off a portion of such tract for a highway is not a violation of the resolve that it shall remain undivided. Matter of Wellington, 16 *Pick.* 87.

UNDUE INFLUENCE. Any improper or wrongful constraint, machination, or urgency of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do, if left to act freely. Inducing an act by threatening may perhaps come within the term: use of actual force seems not included; for that, duress (*q. v.*) is a more proper term.

UNFINISHED BUSINESS. In a clause in a constitution providing for unfinished business pending in the courts when it shall take effect, includes an action in which a verdict has been recovered, but no judgment entered. Foster *v.* Daniels, 39 *Ga.* 39.

UNIFORM. Several of the state constitutions contain provisions that acts of the legislatures shall be uniform in their operation. On this subject see *Sedgw. Stat. & Const. Law*, 502, 503, note.

By that provision of the constitution of California which prescribes that "all laws of a general nature shall be uniform in their operation," it was intended that laws

of this character should, as nearly as possible, affect persons and property alike. A revenue law which is literally equal in its operation is impossible. People *v.* Coleman, 4 *Cal.* 46.

The constitutional provision that all laws "of a general nature" shall be "uniform in their operation," intends that the effect of such laws shall be the same upon all persons standing in the same category, such category depending upon the facts in each case; and this provision does not therefore forbid the passage by the legislature of a special law in derogation of, or in the nature of an exception to the operation of, a general statute; it being an office of the legislature to determine whether the facts constitute a proper exception to the general act. People *v.* Judge, 17 *Cal.* 547.

The provision of Iowa Const. art. 1, § 6, that all acts of a general nature shall have a uniform operation, refers to the practical working and effect of a law. Geebrick *v.* State, 5 *Iowa*, 491.

The statute of Iowa which provides that all actions against persons who are shown to be in the actual military service of the United States, shall stand continued during such actual service, does not conflict with the provision that all laws of a general nature shall have a uniform operation. McCormick *v.* Rusch, 15 *Iowa*, 127.

A statute is general and uniform in its operation when it operates equally upon all persons who are brought within the relations and circumstances provided for. McAunich *v.* Mississippi, &c. R. R. Co., 20 *Iowa*, 338.

That an act giving courts of a designated class jurisdiction over specified offences in some only of the counties of the state is not uniform, see Kelley *v.* State, 6 *Ohio St.* 269.

A constitutional requirement that taxing shall be by a uniform rule, means by one and the same unvarying standard. Taxing by a uniform rule requires uniformity, not only in the rate of taxation, but also uniformity in the mode of the assessment. The uniformity must be coextensive with the territory to which the assessment applies; if it is a state tax, it must be uniform all over the state; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. The uniformity must be extended to all property subject to taxation, so that all property may be taxed alike, equally; that is taxing by a uniform rule. Exchange Bank *v.* Hines, 3 *Ohio St.* 1.

Uniformity of process act. The English statutes 2 Wm. IV. ch. 39, by which a more simple and uniform course of proceeding for the commencement of personal actions was established. Until the passing of that statute, the practice or forms of proceeding in the three superior courts at Westminster differed greatly from each other. The improvements introduced by this statute were founded on the report of the common-law commissioners, a body of distinguished men in the legal profession, appointed to consider the effects of the then existing system, with a view to its correction. In some important particulars, however, the enactments of the Stat. 2 Wm. IV. ch. 39, have been again altered by the more recent act of 1 & 2 Vict. ch. 110. *Brown.*

UNILATERAL. A contract where the party to whom the principal promise is made makes no express undertaking on his part, his obligations being left to legal implication, is called, particularly in modern civil law, unilateral. *Bouvier; Burrill.*

UNINCUMBERED. A lot of land subject to a lease containing a covenant of renewal, at a rent to be agreed upon by the parties or fixed by arbitration, is not an unincumbered lot; and, when sold to the tenant holding the covenant, such lot cannot be deemed to have been sold as an unincumbered lot. Borrowe *v.* Milbank, 5 *Abb. Pr.* 28.

UNION. 1. Under the English poor-laws, a consolidation of parishes, authorized by the Stat. 4 & 5 Wm. IV. ch. 76, passed in 1834, which empowers the local government board, at its discretion, to consolidate any two or more parishes into one union under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes. And each of such unions is to have a common workhouse, provided and maintained at the common expense. (3 *Steph. Com.* 49–51.) Such workhouse is frequently called "the union workhouse," or, more briefly, "the union."

2. A popular term in America for the United States; also, in Great Britain, for the consolidated governments of England and Scotland, or for the political tie between Great Britain and Ireland; particularly, in recent times, the latter.

3. A clause in an infeftment, whereby lands or tenements lying discontiguous are incorporated, so that one seisin may suffice for them all, is called, in Scotch law, a clause of union. See *Wharton.*

Union of benefices, or of parishes. This is authorized by Stat. 23 & 24 Vict. ch. 142, which empowers the bishops of London and Winchester, in any case where a union of benefices may appear desirable, to issue commissions addressed to five com-

missioners, appointed as in the act mentioned, to inquire into the matter. If the commissioners recommend a union, the bishop is to cause proposals for a scheme to be prepared for effecting the union. These proposals, with the consent in writing of the patrons, are to be laid before each parish affected. The parish may then, within two months, notify their assent or objections to the proposals. The proposals are then to be laid before the ecclesiastical commissioners, who are to prepare a scheme in accordance therewith, and submit the same to her majesty in council; provided that no such scheme shall be submitted to her majesty in council until it has been laid before both houses of parliament for two calendar months. Any person interested, who objects to the scheme proposed, may appeal against it to her majesty in council; and her majesty in council may direct that objections be considered by the judicial committee; and the judicial committee, in making their report, may propose to her majesty to affirm, vary, or dismiss the scheme, or return the same to the ecclesiastical commissioners for alteration or amendment. Parishes are united under the act for ecclesiastical purposes only; they remain distinct in all other respects. *Mozley & W.*

Union of churches. A combining and consolidating of two churches into one. Also, it is when one church is made subject to another, and one man is rector of both; and where a conventual church is made a cathedral. (*Lynderwode.*) *Tomlins.*

Union-jack. The national flag of Great Britain and Ireland, which combines the banner of St. Patrick with the crosses of St. George and St. Andrew. The word jack is most probably derived from the surcoat, charged with a red cross, anciently used by the English soldiery. This appears to have been called a *jacque*, whence the word jacket, anciently written *jacquit*. Some, however, without a shadow of evidence, derive the word from *jacques*, the first alteration having been made in the reign of King James I. *Wharton.*

UNITED STATES. There is an inconvenient ambiguity in this phrase. It sometimes designates the states composing the American Union, separately considered, as in the expression "one of the United States." More often, in law-books, it designates the national government, the political entirety, as in the phrases given below. Sometimes it means the whole country subject to the state and federal governments.

United States bonds. Obligations for payment of money which have been at various times issued by the government of the United States.

United States currency. In an indictment for larceny, includes national bank notes. State *v.* Gasting, 23 *La. Ann.* 609.

United States commissioner. See COMMISSIONERS OF CIRCUIT COURTS.

United States marshal. See MARSHAL.

United States notes. Promissory notes, in the similitude of bank-notes, issued by the government of the United States.

UNITY. In the law of estates, the peculiar characteristic of an estate held by several in joint tenancy, and which is fourfold; viz., unity of interest, unity of title, unity of time, and unity of possession. In other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 2 *Bl. Com.* 180.

Unity of interest. One of the properties of a joint estate, all the joint tenants being entitled to the same period of duration or quantity of interest in the lands. 2 *Bl. Com.* 181.

Unity of possession. One of the essential properties of a joint estate, each of the tenants having the entire possession as well of every parcel as of the whole. 2 *Bl. Com.* 182.

Unity of possession is where a man hath a right to two estates, and holds them together jointly in his own hands; as if a man take a lease of lands from another at a certain rent, and after, he buys the fee-simple, this is a unity of possession, by which the lease is extinguished, because that he who had before the occupation only for his rent is now become lord and owner of the land. *Termes de la Ley.*

Unity of time. One of the essential properties of a joint estate; the estates of the tenants being vested at one and the same period. 2 *Bl. Com.* 181.

Unity of title. One of the essential properties of a joint estate. The estate of all the tenants must be created by one and the same act, whether legal or illegal. 2 *Bl. Com.* 181.

UNIVERSAL. Occurs in some compounds.

Universal agent. One who is appointed (if, indeed, one can be) to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. *Story Ag.* 18.

Universal legacy. In the civil law, a testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease. Universal legatee:

a person to whom the whole property of a testator is bequeathed.

Universal partnership. In French law, is said to be a species of partnership by which all the partners agree to put in common all their property, *universorum bonorum*, not only what they then have, but also what they shall acquire. Bouvier says that, in Louisiana, universal partnerships are allowed, with the limitation that property which may accrue to one of the parties after entering into the partnership, by donation, succession, or legacy, does not become common stock; and any stipulation to that effect previous to the obtaining the property aforesaid is void. *La. Civ. Code*, art. 2800.

UNLAWFUL. Contrary to law; illegal. Unlawfully: illegally.

It is not necessary, in an indictment which charges an offence in the precise words of the statute, to employ, in addition, the word unlawful, or any other word showing a wrongful intention. United States *v.* Thompson, 6 *McLean*, 56.

"Injuriously and wrongfully" is as good as "unlawfully," in an indictment. State *v.* Vermont, &c. R. R. Co., 27 *Vt.* 103.

UNLAWFUL ASSEMBLY. An early definition was: a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which, if it was executed, would make them rioters, but neither actually executing it, nor making a motion toward the execution of it. See *Jacob.* This seems to have, in substance, the support of 4 *Bl. Com.* 146. And see 3 *Coke Inst.* 176. *Cowel.*

Hawkins says that this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly. 1 *Hawk. P. C.* ch. 65, § 9. This view seems adopted in 4 *Steph. Com.* (6th ed.) 340.

The true view appears to be, that if three or more persons meet together with an intent mutually to assist each other in the execution of some unlawful enterprise, with force and violence, this is an unlawful assembly, irrespective of whether they do any act or not. If, then, they move forward towards execution of their purpose, it becomes a rout; and if they actually execute their design, it amounts to a riot. But these consequences do not deprive the original meeting of the character of an unlawful assembly. Bouvier's definition is to this effect.

The three offences are thus defined and distinguished by Blackstone: An unlawful assembly is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren, or the game therein, and part without doing it, or making any motion towards it. A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances towards it. A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act in a violent and tumultuous manner. 4 *Bl. Com.* ch. 11, p. 146.

UNLIQUIDATED. Not ascertained in amount; not determined; remaining to be assessed or settled; as unliquidated damages.

UNOCCUPIED. In a provision of a fire policy, that buildings unoccupied shall not be covered by the policy, does not include a house used by the insured and his servants, only to take their meals in while carrying on an adjacent farm; nor to a barn used only to store hay and farming tools. Ashworth *v.* Builders' Mut. Fire Ins. Co., 112 *Mass.* 422.

"Unoccupied," in a law regulating taxes, was held equivalent to "untenanted," in State *v.* Reinhardt, 31 *N. J. L.* 218.

UNSOUND MIND. According to Dr. Ray, this term was introduced, in commissions *de lunatico*, in order to en-

large the scope of that proceeding to a class of persons who could not be pronounced idiots or lunatics according to old standards, yet were deemed proper objects of legal tutelage, by reason of mental incapacity. But he says the authorities do not concur in assigning any precise meaning to the term, as designating a fixed, determinable degree of impairment. *Ray Med. Jur. Ins.* 6.

UNTIL. Ordinarily excludes the day to which it relates. But this construction must yield to the manifest intention of the parties to a lease or other contract. Kendall *v.* Kingsley, 120 *Mass.* 94.

Where the charter of a corporation was limited to continue "until the first day of January," it was held that the word "until" was exclusive, and that the charter expired with December 31. People *v.* Walker, 17 *N. Y.* 502.

UNUSUAL NUMBER. In its legal sense, this phrase cannot be applied to merely two persons violently entering disputed premises. Pike *v.* Witt, 104 *Mass.* 595.

UPLIFTED HAND. An oath, taken by raising the right hand toward heaven, instead of by laying it upon the Gospels, is said to be taken by the uplifted hand.

UPON. In a contract of subscription, — "provided that upon such payment there shall be delivered to me a certificate of stock," &c., — makes the covenant dependent. A tender of the stock would be prerequisite to a suit for the subscription. Courtright *v.* Deeds, 37 *Iowa*, 503.

UPPER BENCH. During the commonwealth (1649–1660), the court of king's bench was called the upper bench.

URBAN. Partaking the character of a city. It is the antithesis of rural.

Urban sanitary district. By the public health act, 1875 (Stat. 38 & 39 Vict. ch. 55), the whole of England and Wales, except the metropolis, is divided into urban sanitary districts and rural sanitary districts; and such districts are made subject, for the purposes of measures for preserving the public health, to bodies called urban sanitary authorities and rural sanitary authorities, respectively. The urban districts, with certain exceptions and qualifications, consist of three classes: Boroughs, in which the "urban sanitary authority" is to be the mayor, aldermen, and town council. Improvement act districts, which are districts subject to commissioners, trustees, or other persons invested by any local act of parliament, with powers of town government and rating; in these, the commissioners, trustees, &c., are to be the urban sanitary authority. Local government districts, in these the local board is to be the urban sanitary authority. *Mozley & W.*

Urban servitude. City servitudes, or servitudes of houses, are called urban. They are the easements appertaining to the building and construction of houses; as, for instance, the right to light and air, or the right to build a house so as to throw the rain-water on a neighbor's house. *Mozley & W.*

USAGE. A general and uniform practice, recognized as a proper guide of individual conduct.

Usage is also called a custom, though the latter word has also another signification, is a long and uniform practice, applied to habits, modes, and courses of dealing. It relates to modes of action, and does not comprehend the mere adoption of certain peculiar doctrines or rules of law. Dickinson *v.* Gay, 7 *Allen*, 29.

Usage, in its most extensive meaning, includes both custom and prescription; but, in its narrower signification, the term refers to a general habit, mode, or course of procedure. A usage differs from a custom, in that it does not require that the usage should be immemorial to establish it; but the usage must be known, certain, uniform, reasonable, and not contrary to law. Lowry *v.* Read, 3 *Brews.* 452.

The word usage, in English law, differs from custom and prescription, in that no man may claim a rent, common, or other inheritance by usage, though he may by prescription. Moreover, a usage is local, in all cases, and must be proved; whereas a custom is frequently general, and as such is noticed without proof. Usage, in French law, is the *usus* of Roman law, and corresponds very nearly to the tenancy at will or on sufferance of English law. *Brown.*

USANCE. Signifies the period which, by commercial custom, is allowed in various countries for payment of foreign bills of exchange. As the usage or custom is different in different countries, it follows that the same phrase imports different periods of time, according to the country in which the bill is drawn. It sometimes means a month, sometimes two or more months, sometimes half a month. In a majority of places, a usance seems to be a month; and a half month is called a half usance, while two months form a double usance. See *Wharton*, for a table.

USE, *n.* 1. The term a use, in its original legal application, denoted simply the benefit or beneficial enjoyment of land. After the enactment of the statutes of mortmain, by which lands were prohibited from being given di-

rectly to religious houses, the ecclesiastics obtained grants to persons to the use of religious houses, which the clerical chancellors of those days declared to be binding. This device, in some measure, evaded the operation of the statutes of mortmain; and under it a use came to consist in the equitable right to receive the profit or benefit of lands and tenements, which was, in cases of lands conveyed to uses, divorced from the legal ownership thereof.

The system of uses was attended with numerous advantages to the true owners of the land, — uses not being subject to escheat or to forfeiture, and being devisable by will, and transferable without livery of seisin; but, like other systems, it was made the channel of numerous abuses; lands being conveyed by means of it to persons and in ways forbidden by the words — or, at all events, by the policy — of the statute law. Then came the statute of uses (27 Hen. VIII. ch. 10), otherwise called the statute for transferring uses into possession. It enacted that, "when any person shall be seised of lands, &c., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estate as they have in the use, trust, or confidence; and that the estates of the persons so seised to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The operation of this statute is to execute the use; that is, it conveys the possession to the use, and transfers the use to the possession, and in this manner makes the *cestui que use* complete owner of the lands and tenements, as well at law as in equity. In other words, it has, in effect, enacted that the use should be the land, and that where the use was there the land or legal estate should be, and should be deemed to be. Hence, since the statute, the use involves the legal ownership; and the word use has lost its original signification, and become equivalent to seisin or legal ownership.

But by the decision in Tyrrell's Case (4 & 5 *Ph. & M.*) the courts of law held that the statute of uses intended the first use only, and that as soon as it had executed that use and made it the legal estate, it was exhausted. The courts of chancery, however, went further, and gave the benefit or beneficial enjoyment, as before, to the person intended to benefit, — calling the first usee the legal estate man, or trustee merely; and the proper beneficiary, being the second or last usee, the *cestui que trust* and true owner in equity. By the joint operation of the statute of uses and the decision in Tyrrell's Case two lines of estate became well established in law; namely, the legal estate in the trustee, which retains all, or nearly all, its ancient incidents; and the equitable estate in the *cestui que trust*, which has received incidents analogous to those of the legal estate, upon the maxim, equity follows the law. See TRUST.

What is signified by the two words, "use" and "trust," is really much the same thing, regarded from two different points of view: a use regards principally the beneficial interest; a trust regards principally the nominal ownership. The usage of the two terms is, however, widely different. The word use is employed to denote either an estate vested since the statute of uses, and by force of that statute, or to denote such an estate created before that statute, as, had it been created since, would have become a legal estate by force of the statute. The word trust is employed since that statute to denote the relation between the party invested with the legal estate (whether by force of that statute or independently of it) and the party beneficially entitled, who has hitherto been said to have the equitable estate. See *Brown; Mozley & W.*

As to charitable uses, or superstitious uses, see those titles.

If the beneficial interest which one person has in land, which in the eye of the common law belongs to another, is a permanent enjoyment of the benefits or profits of the land, it is a use; if the interest is for a temporary purpose, it is a trust. Hutchins *v.* Heywood, 50 *N. H.* 491.

2. The word use has also been employed in its untechnical sense, in papers

which have come before the courts for construction.

Use may be synonymous with benefit. Heaston *v.* Commissioners of Randolph County, 20 *Ind.* 398.

The expression change in use, in a policy of insurance, includes a change from occupancy to disuse. Cannell *v.* Phœnix Ins. Co., 59 *Me.* 582.

In conveyancing, the phrase "for the use of" is expressive of the right of appropriation or enjoyment, rather than descriptive of the purposes or mode of the use. Stockbridge Iron Co. *v.* Hudson Iron Co., 107 *Mass.* 290, 324.

Riding a stray horse about, in the endeavor to discover his owner, is not making use of him, within the rule that one who keeps an estray and uses him becomes liable in trover. Henry *v.* Richardson, 7 *Watts*, 557.

A grant of "the use of the timber" conveys only an incorporeal right to use it, and not the timber itself, nor the soil, the invasion of which cannot support an action of trespass *qu. cl. fr.* Clark *v.* Way, 11 *Rich.* 621.

Use and occupation. The name of an action (one species of the action of assumpsit) which is maintainable where one person has had the enjoyment of real property belonging to another, under an express or implied contract to pay therefor, but cannot maintain an action technically for rent, for want of a lease, or agreement to pay a specific sum. The owner recovers the reasonable value of the use of the premises, upon the ground that it is just and right the occupant should make payment. But the action will not lie where the occupation was tortious, as that forbids the implied promise.

USE, *v.* To "use a port," means to go into a harbor or haven for shelter, for commerce, or for pleasure, and to derive a benefit or an advantage from its protection. Going near a harbor or port, sailing past, or going in the direction of it, is not a use of the port. Snow *v.* Columbian Ins. Co., 48 *N. Y.* 624.

When the words "to use" are employed in connection with "port," they mean to go into a port, harbor, or haven, for shelter, commerce, or pleasure, and to derive a benefit or advantage from its protection. Wheeler *v.* N. Y. Mutual Ins. Co., 35 *N. Y. Superior Ct.* 247.

Ordinarily, the term "use a port" means to enter it, and, until that takes place, the port is not used, and the warranty is not broken. Snow *v.* Columbian Ins. Co., 48 *Barb.* 469.

USEFUL. The patent law requires, as a condition of granting a patent, that the improvement for which it is claimed shall be useful as well as new. It is only for a "new" and "useful" invention that the commissioner is authorized to grant a patent. Noxious or hurtful contrivances, things which contravene public policy or injure the morals or impair the interests of society, are not within the protection of the patent laws; nor ought mere trivialities to obtain any substantial foothold by their aid. But while the courts recognize the principle, that to warrant a patent the invention must be useful or the patent will be void, yet it is held that any degree of utility is sufficient to support a patent. The word useful, in the patent law, is used in opposition to frivolous or noxious. It is not necessary that the thing invented should be the best possible of its kind. By "useful" is meant such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society.

It need not be of such general utility as to supersede all other inventions in practice to accomplish the same purpose. The law does not look to the degree of utility. The requirement of the statute as to utility is satisfied if the invention is capable of being used for the purpose for which it is designed, and that purpose is at all beneficial.

By "useful," in the patent law, is meant, not an invention in all cases superior to the modes now in use for the same purposes, but "useful" in contradistinction to frivolous and mischievous inventions. Lowell *v.* Lewis, 1 *Mas.* 182, 186.

By "useful" is meant such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society. Bedford *v.* Hunt, 1 *Mas.* 302.

Any degree of utility is sufficient to support a patent. The word useful, in the patent law, is used in opposition to frivolous or noxious. Winans *v.* Schenectady & Troy R. R. Co., 2 *Blatchf.* 279, 290; Kneass *v.* Schuylkill Bank, 4 *Wash. C. Ct.* 9; Roberts *v.* Ward, 4 *McLean*, 565.

A patented invention is deemed useful if it is not frivolous. The want of utility may be good cause for not granting the patent, but not ground for setting it aside. Whitney *v.* Emmett, *Baldw.* 303; Dickinson *v.* Hall, 14 *Pick.* 217.

The fact that a patent has been issued

raises the presumption of novelty and utility; and, if utility is contested, the burden of proof is upon the defendant. Upon the question of the utility of an invention courts are not rigid; and, unless the invention be shown to be absolutely frivolous and worthless, the patent is valid. Parker *v.* Stiles, 5 *McLean*, 44.

USER. The exercise or enjoyment of any right or property. It is particularly used of franchises. User of a highway, long continued, establishes the public right of passage. User of corporate franchises shows acceptance of the charter.

User is the act of using or enjoying any profit or benefit to be taken from or upon the land, or any easement to be enjoyed upon or over any land or water. And in law the effect of such user (if continued for a period sufficiently long, and under circumstances which indicate the exercise of a right on the part of the person so using the land) is to establish a prescriptive claim ever after to enjoy the same profit or easement. *Brown.*

USHER. A subordinate officer in the English courts of law. The ushers of the superior courts of law are appointed by the chief justices and chief baron respectively. There are also ushers in the courts of chancery, appointed in like manner by the judges of those courts. *Brown.*

Usher of the black rod. The gentleman usher of the black rod is an officer of the house of lords appointed by letters-patent from the crown. His duties are, by himself or deputy, to desire the attendance of the commons in the house of peers when the royal assent is given to bills either by the queen in person or by commission, to execute orders for the commitment of persons guilty of breach of privilege, and also to assist in the introduction of peers when they take the oaths and their seats. *Brown.*

USQUE. As far; up to. This word is sometimes prefixed to Latin phrases beginning with *ad;* as *usque ad medium filum aquæ.* See AD.

USUAL. Occurs in some phrases which have been passed upon in the decisions.

Usual and customary. These words, when used in respect to a method of selling coal by agents, import such a fixed and established usage as to be declared general by the trade. Carter *v.* Philadelphia Coal Co., 77 *Pa. St.* 286.

Usual course of business. When a deposit with a tavern-keeper is said to have been made "in the usual course of business," the expression must be understood to mean a deposit of goods with him, by a guest, for safe keeping. Harris *v.* Boggs, 5 *Blackf.* 489.

Usual high-water mark. Signifies the limit reached by the neap tides. Teschemacher *v.* Thompson, 18 *Cal.* 11.

Usual place. It being provided by statute that writs shall be served by leaving copies at the "usual" place of abodè, the word usual means the place of abode at the time of the service of the writ. Gadsden *v.* Johnson, 1 *Nott & M.* 89.

The phrase, usual place of business, in a statute prescribing the town where one's weights and measures are to be sealed, refers to the locality of a provision dealer's shop, rather than that of his customers, where he weighs, measures, and delivers from his wagon. Palmer *v.* Kelleher, 111 *Mass.* 320.

Usual terms. Is a phrase in the common-law practice which means pleading issuably, rejoining gratis, and taking short notice of trial. *Wharton.*

USUCAPIO, or USUCAPTIO. A term of Roman law used to denote a mode of acquisition of property; it corresponds very nearly to the term prescription. But the prescription of Roman law differed from that of the English law in this, that no *mala fide* possessor (*i.e.* person in possession knowingly of the property of another) could, by however long a period, acquire title by possession merely. The two essential requisites to *usucapio* were *justa causa* (*i.e.* title) and *bona fides* (*i.e.* ignorance). The term *usucapio* is sometimes, but erroneously, written *usucaptio.* *Brown.*

This word in the Roman law indicated that when a person had for a fixed time been *bona fide* in possession of a chattel not his own, he acquired a property therein by use against all the world. There is nothing in the English law precisely corresponding to it, but there are two things in the English law which in different ways resemble it.

1. A purchase in market overt, whereby a *bona fide* purchaser in general acquires a property in a chattel, though it was not the vendor's to sell.

2. The positive prescription arising under the prescription act, 1832 (2 & 3 Wm. IV. ch. 71). But this prescription applies to incorporeal hereditaments only, whereas *usucapion* applied to all kinds of property.

The purely negative prescription arising from the statutes of limitation is often confounded with *usucapion;* but *usucapion* was a direct source of title to property; while the statutes of limitation confer no title at all directly, but merely bar the right of action of a negligent absentee. *Mozley & W.*

USUFRUCT. A civil-law term for the right of using (*usus*) and taking the fruits (*fructus*) of any property of another, without, however, consuming or injuring it. Usufructuary: one who possessed such a right.

The usufructuary was invariably entitled for life, and for no less period; he there-

fore corresponds to the common-law tenant for life. *Brown.*

But, in practice, a usufruct was generally understood to signify a right of enjoyment of any thing for the life of the usufructuary; *i.e.*, of the party entitled to the usufruct. And the word is so understood in the law of Scotland. (*Bell.*) *Mozley & W.*

USURPATION. The wrongful using of the privilege or right of another.

Usurpation of advowson. An injury which consists in the absolute ouster or dispossession of the patron from the right of presentation to a benefice; and which happens when a stranger who has no right presents a clerk, and the latter is thereupon admitted and instituted.

Usurpation of franchise, or office. The unjustly intruding upon or exercising any office, franchise, or liberty belonging to another.

USURY. In old English, signified any compensation paid by a borrower for the use of money; but in modern language, and since precise limits have been set by the laws of most jurisdictions to distinguish lawful from unlawful compensation for loans, permitted or lawful compensation is called interest; and usury is applied only to prohibited or unlawful payment for the use of money.

Usury is money given for the use of money; it is particularly defined to be the gain of any thing by contract above the principal, or that which was lent, exacted in consideration of loan thereof, whether it be of money or any other thing. Some make usury to be the profit exacted for a loan made to a person in want and distress; but properly it consists in extorting an unreasonable rate for money, beyond what is allowed by positive law. The letting money out at interest, or upon usury, was against the common law; and in former times, if any one, after his death, had been found to be a usurer, all his goods and chattels were forfeited to the king, &c. And, according to several ancient statutes, all usury is unlawful; but at this time neither the common nor statute law absolutely prohibit usury. By this is meant interest for money lent, not exceeding the settled rate; interest being the lawful gain, usury the extortion of unlawful gain. *Jacob.*

Usury is an unlawful contract on the loan of money to receive the same again with exorbitant increase; that is, not only to receive the principal sum again, but also an exorbitant interest by way of compensation for the use of such principal sum. All restrictions upon the rate of interest were, however, abolished by Stat. 17 & 18 Vict. ch. 90. *Brown.*

Usury originally meant any premium or reward for the use of money or other commodities or things. Henry *v.* Bank of Salina, 5 *Hill*, 523, 528.

It now signifies extorting or taking a rate of interest for money beyond what is allowed by law. Wilkie *v.* Roosevelt, 3 *Johns. Cas* 206.

Usury is the taking of more for the use of money than the law allows. Gaar *v.* Louisville B. Co., 11 *Bush*, 180.

Usury consists in taking or reserving, corruptly, a greater sum than at the rate allowed by the statute for the forbearance of a debt or demand. Camp *v.* Bates, 11 *Conn.* 487.

To constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for and to take usurious interest; for, if neither party intend it, and act *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract imports usury upon its very face, as by an express reservation of more than legal interest, inquiry is at an end. But where the contract is, on its face, for legal interest only, then proof is necessary that there was some corrupt agreement to cover usury. Bank of the United States *v.* Waggener, 9 *Pet.* 378.

Two things are necessary to constitute usury, — a loan, and the taking of more interest than the law allows. Wherever these two facts are shown to exist, the law pronounces the intent with which they were done to be corrupt; and this presumption cannot be rebutted by any proof of honesty of purpose. Reed *v.* Coale, 4 *Ind.* 283.

Nothing short of a corrupt and illegal contract in violation of the statute will constitute usury. It must be a contract or agreement for the loan or forbearance of money, goods, or things in action, by which illegal interest is reserved, or agreed to be reserved or taken; otherwise, usury does not exist. Lesley *v.* Johnson, 41 *Barb.* 359; Woodruff *v.* Hurson, 32 *Id.* 557.

UT. That; as. This Latin particle properly introduces a final cause or object. In conveyancing, in old English practice, *ut* was appropriated to the expression of a qualification or *modus* (q. v.), as *si* was adopted to express a condition, and *quia* a consideration.

Ut currere solebat. As it was wont to run. See *Aqua currit et debet currere, ut currere solebat.*

Ut res magis valeat quam pereat. That the subject-matter may rather have effect than be destroyed. See *Benignæ faciendæ sunt interpretationes*, &c.

Uti possedetis. As you possess. Each keeping what he has possession of. This phrase is used to express the prin-

ciple of a treaty of peace by which each belligerent is to retain all the territory of which it holds possession, including what it has acquired by force during the war.

Utile per inutile non vitiatur. The useful is not vitiated by the useless. Surplusage does not vitiate other good and valid matter. This maxim applies more particularly to pleading, the rule being that immaterial matter in a declaration or plea is mere surplusage, and does not vitiate it. The rule is the same as to indictments, except where the obnoxious averment is part of the description of the offence, in which case it will be fatal. In conveyancing, where words of known signification are so placed in a deed as to make it repugnant, they are to be rejected in the same manner as they would be if they were meaningless. So, if a grant be express and certain, a repugnant *habendum* will not vitiate it; but, if the estate granted is not express, but only arises by implication of law, then a *habendum* differing materially from the grant may defeat it.

UTTER, *adj.* 1. Entire.

The expression "an utter loss of the ship," in a respondentia bond, should be construed to mean an actual total loss, and not to embrace a constructive one. Insurance Co. *v.* Duval, 8 *Serg. & R.* 138.

2. Outer.

Utter bar. The bar at which those barristers, usually junior men, practise who have not yet been raised to the dignity of queen's counsel. These junior barristers are said to plead without the bar; while those of the higher rank are admitted to seats within the bar, and address the court or a jury from a place reserved for them, and divided off by a bar. *Brown.*

Utter barristers. Barristers-at-law, in general, who plead without the bar. They are called utter barristers (*i.e.* pleaders without the bar), to distinguish them from the benchers or those who have been readers, and are sometimes admitted to plead within the bar, the same as king's and queen's counsel are. *Cowel.*

UTTER, *v.*; **UTTERING,** *part. n.* To utter, as used in a statute against forgery and counterfeiting, means to offer, whether accepted or not, a forged instrument, with the representation, by words or actions, that the same is genuine. State *v.* Horner, 48 *Mo.* 520.

The words "uttering" and "passing," used of notes, do not necessarily import that they are transferred as genuine. The terms include any delivery of a note to another for value, with intent that it shall be put into circulation as money. United States *v.* Nelson, 1 *Abb. U. S.* 135.

To constitute an uttering of a forged instrument, it is not necessary that the instrument should have been actually received as genuine by the party upon whom the attempt to defraud is made. That it was offered as genuine, or declared or asserted, by words or actions, to be good is enough. People *v.* Caton, 25 *Mich.* 388.

The putting of a forged mortgage on record is a sufficient uttering. Collecting money upon it and indorsing the payments is also a sufficient uttering, whether the instrument itself was produced at the time of payment or not. Perkins *v.* People, 27 *Mich.* 386.

Putting a forged deed on record, or averring it in pleading, as a genuine deed, is uttering and publishing it. Paige *v.* People, 3 *Abb. App. Dec.* 439.

Where a person, knowing the contents of a forged letter, and, with intent to obtain money thereupon, delivered it, sealed, to the clerk of the person to whom it was addressed, and whom he supposed to be authorized to open it, this was held evidence of uttering it, in United States *v.* Carter, 2 *Cranch C. Ct.* 243.

Enclosing a false instrument, directed to a person at W, and depositing it in the post-office at B, to be forwarded, is not an uttering at W. United States *v.* Plympton, 4 *Cranch C. Ct.* 309.

V.

VACANT. Destitute of an occupant; empty; unfilled; unoccupied.

Vacant office. An office is vacant, or there is said to be a vacancy in an office, when there is no incumbent; no person entitled to exercise the powers and receive the compensation; when it is open to be filled by a new appointment.

There is no technical nor peculiar meaning to the word vacant, as used in the constitution of Indiana. It means empty,

unoccupied, or, as applied to an office, without an incumbent. There is no basis for the distinction that it applies only to offices vacated by death, resignation, or otherwise. An existing office without an incumbent is vacant, whether it be a new or an old one. Stocking *v.* State, 7 *Ind.* 326.

Vacant, when used with reference to an office, means unoccupied. An existing office without an incumbent is vacant, whether it is a new or an old one. State *v.* Boecker, 56 *Mo.* 17. S. P. State *v.* Irwin, 5 *Nev.* 111, 130.

Vacant possession. A vacant possession is where a tenant has entirely abandoned the premises which he held; for if he still retains the virtual possession of them, though he has ceased to occupy, the possession cannot be treated as vacant; but the landlord must proceed by ejectment in the ordinary way.

Many nice distinctions have been drawn as to what is a vacant possession. Where the tenant of a house locked it up and quitted it, the court held that the landlord should treat it as a vacant possession. But generally, where there is any thing left by the tenant on the premises, however trifling, that will suffice to prevent a vacant possession. *Tomlins.*

Vacant succession. Is where, on the death of a sovereign or other person of title, there is no one appointed by law to succeed; or where there is an inheritance to which there is no known heir.

VACANTIA BONA. See BONA VACANTIA.

VACATE. 1. To annul; to declare void; as to vacate a proceeding for irregularity, or because of fraud or surprise.

2. To leave empty or unoccupied.

When the occupant of a dwelling-house moves out with his family, taking part of his furniture and all the wearing-apparel of his family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling-house, while thus deserted, must be regarded as vacated. Sleeper *v.* N. H. Fire Ins. Co., 56 *N. H.* 401.

VACATION. The time between the end of one term and the beginning of another; and it begins the last day of every term, as soon as the court rises. The time from the death of a bishop, or other spiritual person, till the bishopric or dignity is supplied with another, is also called vacation. *Jacob.*

The interval between each term is termed the vacation; that is, between the end of one term and the beginning of the next. These intervals of a cessation of business are retained under the judicature acts, but are differently reckoned. *Brown.*

The vacations to be observed in the offices of the supreme court are four: the long vacation, from August 10th to October 24th; the Christmas vacation, from December 24th to January 6th; the Easter vacation, from Good Friday to Tuesday in Easter week; and the Whitsun vacation, from the day before Whit Sunday to Tuesday in Whitsun week. The days of the commencement and termination of each vacation are included in such vacation. The vacations do not entirely fill up the intervals between the sittings. *Mozley & W.*

VADIUM. A pledge; security by pledge of property.

Vadium mortuum. A dead pledge. A mortgage; a security given to a creditor on condition that, if the money be not repaid at the appointed time, the debtor's estate shall be forfeited and pass to the creditor.

Vadium ponere. To take bail for the appearance of a person in a court of justice. *Tomlins.*

Vadium vivum. A living pledge. A security given to a creditor to hold until he has received the amount of the debt out of the issues and profits of the property. This was termed a living pledge, or vif-gage, as distinguished from the *vadium mortuum*, or mortgage, from the fact that the profits of the property pledged were continually paying off the debt, and neither the property nor its income was in danger of loss.

When a man borrows a sum of money of another (suppose £200), and grants him an estate, as of £20 per annum, to hold till the rents and profits shall repay the sum so borrowed, in this case the land or pledge is said to be living: it works off — *i.e.* repays and survives — the debt, and, immediately on the discharge of that, reverts back to the borrower. It is called a *vivum vadium*, or living pledge, in contradistinction to a *mortuum vadium*, the land in which does not of itself work off, *i.e.* repay, the debt; but the mortgagor must needs himself repay the same before the land reverts to him. In the case of both these species of *vadium*, the pledgee receives the rents and profits without account, in which respect they both differ from a mortgage properly so called. *Brown.*

VAGABOND. One that wanders about, and has no certain dwelling; an idle fellow. *Jacob.*

VAGRANT. One belonging to either of the classes of persons who, by reason of their having no fixed home and subsistence, and pursuing courses which tend towards crime, may, by stat-

ute, be confined and disciplined. Who are vagrants must be determined by the statute of the jurisdiction. These statutes do not usually set forth any principle by which vagrancy may be defined, but give extended lists of various descriptions of persons who may be deemed and treated as vagrants.

The English statutes, 17 Geo. II. ch. 5, and 5 Geo. IV. ch. 83, — which latter was, when passed, in the nature of a code of previous laws, and has been made the basis of several like acts in this country, — divided vagrants into three classes: idle and disorderly persons, rogues and vagabonds, and incorrigible rogues; and gave an enumeration of the persons allotted to each class.

Vagrant generally means a person who lives idly, without a settled home; sometimes it includes beggars. *Holthouse.*

Valeat quantum valere potest. It shall operate as far as it can be operative. A maxim of the construction of writings. The general rule is that an instrument is to be construed so as will give it effect; not so as will render it nugatory.

VALET. Was anciently a name denoting young gentlemen of rank and family, but afterwards applied to those of lower degree, and is now used for a menial servant, more particularly occupied about the person of his employer. *Cab.' Lawyer,* 800.

VALOR. Value; an appraisal or valuation.

Valor beneficiorum. Valuation of benefices.

Valor maritagii. Value of the right to marry.

A writ that lay for the lord against his ward, to recover against him the value of his marriage at full age, for that he was not married by his lord within age. And this writ lay, although the lord never tendered any convenient marriage. *Termes de la Ley.*

Under the ancient tenures, while an infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement or inequality; which, if the infants refused, they forfeited the value of the marriage to their guardian, — that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance; and, if the infants married themselves without the guardian's consent, they forfeited double the value. This was one of the greatest hardships of our ancient tenures; but was abrogated when the tenures were abolished. *Jacob.*

VALUE. Appraised worth; estimation in the market; supposed purchasing power; worth in money.

A distinction has been made between value and price. If a plaintiff declares in an action of trespass for the taking away of live cattle, or one particular thing, he ought to say that the defendant took them away, *pretii* so much; if the declaration be for taking of things without life, it must be alleged *ad valentiam,* &c.; so that live cattle are to be prized at such a price as the owner of them did esteem them to be worth, and dead things to be reckoned at the value of the market, which may be certainly known. Of coin not current it shall be *pretii;* but of common coin current it shall be neither said *pretii* nor *ad valentiam,* for the value and price thereof is certain. The difference between *pretii* and *ad valentiam* may proceed from the rule in the register of writs, which shows it to be according to the ancient forms used in the law. (*West. Symb.* par. 2; 2 *Lill. Abr.* 629.) *Jacob.*

The word value has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys. The one may be called "value in use;" the other, "value in exchange." The things which have the greatest value in use have frequently little or no value in exchange; and, on the contrary, those which have the greatest value in exchange have frequently little or no value in use. Nothing is more useful than water; but it will purchase scarce any thing; scarce any thing can be had in exchange for it. A diamond, on the contrary, has scarce any value in use, but a very great value in exchange. *Ad. Smith.*

There is a distinction between "value" and "income," when taken separately and alone. Property may have an annual value without any income. Troy Iron & Nail Factory *v.* Winslow, 45 *Barb.* 231.

Value, as used in assessments of damages for land taken to widen a street, means a fair compensation to the occupant, rather than the market value. Lawrence *v.* Boston, 119 *Mass.* 126.

As used in Minn. Laws, 1857, ch. 1, § 13, providing for the appraisal of the value of lands taken for right of way, it embraces not only the value of the strip of land taken, as an isolated parcel of land, but such additional value as attaches to it by reason of its connection with adjacent land of the same owner. Scott *v.* St. Paul, &c. Ry. Co., 21 *Minn.* 322.

As used in Ohio Crim. Code, § 93, providing that in an indictment for forging, uttering, &c., any instrument, it shall be sufficient to set forth the value thereof, value is used in the sense of "effect," "import," and not in the sense of "worth in money." Chidester *v.* State, 25 *Ohio St.* 433.

Value received. The phrase usually

inserted in a bill or note, as an acknowledgment that the paper was made for a consideration in money or property, and not for accommodation.

The words value received, when used in an instrument, do not necessarily import a consideration in money. A promise to pay in the future may be shown to have been the consideration. Osgood *v.* Bringolf, 32 *Iowa*, 265.

The fact that a bill contains the words "value received," does not make the mere offering it for discount a representation that it was actually accepted for value received. Clark *v.* Loomis, 5 *Duer*, 468.

In a guaranty to pay the debt of another, the words "for value received" sufficiently express a consideration. Watson *v.* M'Laren, 19 *Wend.* 557; Miller *v.* Cook, 23 *N. Y.* 495; Caldwell *v.* McKain, 2 *Nott & M.* 555; Woodward *v.* Pickett, *Dudley* (*S. C.*), 30; Brown *v.* Bussey, 7 *Humph.* 573; Hall *v.* Rodgers, *Id.* 536; Day *v.* Elmore, 4 *Wis.* 190; Cheney *v.* Cook, 7 *Wis.* 413.

One railroad company guaranteeing by indorsement the payment of the interest warrants, or coupons, of another, for "value received," is not an accommodation indorser or guarantor; the words "value received" import a sufficient consideration. Connecticut, &c. Ins. Co. *v.* Cleveland, &c. R. R. Co., 41 *Barb.* 9.

Valuable consideration. The distinction between a good and a valuable consideration is, that the former consists of considerations of blood, or of natural love and affection; as when a man grants an estate to a near relation from motives of generosity, prudence, and natural duty; and the latter consists of such a consideration as money, marriage which is to follow, or the like, which the law esteems an equivalent given for the grant. *Brown.*

Valuable security. Is defined by the English larceny act (Stat. 24 & 25 Vict. ch. 96) to include any order, exchequer acquittance, or other security whatsoever evidencing the title of any party to share in any public stock; also, any debenture, deed, bond, &c., or other security for the payment of any money. *Mozley & W.*

Valued policy. A policy is called valued, when the parties, having agreed upon the value of the interest insured, in order to save the necessity of further proof, have inserted the valuation in the policy, in the nature of liquidated damages. 1 *Duer Ins.* 97.

VALVASOR, or VAVASOR. The first name of dignity next beneath a peer was anciently that of valvasors, or vavasors, who are mentioned by our ancient lawyers as *viri magnæ dignitatis.* Yet they are now quite out of use; and our legal antiquarians are not agreed upon even their original or ancient office. They appear to have been in dignity next to the barons and higher thanes. Selden says they either held of a mesne lord, and not immediately of the king, or, if they held of the king, it was as of an honor or manor, and not in chief. *Tomlins.*

VARIANCE. A difference, inconsistency, or variation between the evidence adduced and the allegation in pleading in support of which the evidence is offered, or between the intimation of the cause of action given in a writ and the cause as shown in the declaration.

VASSAL. In ancient English customs, signified a tenant or feudatary; or person who vowed fidelity and homage to a lord, on account of some land, &c., held of him in fee; also, a slave or servant, and especially a domestic of a prince. (*Du Cange.*) *Vassalus* (in Scotland) is said to be *quasi inferior socius*, as the vassal is inferior to his master, and must serve him; and yet he is in a manner his companion, because each of them is obliged to the other. (*Skene.*) The vassal is the person who receives a feudal right; the giver is the superior. (2 *Bl. Com.* 53.) *Jacob.*

Vassal originally signified a feudal tenant or grantee of land. It seems doubtful what the exact relationship was that subsisted between lord and vassal; some writers are of opinion that they stood to each other in the relation of landlord and tenant, and to a certain extent were the companions of each other; while others affirm that the vassal was little better than the slave or bondman of his lord. The state or condition of a vassal is termed vassalage. (2 *Chitt. Bl. Com.* 52, note 6.) *Brown.*

VAVASOR. See VALVASOR.

VECTIGAL JUDICIARIUM. An old expression for money or fines paid to the king, to defray his charges in maintaining the courts of justice and protection of the people. *Tomlins.*

VEHICLE. As used in the act of July 18, 1866, to prevent smuggling, includes every description of carriage, wagon, engine, car, sleigh, sled, sledge, hurdle, cart, and other artificial contrivance, used or capable of being used as a means or auxiliary of transportation on land. Act of congress of July 18, 1866, § 1, 14 *Stat. at L.* 178.

A ferry-boat is not a vehicle, within a statute authorizing a common council to levy specific taxes on carriages and other vehicles used for passengers for hire. Duckwall *v.* City of New Albany, 25 *Ind.* 283.

VEJOURS. Viewers; persons sent by the court to take a view of any place in question, for the better decision of the right. It signifies, also, such as are sent to view those that *essoine* themselves *de malo lecti* (*i.e.* excuse themselves on ground of illness), whether they be in truth so sick as that they cannot appear, or whether they do counterfeit. *Cowel.*

VENDEE. The party to whom a sale is made.

It is, however, convenient, and the tendency of usage is, to employ "vendee" or "purchaser" when a sale of real property is in view, and "buyer" when the sale is of chattel property.

VENDER. Another form of vendor, *q. v.*

VENDITIO; VENDITION. The Latin term and its Anglicized form for "sale;" the transfer of property for a price. Also, for "a sale," or some particular disposal of property.

Venditioni exponas. That you expose for sale. The emphatic clause, and also the name, of a writ of execution commanding the sheriff to expose to sale goods already taken by him under a *fieri facias*. According to old English practice, it should issue upon a return by the sheriff that he has taken goods which remain in his hands unsold for lack of buyers. But the proceedings on the various writs of execution are regulated in the United States by the law and practice of each state; and in many of the states the *venditioni exponas* is not used. The name of the writ is commonly abbreviated to *vend. exp.*

VENDOR. The party to whom a sale is made.

It is, however, convenient, and the tendency of usage is, to employ "vendor" when a sale of real property is in view, and "seller" when the sale is of chattel property.

The cases have established a distinction between the vendor and grantor. He is the vendor who negotiates the sale, and becomes the recipient of the consideration, though the title comes to the vendee from another source, and not from the vendor. Rutland *v.* Brister, 53 *Miss.* 683.

Vendor's lien. A familiar doctrine of equity jurisprudence accords to a seller of land who parts with the title without having received payment of the price (in full) a lien upon the land for the purchase-money unpaid. The fact that the deed contains a receipt for the purchase-money does not defeat such lien. The lien is good against the purchaser himself, against his heirs, against any person claiming by a voluntary conveyance (that is, one made without parting with value), against any purchaser who buys with notice of the lien, and generally against all persons except a purchaser for value and without notice. Such a purchase overrides the lien.

VENIRE. To come; to appear in court. This word is sometimes used as the name of the writ for summoning a jury, more commonly called a *venire facias*.

Venire facias. That you cause to come. The emphatic clause, used also as the name, of a writ commanding the sheriff to cause to come before the court twelve good and lawful men, &c., qualified as a jury. Though nominally the effective writ for summoning jurors, the *distringas* (q. v.) long since supplanted the *venire facias* in English practice, and the *venire* has been abolished. In some of the United States, the *venire* has been dispensed with, as a general rule; but in most of them it is still in use. The writ is also termed, more fully, a *venire facias juratores*.

Venire facias juratores. Was a writ judicial directed to the sheriff, when issue was joined in an action, commanding him to cause to come to Westminster, on such a day, twelve free and lawful men of his county, by whom the truth of the matter at issue might be better known. This writ was abolished by section 104 of the common-law procedure act, 1852, and by section 105 a precept issued by the judges of assise is substituted in its place. The process so substituted is sometimes loosely spoken of as a *venire*. *Brown.*

Venire facias de novo. That you make to come anew. The name of a second writ of *venire facias*, issued to summon a jury for a second trial. In American books, the expressions, to grant a new trial, and a *venire de novo*, are often used as if equivalent; there is, however, in strictness, this distinction, that *venire de novo* is awarded as of right for error appearing of record, while new trial is largely obtainable by motion addressed to discretion and founded on extrinsic facts, such as separation of jurors; surprise; excessive damages, &c.

Venit et defendit. He comes and defends.

Venit et dicit. He comes and says.

VENTER, or VENTRE. The abdomen or belly. Also the stomach. Also the womb.

The latter sense is most frequent in law-books; as when an unborn child is said to be *en ventre sa mère;* or in naming the writ *de ventre inspiciendo*, q. v.

VENUE. Neighborhood; place; locality. Particularly, the neighborhood, place, or county in which a crime or an injury is alleged to have been committed or a fact alleged to have happened. The name venue is also applied to the clause in a declaration stating the county in which a fact happened; as in the expression to lay a venue, meaning to allege a place. It also designates the county in which an action is intended to be tried. A change of venue is a change of the place of trial to another county.

Under the codes of procedure, the expression "place of trial" has been very generally substituted for venue.

In former times, the direction to the sheriff was to summon a jury, not from the body of the county, but from the immediate neighborhood where the facts occurred, and from among those persons who best knew the truth of the matter; the jurors being formerly regarded as witnesses, or as persons in some measure cognizant, of their own knowledge, of the matter in dispute and of the credit to be given to the parties; and, in order to know into what county the *venire facias* should issue, it was necessary that the issue in the action, and the pleadings out of which it arose, should show particularly what that place or neighborhood was. Such place was called the *visne* or venue; and the statement of it in the pleadings obtained the same name; to allege the place being, in the language of pleading, to lay the venue. *Mozley & W.*

By the judicature act, there is to be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he is in his statement of claim to name the county or place in which he proposes that the action shall be tried; and the action thereupon shall, unless the judge otherwise orders, be tried in the county or place so named. *Brown.*

VERBA. Words; language. Several Latin maxims begin with this word.

Those we give relate chiefly to the construction of written instruments.

Verba accipienda sunt secundum subjectam materiam. Words are to be taken according to the subject matter.

Verba aliquid operari debent. Words should have some effect. Words or clauses to which some effect can be given should not be rejected. "A rule, in mixed interpretation, is to give all doubtful words or expressions that sense which makes them produce some effect. This effect must, in general, be a reasonable one; and it must likewise be the same that the law-maker or the testator or the contractor intended to produce." 2 *Ruth. Inst.* 325.

Verba artis ex arte. Words of art from the art. The sense of a technical term is to be learned from its acceptation in the art to which it pertains.

Verba chartarum fortius accipiuntur contra proferentem. The words of writings are to be taken most strongly against the offering party. Because the author or subscriber of an instrument has full opportunity to frame his language in it according to his true intention and so as to protect his rights, while the party receiving it has but limited means of controlling its phraseology, one established principle of construction is that doubtful language is to be resolved against the one making use of it, and in favor of the one to whom it is given. But the application of the principle is subject to important limitations; and it is not applicable to all instruments alike. See *Trayn. Max.; Whart. Max.* Another form, broader and more liable to doubt, exception, or limitation, is: *verba fortius accipiuntur contra proferentem.* Words are taken most strongly against the offering party. This form purports to extend the principle to all language; while the other confines it to documents, and, if *chartarum* is taken in a strict sense, to instruments of the more solemn kind.

The governing principle under this maxim, in regard to contracts, as against the party making them, seems to be, that he who makes an instrument should take care so to express his own liability as not to bind himself beyond his intention; and that the party who receives an instrument shall have a construction put upon it in his favor, because the words of the instrument are not his, but those of the other party. A distinction is suggested between an ordinary contract and a guaranty, the latter being, not a contract by the party for payment of his own debt, or on his own behalf, but for the debt and on behalf of a third person; in which case the duty is on the party taking the guaranty to see that it is so expressed that the one giving it is not deceived.

A distinction is also made between a

deed-poll and an indenture, the former being executed by the grantor alone, and the words used his only; the latter, by both parties, and the words the words of both. *Whart. Max.*

Verba cum effectu accipienda. Words are to be taken effectively.

In construing deeds, contracts, or writings, the words used are to be read in such a manner as is consistent with giving them some effect; they are supposed to mean something and to have some effect, from the fact of their having been used. If two interpretations or constructions of the words are possible, that one is preferred which will enable the words to be read as meaning something, rather than that which would make them useless or insensible. *Trayn. Max.* 609.

Verba generalia generaliter sunt intelligenda. General terms are to be construed generally.

Verba generalia restringitur ad habilitatem rei vel personæ. General words are restricted according to the subject or person. General language is to be understood with reference to the particular subject-matter.

A bond upon condition is a forcible illustration of the maxim, the bond itself being absolute, controlled, however, by the condition. As, where a bond was given to an employer, conditioned for the due accounting by a clerk, with a recital that he was engaged at a salary of £100 a year, the salary being subsequently changed to a payment by commission, it was held that the recital controlled the condition, and that the obligor was discharged by the change of mode of remuneration. *Whart. Max.*

Verba illata in esse videntur. Words referred to are considered as incorporated.

Verba intentioni debent inservire. Words ought to subserve intention. The intention of parties to instruments will prevail in construction, against the literal meaning of the language.

The application of this principle varies with the differing character of various instruments. In dealing with ordinary simple agreements, and still more when wills are in question, the rule is carried very far; the intention of the writer, if honest and lawful, is the chief guide. When specialties or negotiable instruments are under examination, there is greater reason for adhering to the settled technical construction of words, and this often prevails over the probable intent of the individual. In the interpretation of judgments and statutes, still further qualification of the doctrine is observed. The nature of the suit and limits of the jurisdiction have an important influence in determining the effect of language of a court; while constitutional rules and usages of legislation will often override the intent of the legislator, as indicated in a statute.

Verba ita sunt intelligenda, ut res magis valeat quam pereat. Words are to be so construed that the affair may prevail rather than fail. The language of an instrument is to be so construed that the transaction may succeed, may have effect and operation, rather than so that it shall be nullified.

This rule runs, as it were, counter to the preceding; each of the two limits the application of the other. A striking instance of disregarding the undoubted intention of the writer, in order to give effect to his instrument, is that of Russel *v.* Lanstaffe, 1 *Fish. Dig.* 1141; *Bayl. Bills*, 6, in which defendant gave a written acknowledgment of money borrowed, in these words: "Borrowed of J. S., 10*l.*, which I promise *not* to pay." The intent doubtless was to palm off an instrument which could not be enforced; but the court, considering that the instrument, as expressed, was wholly nugatory, and that it ought to be construed so as to have some sort of effect or operation, if possible, adjudged that the word not might be stricken out as surplusage, thus leaving a valid note. Similarly in Allan *v.* Mawson, 4 *Campb.* 115, where a bill of exchange was sued, which read, instead of "to Sir J. P." (the drawee), "at Sir J. P.;" but the "at" was in very small letters, hidden in the hook of the S of the "Sir," the judge left it to the jury to say whether this was done to deceive purchasers of the bill; if so, the "at" might be rejected and the bill enforced as an ordinary bill of exchange. In other words, the court, in both cases, construed the instrument directly contrary to what the writer intended, on the principle that it must be treated so as to make it operative rather than nugatory.

Verba relata hoc maxime operantur per referentiam, ut in eis inesse videntur. Words to which reference is made operate as if they were inserted.

This rule applies as well to cases where a particular clause in an instrument refers to another clause in the same instrument, as to parcels, schedules, plans, &c., as it does to cases where reference is made in the instrument to some deed, plan, schedule, index, will, &c., altogether disconnected from the instrument in which the reference thereto is made. The following examples will show the meaning of the maxim: A deed referring to furniture, fixtures, machinery, &c., in a schedule, being a totally distinct document, or to trusts declared in another deed; a deed whereof one clause, for brevity, refers to another clause with a *mutatis mutandis;* and affidavits referring to a deed or other document, — are all within the rule. *Whart. Max.*

Verba sunt semper accipienda in mitiori sensu. Numerous early decisions are to the effect that, in slander suits, the words are not actionable if they will bear an innocent construction. Later cases have said that this rule is exploded. Mr. Townshend considers that the supposed change is only a rule of construction of the declaration.

VERBAL. Embodied in language; expressed; worded. See PAROL.

VERDEROR. An officer of the king's forest, who is sworn to maintain and keep the assises of the forest, and to view, receive, and enrol the attachments and presentments of all manner of trespasses of vert and venison in the forest. *Manw.* ch. 6, § 5.

VERDICT. The decision of a petit jury upon an issue of fact submitted to them.

The decision of a judge or referee, upon an issue of fact, is not called a verdict, but a finding, or a finding of fact.

Verdicts are called *general* or *special.* A general verdict is one which the jury find in the terms of the issue; as when they find "for the plaintiff" damages so much; or for the defendant; or "guilty" or "not guilty." A special verdict is where they find distinct, specific facts, upon which the decision of the issue must depend, leaving it to the court to apply the law to those facts, and render the ultimate decision. Thus, if a divorce case were contested on the ground that the defendant was insane when the act of adultery charged was committed, and it were desired to reserve that question for further argument in full court, the judge might direct the jury to render a special verdict, which they would do by returning distinct findings, as thus:

That the defendant, at, &c., committed sexual intercourse with one ——.

That, at the time of the act of sexual intercourse aforesaid, the defendant was of unsound mind.

Upon findings being thus rendered upon the facts, the question, whether the insanity of defendant defeats the action for divorce, as it would defeat a criminal prosecution, is afterwards argued as a pure question of law; and the court will direct judgment to be entered on the special verdict in favor of plaintiff or defendant, according as they decide the question of law.

If, however, in a case such as above mentioned, the findings of fact do not present the question of law, — as, if the jury find there was no adultery, or was no insanity, — judgment can be ordered upon the findings without bestowing labor on the abstract question.

Verdict subject to the opinion of the court, is much the same in nature as a special verdict. When a cause on trial requires determination of a question of fact, or an assessment of damages, so that it cannot be taken from the jury, and decided as matter of law, and yet the recovery or defence depends on a point of law which the judge is unwilling to decide, finally, upon a *nisi prius* trial, he may direct the jury to find a verdict subject to the opinion of the court. They then render a verdict just as they might have done if the cause had been submitted to them in the usual way. But the party in whose favor the verdict is rendered cannot enter judgment upon it at once, but must prepare a case, and obtain the opinion of the court, in his favor, on the question of law.

Verdict is the answer of a jury given to the court, concerning the matter of fact in any cause committed to their trial; wherein every one of the twelve jurors must agree, or it cannot be a verdict. *Jacob.*

A verdict is the unanimous judgment or opinion of the jury on the point or issue submitted to them. A verdict is either general or special. It is said to be general when it is delivered in general words with the issue; as if the issue be on a plea of not guilty, then a general verdict would be

that the defendant is guilty, or is not guilty, as the case may be. It is said to be special when the jury, instead of finding the negative or affirmative of the issue, as in the case of a general verdict, declare that all the facts of the case as disclosed upon the evidence before them are in their opinion proved, or, in other words, find the special facts of the case, but that they are ignorant in point of law on which side they ought, upon these facts, to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, &c.; but if the court are of an opposite opinion, then *vice versa*. This special verdict is then, together with the whole proceedings on the trial, entered on record; and the question of law arising on the facts found is argued before the court *in banc*, and decided by that court as in case of demurrer. *Brown.*

A verdict is the honest accord of twelve intelligent minds upon the issue submitted to them. State *v.* Nelson, 26 *Ind.* 366.

The term verdict is limited to the determination of a jury, upon matters of fact in issue in a cause, upon the evidence. Otis *v.* Spencer, 8 *How. Pr.* 171.

A general verdict is a finding by the jury, in the terms of the issue or issues referred to them; and it is either wholly or in part for the plaintiff or for the defendant. Settle *v.* Alison, 8 *Ga.* 201, 208.

VERIFY. To confirm by oath; to establish; to show to be true. Particularly used of making formal oath, as required by law, to accounts, petitions, pleadings, and some other papers.

Verification: the making oath to, or other legal confirmation of, a paper.

Verify sometimes means to confirm and substantiate by oath, and sometimes by argument. In legal proceedings, it is generally employed in the former sense. DeWitt *v.* Hosmer, 3 *How. Pr.* 284.

Verification is not identical with authentication. A notary may verify a mortgagee's written statement of the actual amount of his claim, but need not authenticate the act by his seal. Ashley *v.* Wright, 19 *Ohio St.* 291.

VERSUS. Against. This word is much used in entitling suits, to separate the names of the plaintiffs or complainants from those of the defendants. It is usually abbreviated *vs.* or *v.*, and is said to be a contraction of *adversus*.

VERT. Any thing that doth grow and bear a green leaf within the forest. It is divided into over vert and nether vert. Over vert is the great woods, and nether vert is the underwoods. There is also a vert called special vert, which includes all trees growing in the king's forests, and such trees in other men's woods as bear fruit to feed the deer. Special vert was so called because the destroying of it was more grievously punished than that of any other vert. *Termes de la Ley; Cowel.*

VESSEL. See SHIP. An open boat is not a ship or vessel. The term vessel is never, or at least very rarely, used to designate any water-craft without a deck. United States *v.* An Open Boat and Lading, 5 *Mas.* 120, 137.

Vessel, in the provision of La. Code that commercial partners are those who are engaged in "carrying personal property for hire in ships or other vessels," means any structure which is made to float upon the water, for purposes of commerce or war, whether impelled by wind, steam, or oars. Chaffe *v.* Ludeling, 27 *La. Ann.* 607.

Setting fire to a small, unfinished boat, still in the hands of the builder, and unfit for use, in a shop, is not within a statute punishing setting fire to a vessel. Commonwealth *v.* Francis, *Thach. Cr. Cas.* 240.

Whether canal-boats are within the word vessel, see Hicks *v.* Williams, 17 *Barb.* 523; Crawford *v.* Collins, 45 *Barb.* 269.

Vessel, as used in the act of congress to prevent smuggling, includes every description of water-craft, raft, vehicle, and contrivance used, or capable of being used, as a means or auxiliary of transportation on or by water. Act of July 18, 1866, § 1, 14 *Stat. at L.* 178.

VEST. This verb is used both transitively and intransitively. A statute or a deed is said to vest an estate in some person, or to vest a person with the estate, meaning to confer the ownership in the subject upon him; or an estate is said to vest or become vested in a person, when it becomes his.

Vest does not always imply actual present enjoyment; if the ownership or title is unqualifiedly conferred, the estate or property is vested, although the enjoyment is postponed. A legacy given unconditionally is vested, although not payable for some time to come.

Vested estate, or interest. Any estate or interest is called vested, whether in possession or not, which is not subject to any condition precedent and unperformed. The interest may be either a present and immediate interest, or it may be a future but uncontingent, and therefore transmissible, interest. A vested interest is not necessarily an unconditional interest; on the contrary, it is frequently qualified by some condition, being, however, a condition which does not extend to delay the vesting of the interest.

An estate is vested when there is a person in being who will have an immediate right to the possession of the lands upon the ceasing of any intermediate or precedent estate. See Tayloe *v.* Gould, 10 *Barb.* 388, 396; Sheridan *v.* House, 4 *Abb. App. Dec.* 218.

Vested legacy. A legacy is said to be vested when the words of the testator making the bequest convey a transmissible interest, whether present or future, to the legatee in the legacy. Thus, a legacy to one, to be paid when he attains the age of twenty-one years, is a vested legacy, because it is given unconditionally and absolutely, and therefore vests an immediate interest in the legatee, of which the enjoyment only is deferred or postponed; and if such legatee die before that age, his representatives shall receive it out of the testator's personal estate at the time that it would have become payable had the legatee himself lived. But if the legacy were given when or if the legatee attain a certain age, it would not be vested, *i.e.* transmissible, until that age; and if the legatee were to die before that age, the legacy would fail to take effect, and his representatives could make no claim to it. For in this case the bequest is as it were a conditional one, depending on the happening of a certain event; viz., the legatee's attaining the specified age.

Vested in possession. A phrase used to indicate that an estate is an estate in possession, as opposed to an estate in reversion or remainder.

Vested remainder. A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in future. Poor *v.* Considine, 6 *Wall.* 468; Cuyler *v.* Ferrill, 1 *Abb. U. S.* 169. See REMAINDER.

Vested right. This term is not applicable to an existing remedy or penalty. Parmelee *v.* Lawrence, 48 *Ill.* 331.

Vesting order. An order of court conferring upon some person designated the legal estate in property, generally land.

A vesting order is often made under the English trustee acts, when the trustees appointed are unwilling or unable to act in the execution of the trusts; or when, for any reason, it is desirable to appoint new trustees, and it is found impracticable or inconvenient to procure a conveyance to them in the ordinary way. *Hunt Eq.* Pt. III. ch. 4, § 2.

VESTRY. The place in a church where the priest's vestures are deposited. Also, an assembly of the minister, church-wardens, and parishioners, usually held in the vestry of the church, or in a building called a vestry-hall, to act upon business of the church. *Mozley & W.*

Vestry clerk. The duties of the vestry clerk, under modern English law, are: to give notice of and attend the meetings of the vestry and committees appointed thereat; to summon and attend meetings of the church-wardens and overseers when required, and to enter the minutes thereof respectively; to keep accounts of all charity moneys which the church-wardens or overseers are authorized or accustomed to distribute; to keep the vestry books and the parish deeds and documents; to assist the overseers in making out their accounts; to make out the list of persons liable to serve on juries; to give notices for claims to vote for members of parliament, and to make out lists of voters; and to advise the church-wardens and overseers in all the duties of their office. *Mozley & W.*

Vestrymen. A select number of parishioners elected in large and populous parishes to take care of the concerns of the parish, — so called because they used ordinarily to meet in the vestry of the church. *Cowel.*

VETO. I forbid. The power reserved by the American constitutions to the president or governor, to refuse that executive assent which is necessary to the complete enactment of a bill, and so to nullify the legislative action (unless a two-thirds vote to pass the measure can afterwards be obtained), is called the veto power; his exercise of it is a veto; and the message communicating his refusal to the legislature is a veto message.

Veto is not, however, a term employed in the Federal constitution, but seems to be of popular use, only. The constitution speaks of returning a bill with objections.

VEXATA QUÆSTIO. A moot point; a vexed question.

VI. See VIS.

Via trita via tuta. The beaten path is the safe path. In its legal application, this appears to be synonymous with the maxim, *cursus curiæ est lex curiæ*, q. v. If any necessary proceeding in an action be informal, or not done within the prescribed limit of time, or in the manner authorized by the usual practice of the court, it may often be set aside for irregularity, for *via trita via tuta.* The courts will not sanction a specula-

tive novelty, without the warrant of any principle, precedent, or authority. *Broom Max.* Another application of this maxim, however, is to cases of employment of skilled labor. The person employed is under obligation to act according to the rules adopted and recognized in his profession or business; and, if he does so, he is not answerable for any ill consequences. But, should he depart from the settled rule or practice, he is answerable for the consequences of such deviation.

VIABLE. Capable of living. Viability: capability of living; possibility of continued existence.

An infant newly born is said to be viable, if the organs are in such a state of regular conformation and development as to render the infant capable of living. But if an infant, newly born, be affected with such a disease or malformation as to render a continuance of life impossible, the infant is said to be non-viable, and, according to some systems of law, is, so far as regards the transmission of right to legal representatives, as if he had never been born. (*Beck; Littré.*) *Mozley & W.*

VICAR. The priest of every parish is called rector, unless the predial tithes are appropriated, and then be is styled vicar; and, when rectories are appropriated, vicars are to supply the rector's places. *Jacob.*

The distinction of a parson and vicar is this: the parson has, for the most part, the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is, in effect, perpetual curate, with a standing salary. 1 *Bl. Com.* 388.

Vicar-general. An officer occasionally constituted, in ancient times, when the bishop was called out of the diocese by foreign embassies or attendances in parliament or other affairs; and his commission contained in it the whole administration of the diocese, except the hearing of causes in the consistory court, which was the province of the official, otherwise called the official principal. In time the vicar-general came to be a fixed and standing officer, who should be ready, without the trouble of a special commission for every occasion, to execute the episcopal power, when the bishop himself was hindered by infirmities, avocations, or other impediments. The office of vicar-general came by degrees to be united with that of official; and the person in whom the two offices are united is called the bishop's chancellor. *Mozley & W.*

Vicarius non habet vicarium. A deputy has not a deputy. See *Delegata potestas non potest delegari.*

VICE. 1. In the law of sales, particularly of sales of animals and slaves, a vice is a defect or fault in the creature sold.

2. As a prefix to the titles of certain offices, vice often denotes a person who may serve in that office, in case of the absence or incapacity, or, in some cases, the death, of the officer.

A vice-officer differs from a deputy, who acts for the principal concurrently with him, but as a subordinate; while the vice has no authority while the principal can act, but, when he cannot, becomes clothed with the whole authority of the office. He differs from an officer *pro tem.*, who is generally one chosen after the exigency requiring a substitute has arisen, to meet that exigency only; while vice designates a distinct officer elected or appointed in advance, to fill the office in case of any such exigency which may happen.

Vice-admiral. An officer in the (English) navy next in rank after the admiral.

Vice-admiralty court. The title of a class of courts, with an admiralty jurisdiction, established by authority of parliament in British possessions beyond the seas.

Vice-chamberlain. A great officer under the lord chamberlain, who, in the absence of the lord chamberlain, has the control and command of the officers appertaining to that part of the royal household which is called the chamber. *Cowel.*

Vice-chancellor. A class of judges in equity courts have had this title, — apparently because originally appointed to act in the place of the chancellor. They have, however, held independent courts, though subject to review and reversal by the chancellor.

Vice-comes. A title formerly bestowed on the sheriff of a county, when he was regarded as the deputy of the count or earl.

Vice-consul. One who acts in the place of, *i. e.* as substitute for, a consul, with legal authority.

Vice-gerent. A deputy or lieutenant. At the present day a vernacular rather than a law term.

Vice-president. 1. In the govern-

ment of the United States, the vice-president is an officer elected at the same time with the president; and he must possess the same qualifications. And the constitution provides that, in case of the removal of the president from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the vice-president. *Const.* art. 2, § 1, subd. 5.

The vice-president is, before he is called upon to assume the office of president, the presiding officer in the senate.

2. In many corporations, the articles or by-laws provide for a vice-president to act in the place of the president, when the latter cannot act.

VICEROY. A person clothed with authority to act in place of the king; hence, the usual title of the governor of a dependency.

VICINAGE. The neighborhood; the vicinity. See PAIS.

VIDELICET. To wit; that is to say; namely. This word has in general the same meaning as *scilicet* (q. v.), and is used in the same manner as that term; and the remarks under that word as to the force and construction of clauses introduced by *scilicet* apply in like manner to those following a *videlicet*. But a peculiar office of *videlicet*, in pleading, is to mark that the party does not undertake to prove the precise circumstances of time, quantity, value, &c., alleged under a *videlicet* strictly as alleged; and he is not held to such proof. The English terms proper to be used for this purpose, instead of *videlicet*, are "to wit," or "that is to say;" which should be inserted immediately preceding the allegation as to which certainty is not intended. This is termed laying the time, &c., under a *videlicet*, although English words be used.

The words to wit, or, that is to say, so frequently used in pleading, are technically called the *videlicet* or *scilicet;* and when any fact alleged in pleading is preceded by or accompanied with these words, such fact is, in the language of the law, said to be laid under a *videlicet*. The use of the *videlicet* or *scilicet* is to point out, particularize, or render more specific that which has been previously stated in general language only; also to explain that which is doubtful or obscure. It has been called by Lord Hobart a "handmaiden to another clause." Where the *scilicet* is contrary to the preceding general statement, it may be rejected. But a *videlicet* or *scilicet*, which is not so contrary, and which is not mere surplusage, cannot be rejected as immaterial, but may be traversed like any other averment. (Dakin's Case, 2 *Wms. Saund.* 290.) *Brown.*

Videlicet is used to avoid a variance and escape a positive averment which must be strictly proved. Brown *v.* Berry, 47 *Ill.* 175.

VIEW, *n.* A legal examination by the eye, or inspection of any subject-matter in question. View, *v.*: to inspect. Viewer: a person appointed to make and report upon ocular examination; particularly of a highway route.

Thus, in real actions, a jury of view was allowed, to inspect the premises in dispute; on a petition to open a highway, viewers are appointed, to inspect the line of road applied for, and report on its advantage and practicability; a coroner's inquest on a person found dead is expected to view the body; on various trials, where to see the spot where a crime is alleged to have been committed, or an occurrence drawn in question took place, is important to enable the jury to understand the testimony regarding it, they may be sent out to view it. And there are other like uses of the word.

View, in a statute directing the sheriff's jury to "view the premises," means more than "look at." They are to examine the land both from within and without the location of the railroad. Wakefield *v.* Boston, &c. R. R. Co., 63 *Me.* 385.

VIF-GAGE. Live pledge; the antithesis of mortgage or dead pledge. Strictly, it applied to a transfer of productive property to a creditor as security for a debt, upon terms that the rents, issues, and profits of the property should go to discharge the debt. See VADIUM.

Vigilantibus et non dormientibus, jura subveniunt. Those who are vigilant, not those who sleep, the laws relieve; legal remedies are for the active and vigilant. It is upon this principle that statutes are enacted for the limitation of actions; "not so much, however, with a view to assisting the vigilant, as to discouraging those who sleep on their rights, by preventing their setting up stale demands, to the injury and annoyance of those who are apparently in the peaceable enjoyment of their rights." *Whart. Max.*

The maxim is sometimes applied to the contract of sale, as expressing the principle in support of which the maxim *caveat emptor* is quoted, that purchasers must exercise proper vigilance and caution. But the more common application is to enforce the doctrine that a party who is entitled to a remedy at law must be active and vigilant in its prosecution. If he neglect for a long and unreasonable time to ask the assistance of the law, it will be refused him, both as a punishment of his neglect, and on the principle of limiting litigation.

VILL. Seems to bear the same signification in law as a town or tithing; and each of them is said to have had originally a church, and celebration of divine service, sacraments, and burials (though this seems to be rather an ecclesiastical than a civil distinction), and hence it is that the word vill has by some writers been described as a parish or a manor. It appears to have some different significations, but its more ordinary meaning was that of a town. *Brown.*

VILLAGE. Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid out streets and alleys or not, constitutes a village, within the rule that a railroad company is not bound to fence its track within the limits of a village. Illinois Central R. R. Co. *v.* Williams, 27 *Ill.* 48.

A place where there is a station-house, a warehouse, a store, a blacksmith-shop, a post-office, and five or six dwelling-houses, whether they are situated upon regularly laid out streets and alleys or not, comes fully up to the requirements of the word village, for the purpose of excusing a railroad company from fencing its track within the limits thereof. Toledo, &c. Railway Co. *v.* Spangler, 71 *Ill.* 568.

VILLEIN, or VILLAIN. The name of a servile class, under Saxon institutions.

Villeinage, or villenage: the state or condition of a villein; also, the tenure by which villeins held their lands.

The villeins were a sort of people under the Saxon government in a condition of downright servitude, who were used and employed in the most servile works, and are even said to have belonged to the lord of the soil, like the cattle or stock upon it. They seem to have been those who held what is termed the folk-land, from which they were removable at the lord's pleasure. *Brown.*

There were two sorts of villeins in England. The one was termed a villein *in gross*, who was immediately bound to the person of the lord and his heirs, and transferable by deed from one owner to another. The other was a villein *regardant* to a manor, as being a member belonging and annexed to a manor, and bound to the lord thereof. *Mozley & W.*

Of tenure in villeinage there were two sorts: *pure*, where a man held upon terms of doing whatsoever was commanded of him; and *privileged*, otherwise called villein socage. *Wharton.*

Villein socage. That species of ancient English tenure in which land was held upon services servile or villein in their nature, but of which the quantity which might be exacted had been made certain. This being preferable to a tenure upon condition of doing whatever might be required, was also called privileged villeinage. Compare SOCAGE.

VIM. See VIS.

VINDICTIVE DAMAGES. See EXEMPLARY DAMAGES.

VIOLENCE. Force. Violent: forcible; used literally and metaphorically. Violently: with force.

Violence is a general term, including all sorts of force. State *v.* Weaver, *Busb. L.* 9.

The acts necessary to constitute the crime of rape must be done "by force," and these words, or something equally significant, cannot be dispensed with in an indictment. The word "violently" does not fulfil the demands of the statute. State *v.* Blake, 39 *Me.* 322.

Violent presumption. A strong presumption; a presumption of such a nature as almost to amount to proof.

Violent profits. The law of Scotland imposes on a tenant who forcibly or unwarrantably retains possession after he ought to have been removed, payment of "violent profits" by way of penalty. In houses, the violent profits amount to double the rent; in lands, they amount to the full profit which the proprietor could otherwise have made. *Mozley & W.*

VIRTUE. The phrase "by virtue" differs in meaning from "under color." For instance, the proper fees are received *by virtue* of the office; extortion is *under color* of the office. Any rightful act in office is by virtue of the office. A wrongful act in office may be under color of the office. Broughton *v.* Haywood, *Phill. L.* 380.

VIRTUOUS. In a statute punishing the seduction of a virtuous, unmarried female, means something more than a woman

who has not had illegal and sexual intercourse. A conviction is not warranted if the character of the woman for chastity and purity of heart and feelings has been successfully impeached. Wood *v.* State, 48 *Ga.* 192.

VIRTUS. Power; strength. Also, applied to a writ, &c., the substance or tenor.

Virtute cujus. By reason whereof. A part of the declaration in an action at common law, which, after setting forth the various grievances complained of, proceeds to point out the injurious results which have flowed therefrom, is quite often technically spoken of as the *virtute cujus*, from the words employed therein, which are, "by reason whereof." Thus, in an action for diverting water from the plaintiff's mill, the declaration, after stating the plaintiff's right to the water, and particularizing the injurious act complained of, proceeds to point out the injury which the plaintiff has sustained in consequence, in the following manner: "and the plaintiff, by reason of the premises," had been prevented from working his said mill in so beneficial a manner as he heretofore has, and otherwise could and would have done, &c. See *Brown.*

Virtute officii. By virtue of office. This term is applied to official acts and powers. Compare COLORE OFFICII; EX OFFICIO.

VIS. Force. This word often signifies unlawful force; violence; but sometimes efficacy; power to produce an effect.

Vis major. A superior force. In the law of bailment, this term expresses an irresistible force, — such an interposition of human agency as is, from its nature and power, absolutely uncontrollable; as the inroads of a hostile army or public enemies, piracy and robbery by force.

Vim vi repellere omnes leges omniaque jura permittunt. All written laws and all unwritten laws permit force to repel force. The law allows one who is attacked to repel force by force, whether in defence of person or property. But the force permitted is strictly limited to that necessary in defence; and a person deprived of his property by violence cannot use violence to recover it. Lord Coke thus states the rule: *Vim vi repellere licet, modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam,* — it is lawful to repel force by force; only let it be done with the self-control of blameless defence, — not to take revenge, but to repel injury. *Co. Litt.* 162.

Vi et armis. With force and arms. Formal words in Latin writs and declarations of trespass, proper to charge acts of force and violence. This expression is literally translated, in English forms.

VISCOUNT. 1. A degree of English nobility, next below that of earl.

2. An old title of the sheriff.

VISIT. In international law, the right of visit or visitation is a claim that officers of a public ship of one nation may go on board a vessel sailing under the flag of another nation, to be assured of her national character, when the piratical character of the vessel is suspected. This right of visit is conceded for the sole purpose of ascertaining the real national character of a vessel sailing under suspicious circumstances, and is wholly distinct from the right of search. See 1 *Kent Com.* 153, note.

VISITATION. In a technical sense, is a visit of an authorized person; such as that of the bishop of a diocese or the archdeacon to the churches, or that of the founder or his appointee to an endowed corporation, made for the purpose of ascertaining and correcting abuses. Visitor: is the title of a person authorized to make such official visit of inspection.

Visitor is an inspector of the government of a corporation, &c. The ordinary is visitor of spiritual corporations. But corporations instituted for private charity, if they are lay, are visitable by the founder, or whom he shall appoint; and from the sentence of such visitor there lies no appeal. By implication of law, the founder and his heirs are visitors of lay foundations, if no particular person is appointed by him to see that the charity is not perverted. *Jacob.*

The term visitor is also applied to an official appointed to see and report upon persons found lunatic by inquisition, and to a person appointed by a school board to visit houses and see that parents are complying with the provisions in reference to the education of their children. *Mozley & W.*

VITIOUS INTROMISSION. In the

Scotch law, is the unlawful meddling, by an heir or other person not executor, with the property of a deceased person. The party so unlawfully meddling is called the *vitious intromitter*; he corresponds with the *executor de son tort* of the English law. *Bell*; *Paterson*.

Viva voce. With living voice; verbally; by word of mouth. A witness is said to give his testimony *viva voce*, when testifying orally in open court, as distinguished from a written deposition.

VOID; VOIDABLE. The true distinction between void and voidable acts, orders, and judgments is, that the former can always be assailed in any proceeding, and the latter only in a direct proceeding. Alexander *v.* Nelson, 42 *Ala.* 462.

Void properly means of no legal force, — null, and incapable of confirmation or ratification, — but is frequently used in the sense of voidable. A statute provision that, "if an owner of lands sold for taxes establishes fraud in the sale, the sale shall be void," may be construed to mean may be avoided. Van Shaack *v.* Robbins, 36 *Iowa*, 201.

The term void, as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense, as contradistinguished from voidable; it being frequently introduced, even by legal writers and jurists, when the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms void and voidable, in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term void can only be properly applied to those contracts that are of no effect whatsoever, — such as are a mere nullity, and incapable of confirmation or ratification. Allis *v.* Billings, 6 *Metc.* (*Mass.*) 415.

Void, as used in statutes and by the courts, does not usually mean that the act or proceeding is an absolute nullity. Kearney *v.* Vaughan, 50 *Mo.* 284.

Void does not always imply entire nullity; but it is, in a legal sense, subject to large qualifications in view of all the circumstances calling for its application and the rights and interests to be affected in a given case. Brown *v.* Brown, 50 *N. H.* 538, 552.

Void, in its most unlimited sense, implies an act of no effect at all, — a nullity *ab initio*. When used in a statute, in reference to the solemn acts and judgments of superior courts, it may mean no more than voidable. Inskeep *v.* Lecony, 1 *N. J. L.* 111.

Void, in the statute of 1843, forbidding assignments, means voidable by creditors. Merrill *v.* Englesby, 28 *Vt.* 150.

Probably no words are more inaccurately used in the books than "void" and "voidable." Statutes not unfrequently declare acts void which the tenor of their provisions necessarily makes voidable only. Perhaps the best excuse made for such inaccuracy is that of Parker, C. J., cited and adopted by this court: "Whatever may be avoided may, in good sense, to this purpose, be called void; and the use of the term void is not uncommon in the language of statutes and of courts. But, in regard to the consequences to third persons, the distinction is highly important; because nothing can be founded upon what is absolutely void, whereas from those which are only voidable fair titles may flow. These terms have not always been used with nice discrimination; indeed, in some books there is a great want of precision in the use of them." Crocker *v.* Bellangee, 6 *Wis.* 645; Bromley *v.* Goodrich, 40 *Wis.* 131. See also Hone *v.* Woolsey, 2 *Edw. Ch.* 289; Anderson *v.* Roberts, 18 *Johns.* 515; Pearsoll *v.* Chapin, 44 *Pa. St.* 9.

Void, in a certain policy of insurance, was held to mean suspended till fulfilment of conditions, in Williams *v.* Albany City Ins. Co., 19 *Mich.* 451.

There is this difference between the two words "void" and "voidable:" Void means that an instrument or transaction is so nugatory and ineffectual that nothing can cure it; voidable applies when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it. Thus, while acceptance of rent will make good a voidable lease, it will not affirm a void lease. The court of chancery has drawn this distinction between voidable and void contracts: With regard to the former, they will be decreed to be delivered up, since their retention is liable to be applied to improper purposes, such as future litigation, when lapse of time may have weakened or destroyed the means of defence; or since their existence uncancelled may cloud a title, or diminish its value and security: but as to void instruments, the illegality of which appears upon their face, equity does not interpose its authority, since their production at any period of time will plainly establish their nullity. *Wharton*.

VOIR DIRE. To speak the truth. This law-French phrase is used to denote a preliminary oath administered to a proposed witness, for the purpose of an examination to ascertain whether he is qualified, he being sworn to say the truth touching the matters inquired of. The examination is also termed an examination on *voir dire*.

This phrase is applied to denote that preliminary examination which the judge makes of one presented as a witness, where the witness's competency is objected to. Thus, if the witness is a child of very tender years, the judge will examine him on the *voir dire*, to test his knowledge of the

sacredness of an oath. The examination on the *voir dire* may be made at any stage of the trial, whenever the occasion for it arises. *Brown.*

Volenti non fit injuria. To the consenting no injury is done. A person who consents to a thing cannot complain of it as an injury. The law regards such person as doing the act himself, and will hold him responsible for the consequences equally with others directly concerned. Thus a trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off. Ilott *v.* Wilkes, 3 *Barn. & Ald.* 304. This maxim applies principally to those cases where a man suffers an injury for which he has a claim for compensation, but which claim he is considered as waiving, by acquiescing in, or not objecting to, the injury committed; as when a husband connives at or condones the adultery of his wife, he cannot obtain damages from the seducer, nor sustain a petition for divorce. The rule also covers those cases where any one receives an injury through his own want of prudence or foresight, instances of which are of frequent occurrence. *Whart. Max.*

The import of the maxim is, that that which, unauthorized, would amount to wrongful injury, subjecting the doer of it to an action for damages by the person injured, loses such character if the person suffering the disadvantage or injury consents to the act. The peculiar signification of the word *injuria* — implying a wrong — should be borne in mind in considering the application of the maxim. On this subject, see DAMNUM ABSQUE INJURIA.

A man cannot complain of an injury which he has received through his own want of prudence and foresight. He cannot recover damages for an injury which but for his own negligence or wrongful act would not have happened. Therefore damages cannot be recovered against a railway company for injuries to persons trespassing upon the line of railway, even though there should have been negligence in the management of the train. Nor can a man recover damages for injuries sustained by him in committing a trespass, — as by climbing up to get into a cart, or by tumbling into a hole in his neighbor's field; nor for injuries sustained by him in running against an obstruction negligently placed in the road by the defendant, if he were riding at an improper rate, or was intoxicated, or could have avoided the injury by riding with ordinary and proper care.

So it is as to any right of action or defence to an action which a man has, and which he chooses to relinquish; as, a right of action for a debt for which a creditor chooses to accept a composition; a right of action by a tenant for an illegal distress; a right of action for trespass or other injury; a defence under the statute of limitations; a right of way; or an easement of air, light, or other like privilege, — the benefit of all of which rights a man may, if he will, waive or relinquish, though to his own injury. *Whart. Max.*

Voluit, sed non dixit. He willed, but he did not say; he may have intended it, but he did not say it. This maxim is frequently used in the construction of wills, in answer to arguments based upon the supposed intention of a testator. It is applied also in the construction of statutes. Judges frequently observe, in answer to the remark that the legislature meant so and so, that they, in that case, have not so expressed themselves; and therefore the maxim applies, *quod voluit non dixit.*

VOLUNTARY. 1. Free; without compulsion or solicitation; in accordance with a person's choice, consent, or agreement.

2. Without consideration, and particularly without valuable consideration; gratuitous.

Voluntary answer. In the practice of the court of chancery, was an answer put in by a defendant, when the plaintiff had filed no interrogatories which required to be answered. *Hunt Eq.*

Voluntary assignment. Presumably means an assignment of a debtor's property in trust to pay his debts generally, in distinction from a transfer of property to a particular creditor in payment of his demand, or to a conveyance by way of collateral security or mortgage. Dias *v.* Bouchaud, 10 *Paige Ch.* 445.

Voluntary confession. A confession of crime made by an accused person, without any promise of worldly advantage held out to him as obtainable by confession, or any harm threatened to him if he refuses to confess. Such a

confession may be received in evidence against the person making it; while a confession made under such circumstances as indicate any inducement or compulsion is rejected.

Voluntary conveyance. A deed without any valuable consideration. Seward *v.* Jackson, 8 *Cow.* 406.

Voluntary courtesy. A voluntary act of kindness. An act of kindness performed by one man towards another, of the free will and inclination of the doer, without any previous request or promise of reward made or offered by him who is the object of the courtesy. From such a voluntary act of kindness the law implies no promise on the part of him who is benefited by such act that he will make any remuneration or return for the same; for, if it were otherwise, one man might impose a legal obligation upon another against his will. If, however, the courtesy or act of kindness was performed at the instance or request of the party benefited, then the law implies a promise on the part of the latter to make a remuneration or return for such act. Hence the meaning of the phrases, that a "voluntary courtesy will not support an assumpsit," but that "a courtesy moved by a previous request will."

Voluntary deposit. A deposit arising from the consent and agreement of parties, as distinguished from a necessary deposit made upon some sudden emergency.

Voluntary escape. An escape attributed to actual consent of the keeper or sheriff is called voluntary, in distinction from one ascribed to neglect to take sufficient precautions for keeping the prisoner in custody, which is called a negligent escape. See ESCAPE.

Voluntary jurisdiction. Those courts (ecclesiastical ones in particular) are said to have a voluntary jurisdiction which are merely concerned in doing or settling what no one opposes, and which keep an open office for that purpose (as granting dispensations, licenses, faculties, and other remnants of the papal jurisdiction), but do not concern themselves with administering redress for any injury. *Brown.*

Voluntary manslaughter. Killing done voluntarily, but reduced below the grade of murder by having been done upon a sudden heat of the passions. See 4 *Bl. Com.* 190, 191.

Voluntary oaths. Such as persons take in extra-judicial matters, and not regularly in a court of justice, or before an officer invested with authority to take the same.

Voluntary redemption. In Scotch law, is when a mortgagee receives the sum due into his own hands, and discharges the mortgage, without any consignation. *Bell.*

Voluntary waste. Injury to real property done by affirmative acts, such as pulling down buildings, as distinguished from mere neglect by which premises are allowed to fall into bad repair, called permissive waste.

VOLUNTAS. Will; intention; design.

Sometimes, a will; a testamentary disposition of property. But in this sense the word is usually followed by *testatoris: voluntas testatoris*, — the will of a testator.

Voluntas reputabatur pro facto. The will shall be taken for the deed. This maxim expresses the rule of old common law in regard to criminal responsibility in cases of treason, that the mere compassing or planning of a treasonable act, such as the assassination of the sovereign, without any overt act, may constitute treason; which is contrary to the general rule of criminal responsibility, that the guilty intent and the guilty act must concur to constitute a crime. See the maxim, *Actus non facit reum, nisi mens sit rea.*

Under the constitution of the United States, an overt act is absolutely essential to constitute treason.

G. F. Wharton explains the application of the maxim, as formerly regarded, to other offences as well as treason, thus:

"This is the old maxim with respect to treasonable offences: *in criminalibus voluntas reputabitur pro facto*, — in criminal offences the will shall be taken for the deed. To constitute which offence of treason, the intention alone is sufficient.

"In treasonable offences, — that is, the compassing or imagining the death of the sovereign, — the law is more strict than in offences concerning the death of a subject; and, in such cases, the rule

is, *voluntas reputabitur pro facto*, and *scribere est agere*. Between subject and subject, however, the intent must be more manifest, and must be accompanied by undeniable overt acts.

"An assault, with intent to rob, without taking money or goods, is not felony; though the contrary was once holden.

"An expressed intention to commit murder, without any overt act, is not felony; though with an overt act, under this maxim, it would be. As where a servant, having stolen his master's goods, went to his bedside and attempted to cut his throat, and, thinking he had done so, left him and fled, he was adjudged to be hanged; for this overt act was evidence of the intent, and, in crimes, the intent, and not the consequence, is to be regarded; as, also, where one, knowing there to be a crowd of persons in the street adjoining where he was, threw a stone over the wall amongst them, thinking to frighten them, but without intent to kill, but whereby, nevertheless, one was killed, — this was adjudged to be manslaughter only; for there was in that case no intent to murder." *Whart. Max.*

Modern statutes defining precisely various crimes and degrees of crime, according to the intent and the circumstances of the act, have greatly modified the application and lessened the importance of this ancient maxim.

An infant under the age of seven years, however, is not within the meaning of the maxim, not being considered as having the capacity to intend to commit the crime of felony. A child under fourteen years, indicted for murder, must be proved capable. *Whart. Max.* 216.

VOLUNTEER. 1. In conveyancing, one who takes title under a conveyance made without a good or valuable consideration.

2. In military law, one who serves willingly, by his choice, in distinction from a conscript or drafted man, and from an enlisted man or officer in the regular army.

A substitute is not a volunteer, within the meaning of statutes providing for bounties to volunteers. People *v.* Quartermaster-General, 25 *Mich.* 340.

To the contrary. Magee *v.* Cutler, 43 *Barb.* 239.

VOTE. The will of a member of a body, formally manifested towards the decision of a question by the body as a whole, is his vote; and the aggregate of the expressions of the will of the members is the vote of the body.

Voting: the act of casting a vote; the proceeding by a body of persons to decide a question by simply ascertaining the preference of each member. Voted: ordered by the preponderance of voices of members of a body; passed by vote.

Voted, in a statutory reservation of "all timber and lumber and lands granted or voted," may apply to a legislative resolve reserving timber, &c. European, &c. Ry. Co. *v.* Dunn, 60 *Me.* 453.

A charge in an indictment for unlawful voting, not that the defendant did "vote," but that he did wilfully and unlawfully "give in his vote," is good. Voting and giving in a vote are precisely synonymous terms. State *v.* Moore, 27 *N. J. L.* 105.

"A majority of the voters of the county," means a majority of those who actually vote. Louisville, &c. R. R. Co. *v.* County Court of Davidson, 1 *Sneed*, 637. Compare ELECTOR; MAJORITY.

The word voters may mean those who have a right to vote for state offices. State *v.* Williams, 5 *Wis.* 308.

VOUCH. To call in; to require a warrantor to defend the title; to summon. Voucher, or vouchor: one who calls his warrantor in to defend the title. Vouchee: a warrantor summoned to defend the title which he warranted.

Voucher is a word of art, used when the tenant in a writ of right called another into the court who was bound to him to warranty; and was either to defend the right against the demandant, or yield him other lands to the value, &c. And it extended to lands or tenements of freehold or inheritance, and not to any chattel real, personal, or mixed: he that vouched was called the voucher, and he that was vouched is the vouchee; and the process whereby the vouchee was called was a *summoneas ad warrantizandum*. There was also a foreign voucher, when the tenant being impleaded within a particular jurisdiction, as in London, vouched one to warranty in some other county out of the jurisdiction of that court, and prayed that he might be summoned, &c. *Jacob.*

Vouching to warranty, in the old form of real action for the recovery of land, was the calling in of some person to answer the action, who had warranted the title of the tenant or defendant to the land in question. If the vouchee appeared, he was made defendant instead of the voucher; but

if he afterwards made default, recovery might then be had against the original defendant, who in his turn might recover over an equivalent in value against the deficient vouchee. This was the form used in common recoveries, which were grounded on a writ of entry, — a species of action that relied chiefly on the weakness of the tenant's title. The tenant thereupon vouched the warrantor, or person who had warranted the title. The process of calling the vouchee was styled a *summoneas* (or summons) *ad warrantizandum*. *Mozley & W.*

VOUCHER. Is used for a ledger-book, or book of accounts, wherein are entered the acquittances or warrants for the accountant's discharge. It also signifies any acquittance or receipt, discharging a person, or being evidence of payment. *Cowel; Tomlins.* And see VOUCH.

A voucher is any instrument which attests, warrants, maintains, bears witness. State *v.* Hickman, 8 *N. J. L.* 299.

VOYAGE. The term voyage, as applied to vessels engaged in foreign and interstate commerce, within the meaning of the maritime law, is not applicable to a tug, making short trips from one body of water to another. The John Martin, 2 *Abb. U. S.* 172.

Voyage, in a marine policy, means the enterprise begun, and not the route taken. Thus, if a schooner on the way to fishing-grounds stops at a port merely for bait, this is but an incidental part of the voyage, and not an independent voyage. Friend *v.* Gloucester Mut. Fishing Ins. Co., 113 *Mass.* 326, 332.

W.

W, in law French, seems to have been interchangeable, in many words, with G. See G.

WADSET. An old Scotch term nearly equivalent to the English "mortgage." The mortgagee was called the wadsetter, and the mortgagor the reverser. The mortgage debt was called the wadset sum. A wadset improper was where the mortgagee entered into possession. See *Bell.*

WAGE, *v.* To give a pledge or security for performance of any agreement or duty. See GAGE.

WAGER. 1. An engagement to pay money, transfer property, perform services, &c., dependent on some event which is uncertain or unknown to the parties, and in which they have no interest.

Wager is said to be synonymous with bet. See BET. If there is a difference, it probably is that bet is more appropriate where the engagement of one party only is the idea prominently presented; and wager more appropriate where the transaction on both sides, comprising mutual bets, is in view. But the words are used interchangeably.

Wagers are considered not to have been intrinsically unlawful at common law, but might be enforced, unless the subject or attendant circumstances furnished a ground of illegality. But they have been, in many jurisdictions, restricted or prohibited by statute.

A wager is a mutual contract for the future payment of money by A to B, or by B to A, according as some unknown fact or event, otherwise of no interest to the parties contracting, shall turn out. Wagers are now void in law, by Stat. 8 & 9 Vict. ch. 109, § 18, passed in 1845. (4 *Steph. Com.* 274.) *Mozley & W.*

A wager is a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event. Merchants' Sav., &c. Co. *v.* Goodrich, 75 *Ill.* 554.

The term wager is applied to the contract by which a bet is made; also to the thing or amount bet. It does not mean the subject on which a bet is laid. Smoot *v.* State, 18 *Ind.* 18.

A wager is something hazarded on the issue of some uncertain event A bet is a wager, though a wager is not necessarily a bet. Cassard *v.* Hinman, 1 *Bosw.* 207.

The word wager implies that there are two or more contracting parties having mutual or reciprocal rights in respect to the money or other things wagered, usually called the stakes, and that each of the parties shall jeopardize something, and have the chance to make something or to recover the stakes or thing bet or wagered upon the determining of the contingent or uncertain event in his favor. Jordan *v.* Kent, 44 *How. Pr.* 206.

In order to constitute a wager, there must be a risk by both parties. Quarles *v.* State, 5 *Humph.* 561.

A promise to pay double price for goods sold and delivered, if A shall be elected, is a wager. Givens *v.* Rogers, 11 *Ala.* 543.

A promise to pay for goods sold and delivered, if A is elected, may well be a wager

contract; the question is for the jury. Craig *v.* Andrews, 7 *Iowa*, 17.

An agreement between two persons, one to sell and the other to buy certain property at a stipulated price, payable when A shall be elected, is a wager. Lucas *v.* Harper, 24 *Ohio St.* 328.

Every sale of stocks "short" is not *ipso facto* a wager. Maxton *v.* Ghcen, 75 *Pa. St.* 166.

2. The name of modes of trial of controversies, now obsolete.

Wager of battel, or battle. A mode of trial allowed by old English law, in which controversies were determined by the result of a combat between the parties or their champions. See BATTEL.

Wager of law. A mode of trial allowed by old English law, in which controversies were determined by admitting defendant to make oath (corroborated by oaths of his neighbors) that he did not owe the money demanded. Law, in this phrase, is used in an old sense of oath, and not with the meaning in which it is commonly used now.

Wager of law takes place where an action of debt is brought against a man upon a simple contract between the parties, without deed or record; and the defendant swears in court, in the presence of eleven compurgators, that he oweth the plaintiff nothing, in manner and form as he hath declared. The reason of this waging of law is, because the defendant might have paid the plaintiff his debt in private, or before witnesses who may be all dead, and therefore the law allows him to wage his law in his discharge; and his oath shall rather be accepted to discharge himself, than the law will suffer him to be charged upon the bare allegation of the plaintiff.

The manner of waging and making law is thus: he that is to do it must bring his compurgators with him into court, and stand at the end of the bar towards the right hand of the chief justice; and the secondary asks him, whether he will wage his law. If he answers that he will, the judge admonisheth him to be well advised, and tells him the danger of taking a false oath; and, if he still persists, the secondary says, and he that wages his law repeats after him: "Hear this, ye justices, that I, A B, do not owe to C D the sum of, &c., nor any penny thereof, in manner and form as the said C D hath declared against me: So help me God." Though, before he takes the oath, the plaintiff is called by the crier thrice; and if he do not appear, he becomes nonsuited, and then the defendant goes quit without taking his oath; and if he appear, and the defendant swears that he owes the plaintiff nothing, and the compurgators do give it upon oath that they believe he swears true, the plaintiff is barred for ever; for when a person has waged his law, it is as much as if a verdict has passed against the plaintiff. If the plaintiff do not appear to hear the defendant perform his law, so that he is nonsuit, he is not barred, but may bring a new action. The defendant cannot wage his law in any action but personal actions where the cause is secret. *Jacob.*

The wager of law was never permitted, except where the defendant bore a fair and irreproachable character; and it also was confined to such cases where a debt might be supposed to be discharged or satisfaction made in private, without any witnesses to attest it; and many other prudential restrictions accompanied this indulgence. But at length it was considered that, even under all its restrictions, it threw too great a temptation in the way of indigent or profligate men; and, therefore, by degrees new remedies were devised and new forms of actions were introduced, wherein no defendant is at liberty to wage his law. So that now no plaintiff need at all apprehend any danger from the hardness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete instead of a modern action. Therefore one shall hardly hear at present of an action of debt brought upon a simple contract; that being supplied by an action of trespass on the case for the breach of a promise or assumpsit. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. 3 *Bl. Com.* 346.

To understand the subject, we must carry back our imagination to the time when European society consisted but of two great classes, that is, of freemen and slaves; when a third class was created by the subdivision of freemen into knights and simple freemen; when national and personal defence was the noblest, because it was the most important, civil employment; when trade was limited and insignificant, and when the arts (including the art of husbandry, and excepting only the art of war) were abandoned to the pursuit of slaves. All freemen, under these circumstances, were warriors; and freemen at this time, and indeed at all others, had a law of their own, their *liberam legem.* In matters of controversy, they were to be believed on their oath; and this high privilege was supported by the magnanimous and concomitant provision, that they might always be called upon to prove or defend their honor by their lives by trial by battle. It was under the same circumstances of society that the other ancient mode of trial called ordeals sprung up; modes of trial in which the accused was neither permitted to defend himself by his body, nor to discharge himself by his oath. In the rudest times, there was a numerous portion of society, including women, priests, the young, the aged, the blind, the lame, and the whole

population of slaves, who could not defend themselves by battle; who, therefore, had no claim to be believed on their oaths, and the greater part of whom were not allowed to offer them. Priests were excepted, because that was accorded to their sanctity which was yielded to freemen as due to their honor; and hence what the law calls canonical purgation, in contradistinction to the vulgar purgation, or trial of the common people by ordeal. Serfs or slaves on either hand could have no trial by arms, or by oath, because they had neither military, civil, nor religious character to justify such an indulgence.

Thus, then, there were three classes of trials: battle for freemen, oaths for the priests, and ordeal for women, infirm persons, and slaves.

But, by degrees, as the arts of peace increased in estimation, their professors rose in the scale of society, and were privileged for their encouragement, and on this occasion a new class of freemen was created: freemen, not by birth or landed tenure, but by charter; freemen, not warlike, but composed of artisans and traders. Now, these freemen had their free law; they were raised above the mode of trial belonging to slaves, because they were freemen; but they did not aspire to the honors of trial by battle, because they were not warriors. The privileges therefore granted to them were assimilated to those of the clergy, though they were still kept at a further distance even from these; they were men of peace, but not of sanctity; and, therefore, while the priest was permitted to discharge himself by his single oath, the lay citizen was obliged to produce his neighbors, who were to swear that he was worthy of being believed on his oath. This was wager of law; this is its foundation as a privilege of freemen of cities; and this privilege stood opposed to trial by battle on appeal at the suit of a subject, and trial by jury on indictment at the suit of the crown. (*Kendall's Arg.*) *Tomlins.*

Wager of law was a species of "decisory oath" taken by the defendant to an action on a simple contract, and in some few other actions, not being on specialties. The defendant swore in court, in the presence of eleven compurgators, that he owed the plaintiff nothing, or that he did not detain the plaintiff's goods, and the eleven swore that they believed his oath to be true. This mode of trial was only admissible in the absence of all evidence; when the court might better discharge the defendant on his oath than charge him on the plaintiff's uncorroborated oath. Wager of law was abolished by 3 & 4 Wm. IV. ch. 42, § 13. *Brown.*

Wager policy. A mere wager policy is that in which the party assured has no interest in the thing assured, and could sustain no possible loss by the event insured against, if he had not made such wager. Amory *v.* Gilman, 2 *Mass.* 1.

WAGES. The agreed compensation for services rendered in a menial or subordinate capacity.

A compensation given to a hired person for his or her services. *Bouvier.*

The payments made to servants and workmen are so called. *Brown.*

Any money or salary paid or payable to any clerk or servant, laborer or workman. *Mozley & W.*

The compensation agreed upon by a master to be paid to a servant, or any other person hired to do business for him. *Wharton.*

The compensation paid or to be paid for services by the day, week, &c.; such as those of laborers, commissioners, &c. Cowdin *v.* Huff, 10 *Ind.* 83.

The expression "wages of laborers and employes," in an act exempting them from execution, does not include the salary of the president of a railroad company. South, &c. Ala. R. R. Co. *v.* Falkner, 49 *Ala.* 115.

The salary of a public officer is not in any proper sense wages; and is not affected by a statute declaring wages subject to or exempt from garnishment. McLellan *v.* Young, 54 *Ga.* 399.

Wages of her personal labor. This expression, in Iowa Code, § 2211, refers to cases where the wife is employed to some extent in performing labor or services for others than her husband; or where she is carrying on some business on her own behalf. She is entitled to the wages for her personal labor or services performed for others; but her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the married relation. Mewhirter *v.* Hatten, 42 *Iowa*, 288.

WAGON. In a statute exempting property from execution, the term wagon is intended to mean a common vehicle for the transportation of goods, wares, and merchandise of all descriptions; and does not include a hackney coach. Quigley *v.* Gorham, 5 *Cal.* 418.

In such a statute, wagon should be construed as a generic term, and it includes a buggy. Gordon *v.* Shields, 7 *Kans.* 320.

A one-horse wagon, with a spring seat and panelled sides, used only for the carriage of persons, was held a "pleasure carriage." Moss *v.* Moore, 18 *Johns.* 128. To the contrary, Pardee *v.* Blanchard, 19 *Id.* 442. Consult CARRIAGE.

WAIFS. Goods stolen and thrown away by the thief in his flight, for fear of being apprehended. *Mozley & W.*

Waifs are to be distinguished from *bona fugitiva*, which are the goods of the felon himself, which he abandons in his flight from justice. *Brown.*

Waifs are goods found but claimed by nobody; that of which every one waives the claim. Also, goods stolen and waived, or thrown away by the thief in his flight, for fear of being apprehended. *Wharton.*

WAITING CLERKS. Officers whose duty it formerly was to wait in attendance upon the court of chancery. The office was abolished in 1842 by Stat. 5 & 6 Vict. ch. 103. *Mozley & W.*

WAIVE. In modern law, to abandon, relinquish, or surrender a claim, privilege, or right. Waiver: abandonment, relinquishment, or surrender of a claim, privilege, or right. Waived: abandoned; relinquished; surrendered.

To waive, in the general signification, is to forsake; but is specially applied to a woman, who for any crime for which a man may be outlawed, is termed waived. (*Reg. Orig.* 132.) Waiver is the passing by of a thing, or a declining or refusal to accept it. Sometimes it is applied to an estate or something conveyed to a man, and sometimes to a plea. *Jacob.*

The doctrine of waiver is chiefly valuable in connection with covenants in leases; and in this use of it waiver is commonly said to be of two sorts; namely, implied waiver and actual waiver. With reference to the first kind of waiver, a receipt of rent by a landlord, after notice of a breach of covenant committed by his tenant prior to the rent becoming due, was an implied waiver of his right of entry for that particular breach; and with reference to the second kind of waiver, if a landlord, in express terms, waived his right of re-entry on the ground of the breach for that once, he was considered in law to have waived it also for all subsequent breaches of the same covenant; but by the Stat. 22 & 23 Vict. ch. 35, § 6, the effect of an actual waiver is now reduced in this respect to that of an implied, which is the most ordinary kind of waiver. *Brown.*

WAKENING. A term in Scotch law for revival of an action which has abated by long delay in prosecution.

WALK OUT. A statute declaring sureties in a bond for the jail liberties to be liable, "if the prisoner walk out of the said grounds," must have a construction according to the intent of the legislature. "Walking out" of the grounds means such a walking out as before the passage of the act would have been an escape; a walking out by which the execution creditor is damnified. The expression does not include a casual and momentary stepping over an imaginary line, without knowledge thereof, and not followed by any escape or departure. Howard *v.* Blackford, 3 *N. J. L.* 777.

WANTON. Regardless of another's rights.

The word wanton does not mean "wilful," and adds no force to the charge that an act was done in a "careless" manner. Lafayette, &c. R. R. Co. *v.* Huffman, 28 *Ind.* 287.

Wantonness is reckless sport, wilfully unrestrained action, running immoderately into excess. Cobb *v.* Bennett, 75 *Pa. St.* 326.

WAR. A fighting between two kings, princes, or parties, in vindication of their just rights. *Wharton.*

War is that state in which a nation prosecutes its rights by force. Alire *v.* United States, 1 *Ct. of Cl.* 233.

Every forcible contest between two governments *de facto* or *de jure* is war. Dole *v.* Merchants' Mut., &c. Ins. Co., 51 *Me.* 465.

Every contention by force between two nations, in external matters, under the authority of their respective governments, is a public war. If war is declared in form, it is called solemn, and is of the perfect kind; because the whole nation is at war with another whole nation. When the hostilities are limited as respects places, persons, and things, the war is properly termed imperfect war. Bas *v.* Tingy, 4 *Dall.* 37, 40.

There are two kinds of war, — perfect and imperfect. Perfect war is one which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility. Imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, — *e. g.*, reprisals. Miller *v.* The Resolution, 2 *Dall.* 19, 21.

WARD. 1. Originally, care; charge; guardianship; as in the expression watch and ward.

2. A territorial division of cities; so called apparently because formerly each such division was under the particular charge of one alderman. The region over which an alderman had especial charge was called his ward.

3. A person placed in the personal care and charge of another, standing towards him in a quasi parental relation; particularly used of infants. See GUARDIAN AND WARD.

Ward of chancery, or **of court.** A minor, lunatic, &c., under the protection of the court of chancery or of a court of equity, is generally called a ward in chancery or a ward of court.

Wardship. The custody of a ward. A word used especially with reference to wardship in chivalry, but also applicable to any form of the relation between guardian and ward. See GUARDIAN AND WARD.

WARDEN. A guardian; a keeper. This is the name given to various officers; as the warden of a prison, the warden of the Cinque Ports, churchwardens, and others.

WARDMOTE. A court kept in every

ward in London, ordinarily called the wardmote court. The wardmote inquest hath power every year to inquire into and present all defaults concerning the watch and constables doing their duty; that engines, &c., are provided against fire; that persons selling ale and beer be honest, and suffer no disorders, nor permit gaming, &c., that they sell in lawful measures; searches are to be made for vagrants, beggars, and idle persons, &c., who shall be punished. *Jacob.*

WAREHOUSE. A building kept for the reception and safe keeping of goods and merchandise.

What is known under the laws for collection of duties, as the warehouse, or warehousing system, is the allowing importers who do not choose to pay the duties on their goods, upon their arrival, to keep the goods in a public store or warehouse designated by law, where the owner pays storage, but cannot withdraw the merchandise until the duties are paid. These warehouses are known as bonded warehouses.

Warehouse book. A book used by merchants to contain an account of the quantities of goods received, sent out, and on hand.

Warehouseman. A person who makes it his business to receive merchandise in quantities, and to keep it in store for the owner until wanted, at a reasonable compensation; the proprietor of a warehouse.

WARRANT. 1. A general name for various judicial writings authorizing officers of the courts to make arrests, searches, or seizures, or do other like acts in aid of the administration of justice.

2. There are also several evidences of debt or title, and negotiable instruments, known as warrants; as land-warrants, which authorize the holder to take up a tract of public lands; city, county, or town warrants, which call for payment of money out of the municipal treasury, to some creditor of the corporation; and dividend warrants, which are of the nature of a check by a joint-stock company upon its bankers, directing them to pay a sum of money specified therein to a shareholder entitled thereto in respect of a dividend, or to his order.

Warrant of arrest. Warrants of arrest are most usually issued for the apprehension of persons accused or suspected of serious crimes. On information being laid before a magistrate that any person has committed, or is suspected to have committed, any offence, the magistrate will, according to the circumstances of the case, issue a summons, to be served upon the defendant, citing him to appear, or will issue a warrant for his apprehension in the first instance. In most cases of serious offences, a warrant will be issued at once. In minor offences, especially those punishable on summary conviction, a warrant will not, by English practice, generally be issued, except against a party who has disobeyed a summons; but a justice may, if he think fit, issue in the first instance a warrant for apprehending the defendant. Where an indictment has been found against a person who is at large, a warrant may be issued for his apprehension.

Warrant of attorney. An instrument in writing, addressed to an attorney-at-law, authorizing him, generally, to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some person therein named. This general authority usually recites a bond which accompanies it, or contains a defeasance, stating the terms upon which it was given, and restraining the creditor from making use of it, except on breach of the condition. The warrant (or bond and warrant) is commonly given to a creditor, as security, and enables him, on default of payment, to enter judgment without the delays of an action. It is the same in substance as the confession of judgment.

In form it is, generally, by deed; but it seems it need not necessarily be so. 5 *Taunt.* 264.

This instrument is given to the creditor as a security.

Warrant of commitment. A warrant of commitment is a written authority committing a person to custody. Such a warrant may be issued in various cases; as in pursuance of a judicial sentence upon a conviction; for the purpose of securing the attendance of the party to take his trial for an indictable offence; for the purpose of a remand, for securing the party's attendance at

an adjourned hearing of the charge against him; for default in payment of a sum of money ordered to be paid, by way of fine or otherwise; for default in finding sureties to keep the peace; in default of sufficient property being found to satisfy a warrant of distress; or for contumacy, as in a witness refusing to answer questions properly put to him.

As to bench-warrant, general warrant, and search-warrant, see those titles.

Warrant officer. A class of officers in the navy, understood to be of inferior grade, but holding their office by written commission or warrant.

WARRANT, *v.* To assure or guarantee the existence of some fact, such as the quality of goods sold, the validity of a title, the description and uses of insured property.

The particular word warrant is not necessary in a deed of general warranty, if other words of equal import are used. Kirkendall *v.* Mitchell, 3 *McLean*, 144.

WARRANTEE; WARRANTOR. The parties, respectively, to whom and by whom a warranty is made or given; the one who receives a warranty, and the one who warrants.

WARRANTIA. In law Latin, warranty.

Warrantia chartæ. An old English writ, which lay for a man who was enfeoffed of lands with warranty, and who, being afterwards sued or impleaded in assise or other actions, in which he could not vouch to warranty, was permitted, by means of this writ, to compel the feoffor or his heirs to warrant the land to him; and, if that writ were obtained by the feoffee pending the first writ against him, then, in case the land were recovered from him, he should recover as much lands in value against the warrantor. (*Fitz. Nat. Brev.* 134; *Termes de la Ley*, 372, 588.) The writ was abolished by 3 & 4 Wm. IV. ch. 27, § 36. *Brown.*

Warrantia custodiæ. An old English writ, which lay for him who was challenged to be a ward to another, in respect to land said to be holden by knight service; which land, when it was bought by the ancestors of the ward, was warranted free from such thraldom. The writ lay against the warrantor and his heirs. *Cowel.*

That is to say, lands held by knight service were charged with certain burdens, the principal of which was called "wardship." Now, if A sold lands to B, warranting them free from the burden of wardship, and C, one of B's descendants, was sued by D, a party claiming right thereto, C might then have the above writ against A or his heirs to make good his warranty. *Mozley & W.*

Warrantia diei. A writ which lay for a man who, having had a day assigned him personally to appear in court in any action in which he was sued, was in the mean time, by commandment, employed in the king's service, so that he could not come at the day assigned. It was directed to the justices, that they might not record him in default for that day. *Cowel.*

WARRANTY. 1. In conveyancing, warranty is, in modern law, used for covenant of warranty, which is a species of covenant often inserted in a deed of lands, whereby the bargainor covenants, for himself and his heirs, to warrant and defend the bargainee and his heirs against all persons, in the enjoyment of the premises conveyed or of the thing granted.

As applied to real property, warranty is a covenant, — *i.e.* a promise by deed, — by the grantor, for himself and his heirs, to warrant — *i.e.* secure — the grantee and his heirs in the thing granted, against all the world. The benefit of such a warranty appeared when it was attempted to evict the grantee of the lands, who thereupon either vouched his warrantor or obtained judgment in a writ of *warrantia chartæ* against him, to defend his title, or else to recompense him with other lands of equal value.

Warranty was either implied or express. By the old law, every feudal grant, by the word *dedi*, involved or implied a warranty; but in other modes of grant of a more recent origin, an express clause of warranty was required.

A warranty bound not only the warrantor himself, but also his heirs; and it made no difference whether the warranty was lineal or collateral, — that is to say, whether the heirs had or not derived, or might or not by possibility have derived, title from or through the warrantor. But the heir, in either case, was in theory bound only if he had received other sufficient lands or assets by descent from the warrantor; although, both in lineal and in collateral warranty, he was in effect bound, whether he had received such lands or not, — inasmuch as the assets he should have recovered, upon upsetting the warranty of his ancestor, were regarded as assets by descent from his ancestor, and, as such, would be liable to make good his warranty. This was an evident abuse of a proper principle; and the abuse was corrected, — as to the warranties of tenants by the curtesy, by the Stat. 6 Edw. I. ch. 3; and as to the warranties of tenants in dower, by the Stat. 11 Hen. VII. § 20; and as to the warranties of tenants for life generally, by the Stat. 4 & 5 Anne, ch. 16; and, last of all,

as to the warrantics of tenants in tail, by the Stat. 3 & 4 Wm. IV. ch. 74, § 14. *Brown.*

For an extended explanation of the old and obsolete doctrine of warranty, in English real-property law, see 2 *Bl. Com.* ch. 20.

2. In sales of personal property, a warranty is an assurance given by the seller, as a part of the contract of sale, recommending the subject-matter sold.

It may relate to quality, quantity, or title.

The general rule of English and American law of sales is, that the buyer buys at his own risk, as otherwise expressed in the maxim, *caveat emptor*, q. v. In the absence of fraud, the seller cannot ordinarily be called upon to respond, in the event of the buyer's being dissatisfied with the thing bought, unless upon the ground of breach of warranty. A warranty, in the case of sale of personal property, may be either *express* or *implied*. No precise form of expression is necessary to create an express warranty. If the seller, at the time of sale, affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such affirmation, that is an express warranty; and the same rule applies where the contract of sale is executory. A representation or any positive affirmation of the state, quality, condition, or fitness of the thing sold, which may be supposed to have entered into the consideration of the sale, showing an intention to warrant, and which was so understood and relied upon by the purchaser, will amount to a warranty. Polhemus *v.* Heiman, 45 *Cal.* 573; Murray *v.* Smith, 4 *Daly*, 277. Whether what passed between the parties amounted to a warranty, or was merely a recommendation or an expression of opinion, is a question for the jury, depending on the apparent intent, unless the language used has a fixed or technical meaning. Where an express warranty is couched in technical terms, it is to be interpreted according to that signification, unless they be manifestly used in a different sense, and differently understood by the buyer. And there is a distinction as to the legal effect of expressions when used in reference to a matter of fact, and when used to express an opinion. When the representation is positive and relates to a matter of fact, it constitutes a warranty; but where it relates to that which is a matter of opinion or fancy, it does not amount to a warranty, unless there are other declarations which leave no doubt of the intention to warrant. Reed *v.* Hastings, 61 *Ill.* 266; Murray *v.* Smith, 4 *Daly*, 277.

Besides all express warranties, a warranty is implied, in some cases, upon a sale of goods. Instances are, that a warranty of title will be presumed, when the goods sold are, at the time of the sale, in the possession of the vendor or of a third person, unless the contrary is expressed; when an examination of goods is, from their nature or situation, at the time of the sale impracticable, a warranty will be implied that they are merchantable; upon an executory contract of sale, where goods are to be manufactured, or to be procured for a particular use or purpose, a warranty will be implied that they are reasonably fit for such purpose or use, as far as goods of such a kind can be; a warranty may be implied against all latent defects, when the seller knew that the buyer did not rely on his own judgment, but on that of the seller, who knew at the time, or might have known, the existence of the defects, or where, from the situation of the parties (as in the case of a manufacturer or producer), the seller might have provided against the existence of defects; and, where goods are sold by sample, a warranty is implied that the bulk corresponds to the sample, in nature and quality. *Story Contr.* 329.

As applied to personal property, a warranty may be either express or implied. The better opinion is that there is no implied warranty of title upon the sale of personal chattels; but there may, of course, be an express warranty of title. And neither is there any implied warranty of the goodness or soundness of the articles sold; but there may, of course, be an express warranty to that effect; and there is an implied warranty that the goods sold are fairly merchantable, or will fairly answer the purpose for which they are known to be bought, *e.g.* that provisions are wholesome. The custom of trade may also give rise to an implied warranty of goodness, *e.g.* where goods are bought and sold by sample.

A warranty differs from a representation

in that a warranty must always be given contemporaneously with, and as part of, the contract; whereas a representation precedes and induces to the contract. And while that is their difference in nature, their difference in consequence or effect is this: that, upon breach of warranty (or false warranty), the contract remains binding, and damages only are recoverable for the breach; whereas, upon a false representation, the defrauded party may elect to avoid the contract, and recover the entire price paid. *Brown.*

3. In insurance, a warranty is an engagement or stipulation on the part of the assured that such and such facts material to the risk are as stated. Where the description given by the insured in a marine policy of the condition of the vessel, the route of the voyage, &c., or by one insured against fire of the location and use of the buildings, or by an applicant for life insurance of his health and habits, is made, and is received by the insurers, not as a mere descriptive representation in which the applicant only engages to speak in good faith and to the best of his knowledge, but as the basis of the contract of insurance, — it may become binding on the insured as part of the contract; and, unless it is true in substance, he may, in general, lose his right to recover, though he himself was mistaken, and honest in what he declared. He is regarded not merely as stating the facts, but as agreeing that they are true. This is the general nature of the distinction between a warranty and a representation, in insurance, though the rules for discriminating the two have become somewhat technical. See REPRESENT.

In marine insurances, an *express* warranty is an agreement expressed in the policy, whereby the assured stipulates that certain facts are or shall be true, or that certain acts shall be done relative to the risk. It may relate to an existing or past fact, or be promissory and relate to the future; and the fact or act warranted need not be material to the risk. But a formal expression is not necessary to give rise to a warranty. There may be an *implied* warranty, which is such a one as necessarily results from the nature of the contract *Mozley & W.*

In insurance, a warranty may be either affirmative (as where the insured undertakes for the truth of some positive allegation) or promissory (as where the insured undertakes to perform some executory stipulation). If a fact is in plain terms expressly warranted, its materiality to the risk is of no importance, as it becomes a condition precedent. But where a circumstance is sought to be included, by implication, in the warranty, the parties will not be supposed to have intended to include it, unless it is manifestly material to the risk. O'Niel *v.* Buffalo Fire Ins. Co., 3 *N. Y.* 122.

WARREN. A term in English law for a place in which birds, fishes, or wild beasts are kept.

A franchise or privilege, either by prescription or grant from the king, to keep beasts and fowls of warren, which are hares, coneys, partridges, pheasants, &c.

Also any place to which such privilege extends. *Mozley & W.*

WASTE. Several definitions have been given, and are presented; but those from English sources should be read with the recollection that American courts have held, and with obvious good reason, that the doctrine of waste, as understood in England, is not fully applicable to a new and unsettled country. Kidd *v.* Dennison, 6 *Barb.* 9; Keeler *v.* Eastman, 11 *Vt.* 293; Findlay *v.* Smith, 6 *Munf.* 134. Thus the cutting and selling of growing trees is not necessarily waste in this country, in every case where by the common law of England it would be so held. In deciding the question of waste, regard is to be had to the condition of the land, and whether good husbandry, as understood and practised here, requires that the land should be cleared or the trees felled and marketed. To what extent wood and timber may be cut without waste is a question for the jury. Drown *v.* Smith, 52 *Me.* 141. And it is not waste to cut down wood or timber so as to fit the land for cultivation, provided it does not injure the inheritance, and is conformable to the rules of good husbandry even though the wood or timber is sold or consumed off the premises. Keeler *v.* Eastman, 11 *Vt.* 293.

As to what particular acts of injury have been held to be or not to be waste, in the various states, see *U. S. Dig.* tit. Waste.

Waste is a lasting damage to the reversion caused by the destruction, by the tenant for life or years, of such things on the land as are not included in its temporary profits. Proffitt *v.* Henderson, 29 *Mo.* 325.

Waste is any thing that does permanent injury to the inheritance. Jackson *v.* Brownson, 7 *Johns.* 227; Jackson *v.* Tibbits, 3 *Wend.* 341.

The destruction or material alteration of any part of a tenement, by a tenant for life or years, to the injury of the person entitled to the inheritance; such, for example as the demolition of buildings, or the cutting of timber. (1 *Steph. Com.* 241.) Spoil and destruction done, or allowed to be done, to houses, woods, lands, or other corporeal hereditaments, by the tenant thereof, during the continuance of his tenancy. (3 *Id.* 503.) *Burrill.*

Waste is a spoil and destruction of an estate, either in houses, woods, or lands, by demolishing, not the temporary profits only, but the very substance of the thing, thereby rendering it wild and desolate, which the common law expresses very significantly by the word *vastum.* 3 *Bl. Com.* 223.

It is spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir or of him in reversion or remainder. *Bouvier.*

A spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail. *Co. Litt.* 53; 2 *Bl. Com.* 284.

A spoil made either in houses, woods, lands, &c., by the tenant for life or years, to the prejudice of the heir, or of him in the reversion or remainder. *Cowel; Kitchin,* 168.

Any spoil or destruction in houses, gardens, trees, &c., to the prejudice of the expectant in fee. It is either *legal,* subdivided into *voluntary* or commissive, or *permissive* or omissive; and *equitable,* which comprehends some acts not deemed waste at the common law. *Wharton.*

Spoil and destruction done, or allowed to be done, by a tenant for life or other particular estate, to houses, woods, lands, or other corporeal hereditaments, during the continuance of his particular estate therein. Whatever is hurtful to the freehold or inheritance is waste. Waste is either voluntary or permissive: voluntary, if it be a matter of commission, as by pulling down a house; permissive, as if a house be allowed to fall into ruin for want of necessary repairs. *Mozley & W.*

Waste denotes that havoc or devastation which arises from exceeding the right of user. The word is, therefore, applicable only to persons having limited interests or estates in lands; *e.g.,* tenant for life, or *pur autre vie,* tenant in dower, and tenant by the curtesy; and is inapplicable, as a general rule, to tenants in fee-tail or in fee-simple. By the common law, waste was punishable in the cases only of tenants for life who were such by operation of law,—namely, tenant in dower and tenant by the curtesy; but by the statute of Marlbridge (52 Hen. III.), ch. 23, it was made punishable in the cases also of tenants for life, or *pur autre vie,* or for years, who were tenants by the creation of the parties or of the settlor. Furthermore, the courts of equity have long interfered to remedy waste in cases in which the courts of law were powerless to interfere; and thus there grew up a distinction of waste into legal, on the one hand, being such as law can restrain, and equitable, on the other hand, being such as equity alone can restrain. However, by the judicature acts, this distinction appears to be abolished. While it subsisted, the divisions and subdivisions of waste were the following:

Legal waste, being either voluntary waste or permissive waste; and equitable waste, which was in all cases voluntary, and so is described as equitable waste only.

Voluntary legal waste consisted in the following particulars: Pulling down houses, pulling down wainscots, doors, windows, furnaces, and other such fixtures, causing timber trees to decay, stubbing up underwood, cutting down fruit-trees in an orchard, cutting down trees which shelter the mansion; also, opening new gravel-pits, lime-pits, clay-pits, &c., or new mines of metal, coal, or the like; also, the conversion of old meadow land into arable, or of arable into plantation, or the like.

Permissive legal waste consisted in suffering houses to get into decay; but the courts have ceased to give any remedy or assistance in such cases.

Equitable waste consisted in "malicious, extravagant, or humorsome" acts of destruction on the part of a tenant who was not impeachable for waste at law. *Brown.*

WATER-BAILIFF. The title of an officer, in port towns in England, appointed for the searching of ships. Also, of an officer belonging to the city of London, who had the supervising and search of the fish brought thither. *Cowel.*

The water-bailiff is the most ancient of the officers who were appointed by the corporation to see to the observance of the statutes and by-laws applicable to the river Thames. He had to survey the whole of the civic jurisdiction of the river, to observe encroachments and nuisances, &c. *Pull. Laws & Cust. Lond.*

WATERCOURSE. The natural flow of water in streams, considered as a subject of a legal interest or right vested in owners of land affected.

A watercourse is a right which a man may have to the benefit or flow of a river or stream. This right includes that of having the course of the stream kept free from any interruption or disturbance to the prejudice of the proprietor, by the acts of persons without his own territory,—whether owing to a diversion of the water, or to its obstruction, or pollution by offensive commixture. 1 *Steph. Com.* 659, 693.

A watercourse is a species of incorporeal hereditament; being a right which one has to the benefit of the flow of a river or stream, such right commonly referring to a stream passing through one's own land, and the banks of which belong either to

himself on both sides, or to himself on one side and to his neighbor on the other, in which latter case (unless the stream be navigable; for then the bed of it — so far, at least, as the tide of the sea flows — presumably belongs to the crown) the proprietor of each bank is considered as *prima facie* the proprietor also of half the land covered by the stream, i.e. *usque medium filum aquæ*. *Wharton.*

A spring on the defendant's land, sixteen rods from the land of the plaintiff, supplied a small stream of water that ran to the plaintiff's land, the water as it came from the spring being sufficient to fill a half-inch pipe, and the flow being constant and nearly uniform, except in very dry times, when it failed to run. For seven rods the stream descended rapidly, in a well-defined course, to a piece of marshy ground, where it spread so that its flow was slight and not sufficient to break the turf, but was generally sufficient to form a continuous sluggish current along the surface, in a natural depression, to a watering-place within the plaintiff's line. It was held that this was a watercourse, within the meaning attached in law to that term. Gillett *v.* Johnson, 30 *Conn.* 180.

To constitute a watercourse from one tract of land into another, there must be something more than a mere surface drainage over the entire face of the first tract on to the second, occasioned by unusual freshets or other extraordinary causes. Luther *v.* Winnisimmet Co., 9 *Cush.* 171.

If the face of the country is such as necessarily to collect in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet, and if such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse. Earl *v.* DeHart, 12 *N. J. Eq.* 280.

A watercourse is a stream of water, usually flowing in a certain direction, in a regular channel, with bed and banks. But the water need not flow continually: the channel may be sometimes dry. Moreover, the term watercourse does not include occasional bodies of surface water descending from the hills at certain seasons, down the hollows and ravines, without any definite channel, during times of rains or the melting of snow and ice. Enlrich *v.* Richter, 37 *Wis.* 226.

The term watercourse does not apply to a line of discharge, whether natural or artificial, which is not the usual channel of flow. Fryer *v.* Warne, 29 *Wis.* 511.

WATER-POWER. The term water-power, in a vote to exempt "improvements made upon the water-power on" a stream, &c., does not include the operation of a tannery by steam, drawing water from a mill-pond by a force-pump and pipe, and located above the dam. Plaisted *v.* Lincoln, 62 *Me.* 91.

WAY. In a popular sense, signifies a place appointed for persons to pass over; but in a legal sense it seems to be not the strip of land, but the easement or right of passing. It is a privilege or right of passage or travel over the land of another.

Way is a passage, street, or road; and a right of way is the privilege which an individual, or a particular description of individuals, as the inhabitants of a village or the owners or occupiers of certain farms, have of going over another's ground. *Bouvier.*

Ways are of four principal varieties: *iter, i.e.* a footway; *actus, i.e.* a horse and foot way, called also a packway; *via, i.e.* a cart-way (including foot and horse way); and a driftway, *i.e.* a way for driving cattle. Ways are either public or private, the former being open to all the king's subjects, the latter being open to the inhabitants of a particular parish, village, or house only; a public way is also commonly called a highway. *Brown.*

The term way is derived from the Saxon, and means a right of use for passengers. It may be private or public. By the term "right of way" is generally meant a private way; which is an incorporeal hereditament of that class of easements in which a particular person, or particular description of persons, have an interest and a right, though another person is the owner of the fee of the land in which it is claimed. Wild *v.* Deig, 43 *Ind.* 455.

WAY-WARDEN. An English name for a sort of overseer of highways. Waywardens are elected under the highway acts of 1862 and 1864 (Stats. 25 & 26 Vict. ch. 61, and 27 & 28 Vict. ch. 101), in any county of which the justices, in sessions assembled, have formed it, or any part of it, into a highway district, governed by a highway board, according to the plan prescribed by those acts. They are elected annually in each parish within the highway district, and, together with the justices acting for the county, and residing within the district, form the highway board for the district. See *Mozley & W.*

WAY-GOING CROP. A phrase formed by elision from "away-going crop," and meaning such crops as the tenant has the right to cut and carry with him, after the end of the term. See *Patterson; Bouvier.*

WAYS AND MEANS. In legislative assemblies there is usually appointed a

committee whose duties are to inquire into and propose to the house the ways and means to be adopted to raise funds for the use of the government. This body is called the committee of ways and means. *Bouvier.*

The functions and duties of a committee of ways and means have reference to the funds by which such expenditure is to be sustained. In parliament, loans, duties, taxes, tolls, revenue, and imports of every description, are submitted to a committee of ways and means (which is always one of the whole house). The propositions of government on these subjects are reduced to the form of resolutions, considered, decided on, and such as are agreed to, reported to the house. Those which may be there adopted are embodied into bills, and in due course become law. As in the case of supply, the lords may reject, but cannot modify; neither can their lordships insert pecuniary penalties in any bill whatever. *Dod Parl. Comp.*

WEARING-APPAREL. Shawls are wearing-apparel, under the duty laws. Maillard *v.* Lawrence, 16 *How.* 251, 261.

A watch which the testator has been in the habit of carrying upon his person does not pass by a bequest of his wearing-apparel, his household furniture, or articles for family use. Gooch *v.* Gooch, 33 *Me.* 535.

Bags are not articles of wearing-apparel, nor are they bedding. Shaw *v.* Davis, 55 *Barb.* 389.

WEEK. This word, both in law and in common conversation or writing, has two separate and distinct meanings. Sometimes it means a period of time commencing on Sunday morning and ending Saturday night at midnight; at other times, a period of time of seven days' duration, without any reference to when that time commences. "Once a week" means once between each Sunday and Saturday night, and the particular time of the week is not important. State *v.* Yellow Jacket, &c. Mining Co., 5 *Nev.* 415, 430.

A week is a definite period of time, commencing on Sunday and ending on Saturday; and under a rule requiring service to be made, by publication, "not less than once a week for six weeks," the notice need not be published on the same day in each week, but may be on any day in each week during the six weeks. Seven days' interval between the publications is not essential. Steinle *v.* Bell, 12 *Abb. Pr.* N. S. 171.

In conformity with a special act of congress authorizing the sale of certain property, public notice of the sale was published in a newspaper for three months; but in the course of that period eleven days at one time, at another ten, and at another eight days transpired between successive advertisements, which were directed to appear "once a week." Held, that the statute did not require the publication to be made on any particular day of the week, and, therefore, that the notice was sufficient. A week is a definite period of time, commencing on Sunday and ending on Saturday. Ronkendorff *v.* Taylor, 4 *Pet.* 349.

WEIGHT OF EVIDENCE. An expression designating the balance or the preponderance in the evidence adduced upon a trial for one party over that adduced on the other. Thus, it is said that the weight of evidence supported the verdict; also, that a new trial is frequently applied for, on the ground that the verdict is against the weight of evidence.

WELFARE. The phrase public welfare includes the considerations of the public health and convenience. Sessions *v.* Crunkilton, 20 *Ohio St.* 349.

WELL, *n.* A well, as the term is used in a conveyance, is an artificial excavation and erection in and upon land which necessarily, from its nature and the mode of its use, includes and comprehends the substantial occupation and beneficial enjoyment of the whole premises on which it is situated. Johnson *v.* Rayner, 6 *Gray*, 107, 110.

WELSH MORTGAGE. A species of mortgage in which there is no condition or proviso for repayment at any time. The agreement is that the mortgagee, to whom the estate is conveyed, shall receive the rents till his debt is paid, and in such case the mortgagor and his representatives are at liberty to redeem at any time. *Smith Man. Eq.*

WERA, or WERE. The estimation or price of a man, especially of one slain. In the criminal law of the Anglo-Saxons, every man's life had its value, called a were, or *capitis æstimatio.* In the time of Athelstan, a law was made to settle the were of every order of persons in the state. The king was rated at 30,000 thrymsæ (a thrymsa being equal to fourpence), that is, at £500; an archbishop or earl, at 15,000 thrymsæ, or £250; a bishop or alderman, at 8,000 thrymsæ, or £133 6s. 8*d.*; a military commander, at 4,000 thrymsæ, or £66 13s. 4*d.*; a priest or thane, at 2,000 thrymsæ, or £33 6s. 8*d.*; a common person, at 267 thrymsæ, or £4 9s. *Reeves Hist. Eng. Law.*

WEREGILD, or WERGILD. This was the price of homicide, or other atrocious personal offence, paid partly to the king for the loss of a subject, partly to the lord for the loss of a vassal, and partly to the next of kin of the injured person. In the Anglo-Saxon laws, the amount of compensation varied with the degree or rank of the party slain. *Brown.*

WERGELT. The Scotch form of the word weregild, *q. v.*

WEST. Construction of the phrase due west, as used in surveys in Ohio, explained. McKinney *v.* McKinney, 8 *Ohio St.* 423.

WHARF. A perpendicular bank or mound of timber, or stone and earth, raised on the shore of a harbor, river, canal, &c., or extending some distance into the water, for the convenience of lading and unlading ships and other vessels. *Webster.*

A broad, plain place near a river, canal, or other water, to lay wares on that are brought to or from the water. *Cowel.*

There are two kinds of wharves, — legal quays and sufferance wharves. The former are established by act of parliament, or exist as such by immemorial usage. The latter are places where goods may be landed and shipped by special permission of the crown. *Tomlins.*

By the customs clauses consolidation act, 1853 (Stat. 16 & 17 Vict. ch. 107), § 13, the commissioners of customs may from time to time, by order under their hands, appoint places to be sufferance wharves for the lading and unlading of goods by sufferance, in such cases, under such restrictions and in such manner as they shall see fit. *Mozley & W.*

A wharf is a structure erected on a shore below high-water mark, and sometimes extending into the channel, for the laying vessels alongside to load or unload, and on which stores are often erected for the reception of cargoes. Doane *v.* Broad Street Assoc., 6 *Mass.* 332.

Wharfage. Money paid for landing wares at a wharf, or for shipping or taking goods into a boat or barge from thence. *Cowel.*

Strictly speaking, wharfage is money due, or money actually paid, for the privilege of landing goods upon, or loading a vessel while moored from, a wharf. The Gem, 1 *Brown Adm.* 37.

On the distinction between wharfage and harborage, see Hays *v.* Briggs, 74 *Pa. St.* 373.

Wharfinger. One who owns or keeps a wharf, or has the oversight or management of it. *Cowel.*

A wharfinger is one who keeps a wharf for receiving goods for hire; and his responsibility begins when the goods are delivered at, or rather on, the wharf, and he has, either expressly or by implication, so received them. Rodgers *v.* Stophel, 32 *Pa. St.* 111.

WHEN. In a bequest of personalty, the word when implies a condition, unless controlled by other words in the will. Guyther *v.* Taylor, 3 *Ired. Eq.* 323.

The word when, like the words "at" and "if," applied to a bequest of personalty, makes the gift contingent; but the addition of the words "equally to be divided," in a case where there are several legatees, shows that the words "when," &c., were only used to designate the time when the enjoyment of the legacy was to commence, and would not prevent it from vesting. Sims *v.* Smith, 6 *Jones Eq.* 347.

When, in a devise, may import a condition, or be equivalent to "if," see Hanson *v.* Graham, 6 *Ves. Jr.* 239.

WHITE. Ballots upon paper tinged with blue, which has ruled lines, not placed there as marks to distinguish the ballots from others, are upon "white paper," within the meaning of the statute. People *v.* Kilduff, 15 *Ill.* 492.

Persons are white, within the meaning of Michigan state constitution, who have less than one-fourth of African blood. People *v.* Dean, 14 *Mich.* 406.

The son of a white man and a half-breed Indian woman is, in Ohio, a "free white citizen," and a legal voter. Jeffries *v.* Ankeny, 11 *Ohio*, 372.

WHOLE BLOOD. The relation between two persons descended from a pair of nearest common ancestors; as opposed to the relation of the half blood, in which there is but one nearest common ancestor, whether male or female. Kinsmen of the whole blood are they who are descended not only from the same ancestor, but from the same pair of ancestors.

WHOLE ESTATE. A testator gave to his four sons equally "the balance of my whole estate after deducting the aforesaid legacies;" and it was held that the words "whole estate" meant not the whole original estate, but the residue after the payment of debts. Morris *v.* Morris, 4 *Houst.* 414.

WHORE. A whore is a woman who practices unlawful commerce with men, particularly one who does so for hire; a harlot; a concubine; a prostitute. A woman who yields only to the solicitations of her affianced ought not, in common parlance, to be styled a whore. Sheehey *v.* Cokley, 43 *Iowa*, 183.

Any single act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is whoredom. Rodebaugh *v.* Hollingsworth, 6 *Ind.* 339.

WIDOW. A widow is a woman who has lost her husband by death. One divorced from her husband cannot, upon his death, claim dower as his widow. Whitsell *v.* Mills, 6 *Ind.* 229.

A widow is a wife who outlives her husband. A woman who obtains an unqualified divorce from her husband, dissolving the marriage, although for his fault, cannot, after his death, claim a benefit under the pension laws as his widow. Claim of Burr, 11 *Op. Att.-Gen.* 1.

WIFE. A woman who has a husband living and undivorced.

After a man has been divorced, although for his own adultery, so that he is (according to the statute) prohibited from marrying again, he can no longer be said to have a wife living. The term wife implies a continuing marriage. After a divorce, a

man has no wife. People *v.* Hovey, 5 *Barb.* 117.

A devise by a husband to his "dear wife," not mentioning her name, applies exclusively to the individual who answers the description at the date of the will, and not to an after-taken wife. Johnson *v.* Johnson, 1 *Tenn. Ch.* 621.

Wife's equity. The equitable right or claim of a married woman to a reasonable and adequate provision, by way of settlement or otherwise, out of her choses in action, or out of any property of hers brought under the jurisdiction of the court of chancery, to insure the support of herself and her children.

At common law, the rights in action of the wife belonged to the husband, if he reduced them to possession during the marriage. Sometimes, however, he could not do this without the aid of chancery; and that court long ago established a practice, that, when the husband wanted the aid of chancery to enable him to get possession of his wife's property, or if her fortune was otherwise brought within the reach of the court, the husband should be required to do what is equitable, by making a reasonable provision out of the fund for the maintenance of her and her children. This right has been known as the wife's equity. It is, in general, limited to that part of her personal property in action which the husband cannot acquire without the assistance of a court of equity.

Wild birds protection act. The Stat. 35 & 36 Vict. ch. 78, passed in 1872, for the protection of certain wild birds during the breeding season. *Mozley & W.*

WILFUL; WILFULLY. Terms used in averring or describing an act, particularly one charged as a crime, to show that it was done with free activity of the perpetrator's will.

To authorize a conviction under a penal statute prescribing a punishment for "wilfully" removing an official seal from property which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal, in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted wilfully. United States *v.* Three Railroad Cars, 1 *Abb. U. S.* 196.

Wilful desertion, as used in regard to divorces, signifies an intentional desertion. It does not imply malice toward the other party. Benkert *v.* Benkert, 32 *Cal.* 467.

Wilfully, as used in a statute imposing on railroads a penalty for wilfully neglecting to post up a schedule of fixed fares, means designedly, as opposed to inadvertently, and does not imply malice. Fuller *v.* Chicago, &c. R. R. Co., 31 *Iowa*, 187.

In common parlance, wilful is used in the sense of intentional, as distinguished from accidental or involuntary. But language of a statute affixing a punishment to acts done wilfully may be restricted to such acts done with an unlawful intent. State *v.* Clark, 29 *N. J. L.* 96.

Wilfully is not a synonym of "unlawfully," and is essential in charging a disturbance of public worship. State *v.* Townsell, 3 *Heisk.* 6.

The word wilfully, in the Vermont trespass act, is not synonymous with "voluntarily," but implies a tort or wrong. Savage *v.* Tullar, *Brayt.* 223.

The construction of the words "wilfully" and "injury," as used in Vt. acts of 1869, ch. 4, § 3, in relation to acts committed by a person in a state of intoxication, determined. Smith *v.* Wilcox, 47 *Vt.* 537.

As used in penal statutes, "wilfully" means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful. State *v.* Preston, 34 *Wis.* 675.

When the phrase "wilfully and maliciously" is not equivalent to "unlawfully and maliciously," see State *v.* Hussey, 60 *Me.* 410.

WILL. 1. The formal instrument by which a person may make disposal of his property, to take effect at his death. See TESTAMENT; also *Burrill*, for any distinction between "will" and "testament."

A will is an instrument by which a person makes a disposition of his property, to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument. McDaniel *v.* Johns, 45 *Miss.* 632.

"Will," as used in Gen. Sts. ch. 92, § 8, — providing that wills made out of the state which might be proved and allowed in the state where made, may be proved and allowed in Massachusetts, — includes nuncupative wills. Slocomb *v.* Slocomb, 13 *Allen*, 38.

2. The power of the mind which directs human action.

In criminal jurisprudence, the neces-

sary condition of guilt, is, generally, that the will of the accused should have concurred in his act.

Willingly and wittingly cannot be deemed words conveying the same idea. The one relates to the will, and means "freely," or "voluntarily;" while the other relates to the wit or understanding, and means "knowingly," or "designedly." An indictment under a statute punishing an act when done wittingly, which alleges that the accused did it willingly, is bad. Harrington *v.* State, 54 *Miss.* 490.

Wills act. In England, 1. The Stat. 32 Hen. VIII. ch. 1, passed in 1540, by which persons seised in fee-simple of lands holden in socage tenure were enabled to devise the same at their will and pleasure, except to bodies corporate; and those who held estates by the tenure of chivalry were enabled to devise two-third parts thereof.

2. The Stat. 7 Wm. IV. & 1 Vict. ch. 26, passed in 1837, and also called Lord Langdale's act. This act permits of the disposition by will of every kind of interest in real and personal estate, and provides that all wills, whether of real or of personal estate, shall be attested by two witnesses, and that such attestation shall be sufficient. Other important alterations are effected by this statute in the law of wills. *Mozley & W.*

WINDING UP. The usual English phrase for the final liquidation or settlement of the accounts and affairs of a partnership or company, with a view to a dissolution. Usually, partnerships and companies are wound up only when they are in insolvent circumstances; and such winding up is most commonly made under the supervision of the court of chancery, which court acts in the matter of the winding up of companies under the provisions of certain statutes.

Winding up acts. General acts of parliament, regulating settlement of corporate affairs on dissolution.

WISBUY. An ancient city in Sweden. *Brown* (Am. ed.) gives the name Wishuy.

Laws of Wisbuy. A compilation of maritime laws framed at Wisbuy towards the close of the thirteenth century. A translation may be found in 1 *Pet. Adm. Dec.* appx.

WISH AND WILL. The words "it is my wish and will he shall give," &c., create a precatory trust to give, &c. McRee *v.* Means, 34 *Ala.* 349.

No recommendatory terms of a will expressing a "wish," "will," "desire," &c., are sufficient to create a trust, unless there is certainty as to the parties who are to take, and what they are to take. Lines *v.* Darden, 5 *Fla.* 51.

As to when the word wish, in a will, will be construed to create a trust, see Cook *v.* Ellington, 6 *Jones Eq.* 371.

WITENA-GEMOTE. Assembly of wise men; which, among the Saxons, was the counterpart, perhaps the original, of the English parliament. See PARLIAMENT.

WITH. The provision of the Illinois law of *ne exeat* and injunctions requiring affidavits to be filed "with" the bill and answer does not require that the affidavit and the pleadings should be filed at the same time. Hummert *v.* Schwab, 54 *Ill.* 142.

WITHDRAW. A claim which has been dismissed by the court, on the plaintiff's motion, for failure to make parties and prosecute the same, may, notwithstanding, be again interposed by the claimant; for this is not a "withdrawal," under the statute. Lynch *v.* Bond, 19 *Ga.* 314.

Withdrawing a juror. This phrase describes a fiction to which the courts will sometimes resort when it clearly appears, upon the trial of a cause, that, owing to some accident or surprise, defect of proof, unexpected and difficult question of law, or like reason, the trial cannot proceed without injustice to one party. Suppose, for example, a paper necessary to the plaintiff's case is missing, and the loss is not discovered till too late to ask a postponement, the judge may allow the plaintiff to withdraw a juror, imposing terms, such as payment of costs, if deemed proper. The clerk then calls one juror out of the box; the plaintiff then objects to proceeding with only eleven jurors; and the trial is at an end for the time. The cause comes on again for trial *de novo* at a subsequent term; but, before that time, the plaintiff will have exerted himself to supply the defect or restore the missing evidence.

Withdrawing record. As, in English *nisi prius* practice, the filing of a *nisi prius* record is a needful preliminary to a trial, so a withdrawal of that record, by the plaintiff's attorney, before the jury is sworn, postpones the trial.

WITHERNAM. See CAPIAS.

WITHIN. A statute prescribing that executions shall be returnable "*within* —— days" means the same as "*in* —— days," or "at the end of —— days." It does not

authorize a return at any time during the period designated upon which the creditor can found proceedings predicated upon return of an execution unsatisfied. Adams *v.* Cummiskey, 4 *Cush.* 420.

When time is spoken of, any act is "within" the time named that does not extend beyond it. Sanborn *v.* Fireman's Ins. Co., 16 *Gray*, 448.

When used as to place and time, in a statute, within means not beyond. Levert *v.* Read, 54 *Ala.* 529.

A delivering up of a poor debtor on the thirtieth day from his arrest, although not leaving time to give the statutory notice within that time, is no breach of a recognizance to deliver up "within thirty days." City Nat. Bank of Manchester *v.* Williams, 122 *Mass.* 534.

WITHOUT. Is a word of positive negation; so that the allegation that the defendant kept "a dog, without said dog being licensed," is of the same legal import and effect as would be an allegation that he kept "a dog not licensed," or "a dog, not being licensed." Commonwealth *v.* Thompson, 2 *Allen*, 507.

For numerous cases on the construction of such phrases as dying without children, without heirs, without issue, see *U. S. Dig.* tit. Will.

For any parallel cases on construction of agreements, conveyances, &c., see CONTRACTS; DEEDS.

Without prejudice. This phrase is employed to signify that what is said or done is not to affect a controversy or question. Thus, in English practice, when a lawyer writes on behalf of a client to offer a compromise of a question in dispute, he often guards himself from being supposed to make any admission, beyond the mere fact of his willingness to compromise, by stating that what he offers is "without prejudice" to any question in dispute.

Without recourse. Upon the sale and transfer of a promissory note by indorsement, "without recourse," the vendor impliedly warrants that the signatures of the prior parties whose names appear thereon are genuine. The words "without recourse," accompanying an indorsement, clearly indicate that the party making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability, if the note is not paid at maturity, upon due demand, or even if all the parties to the paper should prove to be wholly insolvent, but they cannot be construed as importing more than this; at least they do not devest such indorser of his character as a seller of the note, nor exempt him from the liabilities arising from a sale and transfer by delivery, where the note is capable of being thus transferred. Dumont *v.* Williamson, 18 *Ohio St.* 515. See INDORSEMENT; RECOURSE.

Without reserve. A term applied to a sale by auction, indicating that no price is reserved. In such case, good faith (and the statute, in England) forbids the seller to employ any person to bid at the sale; and the auctioneer may not knowingly take any bidding from any such person.

Without this. See ABSQUE HOC; TRAVERSE.

WITNESS. A person who, being present before a court, magistrate, or examining officer, orally declares what he has seen or heard or done relative to a matter in question; also, a person who affixes his signature to an instrument in attestation of its genuineness, and in anticipation of being called to testify thereto.

The deposition of a party to a suit may be taken under the rules governing the taking of the depositions of "witnesses." Abshire *v.* Mather, 27 *Ind.* 381.

The expression "credible witnesses," means such persons as at the time of attestation are competent. Hawes *v.* Humphrey, 9 *Pick.* 350; Haven *v.* Hilliard, 23 *Id.* 10.

The word witnesses was held to include documentary evidence, in McChesney *v.* Lansing, 18 *Johns.* 388.

The phrase prosecuting witness, as used in a statute giving to him half the penalty recovered, means the person in whose name the suit is brought, though, owing to an agreed statement, he does not actually testify. Illinois, &c. R. R. Co. *v.* Herr, 54 *Ill.* 356.

WITTINGLY. Means with knowledge and by design, excluding only cases which are the result of accident or forgetfulness, and including cases where one does an unlawful act through an erroneous belief of his right. Osborne *v.* Warren, 44 *Conn.* 357.

WOMAN. In jurisprudence, as in the vernacular, may mean human beings of the female sex, generally, that is, including girls, or may be restricted to adult females.

WOODS. An old field "turned out," without fencing around it, and which had grown up in broom-sedge and pine bushes, surrounded by forest land, was held to be "woods," within the meaning of N. C. Rev. Code, ch. 16, § 1; so that one setting fire to such a field was liable to the penalty imposed. Hall *v.* Cranford, 5 *Jones L.* 3.

WOOLSACK. The seat of the lord chancellor in the house of lords.

It is not strictly within the house, for the

lords may not speak from that part of the chamber. *May Parl. Prac.*

WORK. A charter provision, requiring that work required to be done for a municipal corporation shall be employed by contract, founded on bids and proposals upon public notice, does not apply to a contract for carriage-hire of aldermen or councilmen, while engaged in public duties. Smith *v* Mayor, &c. of N. Y., 21 *How. Pr.* 1.

Such a provision does not apply to professional services; *e.g.*, those of a surveyor in preparing a map. Where professional services are to be employed, the common council have a power of selection, with reference to securing the requisite skill; and no advertisement is required. People *v.* Flagg, 5 *Abb. Pr.* 232.

The expression, works of all kinds, as used in a licensing provision in a city charter, does not include the business of insurance agents. State *v.* Smith, 31 *Iowa*, 493.

That to make and publish an award on Sunday is not "working," see Story *v.* Elliot, 8 *Cow.* 27.

That a contract giving a mill-owner the right to draw water from a reservoir "during working hours" entitles him to draw water during the night, if required to run his mill, see Phœnix, &c. Manufacturing Co. *v.* Hazen, 118 *Mass.* 350.

Work and labor. The name of one of the common counts in actions of assumpsit, being for work and labor done and materials furnished by the plaintiff for the defendant.

Work-beast; or work-horse. These terms mean an animal of the horse kind, which can be rendered fit for service, as well as one of maturer age and in actual use. Winfrey *v.* Zimmerman, 8 *Bush*, 587.

WORLDLY EMPLOYMENT. In a statute which prohibits performing worldly employment on the Lord's day, has been held to include driving a public conveyance (a street car) for hire. Commonwealth *v.* Jeandell, 2 *Grant Cas.* 506.

Also, driving an omnibus. Johnston *v.* Commonwealth, 22 *Pa. St.* 102.

The term worldly employment, in such a statute, does not include such household or family work as pertains directly to the proper duties, necessities, and comforts of the day; and this work may be done by any member of the family, including domestics. The statute does not forbid a domestic servant to drive his employer's family to church on the Lord's day, in the employer's private conveyance. All the various worldly employments are allowed which in their nature consist of acts of necessity or charity, or if they become so for the time being. In such cases, necessity and charity demand the work, and with it all the ordinary means of doing it. Conducting and attending religious worship are among the very purposes for which the law protects the day; and, therefore, all the means which common usage shows to be reasonably necessary for these purposes are not forbidden. Moreover, the law does not condemn those employments which society regards as necessary, even when they encroach on the Lord's day, if, according to the ordinary skill of the business, it is necessary to do so. And then, the business being recognized as necessary, it may be performed by means of the services of others, and by all the ordinary means of the business, so far as it is necessary. Commonwealth *v.* Nesbit, 34 *Pa. St.* 398.

WORRY. When used in a statute, giving to the owner of domestic animals, such as fowls worried by a dog, the right to kill the dog, means running after, chasing, or barking at them. Marshall *v.* Blackshire, 44 *Iowa*, 475.

WOUND. A wound, according to its use in English statutes, is an injury to the person breaking through the continuity of the skin. Moriarty *v.* Brooks, 6 *Car. & P.* 684.

Meaning the whole skin, not the cuticle only. Regina *v.* M'Loughlin, 8 *Car. & P.* 635.

It is, moreover, distinguishable from a permanent injury, such as maiming. Haywood's Case, 2 *East P. C.* 1076.

Wounding. An aggravated species of assault and battery, consisting in one person giving another some dangerous hurt.

WRECK. A derelict or broken vessel, or portions of one, or cargo from one, cast by the sea upon the land.

Most of the definitions given in the dictionaries seem, however, to exclude a vessel.

Wreck applies to property cast upon land by the sea. Things are not wrecks in the legal sense, so long as they remain at sea. A sunken vessel is not a wreck, but derelict. Baker *v.* Hoag, 7 *N. Y.* 555.

Wreck of the sea. The expression that "the admiralty has not jurisdiction of the wreck of the sea," does not refer to property, deemed wreck or shipwrecked property, in the sense of the maritime or commercial law; but to "wreck of the sea," in the purely technical common-law sense, such as constituted a royal franchise and part of the revenue of the crown in England, and often granted, as such a royal franchise, to lords of manors. United States *v.* Coombs, 12 *Pet.* 72.

Wreck means such goods as after a shipwreck are cast up by the sea and left there within some county. By the common law, all wrecks belonged to the crown; but it was usual to seize wrecks to the king's use, only when no owner could be found. The common law was modified by statute in the reign of Henry I, who granted that if any person escaped alive out of the ship it

should be no wreck; and afterwards, by the statute of Westminster the First (3 Edw. I.), ch. 4, if a man or dog or cat escaped alive, the goods shall be no wreck, but the sheriff shall keep the same (or, if perishable, their value) for a year and a day, in order to restore them to the rightful owner, or his representatives, establishing their claim to them; and still later, by the statute 27 Edw. III. ch. 13, if a ship is lost on the shore, and the goods come to land, they are to be at once returned to the owners, they paying a reasonable reward for their salvage. *Brown.*

WRIT. A general term for a variety of judicial instruments by which a court commands something to be done by a person to whom the instrument is addressed.

Burrill describes a writ as being an instrument in writing, in an epistolary form, running in the name of the sovereign of a state, and issued out of a court of justice, under seal, either as the commencement of an action or during its progress, directed to a sheriff or other ministerial officer, or to the party intended to be bound by it, and commanding some act therein mentioned to be done at or within a certain time specified.

Former common-law practice allowed a great variety of writs specially adapted to different causes of action. These have been described, so far as they possess interest, under their various names, excluding the word writ from the name; thus the writ *de lunatico inquirendo* is mentioned under *de lunatico inquirendo;* and so with others.

The writs particularly mentioned below are those of a general character, employed in modern practice.

In general, a writ is the king's precept in writing, under seal, issuing out of some court, and commanding something to be done touching a suit or action, or giving commission to have it done. (*Termes de la Ley.*) Writs in civil actions were either *original* or *judicial.* Original writs issued out of the court of chancery for summoning a defendant to appear, and were granted before the suit was begun, to begin the same, whence the name; judicial writs issued out of the court where the original was returned after the suit was begun. The original bore date in the name of the king, the judicial in the name of the judge. Another division of writs was into *real, personal,* and *mixed:* the real concerning the possession of land, and being either writs of entry or writs of right; the personal concerning goods, chattels, and personal injuries; and the mixed partaking of the nature of both. Again, writs concerning the possession of land were either *possessory,* of a man's own possession; or *ancestral,* of the seisin and possession of his ancestor as well. Writs also commonly bore some special name or addition descriptive of their particular purpose; *e.g.,* writ of assistance, of inquiry, of *capias,* &c. *Brown.*

The Stat. 3 & 4 Wm. IV. ch. 27, abolished a great number of writs. It enacted that "no writ of right patent, writ of right *quia dominus remisit curiam,* writ of right *in capite,* writ of right in London, writ of right close, writ of right *de rationabili parte,* writ of right of advowson, writ of right upon disclaimer, writ *de rationabilibus divisis,* writ of right of ward, writ *de consuetudinibus et servitiis,* writ of *cessavit,* writ of escheat, writ of *quo jure,* writ of *secta demolendinum,* writ *de essendo quietum de theolonio,* writ of *ne injuste vexes,* writ of *mesne,* writ of *quod permittat,* writ of *formedon in descender* in remainder, or in reverter, writ of assise of *novel disseisin,* nuisance, *darrein presentment, juris utrum,* or *mort d'ancestor,* writ of entry *sur disseisin* in the *quibus,* in the *per,* in the *per* and *cui,* or in the *post,* writ of entry *sur* intrusion, writ of entry *sur* alienation, *dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium,* or *sur cui ante divortium,* writ of entry *sur* abatement, writ of entry *quare ejecit infra terminum,* or *ad terminum qui præteriit,* or *causa matrimonii prælocuti,* writ of *aiel, besaiel, tresaiel, cosinage,* or *nuper obiit,* writ of waste, writ of partition, writ of *disceit,* writ of *quod ei deforceat,* writ of covenant real, writ of *warrantia chartæ,* writ of *curia claudenda,* or writ *per quæ servitia,* and no other action real or mixed (except a writ of right of dower, or writ of dower *unde nihil habet,* or a *quare impedit,* or an ejectment), and no plaint in the nature of any such writ or action, except a plaint for freebench or dower, — shall be brought after the 31st day of December, 1834." (*Troub. & H. Prac.*) *Wharton.*

The common-law definition of a writ includes a seal. Baird *v.* Pridmore, 29 *How. Pr.* 253.

The term writ includes execution and attachment. Bank of Rutland *v.* Parsons, 21 *Vt.* 199.

Also, a capias. Tyler *v.* Canaday, 2 *Barb.* 160.

Also, a summons in a justice's court. Cole *v.* Bell, 48 *Barb.* 194.

Writ of assistance. A writ issuing out of chancery to aid or assist the sheriff in giving possession of lands pursuant to an execution upon a judgment at law for recovery of possession.

Writ of error. A writ issuing out of an appellate court, to bring before it

the record of the proceedings had in a cause which has been adjudged in a court below, to review what has been there done, and correct errors, if any.

Whether "writ of error" includes a *certiorari*, see King *v.* Wright, 2 *Harr.* (*Del.*) 135; Carman *v.* Carman, 3 *N. J. L.* 470.

Writ of inquiry. A writ used in an action at common law, by which, after judgment by default for the plaintiff, the sheriff inquires, by the oaths of twelve honest and lawful men, what amount of damages the plaintiff hath really sustained. The inquiry is usually had by the under-sheriff before a jury.

Writ of right. This was a writ which lay for a man who had the right of property, against another man who had the right of possession and was in possession under such right. This severance of the two rights arose in three cases, chiefly:

Upon discontinuance by tenant in tail;

After judgment in a possessory action; and

After the possessory action was barred by the statute of limitations.

The writ of right properly lay only to recover corporeal hereditaments for an estate in fee-simple; but there were other writs, said to be "in the nature of a writ of right," available for the recovery of incorporeal hereditaments or of lands for a less estate than a fee-simple.

In this action, the demandant alleged some seisin of the lands in himself, or else in some one under whom he claimed; and usually the tenant in possession denied the demandant's right, which the latter was thereupon required to prove; and, failing such proof, the demandant and his heirs were perpetually barred of his claim, otherwise he recovered the lands against the tenant and his heirs for ever. There was a limit to the seisin which the demandant might allege; and such limit was fixed by the Statute of Westminster the First (3 Edw. I.), ch. 39, from the time of Richard I.; and afterwards by the Stat. 32 Hen. VIII. ch. 2, seisin in a writ of right was to be alleged within sixty years.

By the Stats. 3 & 4 Wm. IV. ch. 27, § 36, and the common-law procedure act, 1860, § 26, all writs of right and writs in the nature thereof have been abolished. *Brown.*

Writ of summons. The writ by which, under the English judicature acts, actions are commenced. It corresponds to the writ in use in the New England states for commencing an action, and to the summons employed under the codes of reformed procedure.

WRITE. To express thought by visible words; to impress or mark letters communicating ideas, with coloring matter, upon paper or parchment, by means of pen, pencil, or types.

Writer: one who communicates thoughts by visible marks. Writing: the act of embodying ideas in visible words; also, the communication so formed.

In the vernacular, "to write" and "writing" are in contrast with "to print" and "printing;" but in law the latter are included in the former. It is not so clear, however, that "writer" would include "printer," unless the context indicated such intent.

In the vernacular, "writing" is not at all confined to paper or parchment, but may be on any material which can receive marks. The rules of law relative to written instruments require that they should be upon paper or parchment; though perhaps to say that this is part of the definition of the terms is going too far.

Wherever the contrary does not appear from the context, "writing" not only means words traced with a pen, or stamped, but printed or engraved or made legible by any other device. Henshaw *v.* Foster, 9 *Pick.* 312.

Writer to the signet. In Scotch law, the title of a judicial officer nearly corresponding to an attorney-at-law, in English and American practice.

The writers to the signet are the oldest body of law practitioners in Scotland. The signet was originally under the sole control of the secretary of state, and the writers to the signet were clerks in his office, and were known by the name of "clerks to the signet." In the act of 1537, establishing the college of justice, the writers to the signet are mentioned as a pre-existing body. They became a component part of the college, and were at this time, if not sooner, a corporation, with the secretary of state at their head. Even after the Union, until the year 1746, the secretary of state continued to name a keeper of the signet; but since that time the keeper has been appointed by a special commission from the crown, and he appoints a deputy, who has been accustomed to sit as chairman at meetings of the society. The duty of the writers to the signet is to prepare the warrants of all charters of lands flowing from the crown; all summonses for citing parties to appear in the court of session; all processes of the law for affecting the person or estate of a debtor, or for compelling the performance of the decrees of the supreme court. The writers to the signet have further the privilege of acting as agents or attorneys in conducting causes before the

court of session. (*Bell; Darling; Shand.*) *Mozley & W.*

Written instrument. That a judgment is not a written instrument, within the meaning of the statute requiring a copy to be set out, where it is the foundation of an action or defence, see Wyant *v.* Wyant, 38 *Ind.* 48; Lytle *v.* Lytle, 37 *Id.* 281.

Neither is a tax duplicate. Hazzard *v.* Heacock, 39 *Ind.* 172.

WRONG, *n.* Is generally used in law as equivalent to tort, or as meaning a civil injury independent of contract. It may be used more extensively; thus, where public and private wrongs are spoken of, crimes are included under the first head.

Wrongfully; tortiously; unlawfully.

Wrong-doer. One who commits an injury; a tort-feasor.

Wrongfully intending. Words used in a declaration when in an action for an injury to charge an unlawful motive upon the defendant in committing the act complained of.

Y.

YEAR. The period in which the revolution of the earth round the sun, and the accompanying changes in the order of nature, are completed. Generally, when a statute speaks of a year, twelve calendar and not lunar months are intended. (Peterborough *v.* Catesby, *Cro. Jac.* 166.) The year is either astronomical, ecclesiastical, or regnal, beginning on the 1st of January, or 25th of March, or the day of the sovereign's accession. *Wharton.*

The year, as divided by Julius Cæsar, consists of twelve months. It appears that in early English times the year began with Christmas day; but from the reign of William I. the year is designated by that of the reign only. Upon the reformation of religion, the year was made to begin with the 25th of March, being the day of the feast of the Annunciation; but the year of the reign continued to be the common mode of denoting dates until the Commonwealth, when the year of our Lord came into use; and ultimately, by the 24 Geo. II. ch. 23, it was enacted that the 1st of January next following the last day of December, 1751, should be the first day of the year 1752, and so on for the first day of every succeeding year; and that the then 2d of September, 1752, should continue to be reckoned as the second; but the next succeeding day (which of right would be the 3d of September, 1752) should be reckoned as the 14th of September, 1752, omitting for that time only the eleven intermediate days. And all writings after the 1st of January, 1752, were to be dated according to the new style. *Brown.*

That the words "any one year," in act of congress April 10, 1818, — which was providing a compensation, by annual salary, for the receivers and registers of public moneys for the public lands, — refer to the official year, and not to the fiscal year; that the salary is to commence when the service is to commence, and that the two are to be contemporaneous, see United States *v.* Dickson, 15 *Pet.* 141.

When a year is mentioned in legislative or judicial proceedings, and no mention is made of any other system of reckoning, the Christian calendar is understood to be used. Engleman *v.* State, 2 *Ind.* 91.

"Twenty-four months" is equivalent to the "two years" of the statutes of Kentucky. Hopkins *v.* Chambers, 7 *T. B. Mon.* 257.

The term "one whole year," used in the Massachusetts act of 1793, ch. 34, respecting settlements, must be understood to be a political, or rather a municipal, year; viz., from the time the officer is chosen until a new choice takes place, at the next annual meeting for the choice of town officers, which may sometimes exceed, and sometimes fall short of, a calendar year. Paris *v.* Hiram, 12 *Mass.* 262.

The period of time intended to be designated by the term "year" is to be determined by the subject-matter and the context; and that signification is to be given which accords with the intention of the party using it. Thornton *v.* Boyd, 25 *Miss.* 598.

Where a statute imposes additional punishment upon a second conviction and sentence for "a term of years," that expression includes sentences for life. Commonwealth *v.* Evans, 16 *Pick.* 448.

The expression "in the year one thousand eight hundred and fifty-seven" means the year of our Lord, and is sufficient in an indictment. Commonwealth *v.* Doran, 14 *Gray*, 37. S. P. Commonwealth *v.* Sullivan, *Id.* 97.

The time — one year — within which an appeal from a judgment may be taken, must be computed from the time the judgment is announced by the court and entered in its minutes, and not from the date of its entry in the judgment-book by the clerk. Genella *v.* Relyea, 32 *Cal.* 159; Wetherbee *v.* Dunn, 36 *Cal.* 249.

Appeal taken from a judgment rendered April 27, 1858; by a notice of appeal, served April 28, 1859, is not taken within one year. State *v.* Jones, 11 *Iowa*, 11.

By statute, in New York, a year is deemed to consist of three hundred and sixty-five days. 1 *Rev. Stat.* 606, § 3.

Year and a day. In order to avoid perplexing questions as to including or excluding the last day in computation, the old rules of English law often prescribed a year and a day as the time to be allowed for an act or event, meaning thereby to secure an entire year, beyond all question.

Thus, if a wounded person lived a year and a day, his assailant escaped prosecution for murder.

The period of a year and a day was fixed for many purposes in law. Thus, in the case of an estray, if the owner did not claim it within that time, it became the property of the lord. So the owners of wreck must claim it within a year and a day. Death must follow upon wounding within a year and a day, if the wounding is to be indicted as murder. Also, a year and a day was given for prosecuting or avoiding certain legal acts; *e.g.*, for bringing actions after entry, for making claim, for avoiding a fine, &c. *Brown.*

Year, day, and waste. An ancient prerogative of the king, whereby he was entitled to the profits for a year and a day of persons attainted of petty treason or felony, together with the right of wasting the tenements, afterwards restoring the property to the lord of the fee. It seems to have been originally a usurpation; to have been sanctioned by Stat. 17 Edw. II., and to have been abrogated by 54 Geo. III. ch. 145.

YEAR-BOOKS. Antique English court reports, in a regular series, from King Edward II. to Henry VIII., which were taken by the prothonotaries or chief scribes of the courts, at the expense of the crown, and published annually, hence their name.

YEOMAN. A degree or grade in England, next in order to that of the gentry. The word etymologically means a common man, *i.e.* commoner.

Yeoman also designates an officer of the queen's household, holding a middle place between sergeant and groom. Also, there are yeomen of the queen's guard, being a body of soldiers first established in the reign of Henry VIII. *Brown.*

Yeomanry. The small freeholders and farmers. *Hall. Const. Hist.* ch. 1.

The term is also applied to certain local forces raised by individuals, with the approbation of the queen, who accepts their voluntary service. See *Murray's Official Handbook.*

YIELDING AND PAYING. Are words used at the beginning of the *reddendum* clause in a lease, with reference to the rent intended to be payable under the lease. No special form of words is, however, essential. *Fawcett Land. & T.* 83.

The words "yielding and paying," in a lease, make an implied covenant only, and the lessee is not liable thereon for rent after he has assigned his term. Kimpton *v.* Walker, 9 *Vt.* 191.

YOKE OF OXEN. In the Kansas exemption statute, does not necessarily imply cattle already broke to work. Cattle intended by the owner for use as work cattle, and old enough to be so used, are within the purview of the statute. Mallory *v.* Berry, 16 *Kan.* 293.

YORKSHIRE REGISTRIES. The registries of titles to land provided by acts of parliament for the ridings of the county of York; analogous to the registries of deeds generally established in the various counties of the states. See *Mozley & W.*

YOUNGER CHILDREN. This phrase, when used in English conveyancing with reference to settlements of land, signifies all such children as are not entitled to the rights of an eldest son. It therefore includes daughters, even those who are older than the eldest son. *Mozley & W.*

YOUTH. Funds left by will for the support of a school "for the instruction of youth" may be applied to support a school for both sexes; the trustees are not bound to confine the school to boys alone. Nelson *v.* Cushing, 2 *Cush.* 519.

Z.

ZEALOT. This word is commonly taken in a bad sense, as denoting a separatist from the church of England, or a fanatic.

ZEALOUS WITNESS. A term sometimes employed in the language of the court-room to describe a witness who betrays too much partiality for the party on whose behalf he has been called.

ZOLLVEREIN. Is the name of the trade-league constituted by twenty-five of the states of the German empire, until recently of the German confederation. It comprises the kingdoms of Prussia, Bavaria, Saxony, Hanover, and Wurtemberg, together with one electorate (Hesse), three grand duchies, seven duchies, seven principalities, one landgraviate, and the city of Frankfort-on-the-Main. These states have agreed upon a general system of law with regard to commerce, the effect of which is to override the particular laws of the particular states, excepting where the general law is silent. *Brown.*

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