C.

C. The third letter of the alphabet. It was used among the Romans to denote condemnation, being the initial letter of *condemno*. See **A.**

CABALLERIA. In Spanish Law. A quantity of land, varying in extent in different provinces. In those parts of the United States which formerly belonged to Spain, it is a lot of one hundred feet front, two hundred feet depth, and equivalent to five peonias. 2 White, New Recop. 49; 12 Pet. 444, n.; Escriche, Dicc. Raz.

CABINET. Certain officers who, taken collectively, form a council or advisory board; as the cabinet of the president of the United States, which is composed of the secretary of state, the secretary of the treasury, the secretary of the interior, the secretary of war, the secretary of the navy, the attorney-general, and the postmaster-general.

These officers are the advisers of the president. They are also the heads of their respective departments; and by the constitution (art. 2, sec. 2) the president may require the opinion in writing of these officers upon any subject relating to the duties of their respective departments. These officers respectively have, under different acts of congress, the power of appointing many inferior officers charged with duties relating to their departments. See Const. art. 2, sec. 2.

The cabinet meets frequently at the executive mansion, by direction of the president, who presides over its deliberations and directs it proceedings. No record of its doings is kept; and it has, as a body, no legal authority. Its action is advisory merely; and the president and heads of departments in the execution of their official duties are entitled to disregard the advice of the cabinet and take the responsibility of independent action.

In England, the king, under its constitution, is irresponsible; or, as the phrase is, the king can do no wrong. The real responsibility of government in that country, therefore, rests with his ministers, who constitute his cabinet. The king may dismiss his ministers if they do not possess his confidence; but they are seldom dismissed by the king. They ordinarily resign when they cannot command a majority in favor of their measures in the house of commons.

The first lord of the treasury, the lord chancellor, the principal secretaries of state, and the chancellor of the exchequer, are always of the cabinet; but in regard to the other great officers of state the practice is not uniform, as at times they hold and at others do not hold seats in the cabinet. The British cabinet usually consists of from ten to fifteen persons. See Knight's Pol. Dict. title Cabinet; Bagehot, English Constitution.

CACICAZGOS. In Spanish Law. Lands held in entail by the caciques in Indian villages in Spanish America.

CADASTRE. The official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property; 12 Pet. 428, n.; 3 Am. St. Pap. 679.

CADERE (Lat.). To fall; to fail; to end; to terminate.

The word was generally used to denote the termination or failure of a writ, action, complaint, or attempt: as, *cadit actio* (the action fails), *cadit assisa* (the assise abates), *cadere causa*, or *a causa* (to lose a cause). Abate will translate *cadere* as often as any other word, the general signification being, as stated, to fail or cease. *Cadere ab actione* (literally, to fall from an action), to fail in an action; *cadere in partem*, to become subject to a division.

To become; to be changed to; *cadit assisa in juratum* (the assize has become a jury). Calvinus, Lex.

CADET. A younger brother. One trained for the army.

CADI. A Turkish civil magistrate.

CADUCA (Lat. *cadere*, to fall).

In Civil Law. An inheritance; an escheat; every thing which falls to the legal heir by descent.

By some writers *bona caduca* are said to be those to which no heir succeeds, equivalent to escheats. Du Cange.

CÆTERORUM (Lat. of the rest).

In Practice. Administration granted as to the residue of an estate, which cannot be administered under the limited power already granted; 1 Williams, Ex. 585; 2 Hagg. 62; 4 Hagg. Eccl. 382, 386; 4 M. & G. 398; 1 Curt. Eccl. 286.

It differs from administration *de bonis non* in this, that in *cæterorum* the full power granted is exercised and exhausted, while in the other the power is, for some cause, not fully exercised. See ADMINISTRATION.

CALEFAGIUM. A right to take fuel yearly. Blount.

CALENDAR. An almanac.

Julius Cæsar ordained that the Roman year should consist of three hundred and sixty-five days, except every fourth year, which should contain three hundred and sixty-six,—the additional day to be reckoned by counting the 24th day of February (which was the 6th of the calends of March) twice. See BISSEXTILE. This period of time exceeds the solar year by eleven minutes or thereabouts, which amounts to the error of a day in about one hundred and thirty-one years. In 1582 the error amounted to eleven days or more, which was corrected by Pope

Gregory. Out of this correction grew the distinction between Old and New Style. The Gregorian or New Style was introduced into England in 1752, the 2d day of September (O. S.) of that year being reckoned as the 14th day of September (N. S.)

In Criminal Law. A list of prisoners, containing their names, the time when they were committed and by whom, and the cause of their commitments.

CALIFORNIA. The largest and most populous of the Pacific Coast States.

It was formerly a part of Mexico, but was taken possession of by the United States in the late war with Mexico, and by the treaty of Guadalupe Hidalgo, May 30, 1848, the latter country ceded it to the United States.

The commanding officer of the U. S. forces exercised the duties of civil governor at first, but June 3, 1849, Brigadier-General Riley, then in command, issued a proclamation for holding an election August 1, 1849, for delegates to a general convention to frame a state constitution.

The convention met at Monterey, Sept. 1, 1849; adopted a constitution on October 10, 1849, which was ratified by a vote of the people, November 13, 1849. At the same time an election was held for governor and other state officers, and two members of congress.

The first legislature met at San Jose, December 15, 1849. General Riley, on December 20, 1849, resigned the administration of civil affairs to the newly elected officers under the constitution, and shortly thereafter two United States senators were elected.

In March, 1850, the senators and representatives submitted to congress the constitution, with a memorial asking the admission of the state into the American Union.

On September 9, 1850, congress passed an act admitting the state into the Union on an equal footing with the original states. and allowing her two representatives in congress until an apportionment according to an actual enumeration of the inhabitants of the United States. The third section of the act provides for the admission, upon the express condition that the people of the state, through their legislation or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall not pass any law or do any act whereby the title of the United States to any right to dispose of the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and that in no case shall non-resident proprietors who are citizens of the United States be taxed higher than residents; and that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, and without any tax, impost, or duty therefor.

Congress passed an act, March 3, 1851, to ascertain and settle the private land claims in the state of California. By this act a board of commissioners was created, before whom every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required to present his claim, together with such documentary evidence and testimony of witnesses as he relied upon From the decision of this board an appeal might be taken to the district court of the United States for the district in which the land was situated. Both the board and the court, on passing on the validity of any claim, were required to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of the supreme court of the United States.

A large part of the best agricultural lands of the state was claimed under Spanish and Mexican grants. The evidence in support of these grants was in many instances meagre and unsatisfactory, and the amount of litigation arising therefrom was enormous and has not yet wholly ceased. The board of commissioners, having completed its work, went out of existence.

By an act passed September 28, 1850, congress declared all laws of the United States, not locally inapplicable, in force within the State.

There is one United States district court, with jurisdiction extending over the entire state. The state also is a part of the ninth circuit.

The constitution adopted in 1849 was amended November 4, 1856, and September 3, 1862, and on January 1, 1880, was superseded by the present constitution, which had been framed by a convention March 3, 1879, and adopted by popular vote May 7, 1879.

The new constitution declares California to be an inseparable part of the American Union. Its provisions are mandatory and prohibitory unless by express words they are declared othewise.

It secures freedom of religious opinion, of speech, and of the press, and provides that private property shall not be taken or damaged for public use without compensation having first been made or paid into the court for the owner.

No person can be imprisoned for debt in civil actions, except in cases of fraud, and for wilful injury to person or property.

Foreigners of the white race, or of African descent, and eligible to become citizens of the United States, under the naturalization laws, have the same rights in respect to property while *bonâ fide* residents of the state that native-born citizens have.

Trial by jury may be waived in all civil actions, and in criminal cases not amounting to felony. In civil actions three-fourths of a jury may render a verdict.

A grand jury must be summoned in each county at least once a year, but offences may be prosecuted by information or by indictment. In prosecutions for libel against newspapers the trial must be in the county where the newspaper has its publication office or where the party libelled resides. No special privileges or immunities can be granted. No property qualification can be attached to the right of suffrage, but no native of China, idiot or insane person, or person convicted of any infamous crime or of embezzling or misappropriating public money can vote. On the other hand, persons engaged in the service of the United States, or in navigation, or attending a seminary of learning, or kept at an almshouse or other asylum at public expense, or while confined in a public prison, do not lose their residence for the purpose of voting—the only qualification of the right of suffrage being, that the voter must be a male citizen of the United States, twenty-one years of age, have been naturalized, if of foreign birth, ninety days, a resident of the state one year, of the county ninety days, and of the precinct thirty days.

Any person convicted of having given or offered a bribe to procure his election or appointment is disqualified from holding office.

All property owned by either husband or wife before marriage, or acquired afterwards by gift, devise, or descent, is his or her separate property.

LEGISLATIVE POWER.—The legislative power is vested in a senate and assembly. The sessions

of the legislature are biennial, commencing on the first Monday after the first day of January of the odd years.

No pay is allowed to members for a longer time than sixty days, nor can a bill be introduced in either house after fifty days from the commencement of the session, without the consent of two-thirds of the members of that house.

The senate consists of forty, the assembly of eighty members—chosen by districts.

The members of the assembly are elected for two years, of the senate for four years; and in either case the member must have been a citizen and inhabitant of the state three years, and of his district one year next before election.

No bill can become a law unless read on three several days in each house, unless in case of urgency, and by a vote by yeas and nays two-thirds of the house dispense with the reading.

Every act shall embrace but one subject, which must be expressed by its title.

The powers usually possessed by legislative bodies are by this constitution much restricted, one section alone enumerating thirty-three subjects, of frequent local and special legislation, in which the legislature is forbidden to pass local or special laws.

The legislature, likewise, cannot authorize lotteries or gift enterprises, and must prohibit the sale of lottery tickets, and shall regulate or prohibit the buying and selling stock of corporations in stock boards or exchanges.

All contracts for the sale of stock on a margin are declared void.

The legislature cannot lend the credit of the state, or any subdivision of the state, or authorize any such subdivision to lend its credit, to any person, corporation, or association, or grant extra compensation to any public agent or contractor.

It shall pass laws for the regulation and limitation of charges of telegraphic, gas, and storage corporations.

Stringent provisions are made against lobbying, which is declared a felony.

The legislature must provide for common schools, and there is devoted to their support the proceeds of all lands that may be granted by the United States for the support of schools, and the five hundred thousand acres of land granted to the new states under the act of congress distributing the proceeds of the public lands among the several states, and the estates of all deceased persons who may have died without leaving any will or heir.

It also provides that the State University constitutes a public trust, and that its organization and government shall be perpetually continued.

EXECUTIVE DEPARTMENT. — The governor holds office for four years, and possesses the usual powers.

There are also a lieutenant-governor, secretary of state, controller, treasurer, surveyor-general, and attorney-general, with the usual powers appertaining to those offices, and who are elected at the same time with the governor, and for the same term.

The governor shall not, during his term of office, be elected to the United States senate.

JUDICIAL DEPARTMENT.—The judicial power is vested in the senate, sitting as a court of impeachment; supreme court, a superior court in each county, justices of the peace, and such inferior courts as the legislature may establish in cities and towns.

The supreme court consists of a chief justice and six associate justices, whose term of office is twelve years.

Two departments are provided for—the chief justice assigning three justices to each department. Each department has power to hear and determine causes, and any three members of the court may pronounce judgment upon causes heard before a department.

The chief justice apportions the business between the departments, and may order causes to be heard in banc, as likewise may four justices. In causes heard in banc the concurrence of four members of the court is necessary to pronounce judgment. The decisions of the court must be in writing, and the grounds of the decision stated. The chief justice presides in banc, and may sit in either department.

The court has appellate jurisdiction in such cases as the superior court has original jurisdiction, and may issue writs of mandamus, certiorari, prohibition, and habeas corpus.

The superior court of each county may consist of one or more judges, as the legislature shall order, whose term of office is six years. There may be as many sessions of any court at once as there are judges thereof. It has original jurisdiction in all cases in equity, and all cases at law involving title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand exclusive of interest amounts to $300.00, and in criminal cases amounting to felony; of actions of forcible entry and detainer, to prevent or abate a nuisance; of proceedings in insolvency; of matters of probate; of divorce and naturalization; and has appellate jurisdiction from justices and other inferior courts in such matters as are provided by law. It may also issue writs of mandamus, etc.

In San Francisco, the superior court consists of twelve judges, who elect from among their number a presiding judge, who distributes the business among the several judges.

A judicial officer who absents himself from the state for sixty days is deemed to have forfeited his office. Justices of the supreme court and judges of the superior court may be removed by concurrent resolution of both houses of the legislature, adopted by a two-thirds vote of each; and before a judge can draw his monthly salary he must make affidavit that no cause remains in his court undecided, which has been submitted for a decision for a period of ninety days.

A judge cannot charge juries with respect to matters of law.

MISCELLANEOUS.—The subject of corporations is treated of at length by the constitution, upon the theory that they should be controlled and regulated by the state. The state is divided into three railroad districts, for each of which a railroad commissioner is elected by popular vote for the term of four years, and the board thus formed is given extensive powers over railroads in the state.

Elaborate provision is made for reaching all property for purposes of taxation, except growing crops. Water and water rights, public lands, homesteads, and harbors are treated of.

One article is devoted to the Chinese, whose presence is declared to be dangerous to the well-being of the state. One portion of the article, to wit, that corporations shall not employ Chinamen, has been declared inoperative, because in conflict with the constitution and treaties of the United States. No Chinese can be employed on any public work.

Sending or accepting a challenge to fight, or fighting, a duel works a forfeiture of the right of suffrage and the right to hold office. Liens for mechanics, material men, and laborers upon

property, on which they have labored or furnished materials are provided for. Eight hours constitutes a legal day's work on all public works.

No person on account of sex shall be disqualified from pursuing any lawful business or occupation. Many subjects usually left to legislative action or discretion are likewise made a part of the fundamental law of the state.

CALLING THE PLAINTIFF. **In Practice.** A formal method of causing a nonsuit to be entered.

When a plaintiff perceives that he has not given evidence to maintain his issue, and intends to become nonsuited, he withdraws himself; whereupon the crier is ordered to call the plaintiff, and on his failure to appear he becomes nonsuited. The phrase "let the plaintiff be called," which occurs in some of the earlier state reports, is to be explained by reference to this practice. See 3 Bla. Com. 376; 2 C. & P. 403; 5 Mass. 236; 7 *id.* 257; 4 Wash. C. C. 97.

CALLING TO THE BAR. Conferring the degree or dignity of barrister upon a member of the inns of court. Holthouse, Dict.

CALUMNIÆ JUSJURANDUM (Lat.). The oath against calumny.

Both parties at the beginning of a suit, in certain cases, were obliged to take an oath that the suit was commenced in good faith and in a firm belief that they had a good cause. Bell, Dict. The object was to prevent vexatious and unnecessary suits. It was especially used in divorce cases, though of little practical utility; Bishop, Marr. & Div. § 353. A somewhat similar provision is to be found in the requirement made in some states that the defendant shall file an affidavit of merits.

CALUMNIATORS. **In Civil Law.** Persons who accuse others, whom they know to be innocent, of having committed crimes.

CAMBIO. Exchange.

CAMBIPARTIA. Champerty.

CAMBIPARTICEPS. A champertor.

CAMBIST. A person skilled in exchange; one who deals or trades in promissory notes or bills of exchange; a broker.

CAMBIUM. Change, exchange. Applied in the civil law to exchange of lands, as well as of money or debts. DuCange.

Cambium reale or *manuale* was the term generally used to denote the technical common-law exchange of lands; *cambium locale, mercantile, or trajectitium*, was used to designate the modern mercantile contract of exchange, whereby a man agrees, in consideration of a sum of money paid him in one place, to pay a like sum in another place. Pothier, *de Change*, n. 12; Story, Bills, § 2 *et seq.*

CAMERA REGIS. In old English law a chamber of the king; a place of peculiar privileges especially in a commercial point of view. The city of London was so called. Year Book, p. 7, Hen. VI. 27; Burrill, Law Dic.

CAMERA SCACCARII. The Exchequer Chamber. Spelman, Gloss.

CAMERA STELLATA. The Star Chamber.

CAMERARIUS. A chamberlain; a keeper of the public money; a treasurer. Spelman, Gloss. *Cambellarius;* 1 Perr. & D. 243.

CAMINO. **In Spanish Law.** A road or highway. Las Partidas, pt. 3, tit. 2, l. 6.

CAMPARTUM. A part or portion of a larger field or ground, which would otherwise be in gross or in common. Champerty.

CAMPERTUM. A cornfield; a field of grain. Cowel; Whishaw.

CAMPUS (Lat. a field). In old European law an assemby of the people so called from being held in the open air, in some plain capable of containing a large number of persons. 1 Robertson's Charles V. App. n. 38.

In feudal or old English law a field or plain. Burrill, Law Dict.

CANADA. The name of one of the British possessions in North America.

The first explorations of this country, of which any authentic information exists, were by Jacques Cartier, between the years 1534 and 1554, thus giving to France the first claim upon its territory. Great activity was shown during these and the succeeding years on the part of Great Britian and France to acquire territorial jurisdiction on the newly discovered continent, and the division lines between their acquisitions were not very clearly marked. Those of France included Florida in the south and the lands watered by the St. Lawrence in the north, and to it all the name of "New France" was given. In 1603 an expedition for trading purposes was fitted out under the command of Samuel Champlain, whose explorations up the river St. Lawrence and its tributary, the Richelieu River, brought him to the lake which still bears his name.

The viceroyalty of New France was conferred in 1612 upon the Prince de Conde, who made a formal assignment of it in 1619 to Admiral Montmorency, who personally visited the country.

In 1628, under the rule of Cardinal Richelieu in France, the colony was ceded to "La Compagnie de Cents Associes" (The Company of the One Hundred Associates), a trading company, but armed, like the Hudson Bay Company in later years, with full power for the administration of justice in the primitive forms practicable in new countries and with mixed populations.

This company had an unsuccessful career financially, and upon its disorganization, in 1663, Louis XIV. resumed territorial jurisdiction over the colony, and in April of that year published an edict establishing a "Sovereign Council" for the government of Canada, and this council was specially instructed to prepare laws and ordinances for the administration of justice, framed as much as possible upon those then in force in France under the provisions of the "Custom of Paris."

For more than one hundred years all the legal business of the province was determined by this council—in fact, until the conquest by the English in 1759. By the terms of the capitulation, it was stipulated and conceded that the ancient laws of land tenure should continue to subsist, but it was understood that the English criminal and commercial law should be introduced and adopted.

Under this stipulation the law of France, as it existed in 1759, was recognized as the civil law of Canada, and has always since formed the basis of that law—modified, of course, after the subsequent establishment of a representative government in the colony, by the statutory provisions of the colonial parliaments. This result was applicable, however, only to that section of the

country which subsequently was called Lower Canada, now the province of Quebec. The portion of the colony since known as the province of Upper Canada (now the province of Ontario), was then unsettled, and being subsequently colonized from Great Britain and her other dependencies, the whole body of law, civil as well as criminal, was based upon that in force in England.

Under the provisions of a statute passed by the imperial parliament of Great Britain in 1774, called "The Quebec Act," a legislative council of twenty-three members was established for the province, with power to enact laws. In 1791 Pitt introduced the bill into the English House of Commons which gave a constitution to Canada and divided it into the two provinces of Upper and Lower Canada. Since then (with the short interregnum from 1837 to 1841), regular parliaments have been held, at which the jurisprudence of the country and the establishment of its courts have been determined by formal acts.

In 1867, the confederation of the different North American dependencies of Great Britain, under the name of the "Dominion of Canada," was consummated by an act of the imperial parliament, at the instance and request of the different provinces, including Upper and Lower Canada (under the names of Ontario and Quebec), New Brunswick, and Nova Scotia, to which have since been added Prince Edward's Island, Manitoba, and British Columbia. The act under which this confederation was established—called The British North American Act—contains the provisions of a written constitution, under which the executive government and authority is declared to be vested in the sovereign of Great Britain, whose powers are deputed to a governor-general, nominated by the imperial government, but whose salary is paid by the Dominion. The form of government is modelled after that of Great Britain. The governor acts under the guidance of a council, nominally selected by himself, but which must be able to command the support of a majority in that branch of parliament which represents the suffrages of the electors.

The Dominion parliament consists of a senate and house of commons: the former numbering from 72 to 78 members, appointed for life. The commons consisted, at confederation, of 181 members: 82 for Ontario, 65 for Quebec, 19 for Nova Scotia, and 15 for New Brunswick. This number has since been increased by the addition of new provinces, as follows: 6 from Prince Edward's Island, 4 from Manitoba, and 6 from British Columbia.

Senators must have a property qualification of at least $4000, in real estate and personal property, and must be residents of the province for which they are appointed; and in the province of Quebec, must either reside or have their property qualification in the division which they are appointed to represent. No property qualification is required for a member of the house of commons. He need not be even a resident of the county which elects him as its representative. The limit of the term for which members of the commons are elected is five years, but a house may be dissolved at any time within that limit by order of the governor general and his council, and new elections held. This is only done when a ministry fail to command a working majority in the house and believe that additional support may be obtained by a new appeal to the suffrages of the electors.

The privileges, immunities, and powers of the senate and house of commons are within the control of the parliament of Canada—that is of the three united branches—queen (or governor general), senate, and commons.

Any male person twenty-one years of age, a subject of her majesty by birth or naturalization, and not disqualified by law, may vote for members of the legislative assembly, if he be enrolled on the last assessment-roll, as revised, corrected, and in force, as owner, tenant, or occupant of real property of the assessed value of three hundred dollars clear of incumbrances, or of the annual clear value of thirty dollars, situated within the limits of the town or city, for municipal purposes; or as possessed of property to the clear value of two hundred dollars, or clear annual value of twenty dollars, situated within the limits of any township, parish, or place within the limits of such town or city, for representative, but not for municipal purposes; or if enrolled on such roll, in any parish, township, town, village, or place, not within the limits of a town or city entitled to send a member of the legislative assembly, as owner, tenant, or occupant of property of the clear assessed value of two hundred dollars, or the clear annual value of twenty dollars, situated in the district in which such town, etc., is included. Judges of all courts holding fixed sessions, and officers of such courts, as sheriffs and the like, under a penalty of two thousand dollars, officers of the customs, returning officers of elections, and all who have been employed by any candidate in assisting or forwarding his election, are prohibited voting.

It is declared that the free exercise and enjoyment of religious profession and worship without discrimination or preference, so that the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all her majesty's subjects within the same. Consol. Can. Laws, 857.

Each of the provinces has also a separate parliamentary organization for the administration of local affairs, with a lieutenant governor for each, appointed for a term of five years by the governor general in council.

THE JUDICIAL POWER.—The administration of the laws differs in the separate provinces. There is, however, a supreme court with ultimate jurisdiction in matters affecting the Dominion and as a final court of appeal from the provincial courts. It consists of a chief justice and five puisne judges, and is held at Ottawa. Litigants in cases in the provincial courts, involving amounts exceeding $2500, may appeal either to the supreme court or to the queen in privy council, but the decision, by whichever tribunal selected, is final.

The judicial system in the province of Quebec is based upon that in France in the last century,

while that in Ontario and the other provinces is modelled mainly after the English system.

The province of Quebec is divided into twenty judicial districts, in which circuit and superior courts are held. The circuit court has jurisdiction in cases up to $200, except in Montreal and Quebec, where it is limited to $100. The superior court has unlimited jurisdiction in civil matters beyond that of the circuit. A single superior court judge presides over each court. The court of review is a revisionary tribunal consisting of three judges of the superior court, sitting in Montreal and Quebec, before which all superior court cases and cases in the circuit court over $100 may be re-argued, after decision of a single judge. The judgment of this court—confirming or reversing the original judgment—becomes the judgment of record, but in case of a reversal of the original judgment an appeal may be taken to the court of queen's bench (appeal side), to which appeals may also be taken direct from the first judgment. This court consists of six judges, five of whom constitute a full bench, and sit alternately at Montreal and Quebec. A judge of this court is detailed in both Montreal and Quebec to hold the terms of the criminal court, a duty imposed in country districts upon the judge of the superior court.

In this province (Quebec) the members of the bar are incorporated by act of parliament under the name of "The Bar of the Province of Quebec," with absolute control over their own organization,—both as to admission to its ranks and control and discipline over its members.

The notarial profession is also regularly organized and incorporated. Its members are obliged to make a certain course of study and clerkship before admission. A notary when once admitted becomes a public functionary. Documents executed before him remain always in his custody, and copies only are delivered to the parties, but these copies when authenticated by the notary make proof of themselves in all courts and legal proceedings. Upon the decease of the notary his original documents (*minutes*, as they are called), all numbered consecutively, are delivered up to the clerk of the superior court and deposited in the archives of that court for future reference. A very elaborate system of registration is in force in all the provinces for all transactions affecting real estate, and throughout the cities and older provinces, Cadastral plans are in force showing the exact position and dimensions of each property with its Cadastral number, which is a sufficient designation of it for legal or registration purposes.

In the province of Quebec either the English or French language may be used in contracts, in writs or other legal proceedings or pleadings, and both languages are used in all official proclamations and in the publication of the statutes.

In the other provinces the English language only is officially used, and the procedure in all the courts—based upon that of England—is quite uniform and similar to that still in use there.

CANAL. An artificial cut or trench in the earth, for conducting and confining water to be used for transportation.

Public canals originate under statutes and charters enacted to authorize their construction and to protect and regulate their use. They are in this country constructed and managed either by the state itself, acting through the agency of commissioners, or by companies incorporated for the purpose. These commissioners and companies are armed with authority to appropriate private property for the construction of their canals, in exercising which they are bound to a strict compliance with the statutes by which it is conferred. Where private property is thus taken, it must be paid for in gold and silver; 8 Blackf. 246. Such payment need not precede or be cotemporaneous with the taking; 20 Johns. 735; 4 Zabr. 587; 8 Blackf. 266; though, if postponed, the proprietor of the land taken is entitled to interest; 5 Denio, 401; 1 Md. Ch. Dec. 248. The following cases relate to the rules to be observed in estimating the amount of damage to be awarded for private property taken or injured by the construction of canals: 7 Blackf. 209; 5 *id.* 384–543; 6 *id.* 483; 1 Watts & S. 346; 1 Penn. 462; 15 Barb. 457, 627; 24 *id.* 362; 4 Wend. 647; 1 Spenc. 249; 14 Conn. 146; 16 *id.* 98; 1 Sneed, 239; 1 Sumn. 46.

After the appropriation of land for a canal, duly made under statute authority, though the title remains in the original owner until he is paid therefor, he cannot sustain an action against the party taking the same for any injury thereto; 19 Barb. 263, 370; 4 Wend. 647; 20 Johns. 735; 7 Johns. Ch. 314; 19 Penn. 456. But if there be a deviation from the statute authority, the statute is no protection against suits by persons injured by such deviation; 4 Denio, 356; 26 Wend. 485; 1 Sumn. 46; 2 Dow. 519; Coop. Ch. 77. Appraisers appointed to assess damages for land taken have no authority to entertain claims not presented in the mode and within the time prescribed by statute; 9 Barb. 496; 11 N. Y. 314. But though a special remedy for damages be given by a statute authorizing the construction of a canal, the party injured thereby is not barred of his common-law action; 24 Barb. 159; 5 Cow. 163; 16 Conn. 98. But see, to the contrary; 12 Mass. 466; 1 N. H. 339. The legislature have the exclusive power to determine when land may be taken for a canal or other public use, and the courts cannot review their determination in that respect; 9 Barb. 350; 8 Blackf. 266.

In navigating canals, it is the duty of the canal-boats to exercise due care in avoiding collisions, and in affording each other mutual accommodation; and for any injury resulting from the neglect of such care the proprietors of the boats are liable in damages; 19 Wend. 399; 8 *id.* 469; 6 Cow. 698; 1 Barr, 44. The proprietors of the canal will be liable for any injury to canal-boats occasioned by a neglect on their part to keep the canal in proper repair and free from obstructions; 7 Mass. 189; 7 Metc. 276; 13 Gratt. 541; 8 Dana, 161; 7 Ind. 462; 20 Barb. 620; 11 A. & E. 223. In regard to the right of the proprietors of canals to tolls, the rule is that they are only entitled to take them as authorized by statute, and that any ambiguity in the terms of the statute must operate in favor of the public; 2 B. & Ad. 792; 2 *id.* 58; 2 M. & G. 134; 9 How. 172;

6 Cow. 567; 21 Penn. 131. For other cases relating to various points arising under statutes in regard to canals; see 8 Blackf. 352; 12 Mass. 403; 7 B. Monr. 160; 4 Zabr. 62, 555; 11 Penn. 202; 2 *id.* 217; 1 Binn. 70; 1 Gill, 222; 6 W. & S. 560; 17 Barb. 193; 19 *id* 657; 25 Wend. 692. See RAILWAY.

CANCELLARIA. Chancery; the court of chancery. *Curia cancellaria* is also used in the same sense. See 4 Bla. Com. 46; Cowel.

CANCELLARIUS. A chancellor. A janitor, or one who stood at the door of the court and was accustomed to carry out the commands of the judges. A scribe. A notary. Du Cange.

It was under the reign of the Merovingian kings that the *cancellarii* first obtained the dignity corresponding with that of the English chancellor, and became keepers of the king's seal. Du Cange. In ecclesiastical matters it was the duty of the *cancellarius* to take charge of all matters relating to the books of the church,—acting as librarian; to correct the laws, comparing the various readings, and also to take charge of the seal of the church, affixing it when necessary in the business of the church.

In this latter sense only of keeper of the seal the word chancellor, derived hence, seems to have been used in the English law. 3 Bla. Com. 46. It is said by Ingulphus that Edward the Elder appointed Torquatel his chancellor, so that whatever business of the king, spiritual or temporal, required a decision, should be decided by his advice and decree, and, being so decided, the decree should be held irrevocable. Spence, Eq. Jur. 78, n.

The origin of the word has been much disputed; but it seems probable that the meaning assigned by Du Cange is correct, who says that the *cancellarii* were originally the keepers of the gate of the king's tribunal, and who carried out the commands of the judges. In the civil law their duties were very various, giving rise to a great variety of names, as *notarius, a notis, abactis, secretarius, a secretis, a cancellis, a responsis*, generally derived from their duties as keepers and correctors of the statutes and decisions of the tribunals.

The transition from keeper of the seal of the church to keeper of the king's seal would be natural and easy in an age when the clergy were the only persons of education sufficient to read the documents to which the seal was to be appended. And this latter sense is the one which has remained and been perpetuated in the English word Chancellor. See Du Cange; Spelman, Gloss.; Spence, Eq. Jur. 78; 3 Bla. Com. 46

CANCELLATION. The act of crossing out a writing. The manual operation of tearing or destroying a written instrument; 1 Eq. Cas. Abr. 409; Roberts, Wills, 367, n.

The Statute of Frauds provides that the revocation of a will by cancellation must be by the "testator himself, or in his presence and by his direction and consent." This provision is in force in many of the United States; 1 Jarm. Wills, Rand. & Talc. ed. c. 7, § 2, n. In order that a revocation may be effected, it must be proved to have been done according to the statute, 25 N. Y. 79; 31 Penn. 246; 66 Mo. 579; 46 Ala. 216; declarations of a testator are not sufficient; 2 W. & S. 455; 26 Md. 95; 2 Johns. 31.

Cancelling a will, *animo revocandi*, is a revocation; and the destruction or obliteration need not be complete; 3 B. & Ald. 489; 2 W. Blackst. 1043; 4 Mass. 462; 2 N. & M'C. 472; 5 Conn. 168; 4 S. & R. 567. It must be done *animo revocandi;* 62 Ill. 368; 6 Mo. 177; and evidence is admissible to show with what intention the act was done; 7 Johns. 394; 4 Wend. 474, 485; 9 Mass. 307; 4 Conn. 550; 5 *id.* 262; 8 Vt. 373; 1 N. H. 1; 4 *id.* 191; 2 Dall. 266; 4 S. & R. 297; 3 Hen. & M. 502; 1 Harr. & M'H. 162; 4 Kent, 531; 57 Me. 449; 25 Mich. 505; 2 Rich. 184; 8 Mich. 411; 32 Ga. 156. Accidental cancellation is not a revocation; 3 Stockt. 156. Where the first few lines of a will were cut off, the remainder, which was complete, was admitted to probate; L. R. 2 P. & D. 206. Partial cancellation, with proof of an *animo revocandi*, will revoke a will; 2 Miss. 336. Where the testator wrote on his will, "this will is invalid," held a revocation; 2 Conn. 67. Cancellation by an insane man will not revoke a valid will; 54 Barb. 274; 7 Humphr. 92 See 1 Pick. 535; 1 Rich. 80.

There may be a partial obliteration, which works a revocation *pro tanto;* 34 Barb. 140; 123 Mass. 102; 62 Ill. 368; and a careful interlineation is not a cancellation; 55 Penn. 424. A cancellation by pencil is enough; 2 D. & B. 311; 6 Hare, 39; L. R. 2 P. & D. 256. Where a will is found among a testator's papers, torn, there is a presumption of revocation; 41 Vt. 125; 50 Mo. 28; 40 Conn. 587; 11 Wend. 227.

Mere cancellation of a deed does not divest the grantee's title; 9 Pick. 108; 33 Ala. 264; 18 Cal. 49; 4 Conn. 550; even though done before recording; 24 Me. 312; but it might practically have that effect between the parties by estoppel; 50 N. H. 143; or by reason of the destruction of the only evidence of the transaction; 14 Iowa, 400; 4 Wis. 12.

CANDIDATE (Lat. *candidus*, white. Said to be from the custom of Roman candidates to clothe themselves in a white tunic).

One who offers himself, or is offered by others, for an office.

CANON. In Ecclesiastical Law. A prebendary, or member of a chapter. All members of chapters except deans are now entitled *canons*, in England. 3 Steph. Com. 67, n.; 1 Bla. Com. 382.

CANON LAW. A body of ecclesiastical law, which originated in the church of Rome, relating to matters of which that church has or claims jurisdiction.

A canon is a rule of doctrine or of discipline, and is the term generally applied to designate the ordinances of councils and decrees of popes. The position which the canon law obtains beyond the papal dominions depends on the extent to which it is sanctioned or permitted by the government of each country; and hence the system of canon law as it is administered in different countries varies somewhat.

Though this system of law is of primary importance in Catholic countries alone, it still maintains great influence and transmits many of its peculiar regulations down through the jurisprudence of Protestant countries which were formerly Catholic. Thus, the canon law has been a distinct branch of the profession in the ecclesiastical courts of England for several centuries; but the recent modifications of the jurisdiction of those courts have done much to reduce its independent importance.

The *Corpus Juris Canonici* is drawn from various sources—the opinions of the ancient fathers of the church, the decrees of councils, and the decretal epistles and bulls of the holy see, together with the maxims of the civil law and the teachings of the Scriptures. These sources were first drawn upon for a regular ecclesiastical system about the time of Pope Alexander III., in the middle of the twelfth century, when one Gratian, an Italian monk, animated by the discovery of Justinian's Pandects, collected the ecclesiastical constitutions also into some method in three books, which he entitled *Concordia Discordantium Canonum*. These are generally known as *Decretum Gratiani*.

The subsequent papal decrees to the time of the pontificate of Gregory IX. were collected in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII., about the year 1298, which is called *Sextus Decretalium* The Clementine Constitution, or decrees of Clement V., were in like manner authenticated in 1317 by his successor, John XXII., who also published twenty constitutions of his own, called the *Extravagantes Joannis*, so called because they were in addition to, or beyond the boundary of, the former collections, as the additions to the civil law were called Novels. To these have since been added some decrees of later popes, down to the time of Sixtus IV., in five books, called *Extravagantes communes*. And all these together—Gratian's Decrees, Gregory's Decretals, the Sixth Decretals, the Clementine Constitutions, and the Extravagants of John and his successors—form the *Corpus Juris Canonici*, or body of the Roman canon law; 1 Bla. Com. 82; Encyclopédie, *Droit Canonique, Droit Public Ecclesiastique;* Dict. de Jur. *Droit Canonique*, Erskine, Inst. b. 1 t. 1, s. 10. See, in general, Ayliffe, Par. Jur. Can. Ang.; Shelford, Marr. & D. 19; Preface to Burn, Eccl. Law, Tyrwhitt ed 22, Hale, Civ. L. 26-29; Bell's Case of a Putative Marriage, 203; Dict. du Droit Canonique; Stair, Inst. b. 1. t. 1. 7.

CANONRY. An ecclesiastical benefice attaching to the office of canon. Holthouse, Dict.

CANTRED. A hundred, a district containing a hundred villages. Used in Wales in the same sense as hundred in England. Cowel; Termes de la Ley.

CANVASS. The act of examining the returns of votes for a public officer. This duty is usually intrusted to certain officers of a state, district, or county, who constitute a board of canvassers. The determination of the board of canvassers of the persons elected to an office is *primâ facie* evidence only of their election. A party may go behind the canvass to the ballots, to show the number of votes cast for him. The duties of the canvassers are wholly ministerial; 8 Cow. 102; 20 Wend. 14; 1 Dougl. Mich. 59; 1 Mich. 362; 15 Ill. 492.

CAPACITY. Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law; as, the capacity to devise, to bequeath, to grant or convey lands; or to take and hold lands; to make a contract, and the like. 2 Comyns, Dig. 294; Dane, Abr.

CAPAX DOLI (Lat. capable of committing crime). The condition of one who has sufficient mind and understanding to be made responsible for his actions. See DISCRETION.

CAPE. A judicial writ touching a plea of lands and tenements. The writs which bear this name are of two kinds—namely, *cape magnum*, or grand cape, and *cape parvum*, or petit cape. The petit cape is so called not so much on account of the smallness of the writ as of the letter. Fleta, l. 6, c. 55, § 40. For the difference between the form and the use of these writs, see 2 Wms. Saund. 45 *c*, *d*; Fleta, l. 6, c. 55, § 40.

CAPERS. Vessels of war owned by private persons, and different from ordinary privateers only in size, being smaller. Beawes, Lex Merc. 230.

CAPIAS (Lat. *capere*, to take; *capias*, that you take). **In Practice.** A writ directing the sheriff to take the person of the defendant into custody.

It is a judicial writ, and issued originally only to enforce compliance with the summons of an original writ or with some judgment or decree of the court. It was originally issuable as a part of the original process in a suit only in case of injuries committed by force or with fraud, but was much extended by statutes. See ARREST; BAIL. Being the first word of distinctive significance in the writ, when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested. It was issuable either by the court of Common Pleas or King's Bench, and bore the seal of the court.

Consult Sellon, Practice, Introd.; Spence, Eq. Jur.; BAIL; BREVE; ARREST; 3 Bouvier, Inst. n. 2794.

CAPIAS AD AUDIENDUM JUDICIUM. **In Practice.** A writ issued, in a case of misdemeanor, after the defendant has appeared and is found guilty, to bring him to judgment if he is not present when called. 4 Bla. Com. 368.

CAPIAS AD COMPUTANDUM. **In Practice.** A writ which issued in the action of account render upon the judgment *quod computet*, when the defendant refused to appear in his proper person before the auditors and enter into his account.

According to the ancient practice, the defendant might, after arrest upon this process, be delivered on mainprize, or, in default of finding mainpernors, was committed to the Fleet prison, where the auditors attended upon him to hear and receive his account. The writ is now disused.

Consult Thesaurus Brevium, 38, 39, 40; Coke, Entries, 46, 47; Rastell, Entries, 14 b, 15.

CAPIAS PRO FINE. **In Practice.** A writ which issued against a defendant who had been fined and did not discharge the fine according to the judgment.

The object of the writ was to arrest a defendant against whom a plaintiff had obtained judgment, and detain him until he paid to the king the fine for the public misdemeanor, coupled with the remedy for the private injury sustained, in all cases of forcible torts; 11 Coke, 43; 5 Mod. 285; falsehood in denying one's own deed; Coke, Litt. 131; 8 Coke, 60; unjustly claiming property in replevin, or contempt by disobeying the command of the king's writ, or the express prohibition of any statute; 8 Coke, 60. It is now abolished; 3 Bla. Com. 398.

CAPIAS AD RESPONDENDUM. **In Practice.** A writ commanding the officer to whom it is directed "to take the body of the defendant and keep the same to answer the plaintiff," etc.

This is the writ of capias which is generally intended by the use of the word capias, and was formerly a writ of great importance. For some account of its use and value, see ARREST; BAIL.

According to the course of the practice at common law, the writ bears teste, in the name of the chief justice, or presiding judge of the court, on some day in term-time, when the judge is supposed to be present, not being Sunday, and is made returnable on a regular return day.

If the writ has been served and the defendant does not give bail, but remains in custody, it is returned C. C. (*cepi corpus*); if he have given bail, it is returned C. C. B. B. (*cepi corpus*, bail bond); if the defendant's appearance have been accepted, the return is, "C. C., and defendant's appearance accepted." See 1 Archb. Pr. 67.

CAPIAS AD SATISFACIENDUM. **In Practice.** A writ directed to the sheriff or coroner, commanding him to take the person therein named and him safely keep so that he may have his body in court on the return day of the writ, to satisfy (*ad satisfaciendum*) the party who has recovered judgment against him.

It is a writ of execution issued after judgment, and might have been issued against a plaintiff against whom judgment was obtained for costs, as well as against the defendant in a personal action. As a rule at common law it lay in all cases where a *capias ad respondendum* lay as a part of the mesne process. Some classes of persons were, however, exempt from arrest on mesne process who were liable to it on final. It was a very common form of execution, until within a few years, in many of the states, but its efficiency has been destroyed by statutes facilitating the discharge of the debtor, in some states, and by statutes prohibiting its issue, in others, except in specified cases. See ARREST; PRIVILEGE. It is commonly known by the abbreviation *ca. sa.*

It is tested on a general teste day, and returnable on a general return day.

It is executed by arresting the defendant and keeping him in custody. He cannot be discharged upon bail or by consent of the sheriff. See ESCAPE. And payment to the sheriff is held in England not to be sufficient to authorize a discharge.

The return made by the officer is either C. C. & C. (*cepi corpus et committitur*), or N. E. I. (*non est inventus*). The effect of execution by a ca. sa. is to prevent suing out any other process against the lands or goods of the person arrested, at common law; but this is modified by statutes in the modern law. See EXECUTION.

Consult Archbold; Chitty; Sellon, Practice; 3 Bla. Com. 414.

CAPIAS UTLIGATUM. **In Practice.** A writ directing the arrest of an outlaw.

If *general*, it directs the sheriff to arrest the outlaw and bring him before the court on a general return day.

If *special*, it directs the sheriff, in addition, to take possession of the goods and chattels of the outlaw, summoning a jury to determine their value.

It was a part of the process subsequent to the capias, and was issued to compel an appearance where the defendant had absconded and a capias could not be served upon him. The outlawry was readily reversed upon any plausible pretext, upon appearance of a party in person or by attorney, as the object of the writ was then satisfied. The writ issued after an outlawry in a criminal as well as in a civil case. See 3 Bla. Com. 284; 4 *id.* 320.

CAPIAS IN WITHERNAM. **In Practice.** A writ directing the sheriff to take other goods of a distrainor equal in value to a distress which he has formerly taken and still withholds from the owner beyond the reach of process.

When chattels taken by distress were decided to have been wrongfully taken and were by the distrainor *eloigned*, that is, carried out of the county or concealed, the sheriff made such a return. Thereupon this writ issued, thus putting distress against distress.

Goods taken *in withernam* are irrepleviable till the original distress be forthcoming; 3 Bla. Com. 148.

CAPITA (Lat.). Heads, and figuratively entire bodies, whether of persons or animals. Spelman.

An expression of frequent occurrence in laws regulating the distribution of the estates of persons dying intestate. When all the persons entitled to shares in the distribution are of the same degree of kindred to the deceased person (*e. g.* when all are grandchildren), and claim directly from him in their own right, and not through an intermediate relation, they take *per capita*, that is, equal shares, or share and share alike. But when they are of different degrees of kindred (*e. g.* some the children, others the grandchildren or the great-grandchildren, of the deceased), those more remote take *per stirpem*, or *per stirpes*, that is, they take respectively the shares their parents (or other relation standing in the same degree with them of the surviving kindred entitled, who are in the nearest degree of kindred to the intestate) would have taken had they respectively survived the intestate. Reeve, Descent, Introd. xxvii.; also, 1 Roper, Leg. 126, 130. See PER CAPITA; PER STIRPES; STIRPES.

CAPITAL. In Commerce. The sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership, and also the fund of a trading company. McCulloch; Abb. Dict.

Capital signifies the actual estate, whether in money or property, owned by an individual or corporation; 23 N. Y. 192; it is the fund upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver; 28 Barb. 318; it does not include money borrowed temporarily; 21 Wall. 284. See, also, 31 Conn. 306; 7 Blackf. 295; 5 Blatch. 315; 18 Wend. 605.

CAPITAL CRIME. One for which the punishment of death is inflicted.

CAPITAL PUNISHMENT. The punishment of death.

The subject of capital punishment has occupied the attention of enlightened men for a long time, particularly since the middle of the last century; and none deserves to be more carefully investigated. The right of punishing its members by society is admitted; but how far this right extends, by the laws of nature or of God, has been much disputed by theoretical writers, although it cannot be denied that most nations, ancient and modern, have deemed capital punishment to be within the scope of the legitimate powers of government. Beccaria contends with zeal that the punishment of death ought not to be inflicted in time of peace, nor at other times, except in cases where the laws can be maintained in no other way. Beccaria, chap. 28.

CAPITAL STOCK. The sum, divided into shares, which is raised by mutual subscription of the members of a corporation. It is said to be the sum upon which calls may be made upon the stockholders, and dividends are to be paid; 1 Sandf. Ch. 280; 4 Zabr. 195; Angell & A. Corp. §§ 151, 556. The term is used to indicate the amount of capital which the charter provides for, and not the value of the property of the corporation; 23 N. J. L. 195. See 30 Ark. 693 (*contra*, under an Illinois revenue statute; 83 Ill. 602); the entire sum agreed to be contributed to the enterprise, whether paid in or not; 40 Ga. 98.

It has been held to mean the amount paid in, not the amount subscribed; 52 Penn. 177; *contra*, 8 Ga. 486.

CAPITALIS JUSTICIARIUS. The chief justiciary; the principal minister of state, and guardian of the realm in the king's absence.

This office originated under William the Conqueror; but its power was greatly diminished by Magna Charta, and finally distributed among several courts by Edward I. Spelman, Gloss.; 3 Bla. Com. 38.

CAPITANEUS. He who held his land or title directly from the king himself.

A commander or ruler over others, either in civil, military, or ecclesiastical matters.

A naval commander. This latter use began A. D. 1264. Spelman, Gloss. *Capitaneus*, *Admiralius*.

CAPITATION (Lat. *caput*, head). A poll-tax. An imposition yearly laid upon each person.

The constitution of the United States provides that "no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration, thereinbefore directed to be taken." Art. 1, s. 9, n. 4. See 3 Dall. Penn. 171; 5 Wheat. 317.

CAPITE. See IN CAPITE.

CAPITULA. Collections of laws and ordinances drawn up under heads or divisions. Spelman, Gloss.

The term is used in the civil and old English law, and applies to the ecclesiastical law also, meaning chapters or assemblies of ecclesiastical persons. Du Cange.

CAPITULA CORONÆ. Specific and minute schedules, or *capitula itineris*.

CAPITULA ITINERIS. Schedules of inquiry delivered to the justices in eyre before setting out on their circuits, and which were intended to embrace all possible crimes.

CAPITULA DE JUDÆIS. A register of mortgages made to the Jews. 2 Bla. Com. 343; Crabb, Eng. Law, 130 *et seq.*

CAPITULARY. In French Law. A collection of laws and ordinances orderly arranged by divisions.

The term is especially applied to the collections of laws made and published by the early French emperors.

The execution of these capitularies was intrusted to the bishops, courts, and *missi regis*; and many copies were made. The best edition of the Capitularies is said by Butler to be that of Baluze, 1677. Coke, Litt. 191 *a*, Butler's note, 77.

In Ecclesiastical Law. A collection of laws and ordinances orderly arranged by divisions. A book containing the beginning and end of each Gospel which is to be read every day in the ceremony of saying mass. Du Cange.

CAPITULATION. The treaty which determines the conditions under which a fortified place is abandoned to the commanding officer of the army which besieges it.

On surrender by capitulation, all the property of the inhabitants protected by the articles is considered by the law of nations as neutral, and not subject to capture on the high seas by the belligerent or its ally; 2 Dall. 8.

In Civil Law. An agreement by which the prince and the people, or those who have the right of the people, regulate the manner in which the government is to be administered. Wolffius, § 989.

CAPITUR PRO FINE. See CAPIAS PRO FINE. See, also, Wharton, Dict.

CAPTAIN (Lat. *capitaneus*; from *caput*, head). The commander of a company of soldiers.

The term is also used of officers in the municipal police in a somewhat similar sense: as, captain of police, captain of the watch.

The master or commander of a merchant-vessel, or a vessel of war.

A subordinate officer having charge of a certain part of a vessel of war.

In the United States, the commander of a merchant-vessel is, in statutes and legal proceedings and language, more generally termed *master*, which title see. In foreign laws and languages he is frequently styled *patron*.

The rank of captain in the United States navy is next above that of commander; and captains are generally appointed from this rank in the order of seniority. The president has the appointing power, subject to the approval and consent of the senate.

CAPTATION. In French Law. The act of one who succeeds in controlling the will of another, so as to become master of it. It is generally taken in a bad sense.

Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those services and officious little presents, which are usual among friends, and by all those means which ordinarily render us agreeable to others. When these attentions are unattended by deceit or fraud, they are perfectly fair, and the captation is lawful; but if, under the mask of friendship, fraud is the object, and means are used to deceive the person with whom you are connected, then the captation is fraudulent, and the acts procured by the captator are void.

CAPTION (Lat. *capere*, to take). A taking, or seizing; an arrest. The word is no longer used in this sense.

The heading of a legal instrument, in which is shown when, where, and by what authority it was taken, found, or executed.

In the English practice, when an inferior court, in obedience to the writ of certiorari, returned an indictment into the king's bench, it was annexed to the caption, then called a schedule, and the caption concluded with stating that "it is presented in manner and form as appears in a certain indictment thereto annexed," and the caption and indictment were returned on separate parchments; 1 Wms. Saund. 309, n. 2.

In some of the states, every indictment has a caption attached to it, and returned by the grand jury as part of their presentment in each particular case; and in this respect a caption differs essentially from that of other tribunals, where the separate indictments are returned without any caption, and the caption is added by the clerk of the court, as a general caption embracing all the indictments found at the term; 3 Gray, 454; 4 *id.* 5; 6 Cush. 174.

In Criminal Practice. The object of the caption is to give a formal statement of the proceedings, describe the court before which the indictment is found, and the time and place when it was found; 3 Gray, 454; and the jurors by whom it was found; Whart. Cr. Pl. § 91. Thus particulars must be set forth with reasonable certainty; 6 McLean, 66; 39 Me. 78; 20 Ala. 33. It must show that the *venire facias* was returned, and from whence the jury came; Whart. Cr. Pl. § 91. The caption may be amended in the court in which the indictment was found; 6 McLean, 156; 101 Mass. 33; 78 Penn. 122; even in the supreme court; 4 Halst. 357; 2 McCord, 301. It is no part of the indictment; 3 Gray, 454; 37 N. H. 196; 37 N. Y. 117; 24 Ala. 672.

In Depositions. The caption should state the title of the cause, the names of the parties, and at whose instance the depositions are taken; 2 Cra. 123; 34 Me. 208. See 1 Hemp. 701.

See Week, Depositions.

For some decisions as to the forms and requisites of captions, see 1 Murph. 281; 1 Brev. 169; 8 Yerg. 514; 1 Hawks, 354; 6 Mo. 469; 2 Ill. 456; 6 Blackf. 299; 6 Miss. 20.

CAPTIVE. A prisoner of war. Such a person does not by his capture lose his civil rights.

CAPTOR. One who has taken property from an enemy: this term is also employed to designate one who has taken an enemy.

Formerly, goods taken in war were adjudged to belong to the captor; they are now considered to vest primarily in the state or sovereign, and belong to the individual captors only to the extent that the municipal laws provide. Captors are responsible to the owners of the property for all losses and damages, when the capture is tortious and without reasonable cause in the exercise of belligerent rights. But if the capture is originally justifiable, the captors will not be responsible, unless by subsequent misconduct they become trespassers *ab initio;* 1 C. Rob. Adm. 93, 96. See 2 Gall. 374; 1 *id.* 274; 1 Pet. Adm. 116; 1 Mas. 14.

CAPTURE. The taking of property by one belligerent from another.

To make a good capture of a ship, it must be subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.

Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. The former is the capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to deprive the owner of it. Capture is deemed lawful when made by a declared enemy lawfully commissioned and according to the laws of war, and unlawful, when it is against the rules established by the law of nations; Marshall, Ins. b. 1, c. 12, s. 4. All captures *jure belli* are made for the government; 10 Wheat. 306; 1 Kent, 100. See 1 Curt. C. C. 266.

See, generally, 1 Kent, 100 *et seq.;* Bouvier, Inst.; Story, Const. §§ 1168–1177; Wheaton, Int. Law; Phillimore, Int. Law; PRIZE; 2 Caines, Cas. 158; 7 Johns. 449; 13 *id.* 161; 14 *id.* 227; 6 Mass. 197; 4 Cranch, 43; 11 Wheat. 1; 2 How. 210; Paine, 129.

CAPUT (Lat. head).

In Civil Law. Status; a person's civil condition.

According to the Roman law, three elements concurred to form the *status* or *caput* of the citizen, namely, liberty, *libertas*, citizenship, *civitas*, and family, *familia*.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur. This definition of liberty has been translated by Dr. Cooper, and all the other English translators of the Institutes, as follows: "Freedom, from which we are denominated free, is the natural power of acting as we please, unless prevented by force or by the law." This, although it may be a literal, is certainly not a correct, translation of the text. It is absurd to say that liberty consists in the power of acting as we think proper, so far as not restrained by force; for it is evident that even the slave can do what he chooses, except so far as his volition is controlled by the power exercised over him by his master. The true meaning of the text is, "Liberty (from which we are called free) is the power which we derive from nature of acting as we please, except so far as restrained by physical and moral impossibilities." It is obvious that a person is perfectly free though he cannot reach the moon nor stem the current of the Mississippi; and it is equally clear that true freedom is not impaired by the rule of law not to appropriate the property of another to ourselves, or the precept of morality to behave with decency and decorum.

Civitas—the city—reminds us of the celebrated expression, "*civis sum Romanus*," which struck awe and terror into the most barbarous nations. The citizen alone enjoyed the *jus Quiritium*, which extended to the family ties, to property, to inheritance, to wills, to alienations, and to engagements generally. In striking contrast with the *civis* stood the *peregrinus*, *hostis*, *barbarus*. *Familia*—the family—conveyed very different ideas in the early period of Roman jurisprudence from what it does in modern times. Besides the singular organization of the Roman family, explained under the head of pater familias, the members of the family were bound together by religious rites and sacrifices,—*sacra familiæ*.

The loss of one of these elements produced a change of the *status*, or civil condition; this change might be threefold; the loss of liberty carried with it that of citizenship and family, and was called the *maxima capitis deminutio;* the loss of citizenship did not destroy liberty, but deprived the party of his family, and was denominated *media capitis deminutio;* when there was a change of condition by adoption or abrogation, both liberty and citizenship were preserved, and this produced the *minima capitis deminutio*. But the loss or change of the *status*, whether the great, the less, or the least, was followed by serious consequences: all obligations merely civil were extinguished; those purely natural continued to exist. Gaius says, *Eas obligationes quæ naturalem præstationem habere intelliguntur, palam est capitis deminutione non perire, quia civilis ratio naturalia jura corrumpere non potest.* Usufruct was extinguished by the diminution of the head: *amittitur usufructus capitis deminutione.* D. 3. 6. § 28. It also annulled the testament: "*Testamenta jure facta infirmantur, cum is qui fecerit testamentum capite deminutus sit.*" Gaius, 2, § 143. *Capitis deminutio* means that the family, to which the person whose *status* has been lost or changed belongs, has lost a head, or one of its members. See Rattigan, Roman Law.

At Common Law. A head.

Caput comitatis (the head of the county). The sheriff; the king. Spelman, Gloss.

A person; a life. The upper part of a town. Cowel. A castle. Spelman, Gloss.

Caput anni. The beginning of the year. Cowel.

CAPUT LUPINUM (Lat.). Having a wolf's head.

Outlaws were anciently said to have *caput lupinum*, and might be killed by any one who met them, if attempting to escape; 4 Bla. Com. 320. In the reign of Edward III. this power was restricted to the sheriff when armed with lawful process; and this power, even, has long since disappeared, the process of outlawry being resorted to merely as a means of compelling an appearance; Coke, Litt. 128 *b*; 3 Bla. Com. 284; 1 Reeve's Hist. Eng. Law, 471.

CAPUTAGIUM. Head-money; the payment of head-money. Spelman, Gloss; Cowel.

CARAT. The weight of four grains, used by jewellers in weighing precious stones. Webster.

CARCAN. In French Law. An instrument of punishment, somewhat resembling a pillory. It sometimes signifies the punishment itself. Biret, Vocab.

CARDINAL. In Ecclesiastical Law. The title given to one of the highest dignitaries of the church of Rome.

Cardinals are next to the pope in dignity: he is elected by them and out of their body. There are cardinal bishops, cardinal priests, and cardinal deacons. See Fleury, *Hist. Ecclés.* liv. xxxv. n. 17, li. n. 19; Thomassin, part ii. liv. i. c. 53, part iv. liv. i. cc. 79, 80; Loiseau, *Traité des Ordres*, c. 3. n. 31; André, *Droit Canon.*

CARDS. In Criminal Law. Small rectangular pasteboards, generally of a fine quality, on which are painted figures of various colors, and used for playing certain games. The playing of cards for amusement is not forbidden; nor is gaming for money, at common law; Bish. Stat. Cr. § 504.

CARETA (spelled, also, *Carreta* and *Carecta*). A cart; a cart-load.

In Magna Charta (9 Hen. III. c. 21) it is ordained that no sheriff shall take horses or carts (*careta*) without paying the ancient livery therefor.

CARGO. In Maritime Law. The entire load of a ship or other vessel; Abbott, Shipp.; 1 Dall. 197; Merlin, *Répert.;* 2 Gill. & J. 136.

This term is usually applied to *goods* only, and does not include human beings; 1 Phillips, Ins. 185; 4 Pick. 429. But in a more extensive and less technical sense it includes persons: thus, we say, A cargo of emigrants. See 7 M. & G. 729, 744.

CARNAL KNOWLEDGE. Sexual connection. The term is generally, if not exclusively, applied to the act of the male.

CARNALLY KNEW. In Pleading. A technical phrase essential in an indictment to charge the defendant with the crime of rape.

No other words nor circumlocution will suffice. Comyns, Dig. *Indictment;* 1 Hale, Pl. Cr. 632; 1 Chitty, Cr. Law, 243; Coke, Litt. 137. Their omission renders an indictment bad on demurrer, but is cured by a verdict; 1 Russ. 686; 1 East, Pl. Cr. 448; 97 Mass. 59.

CARRIER. One who undertakes to transport goods from one place to another; 1 Parsons, Contr. 632.

They are either *common* or *private*. Private carriers incur the responsibility of the exercise of ordinary diligence only, like other bailees for hire; Story, Bailm. § 495; 13 Barb. 481; 1 Wend. 272; 1 Hayw. 14; 2 Dana, 430; 4 Taunt. 787; 6 *id.* 577; 2 B. & P. 417; 2 C. B. 877. See COMMON CARRIER.

CARRYING AWAY. In Criminal Law. Such a removal or taking into possession of personal property as is required in order to constitute the crime of larceny.

The words "did take and carry away" are a translation of the words *cepit et asportavit*, which were used in indictments when legal processes and records were in the Latin language. But no single word in our language expresses the meaning of *asportavit*. Hence the word "away," or some other word, must be subjoined to the word "carry," to modify its general signification and give it a special and distinctive meaning; 7 Gray, 45.

Any removal, however right, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient; 2 Bishop, Crim. Law, § 699; 1 Mood. 14; 1 Dearsl. 421; Coxe, 439. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair; 1 Leach, 320; to remove sheets from a bed and carry them into an adjoining room; 1 Leach, 222, n.; to take plate from a trunk, and lay it on the floor with intent to carry it away; *id.*; to remove a package from one part of a wagon to another, with a view to steal it; 1 Leach, 236; have respectively been holden to be felonies. But nothing less than such a severance will be sufficient; 2 East, Pl. Cr. 556; 1 Leach, 4th ed. 236, 321; 1 Hall, Pl. Cr. 508; 1 Ry. & M. 14; 4 Bla. Com. 231; 2 Russell, Cr. 96.

CART. A carriage for luggage or burden, with two wheels, as distinguished from a wagon, which has four wheels. Worcester, Dict.; Brande. The vehicle in which criminals are taken to execution. Johnson.

The term has been held to include four-wheeled vehicles, to carry out the intent of a statute; 22 Ala. N. S. 621.

CART BOTE. An allowance to the tenant of wood sufficient for carts and other instruments of husbandry. 2 Bla. Com. 35.

CARTA. A charter, which title see. Any written instrument.

In Spanish Law. A letter; a deed; a power of attorney. Las Partidas, pt. 3, t. 18, l. 30.

CARTE BLANCHE. The signature of one or more individuals on a white paper, with a sufficient space left above it to write a note or other writing.

In the course of business, it not unfrequently occurs that, for the sake of convenience, signatures in blank are given with authority to fill them up. These are binding upon the parties. But the blank must be filled up by the very person authorized; 6 Mart. La. 707. See Chitty, Bills, 70; 2 Penn. 200.

CARTEL. An agreement between two belligerent powers for the delivery of prisoners or deserters, and also a written challenge to a duel.

Cartel ship. A ship commissioned in time of war to exchange prisoners, or to carry any proposals between hostile powers: she must carry no cargo, ammunition, or implements of war, except a single gun for signals. The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations; 4 C. Rob. Adm. 357. See Merlin, *Répert.*; Dane, Abr. c. 40, a. 6, § 7; 1 Kent, 68, 69; 3 Phill. Int. Law, 161–163; 1 Pet. C. C. 106; 3 C. Rob. Adm. 141; 6 *id.* 336; 1 Dods. Adm. 60.

CARTMEN. Persons who carry goods and merchandise in carts, either for great or short distances, for hire.

Cartmen who undertake to carry goods for hire as a common employment are common carriers; 3 C. & K. 61; Story, Bailm. § 496. And see 2 Wend. 327; 2 N. & M'C. 88; 1 M'Cord, 444; 2 Bail. 421; 2 Vt. 92; 1 Murph. 417; Bacon, Abr. *Carriers*, A.

CARUCAGE. A taxation of land by the *caruca* or *carue*.

The *caruca* was as much land as a man could cultivate in a year and a day with a single plough (*caruca*). *Carucage*, *carugage*, or *caruage* was the tribute paid for each *caruca* by the *carucarius*, or tenant. Spelman, Gloss.; Cowel.

CARUCATA. A certain quantity of land used as the basis for taxation. As much land as may be tilled by a single plough in a year and a day. Skene, *de verb. sig.* A team of cattle. A cartload.

It may include houses, meadow, woods, etc. It is said by Littleton to be the same as *soca*, but has a much more extended signification. Spelman, Gloss.; Blount; Cowel.

CASE. In Practice. A question contested before a court of justice. An action or suit at law or in equity. 1 Wheat. 352.

A case arising under a treaty (U. S. Const. art. 3, sect. 2) is a suit where is drawn in question the construction of a treaty and the decision is against the title set up by either party under such treaty; *Story*, J.; 1 Wheat. 356. And see also 6 Cra. 286; 9 Wheat. 819; 11 How. 529; 12 *id.* 111.

In Practice. A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Steph. Pl. 15.

Case, or, more fully, action upon the case, or trespass on the case, includes in its widest sense *assumpsit* and *trover*, and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the

ancient actions, the writs in which, called *brevia formata*, are collected in the *Registrum Brevium*.

By the common law, and by the statute Westm. 2d, 13 Edw. I. c. 24, if any cause of action arose for which no remedy had been provided, a new writ was to be formed, analogous to those already in existence which were adapted to similar causes of action. The writ of trespass was the original writ most commonly resorted to as a precedent; and in process of time the term trespass seems to have been so extended as to include every species of wrong causing an injury, whether it was *mal*feasance, *mis*feasance, or *non*feasance, apparently for the purpose of enabling an action on the case to be brought in the king's bench. It thus includes actions on the case for breach of a parol undertaking, now called assumpsit (see ASSUMPSIT), and actions based upon a finding and subsequent unlawful conversion of property, now called trover (see TROVER), as well as many other actions upon the case which seem to have been derived from other originals than the writ of trespass, as nuisance, deceit, etc.

And, as the action had thus lost the peculiar character of a technical trespass, the name was to a great extent dropped, and actions of this character came to be known as actions on the case.

As used at the present day, *case* is distinguished from *assumpsit* and *covenant*, in that it is not founded upon any contract, express or implied; from *trover*, which lies only for unlawful conversion; from *detinue* and *replevin*, in that it lies only to recover damages; and from *trespass*, in that it lies for injuries committed without force, or for forcible injuries which damage the plaintiff consequentially only, and in other respects. See 3 Reeves, Eng. Law, 84; 1 Spence, Eq. Jur. 237–243; 1 Chitty, Pl. 123; 3 Bla. Com. 41.

A similar division existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. Upon innominate contracts, however, an action *præscriptis verbis* (which lay where the obligation was one already recognized as existing at law, but to which no name had been given), or *in factum* (which was founded on the equity of the particular case), might be brought.

The action lies for:

Torts not committed with force, actual or implied; 2 Ired. 38; 2 Gratt. 366; 20 Vt. 151; 8 Ga. 190; as, for malicious prosecution; 6 Munf. 27, 113; 11 G. & J. 80; 7 B. Monr. 545; 21 Ala. N. S. 491; see MALICIOUS PROSECUTION; fraud in purchases and sales; 5 Yerg. 290; 1 T. B. Monr. 215; 17 Wend. 193; 7 Ala. 185; 22 *id.* 501; 11 Metc. 356; 3 Cush. 407; 17 Penn. 293; 4 Strobh. 69; 15 Ark. 109; 18 Ill. 299.

Torts committed forcibly where the matter affected was *not tangible;* 2 Conn. 529; 2 Vt. 68; as, for obstructing a private way; 14 Johns. 383; 5 H. & J. 467; 18 Pick. 110; 4 Penn. 486; 23 *id.* 348; 2 Dutch. 308; disturbing the plaintiff in the use of a pew; 1 Chitty, Pl. 43; injury to a franchise.

Torts committed forcibly when the injury is consequential merely, and not immediate; 6 S. & R. 348; 6 H. & J. 230; 4 D. & B. 146; as, special damage from a public nuisance; Willes, 71; 5 Blackf. 35; 1 Rich. So. C. 444; 3 Barb. 42; 3 Cush. 300; 4 McLean, 333; 12 Penn. 81; 3 Md. 431; acts done on the defendant's land which by immediate consequence injure the plaintiff; Stra. 634; 2 Green, 472; 21 Pick. 378; 8 Cush. 595; 7 Monr. 325; 8 B. Monr. 453; 18 Me. 32; 35 *id.* 271; 2 Barb. 165; 2 N. Y. 159, 163; 17 Ohio, 489; 18 *id.* 229; 1 N. J. 5; 12 Ill. 20; 22 Vt. 38; 21 Conn. 213; 3 Md. 431. See 20 Vt. 302; 4 N. Y. 195; 5 Rich. So. C. 583.

Injuries to the relative rights; 1 Halst. 322; 1 M'Cord, 207; 3 S. & R. 215; 2 Murph. 61; 7 Ala. 169; 6 T. B. Monr. 296; 7 Blackf. 578; 3 Denio, 361; enticing away servants and children; 1 Chitty, Pl. 137; 4 Litt. 25; 15 Barb. 489; seduction of a daughter or servant; 5 Me. 546; 2 Greene, 520. See 6 Munf. 587; 1 Gilm. 33; SEDUCTION.

Injuries which result from *negligence;* 7 Mass. 169; 1 Cush. 475; 23 Me. 371; 1 Denio, 91; 2 Ired. 138; 9 *id.* 73; 18 Vt. 620; 21 *id.* 102; 2 Strobh. 356; 4 Rich. 228; 9 Ark. 85; 24 Miss. 93; 20 Penn. 387; 13 B. Monr. 219; 15 Ill. 366; 3 Ohio St. 172; see 5 Denio, 255; 20 Vt. 529; 19 Conn. 507; 29 Me. 307; 16 Penn. 463; 2 Mich. 259; though the direct result of actual force; 10 Bingh. 112; 4 B. & C. 223; 14 Johns. 432; 17 *id.* 92; 17 Barb. 94; 3 N. H. 465; 11 Mass. 137; 2 Harr. Del. 443; 2 Ired. 206; 18 Vt. 605; 7 Blackf. 342; 1 R. I. 474.

Wrongful acts done under a legal process regularly issuing from a court of competent jurisdiction; 2 Conn. 700; 9 *id.* 141; 11 Mass. 500; 6 Me. 421; 1 Bail. 441; 19 Ala. 760; 21 *id.* 491; 2 Litt. 234; 6 Dana, 321; 3 G. & J. 377; 13 Ga. 260; 6 Cal. 399. See 3 S. & R. 142; 12 *id.* 210.

Wrongful acts committed by the defendant's servant without his order, but for which he is responsible; 17 Mass. 246; 1 Pick. 66; 3 Cush. 300; 8 Wend. 474; 9 Humphr. 757; 13 B. Monr. 219; 2 Ohio St. 536; 17 Ill. 580.

The infringement of rights given by statute; 15 Conn. 526; 7 Mass. 169; 23 Me. 371; 9 Vt. 411; 2 Woodb. & M. 337.

Injuries committed to property of which the plaintiff has the *reversion* only; 8 Pick. 235; 4 Gray, 197; 7 Conn. 328; 24 *id.* 15; 2 Green, 8; 1 Johns. 511; 3 Hawks, 246; Busb. 30; 2 Murph. 61; 2 N. H. 430; 3 *id.* 103; 5 Penn. 118; 8 *id.* 523; 2 Dougl. 184; 4 Harr. Del. 181; 21 Vt. 108; 1 Dutch. 97, 255; 41 Me. 104; see 1 N. Y. 528; as where property is in the hands of a bailee for hire; 3 Campb. 187; 3 East, 593; 3 Hawks, 246; 8 B. Monr. 515.

As to the effect of intention, as distinguishing case from trespass, see 1 M'Mull. 364; 7 Blackf. 342; 4 Denio, 464; 4 Barb. 225; 30 Me. 173; 13 Ired. 50; 26 Ala. N. S. 633. In some states the distinction is expressly abolished by statute; 25 Me. 86; 8 Blackf. 119; 3 Sneed, 20; 1 Wisc. 352.

The declaration must not state the injury to have been committed *vi et armis;* 3 Conn. 64 (yet after verdict the words *vi et armis* (with force and arms) may be rejected as surplusage; Harp. 122); and should not conclude *contra pacem.* Comyns, Dig. *Action on the Case* (C, 3).

Damages not resulting necessarily from the

acts complained of must be specially stated; 3 Strobh. 373; 32 Me. 578; 5 Cush. 104; 9 Ga. 160; 4 Chandl. Wisc. 20. Evidence which shows the injury to be trespass will not support case; 5 Mass. 560; 16 *id.* 451; 3 Johns. 468; 4 Barb. 596; 3 Md. 431. See 2 Rand. 440; 8 Blackf. 119.

The plea of not guilty raises the general issue; 2 Ashm. 150. Under this plea almost any matter may be given in evidence, except the statute of limitations; and the rule is modified in actions for slander and a few other instances; 1 Wms. Saund. 130, n. 1; Willes, 20.

The judgment is that the plaintiff recover a sum of money ascertained by a jury for his damages sustained by the commission of the grievances complained of in the declaration; 2 Ired. 221; 18 Vt. 620; 18 Conn. 494; with costs.

CASE STATED. In Practice. A statement of all the facts of a case, with the names of the witnesses, and a detail of the documents which are to support them. A brief.

An agreement in writing, between a plaintiff and defendant, that the facts in dispute between them are as therein agreed upon and set forth. 3 Whart. 143.

Some process of this kind exists, it is presumed, in all the states, for the purpose of enabling parties who agree upon the facts to dispense with a formal trial to ascertain what is already known, and secure a decision upon the law involved merely. These agreements are called also agreed cases, cases agreed on, agreed statements, etc. In chancery, also, when a question of mere law comes up, it is referred to the king's bench or common pleas, upon a case stated for the purpose; 3 Sharsw. Bla. Com. 453, n.; 6 Term, 313.

The jury in such case find a general verdict for the plaintiff or defendant, subject to the decision of the court upon the law-questions involved; 3 Bla. Com. 378.

The facts being thus ascertained, it is left for the court to decide for which party is the law. As no writ of error lies on a judgment rendered on a case stated; Dane, Abr. c. 137, art. 4, § 7; it is usual in the agreement to insert a clause that the case stated shall be considered in the nature of special verdict.

In that case, a writ of error lies on the judgment which may be rendered upon it. And a writ of error will also lie on a judgment on a case stated, when the parties have agreed to it; 8 S. & R. 529.

CASH. That which circulates as money, including bank bills, but not mere bills receivable. The provision of the limited partnership acts requiring "actual cash payment" by the special partner is not complied with by the delivery to the firm of promissory notes, which are received and treated as cash; 5 Allen, 91; nor of credits, 62 N. Y. 513; nor of post-dated checks, 69 *id.* 148; though regular checks of third parties, conceded to represent cash, have been allowed, 34 Penn. 344.

Cash price is the price of articles paid for in cash at the time of purchase, in distinction from the barter and credit prices.

CASH-BOOK. A book in which a merchant enters an account of all the cash he receives or pays. An entry of the same thing ought to be made, under the proper dates, in the journal. The object of the cash-book is to afford a constant facility to ascertain the true state of a man's cash. Pardessus, n. 87.

CASHIER. An officer of a moneyed institution, or of a private person or firm, who is entitled by his office to take care of the cash or money of such institution, person, or firm.

The cashier of a bank is usually intrusted with all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly, or through subordinate officers, all moneys and notes of the bank; delivers up all discounted notes and other securities; signs drafts on corresponding banks, and, with the president, the notes payable on demand issued by the bank; and, as an executive officer of the bank, transacts much of its general business. He need not be a stockholder; indeed, some bank charters prohibit him from owning stock in the bank. He usually gives security for the faithful discharge of his trusts. It is his duty to make reports to the proper state officer (in banks incorporated under the national bank act to the comptroller of the currency; U. S. R. S. § 5210 *et seq.*) of the condition of the bank, as provided by law; and false statements are punished, and render the cashier liable for any damage resulting to third parties therefrom. Bank Mag. July, 1860.

In general, the bank is bound by the acts of the cashier within the scope of his authority, express or implied; 1 Pet. 46, 70; 8 Wheat. 300, 361; 5 *id.* 326; 10 Wall. 604; 3 Mas. 505; 1 Holmes, 396; 1 Ill. 45; 1 T. B. Monr. 179. But the bank is not bound by a declaration of the cashier not within the scope of his authority: as if, when a note is about to be discounted by the bank, he tells a person that he will incur no risk nor responsibility by becoming an indorser on such note; 6 Pet. 51; 8 *id.* 12. See 95 U. S. 557; 58 How. Pr. 267; 17 Mass. 1; Story, Ag. §§ 114, 115; Whart. Ag. §§ 684–687; 3 Am. L. Rev. 612; 3 Halst. 1; 12 Wheat. 183; 1 W. & S. 161; 1 Pars. Eq. Cas. 240.

In Military Law. To deprive a military officer of his office. See Art. of War, art. 14.

CASSARE. To quash; to render void; to break. Du Cange.

CASSATION. In French Law. A decision emanating from the sovereign authority, by which a decree or judgment in the court of last resort is broken or annulled. See COUR DE CASSATION.

CASSETUR BREVE (Lat. that the writ be quashed). **In Practice.** A judgment sometimes entered against a plaintiff at his request when, in consequence of allegations

of the defendant, he can no longer prosecute his suit with effect.

The effect of such entry is to stop proceedings, and exonerate the plaintiff from liability for future costs, leaving him free to sue out new process; 3 Bla. Com. 303. See Gould, Pl. c. 5, § 139; 3 Bouvier, Inst. n. 2913, 2914; 5 Term, 634.

CASTELLAIN, CASTELLANUS. The keeper or captain of a fortified castle; the constable of a castle. Spelman, Gloss.; Termes de la Ley; Blount.

CASTELLORUM OPERATIO. In Old English Law. Service or labor done by inferior tenants for the building and upholding of castles and public places of defence.

Towards this some gave their personal service, and others, a contribution of money or goods. This was one branch of the *trinoda necessitas;* 1 Bla. Com. 263; from which no lands could be exempted under the Saxons; though immunity was sometimes allowed after the conquest. Kennett, Paroch. Ant. 114; Cowel.

CASTIGATORY. An engine used to punish women who have been convicted of being common scolds. It is sometimes called the trebucket, tumbrel, ducking-stool, or cucking-stool. This barbarous punishment has perhaps never been inflicted in the United States; 12 S. & R. 225.

CASTING-VOTE. The privilege which the presiding officer possesses of deciding a question where the body is equally divided. The vice-president of the United States, as president of the senate, has the casting-vote when that body is equally divided, but cannot vote at any other time; Const. I. 3. This is a provision frequently made, though in some cases the presiding officer, after giving his vote with the other members, is allowed to decide the question in case of a tie; 48 Barb. 603.

CASTRATION. In Criminal Law. The act of gelding. When this act is maliciously performed upon a man, it is a mayhem, and punishable as such, although the sufferer consented to it; 2 Bishop, Cr. Law, §§ 1001, 1008. By the ancient law of England the crime was punished by retaliation, *membrum pro membro;* Coke, 3d Inst. 118. It is punished in the United States, generally, by fine and imprisonment. The civil law punished it with death. Dig. 47. 8. 4. 2. For the French law, vide Code Pénal, art. 316. The consequences of castration, when complete, are impotence and sterility. 1 Beck, Med. Jur. 72.

CASU PROVISO (Lat. in the case provided for). **In Practice.** A writ of entry framed under the provisions of the statute of Gloucester (6 Edw. I.) c. 7, which lay for the benefit of the reversioner when a tenant in dower aliened in fee or for life.

It seems to have received this name to distinguish it from a similar writ framed under the provisions of the statute Westm. 2d (13 Edw. I.) c. 24, where a tenant by curtesy had alienated as above, and which was known emphatically as the writ *in consimili casu*.

The writ is now practically obsolete. Fitzh. Nat. Brev. 205; Dane, Abr. Index.

CASUAL EJECTOR. In Practice. The person supposed to perform the fictitious ouster of the tenant of the demandant in an action of ejectment. See EJECTMENT.

CASUALTIES OF SUPERIORITY. In Scotch Law. Certain emoluments arising to the superior lord in regard to the tenancy.

They resemble the *incidents* to the feudal tenure at common law. They take precedence of a creditor's claim on the tenant's land, and constitute a personal claim also against the vassal; Bell, Dict. They have very generally disappeared; Paterson, Comp. 29.

CASUALTY. Inevitable accident. Unforeseen circumstances not to be guarded against by human agency, and in which man takes no part. Story, Bailm. § 240; 1 Parsons, Contr. 543–547; Whart. Negl. § 558.

CASUS FŒDERIS (Lat.). **In International Law.** A case within the stipulations of a treaty.

The question whether, in case of a treaty of alliance, a nation is bound to assist its ally in war against a third nation, is determined in a great measure by the justice or injustice of the war. If manifestly unjust on the part of the ally, it cannot be considered as *casus fœderis*. Grotius, b. 2, c. 25; Vattel, b. 2, c. 12, § 168.

See 1 Kent, 49; 3 Cow. 264.

CASUS FORTUITUS (Lat.). An inevitable accident. A loss happening in spite of all human effort and sagacity. 3 Kent, 217, 300; Whart. Negl. §§ 113, 553.

It includes such perils of the sea as strokes of lightning, etc. A loss happening through the agency of rats was held an unforeseen, but not an inevitable, accident. 1 Curt. C. C. 148. The happening of a *casus fortuitus* excuses ship-owners from liability for goods conveyed; 3 Kent, 216; L. R. 1 C. P. D. 143.

CASUS MAJOR (Lat.). An unusual accident. Story, Bailm. § 240.

CASUS OMISSUS (Lat.). A case which is not provided for. When such cases arise in statutes which are intended to provide for all cases of a given character which may arise, the common law governs; 5 Coke, 38; 11 East, 1; 2 Binn. 279; 2 Sharsw. Bla. Com. 260; Broom, Max. 46. A casus omissus may occur in a contract as well as in a statute; 2 Bla. Com. 260.

CATALLA OTIOSA (Lat.). Dead goods, and animals other than beasts of the plough, *averia carucæ*, and sheep. 3 Bla. Com. 9; Bract. 217 *b*.

CATALLUM. A chattel.

The word is used more frequently in the plural, *catalla*, but has then the same signification, denoting all goods, movable or immovable, except such as are in the nature of fees and freeholds. Cowel; Du Cange.

CATANEUS. A tenant *in capite*. A tenant holding immediately of the crown. Spelman, Gloss.

CATCHING BARGAIN. An agreement made with an heir expectant for the purchase of his expectancy at an inadequate price.

In such cases the heir is, in general, entitled to relief in equity, and may have the contract rescinded upon terms of redemption; 1 Vern. 167, 320, n.; 2 *id.* 121; 2 Cox, 80; 2 Ch. Cas. 136; 2 Freem. 111; 2 Ventr. 329; 1 P. Wms. 312; 3 *id.* 290, 293, n.; 1 Cro. Car. 7; 2 Atk. 133; 2 Swanst. 147, and the cases cited in the note; 1 Fonbl. Eq. 140; 1 Belt, Supp. Ves. Jr. 66; 2 *id.* 361. It has been said that all persons dealing for a reversionary interest are subject to this rule; but it may be doubted whether the course of decisions authorizes so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir; 2 Swanst. 148, n. See 1 Ch. Pr. 112, 113, n., 458, 826, 838, 839. A mere hard bargain is not sufficient ground for relief.

The English law on this subject has been so altered by stat. 31 and 32 Vic. c. 4, that, while before that act slight inadequacy of consideration was sufficient to set the contract aside, at present only positive unfairness will be relieved against; Bisph. Eq. § 221, and cases cited. See Chesterfield *v.* Janssen, 1 Lead. Cas. Eq. 773, and notes; Bisph. Eq. § 220 *et seq.*

CATCHPOLE. A name formerly given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons. He was a sort of sergeant. The word is not now in use as an official designation; Minshew.

CATER COUSIN. A very distant relation. Bla. Law Tracts, 6.

CATHEDRAL. In Ecclesiastical Law. A tract set apart for the service of the church.

After the establishment of Christianity, the emperors and other great men gave large tracts of land whereon the first places of public worship were erected,—which were called *cathedræ*, cathedrals, *sees*, or seats, from the clergy's residence thereon. And when churches were afterwards built in the country, and the clergy were sent out from the cathedrals to officiate therein, the cathedral or head seat remained to the bishop, with some of the chief of the clergy as his assistants.

CATHOLIC CREDITOR. In Scotch Law. A creditor whose debt is secured on several parts or all of his creditor's property. Such a creditor is bound to take his payment with reference to the rights of the secondary creditors, or, if he disregards their rights, must assign over to them his claims. This rule applies where he collects his debts of a cautioner (surety). Bell, Dict.

CATHOLIC EMANCIPATION ACT. The act 10 Geo. IV. c. 7. This act relieves from disabilities and restores all civil rights to Catholics, except that of holding ecclesiastical offices and certain high state offices. 3 Steph. Com. 109.

CATTLE GATE. A customary proportionate right of pasture enjoyed in common with others. The right is measured not by the number of cattle to be pastured, but by reference to the rights of others and the whole amount of pasture. 34 E. L. & Eq. 511; 1 Term, 137.

CAUSA (Lat.). A cause; a reason.

A condition; a consideration. Used of contracts, and found in this sense in the Scotch law also. Bell, Dict.

A suit; an action pending. Used in this sense in the old English law.

Property. Used thus in the civil law in the sense of *res* (a thing). *Non porcellum, non agnellum nec aliam causam* (not a hog, not a lamb, nor other thing). Du Cange.

By reason of.

Causa proxima. The immediate cause.

Causa remota. A cause operating indirectly by the intervention of other causes.

In its general sense, *causa* denotes anything operating to produce an effect. Thus, it is said, *causa causantis causa est causati* (the cause of the thing causing is the cause of the thing caused). 4 Gray, Mass. 398; 4 Campb. 284. In law, however, only the direct cause is considered. See CAUSA PROXIMA; 9 Coke, 50; 12 Mod. 639.

CAUSA JACTITATIONIS MARITAGII (Lat.). A form of action which anciently lay against a party who boasted or gave out that he or she was married to the plaintiff, whereby a common reputation of their marriage might ensue. 3 Bla. Com. 93.

CAUSA MATRIMONII PRÆLOCUTI (Lat.). A writ lying where a woman has given lands to a man in fee-simple with the intention that he shall marry her, and he refuses so to do within a reasonable time, upon suitable request. Cowel. Now obsolete. 3 Bla. Com. 183, n.

CAUSA PROXIMA NON REMOTA SPECTATUR (Lat.). The direct and not the remote cause is considered.

Important questions have arisen as to which, in the chain of acts tending to the production of a given state of things, is to be considered the cause. It is not merely distance of place or of causation that renders a cause remote. The cause nearest in order of causation, which is adequate without any efficient concurring cause to produce the result, may be considered the direct cause. The rule is thus stated by *Thomas*, J., in 4 Gray, 412: "Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of, the first, shall be found to intervene between it and the result." See other statements of the rule by *Bacon*, Max. Reg. 1; *Phillips*, Ins. vol. 2, §§ 1097, 1131, 1132; *Story*, J. 14 Pet. 99.

The principle is of frequent application in fire and marine insurance; 2 Arnould, Ins. § 284; L. R. 4 Q. B. 414; Broom, Max. 210; 12 East, 648; L. R. 4 C. P. 206; Am. L. J. (1870), 216; 14 Pet. 99; 14 How. 487; 2 Sumn. 218; 13 Mass. 354; 8 Cush. 477; 1

Duer, 159; 2 *id.* 301; 11 N. Y. 9; 32 Penn. 351; 13 B. Monr. 311; 16 *id.* 427; 14 How. 351; and in cases of injuries sustained in consequence of negligence; L. R. 4 C. P. 279; 5 C. & P. 190; L. R. 8 Q. B. 274; 35 N. J. 17; 70 Penn. 86; 1 Sm. L. C. 755; 109 Mass. 277; or tortious acts of the defendant; 2 W. Bla. 892. See Whart. Negl. § 73 *et seq.*; 4 Am. L. Rev. 201; 4 So. L. Rev. 703.

CAUSA REI (Lat.). **In Civil Law.** Things accessory or appurtenant. All those things which a man would have had if the thing had not been withheld. Du Cange; 1 Mackeldey, Civ. Law, 55.

CAUSARE (Lat. to cause). To be engaged in a suit; to litigate; to conduct a cause. Used in the old English and in the civil law.

CAUSATOR (Lat.). A litigant; one who takes the part of the plaintiff or defendant in a suit.

CAUSE (Lat. *causa*). **In Civil Law.** The consideration or motive for making a contract. Dig. 2. 14. 7; Toullier, liv. 3, tit. 3, c. 2, § 4.

In Pleading. Reason; motive.

In a replication *de injuria*, for example, the plaintiff alleges that the defendant of his own wrong and *without the cause* by him, etc., where the word *cause* comprehends all the facts alleged as an excuse or reason for doing the act. 8 Coke, 67; 11 East, 451; 1 Chitty, Plead. 585.

In Practice. A suit or action. Any question, civil or criminal, contested before a court of justice. Wood, Civ. Law, 301.

CAUSE OF ACTION. **In Practice.** Matter for which an action may be brought.

A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however, an obvious distinction between a cause of action and a right, though a cause of action generally confers a right. Thus, statutes of limitation do not affect the cause of action, but take away the right.

When a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it; 3 B. & Ald. 288, 626; 5 B. & C. 259; 4 C. & P. 127. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; 5 B. & C. 360; 8 D. & R. 346; 4 Bingh. 686.

CAUTIO, CAUTION. **In Civil Law.** Security given for the performance of any thing. A bond whereby the debtor acknowledges the receipt of money and promises to pay it at a future day.

In French Law. The person entering into an obligation as a surety.

In Scotch Law. A pledge, bond, or other security for the performance of an obligation, or completion of the satisfaction to be obtained by a judicial process. Bell, Dict.

CAUTIO FIDEJUSSORIA. Security by means of bonds or pledges entered into by third parties. Du Cange.

CAUTIO PIGNORATITIA. A pledge by deposit of goods.

CAUTIO PRO EXPENSIS. Security for costs or expenses.

This term is used among the civilians, Nov. 112, c. 2, and generally on the continent of Europe. In nearly all the countries of Europe, a foreign plaintiff, whether resident or not, is required to give caution *pro expensis*; that is, security for costs. In some states this requisition is modified, and, when such plaintiff has real estate or a commercial or manufacturing establishment within the state, he is not required to give such caution. Fœlix, *Droit Intern. Privé*, n. 106.

CAUTIO USUFRUCTUARIA. Security, which tenants for life give, to preserve the property rented free from waste and injury. Erskine, Inst. 2. 9. 59.

CAUTION JURATORY. Security given by oath. That which a suspender swears is the best he can afford in order to obtain a suspension. Erskine, Pract. 4. 3. 6; Paterson, Comp.

CAUTIONER. A surety; a bondsman. One who binds himself in a bond with the principal for greater security. He is still a cautioner whether the bond be to pay a debt or whether he undertake to produce the person of the party for whom he is bound. Bell, Dict.

CAVEAT (Lat. let him beware). **In Practice.** A notice not to do an act, given to some officer, ministerial or judicial, by a party having an interest in the matter.

It is a formal caution or warning not to do the act mentioned, and is addressed frequently to prevent the admission to probate of wills, the granting letters of administration, etc.

1 Bouvier, Inst. 71, 534; 1 Burn, Eccl. Law, 19, 263; Nelson, Abr.; Dane, Abr.; Ayliffe, Parerg.; 3 Bla. Com. 246; 2 Chitty, Pr. 502, note *b*; 3 Redf. Wills, 119; Poph. 133; 1 Sid. 371; 3 Binn. 314; 3 Halst. 139.

In Patent Law. A legal notice not to issue a patent on a particular device to any other person without allowing the caveator an opportunity to establish his priority of invention.

It is filed in the patent-office under statutory regulations. The principal object of filing it is to obtain for an inventor time to perfect his invention without the risk of having a patent granted to another person for the same thing.

Upon the filing of such caveat and the payment of the proper fee, the law provides that if application be made within the year for a patent with which the caveat would in any manner interfere, the commissioner shall deposit the drawings, etc., of such application in the confidential archives of his office, and give notice thereof by mail to the person filing the caveat, who, if he would avail himself of

his caveat, shall file his description, etc., within three months of the mailing of the notice, with allowance for the usual time of transmission.

As to the form of the caveat, it need contain nothing more than simply an intelligible description of any invention which the caveator claims to have made, giving its distinguishing characteristics. It amounts in effect to a notice to the office not to grant a patent for the same thing to another without giving the caveator an opportunity to show his better title to the same. Act of 1870, § 40. See PATENTS.

CAVEAT EMPTOR (Lat. let the purchaser take care). In every sale of real property, a purchaser's right to relief at law or in equity on account of defects or incumbrances in or upon the property sold depends solely upon the covenants for title which he has received; 2 Sugd. Vend. 425; Coke, Litt. 384 *a*, Butl. note; Dougl. 665; 1 Salk. 211; 2 Freem. 1; 3 Swanst. 651; 1 Coke, 1; 17 Pick. 475; 10 Ga. 311; 1 S. & R. 52; unless there be fraud on the part of the vendor; 3 B. & P. 162; 14 Me. 133; 30 *id.* 266; 2 Caines, 192; 2 Johns. Ch. 519; 5 *id.* 79; 9 N. Y. 36; 24 Penn. 142; 4 Gill, 300; 3 Md. Ch. Dec. 351; 1 Spenc. 353; 66 N. C. 233; 70 *id.* 713; 4 Ill. 334; 11 *id.* 146; 76 *id.* 71; 8 Leigh, 658; 7 Gratt. 238; 15 B. Monr. 627; Freem. Ch. 134, 276; 3 Ired. Eq. 408; 3 Humphr. 347; 5 Iowa, 293; 39 Tex. 177; and consult Rawle on Covenants for Title, 4th ed. 565-647.

In sales of personal property, substantially the same rule applies, and is thus stated by Story (Sales, 3d ed. § 348). The purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale; Benj. Sales, 2d Am. ed. § 610 *et seq.*; 10 Wall. 383; 1 Pet. C. C. 301; 4 Johns. 421; 20 *id.* 196; 1 Wend. 185; 53 N. Y. 515; 82 Penn. 441; 11 Metc. 559; 33 Iowa, 120; 43 Cal. 110; 51 Ala. 410; 75 N. C. 397. SEE MISREPRESENTATION; CONCEALMENT.

Consult Rawle, Covenants for Title; Benjamin, Sales; Story, Sales; 2 Kent, Comm. 478; 1 Story, Equity; Sugden, Vendors & P.; 1 Bouvier, Inst. 954, 955.

CAVEATOR. One who files a caveat.

CAYAGIUM. A toll or duty paid the king for landing goods at some quay or wharf. The barons of the Cinque Ports were free from this duty. Cowel.

CEAPGILD. Payment of an animal. An ancient species of forfeiture. Cowel; Spelman, Gloss.

CEDE. To assign; to transfer. Applied to the act by which one state or nation transfers territory to another.

CEDENT. An assignor. The assignor of a chose in action. Kames, Eq. 43.

CEDULA. In Spanish Law. A written obligation, under private signature, by which a party acknowledges himself indebted to another in a certain sum, which he promises to pay on demand or on some fixed day.

In order to obtain judgment on such an instrument, it is necessary that the party executing it should acknowledge it in open court, or that it be proved by two witnesses who saw its execution.

The citation affixed to the door of an absconding offender, requiring him to appear before the tribunal where the accusation is pending.

CELEBRATION OF MARRIAGE. The solemn act by which a man and woman take each other for husband and wife, conformably to the rules prescribed by law.

CEMETERY. A place set apart for the burial of the dead. Cemeteries are regulated in England and many of the United States by statute. The fundamental English act is the cemeteries clauses act, 1847, 10 and 11 Vict. c. 65.

After ground has once been devoted to this object it can be applied to secular purposes only with the sanction of the legislature; L. R. 4 Q. B. 407; 100 Mass. 1. A cemetery association holds the fee of lands purchased for the purposes of the association. The persons to whom lots are conveyed for burial purposes take only an easement—the right to use their lots for such purposes; 32 Barb. 42; 46 N. Y. 503; 21 Hun, 184. In the absence of a deed, or certificate equivalent thereto, they are mere licensees; 8 B. & C. 288. Their rights cease when the cemetery is vacated, as such, by authority of law; 39 Md. 631; 88 Penn. 42; and the owner of a lot in which no interments have been made, loses all use of it by the passage of a law making interments therein unlawful; 66 Penn. 411.

The property of cemetery associations is usually exempt from taxation; 118 Mass. 354; 86 Ill. 336; and this exemption includes immunity from claims for municipal improvements, *e. g.*, a sewer passing by the cemetery; 37 Leg. Int. 264. See 1 Washb. R. P. 9; Washb. Easem. 515; 19 Am. L. Reg. 65.

CENEGILD. In Saxon Law. A pecuniary mulct or fine paid to the relations of a murdered person by the murderer or his relations. Spelman, Gloss.

CENNINGA. A notice given by a buyer to a seller that the things which had been sold were claimed by another, in order that he might appear and justify the sale. Blount; Whishaw.

The exact significance of this term is somewhat doubtful. It probably denoted notice, as defined above. The finder of stray cattle was not always entitled to it; for Spelman says, "As to strange (or stray) cattle, no one shall have them but with the consent of the hundred of tithingmen; unless he have one of these, we can-

not allow him any *cenninga* (I think notice)." Spelman, Gloss.

CENS. In Canadian Law. An annual payment or due reserved to a seignor or lord, and imposed merely in recognition of his superiority. Guyot, Inst. c. 9.

The land or estate so held is called a *censive;* the tenant is a *censitaire*. It was originally a tribute of considerable amount, but became reduced in time to a nominal sum. It is distinct from the rentes. The *cens* varies in amount and in mode of payment. Payment is usually in kind, but may be in silver. 2 Low. C. 40.

CENSARIA. A farm, or house and land, let at a standing rent. Cowel.

CENSUS (Lat. *censere*, to reckon). An official reckoning or enumeration of the inhabitants and wealth of a country.

The census of the United States is taken every tenth year, in accordance with the provisions of the constitution; and many of the states have made provisions for a similar decennial reckoning at intervening periods. U. S. Laws, 73, 722, 751; 2 *id.* 1134, 1139, 1169, 1194; 3 *id.* 1776; 4 Sharsw. U. S. Laws, 2179; Rev. Stat. U. S. title xxxi.

CENT (Lat. *centum*, one hundred). A coin of the United States, weighing seventy-two grains, and composed of eighty-eight per centum of copper and twelve of nickel. Act of Feb. 21, 1857, sect. 4. See 11 U. S. Stat. at Large, 163, 164; Rev. Stat. U. S. § 3515 *et seq.*

Previous to the act of congress just cited, the cent was composed wholly of copper. By the act of April 2, 1792, Stat. at Large, vol. 1, p. 248, the weight of the cent was fixed at eleven pennyweights, or 264 grains; the half cent in proportion. Afterwards, namely, on the 14th of January, 1793, it was reduced to 208 grains; the half-cent in proportion. 1 U. S. Stat. at Large, 299. In 1796 (Jan. 26), by the proclamation of President Washington, who was empowered by law to do so, act of March 3, 1795, sect. 8, 1 U. S. Stat. at Large, 440, the cent was reduced in weight to 168 grains; the half-cent in proportion. It remained at this weight until the passage of the act of Feb. 21, 1857. The same act directs that the coinage of half-cents shall cease. The first issue of cents from the national mint was in 1793, and has been continued every year since, except 1815. But in 1791 and 1792 some experimental pieces were struck, among which was the so-called Washington cent of those years.

CENTESIMA (Lat. *centum*). **In Roman Law.** The hundredth part.

Usuriæ centesimæ. Twelve *per cent. per annum;* that is, a hundredth part of the principal was due each month,—the month being the unit of time from which the Romans reckoned interest; 2 Bla. Com. 462, n.

CENTRAL CRIMINAL COURT. In English Law. A court which has jurisdiction of all cases of treason, murder, felony, or misdemeanor committed within the city of London and county of Middlesex, and certain parts of the counties of Essex, Kent and Surry, and also of all serious offences within the former jurisdiction of the admiralty court.

This court was erected in 1834, and received the jurisdiction of the court of sessions, as far as concerned all the more serious offences, by virtue of the act 4 & 5 Will. IV. c. 36; and by virtue of the same act, and the subsequent acts 7 Will. IV. and 1 Vict. cc. 84–89, received the entire criminal jurisdiction of the court of admiralty.

The court consists of the lord mayor, the Lord Chancellor, the judges of the three superior courts at Westminster, the judges in bankruptcy, the judges of the admiralty, the dean of the arches, the aldermen, recorder, and common serjeant of London, the judges of the sheriff's court, persons who have been Lord Chancellor, or judge in one of the superior courts, and such others as may from time to time be appointed by the crown.

Twelve sessions at least are held every year, at the Sessions House in the Old Bailey. The important cases are heard in a session of the court presided over by two of the judges of the superior courts at Westminster. The less important cases are tried by either the recorder or common serjeant, or a judge from the sheriff's court commissioned for that purpose,—on every occasion the lord mayor or some of the aldermen being also present on the bench. Two sessions of the court adjoin each other and sit simultaneously.

See 9 & 10 Vict. c. 24; 14 & 15 Vict. c. 55; 19 & 20 Vict. c. 16; 25 & 26 Vict. c. 65; L. R. 4 Q. B. 394.

CENTUMVIRI (Lat. one hundred men). The name of a body of Roman judges.

Their exact number was one hundred and five, there being selected three from each of the thirty-five tribes comprising all the citizens of Rome. They constituted, for ordinary purposes, four tribunals; but some cases (called *centumvirales causas*) required the judgment of all the judges. 3 Bla. Com. 515.

CENTURY. One hundred. One hundred years.

The Romans were divided into *centuries*, as the English were formerly divided into hundreds.

CEORL. A tenant at will of free condition, who held land of the thane on condition of paying rent or services.

A freeman of inferior rank occupied in husbandry. Spelman, Gloss.

Those who tilled the outlands paid rent; those who occupied or tilled the inlands, or demesne, rendered services. Under the Norman rule, this term, as did others which denoted workmen, especially those which applied to the conquered race, became a term of reproach, as is indicated by the popular signification of churl. Cowel; Spelman, Gloss.

CEPI (Lat.). I have taken. It was of frequent use in the returns of sheriffs when they were made in Latin; as, for example, *cepi corpus et* B. B. (I have taken the body and discharged him on bail bond); *cepi corpus et est in custodia* (I have taken the body and it is in custody); *cepi corpus et est languidus* (I have taken the body and he is sick).

CEPI CORPUS (Lat. I have taken the body). The return of an officer who has arrested a person upon a capias. 3 Bouvier, Inst. n. 2804.

CEPIT (Lat. *capere*, to take; *cepit*, he took or has taken).

In Civil Practice. A form of replevin which is brought for carrying away goods merely; Wells on Replevin, § 53; 3 Hill, 282. *Non detinet* is not the proper answer to such a charge; 17 Ark. 85. And see 3 Wisc. 399. Success upon a *non cepit* does not entitle the defendant to a return of the property; 5 Wisc. 85. A plea of *non cepit* is not inconsistent with a plea showing property in a third person. 8 Gill, 133.

In Criminal Practice. Took. A technical word necessary in an indictment for larceny. The charge must be that the defendant took the thing stolen with a felonious design. Bacon, Abr. *Indictment*, G, 1.

CEPIT ET ABDUXIT (Lat.). He took and led away. Applicable in a declaration in trespass or indictment for larceny where the defendant has taken away a living chattel.

CEPIT ET ASPORTAVIT (Lat.). He took and carried away. Applicable in a declaration in trespass or an indictment for larceny where the defendant has carried away goods without right. 4 Bla. Com. 231.

CEPIT IN ALIO LOCO (Lat. he took in another place). **In Pleading.** A plea in replevin, by which the defendant alleges that he took the thing replevied in another place than that mentioned in the declaration; 1 Chitty, Pl. 490; 2 *id.* 558; Rast. Entr. 554, 555; Willes, 475; Morris on Replevin, 3d ed. 141; Wells on Replevin, §§ 707. It is the usual plea where the defendant intends to avow or justify the taking to entitle himself to a return; 4 Bouvier, Inst. n. 3569.

CERT MONEY. The head-money given by the tenants of several manors yearly to the lords, for the purpose of keeping up certain inferior courts. Called in the ancient records *certum letæ* (leet money). Cowel.

CERTAINTY. In Contracts. Distinctness and accuracy of statement.

A thing is certain when its essence, quality, and quantity are described, distinctly set forth, etc. Dig. 12. 1. 6. It is uncertain when the description is not that of an individual object, but designates only the kind. La. Civ. Code, art. 3522, no. 8; 5 Coke, 121.

If a contract be so vague in its terms that its meaning cannot be certainly collected, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty, 5 B. & C. 583, or parol evidence cannot supply the defect, then neither at law nor in equity can effect be given to it; 1 R. & M. 116; 1 Ch. Pr. 123.

It is a maxim of law, that that is certain which may be made certain: *certum est quod certum reddi potest.* Co. Litt. 43. For example, when a man sells the oil he has in his store at so much a gallon, although there is uncertainty as to the quantity of oil, yet, inasmuch as it can be ascertained, the maxim applies, and the sale is good. See, generally, Story, Eq. §§ 240–256; Mitford, Eq. Pl. Jeremy ed. 41; Cooper, Eq. Pl. 5; Wigram, Disc. 77.

In Pleading. Such clearness and distinctness of statement of the facts which constitute the cause of action or ground of defence that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give the judgment; Cowp. 682; Hob. 295; 13 East, 107; 2 B. & P. 267; Co. Litt. 303; Comyns, Dig. *Pleader*, c. 17.

Certainty to a common intent is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. See 2 H. Blackst. 530.

Certainty to a certain intent in general is attained when the meaning of the statute may be understood upon a fair and reasonable construction without recurrence to possible facts which do not appear; 1 Wms. Saund. 49; 9 Johns. 317; 5 Conn. 423.

Certainty to a certain intent in particular is attained by that technical accuracy of statement which precludes all argument, inference, and presumption against the party pleading. When this certainty is required, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be controverted, and, as it were, anticipate the case of his adversary; Lawes, Pl. 54, 55.

The last description of certainty is required in estoppels; Coke, Litt. 303; 2 H. Blackst. 530; Dougl. 159; and in pleas which are not favored in law, as alien enemy; 8 Term, 167; 6 Binn. 247. See 10 Johns. 70; 1 Rand. 270. With respect to an indictment, it is laid down that "an indictment ought to be certain to every intent, and without any intendment to the contrary;" Cro. Eliz. 490; and the charge contained in it must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include any thing more than is expressed; 2 Burr. 1127.

These decisions, which have been adopted from Lord Coke, have been subjected to severe criticism, but are of some utility in drawing attention to the different degrees of exactness and fulness of statement required in different instances. Less certainty is required where the law presumes that the knowledge of the facts is peculiarly in the opposite party; 8 East, 85; 13 *id.* 112; 3 Maule & S. 14; 13 Johns. 437.

Less certainty than would otherwise be requisite is demanded in some cases, to avoid prolixity of statement. 2 Wms. Saund. 117. n. 1; *id.* 411, n. 4. See, generally, 1 Chitty. Pl.

CERTIFICATE. In Practice. A writing made in any court, and properly authenticated, to give notice to another court of any thing done therein.

A writing by which testimony is given that a fact has or has not taken place.

Certificates are either *required by law*, as an insolvent's certificate of discharge, an alien's certificate of naturalization, which are evidence of the facts therein mentioned; or *voluntary*, which are given of the mere motion of the party giving them, and are in no case evidence. Comyns, Dig. *Chancery* (T. 5); 1 Greenl. Ev. § 498; 2 Willes, 549, 550.

There were anciently various modes of trial commenced by a certificate of various parties, which took the place of a writ in a common-law action. See Comyns, Dig. *Certificate*.

By statute, the certificates of various officers may be made evidence, in which case the effect cannot be extended by including facts other than those authorized; 1 Maule & S. 599; 3 Pet. 12, 29; 4 How. 522; 13 Pick. 172; 14 *id.* 442; 1 Dall. 406; 6 S. & R. 324; 3 Murph. 331; Rob. La. 307. See RETURN; NOTARY.

CERTIFICATE OF ASSIZE. In Practice. A writ granted for the re-examination or retrial of a matter passed by assize before justices. Fitzh. Nat. Brev. 181. It is now entirely obsolete. 3 Bla. Com. 389. Consult, also, Comyns, Dig. *Assize* (B, 27, 28).

CERTIFICATE OF COSTS. See JUDGE'S CERTIFICATE.

CERTIFICATE OF REGISTRY. A certificate that a ship has been registered as the law requires. 3 Kent, 149. Under the United States statutes, "every alteration in the property of a ship must be indorsed on the certificate of registry, and must itself be registered." Unless this is done, the ship or vessel loses its national privileges as an American vessel; 1 Parsons, Sh. & Adm. 50; Desty, Sh. & Adm. §§ 8–28. The English statutes make such a transfer void. Stat. 3 & 4 Will. IV. c. 54; Stat. 17 & 18 Vict. c. 104, §§ 44–54; Abbot, Shipp. 12th ed. 46.

The registry is not a document required by the law of nations as expressive of a ship's national character; 4 Taunt. 367; and is at most only *primâ facie* evidence of ownership; 2 Hall, Adm. 1; 2 Wall. Jr. 264; Newb. Adm. 176, 312; 23 Penn. 76; 1 Cal. 481; 33 E. L. & Eq. 204; 14 East, 226; 16 *id.* 169. The registry acts are to be considered as forms of local or municipal institution for purposes of public policy; 3 Kent, 149.

CERTIFICATION. In Scotch Law. A notice to a party in a suit that, if he fail to do something, certain consequences will follow. Paterson, Comp.

CERTIFIED CHECK. A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition.

Certification of a check is usually accomplished by writing the name of the officer authorized to bind the bank in that manner, or the word "good," across the face of the check. See CHECK; Sewall, Bank.

CERTIORARI. In Practice. A writ issued by a superior to an inferior court of record, requiring the latter to send in to the former some proceeding therein pending, or the records and proceedings in some cause already terminated in cases where the procedure is not according to the course of the common law.

The office of the writs of certiorari and mandamus is often much the same. It is the practice of the United States Supreme Court, upon a suggestion of any defect in the transcript of the record sent up into that court upon a writ of error, to allow a special certiorari, requiring the court below to certify more fully; 3 Dall. 411; 7 Cranch, 288; 3 How. 553; 9 Wall. 661. The same result might also be effected by a writ of mandamus. The two remedies are, when addressed to an inferior court of record, from a superior court, requiring the return of a record, much the same. But where diminution of the record is suggested in the inferior court, and the purpose is to obtain a more perfect *record*, and not merely a more perfect *copy* or *transcript*, it is believed that the writ of mandamus is the appropriate remedy.

In many of the states, the writ produces the same result in proceedings given by statute, such as the proceedings for obtaining damages under the mill acts, highway acts, pauper laws, etc., as the writ of error does when the proceedings are according to the course of the common law. Where the lower court is to be required to proceed in a cause, a writ of procedendo or mandamus is the proper remedy.

The writ lies in most of the states of the United States to remove from the lower courts proceedings which are created and regulated by statute merely, for the purpose of revision; 2 Mass. 89; 11 *id.* 466; 13 Pick. 195; 8 Me. 293; 5 Binn. 27; 5 S. & R. 174; 7 Halst. 368; 2 Dutch. 49; 4 Hayw. 100; 2 Yerg. 173; 1 G. & J. 196; 8 Vt. 271; 1 Ohio, 383; 2 Va. Cas. 270; 16 Johns. 50; 20 *id.* 300; 54 Barb. 589; 1 Ala. 95; 8 Cal. 58; 6 Mich. 137; and to complete the proceedings when the lower court refuses to do so, upon erroneous grounds; 1 Hayw. 302; 2 Ark. 73. In England, 13 E. L. & Eq. 129; 1 B. & C. 142; 3 Salk. 78; 9 L. R. Q. B. 350; and in some states of the United States; 3 H. & M'H. 115; Coxe, 287; 2 South. 539; 7 Cow. 141; 2 Yerg. 173; 2 Whart. 117; 3 Brews. 30; 2 Va. Cas. 268; 2 Murph. 100; 1 Ala. 95; 5 R. I. 385; the writ may also be issued to remove criminal causes to a superior court. But see 10 Ohio, 345.

It is used also as an auxiliary process to obtain a full return to other process, as when, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode, and there is a manifest defect or suggestion of diminution, to obtain a perfect transcript and all papers; 3 Dall. 413; 7 Cra. 288; 9 Wheat. 526; 3 Johns. 23; 2 Cow. 38; 2 South. 270, 551; 7 Halst. 85; 1 Blackf. 32; 3 Ind. 316; 3 Dev. 117; 1 Dev. & B. 382; 11 Mass. 414; 2 Munf. 229; 2 T. B. Monr. 371; 16 B. Monr. 472; 2 Ala. 499; 1 Col. T. 490.

It does not lie to enable the superior court

to revise a decision upon matters of fact; 6 Wend. 564; 69 N. Y. 408; 4 Halst. 209; 2 Dutch. 303; 2 Green, 74, 141; 34 N. J. L. 343; 10 Pick. 358; 112 Mass. 206; 40 Me. 389; 65 *id.* 160; 18 Ill. 324; 5 Wisc. 191; 3 *id.* 736; 46 Cal. 667; see 2 Ohio, 27; nor matters resting in the discretion of the judge of the inferior court; 9 Metc. 423; 1 Dutch. 173; unless by special statute; 6 Wend. 564; 10 Pick. 358; 4 Halst. 209; or where palpable injustice has been done; 1 Miss. 112; 1 Wend. 288; 8 *id.* 47; 2 Mass. 173, 489; 3 *id.* 188, 229.

It does not lie where the errors are formal merely, and not substantial; 8 Ad. & E. 413; 4 Mass. 567; 17 *id.* 351; 1 Metc. Mass. 122; 6 Miss. 578; 42 Me. 395; 56 Me. 184; 59 Ill. 225; nor where substantial justice has been done though the proceedings were informal; 24 Me. 9; 20 Pick. 71; 24 *id.* 181; 13 Tex. 18; 32 Wisc. 467.

It is granted or refused in the discretion of the superior court; Colby, Pr. 351; 8 Me. 293; 24 *id.* 9; 2 Mass. 445; 17 *id.* 352; 2 N. H. 210; 15 Wend. 198; 2 Hill, 9, 14; 26 Barb. 437; 34 N. J. L. 261; 4 T. B. Monr. 420; 1 Miss. 112; 28 Ark. 87; 16 Vt. 446; 24 Ga. 379; L. R. 5 Q. B. 466; and the application must disclose a proper case upon its face; 8 Ad. & E. 43; 17 Mass. 351; 2 Hawks. 102; 1 Ashm. 51, 215; 2 Harr. Del. 459; Wright, Ohio, 130; 4 Jones, No. C. 309; 18 Ark. 449; 17 Ill. 31; 4 Tex. 1; 2 Swan, 176.

The judgment is either that the proceedings below be quashed or that they be affirmed; 8 Yerg. 102, 218; 5 Mass. 423; 11 *id.* 466; 12 G. & J. 329; 6 Coldw. 362; see 35 N. H. 315, either wholly or in part; 5 Mass. 420; 13 *id.* 433; 13 Pick. 195; 4 Ohio, 200; 13 Johns. 461; 15 *id.* 195. See, also, 1 Overt. 58; 2 Hayw. 38; 4 Ala. 357. The costs are discretionary with the court; 16 Vt. 426; 6 Ind. 367; but at common law neither party recovers costs; 8 Johns. 321; 12 Wend. 262; 11 Mass. 465; 3 N. H. 44; 4 Ohio, 200; and the matter is regulated by statute in some states; 4 Watts, 451; 1 Spenc. 271. See MANDAMUS; PROCEDENDO. Consult 4 Bla. Com. 262, 265; Redf. Railw. and the authorities on the practice of the several states.

CERVISARII (*cervisiæ*, ale). Among the Saxons, tenants who were bound to supply drink for their lord's table. Cowel; Domesday.

CERVISIA. Ale. *Cervisarius.* An ale-brewer; an ale-house keeper. Cowel; Blount.

CESIONARIO. In Spanish Law. An assignee. White, New Recop. 304.

CESSAVIT PER BIENNIUM (Lat. he has ceased for two years). **In Practice.** An obsolete writ, which could formerly have been sued out when the defendant had for two years *ceased* or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not upon his lands sufficient goods or chattels to be distrained. Fitzh. Nat. Brev. 208. It also lay where a religious house held lands on condition of performing certain spiritual services which it failed to do. 3 Bla. Com. 232.

CESSET EXECUTIO (Lat. let execution stay). **In Practice.** The formal order for a stay of execution, when proceedings in court were conducted in Latin. See EXECUTION.

CESSET PROCESSUS (Lat. let process stay). **In Practice.** The formal order for a stay of process or proceedings, when the proceedings in court were conducted in Latin. See 2 Dougl. 627; 11 Mod. 231.

CESSIO BONORUM (Lat. a transfer of property). **In Civil Law.** An assignment of his property by a debtor for the benefit of his creditors.

Such an assignment discharged the debtor to the extent of the property ceded only, but exempted him from imprisonment. Dig. 2. 4. 25; 48. 19. 1; Nov. 4. 3. And see La. Civ. Code, 2166; 2 Mart. La. 112; 2 La. 354; 11 *id.* 531; 2 Mart. La. N. S. 108; 5 *id.* 299; 4 Wheat. 122; 1 Kent, 422.

CESSION (Lat. *cessio*, a yielding).

In Civil Law. An assignment. The act by which a party transfers property to another.

In Ecclesiastical Law. A surrender. When an ecclesiastic is created bishop, or when a parson takes another benefice, without dispensation, the first benefice becomes void by a legal cession or surrender. Cowel.

In Governmental Law. The transfer of land by one government to another.

France ceded Louisiana to the United States, by the treaty of Paris, of April 30, 1803; Spain made a cession of East and West Florida, by the treaty of Feb. 22, 1819. Cessions have been severally made to the general government of a part of their territory by New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. See Gordon, Dig. art. 2236–2250.

CESSIONARY. In Scotch Law. An assignee. Bell, Dict.

CESTUI QUE TRUST. He for whose benefit another person is seised of lands or tenements or is possessed of personal property.

He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. 2 Wasb. R. P. 163.

He may be said to be the equitable owner; Williams, R. P. 135; 1 Spence, Eq. Jur. 497; 1 Ed. Ch. 223; 2 Pick. 29; is entitled, therefore, to the rents and profits; may transfer his interest, subject to the provisions of the instrument creating the trust; 1 Spence, Eq. Jur. 507; 2 Washb. Real Prop. 195; may defend his title in the name of his trustee, 1 Cruise, Dig. tit. 12, c. 4, § 4; but has no legal title to the estate, as he is merely a tenant at will if he occupies the estate; 2 Ves.

Sen. Ch. 472; 16 C. B. 652; 1 Washb. R. P. 88; and may be removed from possession in an action of ejectment by his own trustee; Lewin, Trust. 475; Hill, Trust. 274; 3 Dev. 425; 2 Pick. 508. See TRUST.

CESTUI QUE USE. He for whose benefit land is held by another person.

He who has a right to take the profits of lands of which another has the legal title and possession, together with the duty of defending the same and to direct the making estates thereof; Tudor, Lead. Cas. 252; 2 Bla. Com. 330. See 2 Washb. R. P. 95; USE.

CESTUI QUE VIE. He whose life is the measure of the duration of an estate. 1 Washb. R. P. 88.

CHACEA. A station for game, more extended than a park, less so than a forest; the liberty of hunting within such limits. Cowel.

The driving or hunting animals; the way along which animals are driven. Spelman, Gloss.

CHAFEWAX. An officer in chancery who fits the wax for sealing to the writs, commissions, and other instruments there made to be issued out. He is probably so called because he warms (*chaufe*) the wax.

CHAFFERS. Anciently signified wares and merchandise: hence the word *chaffering*, which is yet used for buying and selling, or beating down the price of an article. The word is used in stat. 3 Edw. III. c. 4.

CHALDRON. A measure of capacity, equal to fifty-eight and two-thirds cubic feet, nearly; Cowel.

CHALLENGE. In Criminal Law. A request by one person to another to fight a duel. No particular form of words is necessary to constitute a challenge, and it may be oral or written; 6 Blackf. 20; 12 Ala. 276; 2 Nott. & M. 181; 3 Dana (Ky.), 418. Sending a challenge is a high offence at common law, and indictable as tending to a breach of the peace; Hawk. Pl. Cr. b. 1, c. 3, § 3; 3 East, 581; 6 *id.* 464; 1 Dana, 524; 1 South. 40; 2 M'Cord, 334; 1 Const. 107; 1 Hawks, 487; 2 Ala. 506; 6 Blackf. 20; 9 Leigh, 603; 3 Rog. 133; 3 Wheel. Cr. Cas. 245. He who carries a challenge is also punishable by indictment; 3 Cra. C. C. 178. In most of the states, this barbarous practice is punishable by special laws. 2 Bishop, Crim. Law, §§ 312–315. And in a large number of them by their constitutions the giving, accepting, or knowingly carrying a challenge, deprives the party of the right to hold any office of honor or profit in the commonwealth; Desty's Const. of California, pp. 367, 368; 20 Johns. 457; 1 Munf. 468; 28 Gratt. 130; 10 Bush, 725.

In most of the civilized nations, challenging another to fight is a crime, as calculated to destroy the public peace; and those who partake in the offence are generally liable to punishment. In Spain, it is punished by loss of offices, rents, and honors received from the king, and the delinquent is incapable to hold them in future; Aso & M. Inst. b. 2, t. 19, c. 2, § 6. See, generally, Joy, Chall.; 1 Russell, Cr. 275; 2 Bishop, Crim. Law, chap. xv; 6 J. J. Marsh. 120; 1 Const. 107; 1 Munf. 468.

In Practice. An exception to the jurors who have been arrayed to pass upon a cause on its trial.

An exception to those who have been returned as jurors; Co. Litt. 155 *b*.

The most satisfactory derivation of the word is that adopted by Webster and Crabb, from *call*, challenge implying a calling off. The word is also used to denote exceptions taken to a judge's capacity on account of interest; 2 Binn. 454; 4 *id.* 349; and to the sheriff for favor as well as affinity; Co. Litt. 158 *a*; 10 S. & R. 336; 11 *id.* 303.

Challenges are of the following classes:—

To the array. Those which apply to all the jurors as arrayed or set in order by the officer upon the panel. Such a challenge is, in general, founded upon some error or manifest partiality committed in obtaining the panel, and which, from its nature, applies to all the jurors so obtained. These are not allowed in the United States generally; Colby, Pr. 235; 2 Blatchf. 435; 6 Miss. 20; the same end being attained by a motion addressed to the court, but are in some states; 33 Penn. 338; 12 Tex. 252; 41 *id.* 417; 24 Miss. 445; 1 Mann. 451; 20 Conn. 510; 1 Zabr. 656; 5 Johns. 133; 1 Cowen, 432; 2 Blackf. 332; 82 Penn. 306.

For cause. Those for which some reason is assigned.

These may be of various kinds, unlimited in number, may be to the array or to the poll, and depend for their allowance upon the existence and character of the reason assigned.

To the favor. Those challenges to the poll for cause which are founded upon reasonable grounds to suspect that the juror will act under some undue influence or prejudice, though the cause be not so evident as to authorize a principal challenge; Co. Litt. 147 *a*, 157 *a*; Bacon, Abr. *Juries*, E, 5; 3 Wis. 823. Such challenges are at common law decided by triors, and not by the court. See TRIORS; 16 N. Y. 501; 14 N. J. L. 195. But see 24 Ark. 346; 21 N. Y. 134; 6 Hun, 140.

Peremptory. Those made without assigning any reason, and which the court must allow. The number of these in trials for felonies was, at common law, thirty-five; 4 Bla. Com. 354; but, by statute, has been reduced to twenty in most states, and is allowed in criminal cases only when the offence is capital; 2 Blatchf. C. C. 470; 10 B. Monr. 125; 8 Ohio St. 98; 25 Mo. 167; see 5 Wis. 324; 1 Jones, N. C. 289; 16 Ohio, 354; while in civil cases the right is not allowed at all; 9 Exch. 472; 2 F. & F. 137; 2 Blatchf. 470; or, if allowed, only to a very limited extent; 5 Harr. Del. 245; 7 Ohio St. 155; 9 Barb. 161; 20 Conn. 510; 8 Blackf. 507; 3 Iowa, 216.

To the poll. Those made separately to each juror to whom they apply. Distinguished from those to the array.

Principal. Those made for a cause which when substantiated is of itself sufficient evidence of bias in favor of or against the party challenging; Co. Litt. 156 *b*. See 3 Bla. Com. 363; 4 *id.* 353. They may be either to the array or to the poll; Co. Litt. 156 *a*, *b*.

The importance of the distinction between principal challenges and those to the favor is found in the case of challenges to the array or of challenges to the poll for favor or partiality. All other challenges to the poll must, it seems, be principal. The distinctions between the various classes of challenges are of little value in modern practice, as the court generally determine the qualifications of a juror upon suggestion of the cause for challenge, and examination of the juror upon oath when necessary. See TRIORS.

The *causes* for challenge are said to be either *propter honoris respectum* (from regard to rank), which do not exist in the United States; *propter defectum* (on account of some defect), from personal objections, as alienage, infancy, lack of statutory requirements; *propter affectum* (on account of partiality), from some bias or partiality either actually shown to exist or presumed from circumstances; *propter delictum* (on account of crime), including cases of legal incompetency on the ground of infamy; Co. Litt. 155 *b et seq.*

These causes include, amongst others, *alienage*, Wall. C. C. 147, but see 2 Cranch, C. C. 3; *incapacity* resulting from age, lack of statutory qualifications; 10 Gratt. 767; *partiality* arising from near relationship; 19 N. H. 372; 19 Penn. 95; 10 Gratt. 690; Busb. 330; 32 Me. 310; 20 Conn. 87; 2 Barb. Ch. 331; 3 Ind. 198; 47 Ga. 538; see 38 Me. 44; 19 N. H. 351; an *interest* in the result of the trial; 11 Ind. 234; 8 Cush. 69; 21 N. H. 438; 1 Zabr. 656; 11 Mo. 247; *conscientious scruples* as to finding a verdict of conviction in a capital case; 1 Baldw. 78; 16 Tex. 206, 445; 7 Ind. 338; 2 Cal. 257; 3 Ga. 453; 17 Miss. 115; 16 Ohio, 364; 13 N. H. 536; see 13 Ark. 568; 14 Ill. 433; 5 Cush. 295; *membership* of societies, under some circumstances; 13 Q. B. 815; 5 Cal. 347; 4 Gray, 18; *citizenship* in a municipality interested in the case; 13 Iowa, 229; 42 *id.* 315; 51 N. Y. 506; 51 Ind. 119; 61 Mo. 479; 20 Kan. 156; or indicated by *declarations* of wishes or opinions as to the result of the trial; 1 Zabr. 106; 19 Ohio, 198; 1 Johns. 316; 60 Ill. 452, 465; 75 Penn. 424; 76 *id.* 414; 79 *id.* 308; 52 Ind. 68; see 96 U. S. 640; 6 Ind. 169; or *opinions* formed or expressed as to the guilt or innocence of one accused of crime; 19 Ark. 156; 30 Miss. 627; 2 Wall. Jr. 333; 10 Humphr. 456; 13 Ill. 685; 2 Greene, 404; 19 Ohio. 198; 5 Ga. 85. See 1 Dutch. 566; 15 Ga. 498; 18 *id.* 383; 7 Ind. 332; 2 Swan, 581; 16 Ill. 364; 1 Cal. 379; 5 Cush. 295; 7 Gratt. 593; 12 Mo. 223; 18 Conn. 166.

Who may challenge. Both parties, in civil as well as in criminal cases, may challenge, for cause; and equal privileges are generally allowed both parties in respect to peremptory challenges; but see 6 B. Monr. 15; 3 Wisc. 823; 2 Park. Cr. Cas. N. Y. 586; and after a juror has been challenged by one party and found indifferent, he may yet be challenged by the other; 32 Miss. 389. A juror has no right to challenge himself, and though a good cause of challenge subsists, yet, if neither party will take advantage of it, the court cannot reject him; 1 N. J. L. 220; but see 43 Miss. 641.

The time to make a challenge is between the appearance and swearing of the jurors; 8 Gratt. 637; 3 Jones, N. C. 443; 3 Iowa, 216; 23 Penn. 12; 8 Gill, 487; 8 Blackf. 194; 3 Ga. 453; 14 La. Ann. 461; 4 Nev. 265; 22 Mich. 76; 113 Mass. 297; but see 7 Ala. 189; 1 Curt. C. C. 23. It is a general rule at common law that no challenge can be made till the appearance of a full jury; 4 B. & Ald. 476; 45 Cal. 323; on which account a party who wishes to challenge the array may pray a *tales* to complete the number, and then make his objection. Challenges to the array, where allowed, must precede those to the poll; and the right to the former is waived by making the latter; Co. Litt. 158 *a*; Bacon, Abr. *Juries*, E, 11; 6 Cal. 214; but see 13 Wall. 434. In cases where peremptory challenges are allowed, a juror unsuccessfully challenged for cause may subsequently be challenged peremptorily; 4 Bla. Com. 356; 6 Term, 531; 4 B. & Ald. 476. See 5 Cush. 295.

Manner of making. Challenges to the array must be made in writing; 1 Mann. 451; 1 Iowa, 141; but challenges to the poll are made orally and generally by the attorney's or party's saying, "Challenged," or, "I challenge," or, "We challenge;" 1 Chitty, Cr. Law, 533–541; 4 Hargrave, St. Tr. 740; Trials per Pais, 172; Cro. Car. 105. See 43 Me. 11; 25 Penn. 134; 82 *id.* 306.

CHAMBER. A room in a house. There may be an estate of freehold in a chamber as distinct and separate from the ownership of the rest of the house; 1 Term, 701; Coke, Litt. 48 *b*; 4 Mass. 576; 1 Metc. Mass. 538; 10 Conn. 318; and ejectment will lie for a deprivation of possession; 1 Term, 701; 9 Pick. 293; though the owner thereof does not thereby acquire any interest in the land; 11 Metc. 448. See Brooke, Abr. *Demand*, 20; 6 N. H. 555; 3 Watts, 243; 3 Leon. 210.

Consult Washburn; Preston; Real Property.

CHAMBER OF ACCOUNTS. In French Law. A sovereign court, of great antiquity, in France, which took cognizance of and registered the accounts of the king's revenue: nearly the same as the English court of exchequer. Encyc. Brit.

CHAMBER OF COMMERCE. A society of the principal merchants and traders of a city, who meet to promote the general trade and commerce of the place. Some of these are incorporated, as in Philadelphia. Similar societies exist in all the large com-

mercial cities, and are known by various names, as, Board of Trade, etc.

CHAMBERS. In Practice. The private room of the judge. Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be *in chambers*. The act may be an official one, and the hearing may be in the court-room; but if the court is not in session, it is still said to be done *in chambers*.

CHAMPART. In French Law. The grant of a piece of land by the owner to another, on condition that the latter would deliver to him a portion of the crops. 18 Toullier, n. 182.

CHAMPERTOR. In Criminal Law. One who makes pleas or suits, or causes them to be moved, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gain. Stat. 33 Edw. I. stat. 2.

CHAMPERTY. A bargain with a plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. See 19 Alb. L. J. 468.

Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it; 16 Ala. 488; 24 Ala. N. s. 472; 9 Metc. 489; 1 Jones, Eq. 100; 5 Johns. Ch. 44; 4 Litt. 117; 57 Ga. 263; 10 Heisk. 339; 89 Ill. 183; while in simple maintenance the question of compensation does not enter into the account; 2 Bishop, Cr. Law, § 131; 53 Ind. 317.

The offence was indictable at common law; 4 Bla. Com. 135; 1 Pick. 415; 5 T. B. Monr. 413; 1 Swan, 393; 8 M. & W. 691; see 1 Ohio, 132; 3 Greene, 472; 18 Ill. 449; 28 Vt. 490; 6 Tex. 275; and in some of the states of the United States by statute; see L. R. 8 Q. B. 112; 2 App. Cas. 186; 4 L. R. Ir. 43; 37 Me. 196; 14 N. Y. 289; 18 Ill. 449; 73 *id.* 11; 15 B. Monr. 64; 14 Conn. 12; 40 Conn. 565; 38 Tex. 458; 2 Mo. App. 1. Champerty avoids contracts into which it enters; 8 R. I. 389. A common instance of champerty is where an attorney agrees with a client to collect by suit a particular claim or claims in general, receiving a certain proportion of the money collected; 9 Ala. N. s. 755; 17 *id.* 305; 1 Ohio, 132; 4 Dowl. 304; or a percentage thereon; 17 Ala. N. s. 206; 9 Metc. 489; 2 Bishop, Cr. Law, § 132. And see 3 Pick. 79; 4 Duer, 275; 1 Pat. & H. 48; 18 Ill. 449; 15 B. Monr. 64; 29 Ala. N. s. 676; 6 Dana, 479; 17 Ark. 608; 4 Mich. 535; 8 R. I. 389; 12 *id.* 94; 53 Ill. 275; 7 Bush. 355. The doctrine of champerty does not apply to judicial sales; 10 Yerg. 460; 5 N. Y. 320.

CHAMPION. He who fights for another, or who takes his place in a quarrel. One who fights his own battles. Bracton, l, 4, t. 2, c. 12.

CHANCE. See ACCIDENT.

CHANCE-MEDLEY. In Criminal Law. A sudden affray. This word is sometimes applied to any kind of homicide by misadventure, but in strictness it is applicable to such killing only as happens in defending one's self. 4 Bla. Com. 184.

CHANCELLOR. An officer appointed to preside over a court of chancery, invested with various powers in the several states.

The office of chancellor is of Roman origin. He appears at first to have been a chief scribe or secretary, but was afterwards invested with judicial power, and had superintendence over the other officers of the empire. From the Romans the title and office passed to the church; and therefore every bishop of the Catholic church has, to this day, his chancellor, the principal judge of his consistory. When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. In all he seems to have had a supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner; and when seals came into use, he had the custody of the public seal. See CANCELLARIUS.

An officer bearing this title is to be found in most countries of Europe, and is generally invested with extensive authority. The title and office of chancellor came to us from England. Many of our state constitutions provide for the appointment of this officer, who is by them and by the laws of the several states invested with power as they provide; see 1 Spence, Eq. Jur.; Encyc. Am.; 4 Viner, Abr. 374; Woodd. Lect. 95.

In England the title is borne by several functionaries; thus (see Mozley & Whiteley's Law Dictionary, s. v.).

The Lord High Chancellor is speaker of the house of lords, formerly presided over the court of chancery, and is principal judge of the high court of justice under the judicature act, 1873. He is a privy councillor by virtue of his office, and visitor of all hospitals and colleges of the king's foundation for which no other visitor is appointed. To him belongs the appointment of justices of the peace throughout the kingdom. Cowel; 3 Bla. Com. 38, 47; 2 Steph. Com. 382; 3 *id.* 320.

The Chancellor of the Duchy of Lancaster, who presides over the court of the duchy, to judge and determine controversies relating to lands holden of the king in right of the Duchy of Lancaster. This court has a concurrent jurisdiction with the court of chancery in matters relating to the duchy. Cowel; 3 Bla. Com. 78; 3 Steph. Com. 347, n.

The Chancellor of the Exchequer is an officer who formerly sat in the court of exchequer, and, with the rest of the court, ordered things for the king's benefit; *Cowel.* This part of his functions is now practically obsolete; and the chancellor of the exchequer is now known as the minister of state who has control over the national revenue and expenditure. 2 Steph. Com. 458.

The Chancellor of a University, who is the principal officer of the university. His office is for the most part honorary. The chancellor's court has a jurisdiction over the members of the university, and the judge of the court is the vice-chancellor or his deputy. 3 Bla. Com. 83; 3 Steph. Com. 299, 300; 1 *id.* 67; 4 *id.* 325.

The Chancellor of a Diocese is the officer appointed to assist a bishop in matters of law, and to hold his consistory courts for him; 1 Bla. Com. 382; 2 Steph. Com. 672.

CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES. In English Law. Courts of local jurisdiction in and for the two univerities of Oxford and Cambridge in England.

These courts have jurisdiction of all civil actions or suits, except those in which a right of freehold is involved, and of all criminal offences and misdemeanors, under the degree of treason, felony, or mayhem, at Oxford when a scholar or privileged person is one of the parties, and at Cambridge when both parties are scholars or privileged persons and the cause of action arose within the town of Cambridge or its suburbs; 3 Bla. Com. 83, n.; Stat. 19 & 20 Vict. c. 17, § 18, c. 88; Rep. *temp.* Hardw. 241; 2 Wils. 406; 12 East, 12; 13 *id.* 635; 15 *id.* 634. The judge of the chancellor's court at Oxford is a vice-chancellor, with a deputy or assessor. An appeal lies from his sentence to delegates appointed by the congregation, thence to delegates appointed by the house of convocation, and thence, in case of any disagreement only, to judges delegates appointed by the crown under the great seal in chancery; 3 Steph. Com. 453, 455.

They are now governed by the common and statute law of the realm. Stat. 17 & 18 Vict. c. 81, § 45; 18 & 19 Vict. c. 36; 19 & 20 Vict. cc. 31, 95; 20 & 21 Vict. c. 25.

CHANCERY. See COURT OF CHANCERY.

CHANTRY. A church or chapel endowed with lands for the maintenance of priests to say mass daily for the souls of the donors. Termes dè la Ley; Cowel.

CHAPELRY. The precinct of a chapel; the same thing for a chapel that a parish is for a church. Termes de la Ley; Cowel.

CHAPELS. Places of worship. They may be either *private* chapels, such as are built and maintained by a private person for his own use and at his own expense, or *free* chapels, so called from their freedom or exemption from all ordinary jurisdiction, or chapels *of ease*, which are built by the mother-church for the ease and convenience of its parishioners, and remain under its jurisdiction and control.

CHAPTER. In Ecclesiastical Law. A congregation of clergymen.

Such an assembly is termed *capitulum*, which signifies a little head; it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also for other purposes. Coke, Litt. 103.

CHARACTER. In Evidence. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him. 3 S. & R. 336; 3 Mass. 192; 3 Esp. 236.

A clear distinction exists between the strict meaning of the words character and reputation. Character is defined to be the assemblage of qualities which distinguish one person from another, while reputation is the opinion of character generally entertained; Worcester, Dict. This distinction, however, is not regarded either in the statutes or in the decisions of the courts; thus, a libel is said to be an injury to character; the character of a witness for veracity is said to be impeached; evidence is offered of a prisoner's good character; Abbott, Law Dict.

The moral character and conduct of a person in society may be used in proof before a jury in three classes of cases: *first*, to afford a presumption that a particular party has not been guilty of a criminal act; *second*, to affect the damages in particular cases, where their amount depends on the character and conduct of any individual; and, *third*, to impeach or confirm the veracity of a witness.

Where the guilt of an accused party is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general character; since it is not probable that a person of known probity and humanity would commit a dishonest or outrageous act in the particular instance. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. If he does,

and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character. *Per Shaw*, C. J., 5 Cush. 325. See 5 Esp. 13; 1 Campb. 460; 3 *id.* 519; 2 Strange, 925; 2 State Tr. 1038; 1 Coxe, 424; 5 S. & R. 352; 2 Bibb, 286; 3 *id.* 195; 5 Day, 260; 7 Conn. 116; 14 Ala. 382; 6 Cowen, 673; 3 Hawks, 105. Negative evidence of character is competent; 22 Minn. 407.

On the trial of an indictment for homicide evidence offered generally to prove that the deceased was well known, and understood to be a quarrelsome, riotous, and savage man, is inadmissible; 1 Whart. Cr. L. § 641; but for the purpose of showing that the homicide was justifiable on the ground of self-defence, proof of the character of the deceased may be admitted, if it is also shown that the prisoner was influenced by his knowledge thereof in committing the deed; 26 Ohio, 162. Unless the character of the deceased is attacked, it is clearly not admissible for the prosecution to prove its peaceableness; 1 Whart. Cr. L. § 641.

In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad character for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant; Buller, N. P. 27, 296; 12 Mod. 232; 3 Esp. 236. See 5 Munf. 10. As to the statutory use of the word "character," see 8 Barb. 603; 5 Park. Cr. C. 254; 5 Ia. 389; *id.* 430; 18 *id.* 372; 49 *id.* 531.

In actions for slander or libel, the law is well settled that evidence of the previous general character of the plaintiff, before and at the time of the publication of the slander or libel, is admissible, under the general issue, in mitigation of damages. The ground of admitting such evidence is that a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished. And the reasons which authorize the admission of this species of evidence under the general issue alike exist, and require its admission, where a justification has been pleaded but the defendant has failed in sustaining it; Stone *v.* Varney, 7 Metc. 86, where the decisions are collected and reviewed; 11 Cush. 241; 3 Pick. 378; 4 Denio, 509; 20 Vt. 232; 6 Penn. 170; 2 Nott & M'C. 511; 1 *id.* 268; Heard, Lib. & Sland. § 299. See 1 Johns. 46; 11 *id.* 38. When evidence is admitted touching the general character of a party, it is manifest that it is to be confined to matters in reference to the nature of the charge against him; 2 Wend. 352.

The party against whom a witness is called may disprove the facts stated by him, or may examine other witnesses as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct; Buller, N. P. 296. For example, evidence of the general character of a prosecutrix for a rape may be given, as that she was a street-walker; but evidence of specific acts of criminality cannot be admitted; 3 C. & P. 589. And see 17 Conn. 467; 18 Me. 372; 14 Mass. 387; 5 Cox, Cr. Cas. 146. The regular mode is to inquire whether the witness under examination has the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath; 4 State Tr. 693; 4 Esp. 102; 17 Wall. 586. In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge and the grounds of his opinion, or he may attack such witness's general character, and by fresh evidence support the character of his own; 2 Stark. 151, 241; Starkie, Ev. pt. 4, 1753 to 1758; 1 Phillips, Ev. 229. A party cannot give evidence to confirm the good character of a witness, unless his general character has been impugned by his antagonist; 9 Watts, 124. Consult Wharton; Greenleaf; Phillips; Starkie; Evidence; Roscoe, Crim. Evidence.

CHARGE. A duty or obligation imposed upon some person. A lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies.

To impose such an obligation; to create such a claim.

To accuse.

The distinctive significance of the term rests in the idea of obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. Thus, charging an estate with the payment of a debt is appropriating a definite portion to the particular purpose; charging a person with the commission of a crime is pointing out the individual who is bound to answer for the wrong committed; charging a jury is stating the precise principles of law applicable to the case immediately in question. In this view, a charge will, in general terms, denote a responsibility peculiar to the person or thing affected and authoritatively imposed, or the act fixing such responsibility.

In Contracts. An obligation, binding upon him who enters into it, which may be removed or taken away by a discharge. Termes de la Ley.

An undertaking to keep the custody of another person's goods.

An obligation entered into by the owner of an estate, which binds the estate for its performance. Comyns, Dig. *Rent*, c. 6; 2 Ball & B. 223.

In Devises. A duty imposed upon a devisee, either personally, or with respect to the estate devised.

Where the charge is personal, the devisee will generally take the fee of the estate de-

vised; 4 Kent, 540; 2 Bla. Com. 108; 3 Term, 356; 6 Johns. 185; 24 Pick. 139; but he will take only a life estate if it be upon the estate generally; 5 Term, 558; 4 East, 496; 14 Mees. & W. 698; 3 Mas. 209; 10 Wheat. 231; 10 Johns. 148; 18 *id.* 35; 7 Paige, Ch. 481; 15 Me. 436; 8 Harr. & J. 208; 9 Mass. 161; unless the charge be greater than a life estate will satisfy; 6 Co. 16; 4 Term, 93; 1 Barb. 102; 24 Pick. 138; 1 Washb. R. P. 59. A charge is not an interest in, but a lien upon, lands; 3 Mas. 768; 12 Wheat. 498; 4 Metc. Mass. 523.

Consult Washburn, Real Property; Kent; Preston, Estates; Roper, Legacies; Williams, Executors.

In Equity Pleading. An allegation in the bill of matters which disprove or avoid a defence which it is alleged the defendant is supposed to pretend or intend to set up. Story, Eq. Pl. § 31.

It is frequently omitted, and this the more properly as all matters material to the plaintiff's case should be fully stated in the stating part of the bill. Cooper, Eq. Pl. 11; 11 Ves. Ch. 574; 2 Anstr. 543. See 2 Hare, Ch. 264.

In Practice. The instructions given by the court to the grand jury or inquest of the county, at the commencement of their session, in regard to their duty.

The exposition by the court to a petit jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit.

The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligations to obey; 10 Metc. 285–287; 13 N. H. 536; 21 Barb. 566; 2 Blackf. 162; 1 Leigh, 588; 3 *id.* 761; 3 J. J. Marsh. 150; 21 How. St. Tr. 1039; 89 Penn. 522. See 5 South. L. Rev. 352. By statute, in some states, the jury are constituted judges of the law as well as of the facts in criminal cases,—an arrangement which assimilates the duties of a judge at once to those of the moderator of a small-sized town-meeting and of the preceptor of a class of law-students, besides subjecting successive criminals to a code of laws varying as widely as the impulses of successive juries can differ. The charge frequently and usually includes a *summing up* of the evidence, given to show the application of the principles involved; and in English practice the term *summing up* is used instead of charge. Though this is customary in many courts, the judge is not bound to sum up the facts; Thomps. Ch. Juries, § 79; 3 Hawks, 390. But if he do sum up he must present all the material facts; 6 W. & S. 132; 1 Ga. 428. This is the practice in the courts of the U. S.; 8 Wall. 342. In case of an omission a party must request a charge at that point at the time, or the omission is not error; *ibid.*

It should be a clear and explicit statement of the law applicable to the condition of the facts; 4 Hawks, 61; 1 A. K. Marsh. 76; 1 Dana, 35; 1 Bail. 482; 4 Conn. 356; 3 Wend. 75; 10 Metc. 14, 263; 1 Mo. 97; 24 Me. 289; 16 Vt. 679; 3 Green, 32; 5 Blackf. 296; 6 W. & S. 488; 23 Penn. 76; 1 Gill, 127; adding such comments on the evidence as are necessary to explain its application; 8 Me. 42; 1 Const. 216; 1 W. & S. 68; 22 Ga. 385 (though in some states the court is prohibited by law from charging as to matters of fact, "but may state the testimony and the law;" *e. g.*, California, Tennessee, South Carolina, Georgia, Massachusetts, etc.); and may include an opinion on the weight of evidence; 13 How. 115; 2 M. & G. 721; 34 N. H. 460; 8 Conn. 431; 81 Penn. 139; 5 Cow. 243; 28 Vt. 223; 5 Jones, No. C. 393; though the rule is otherwise in some states; 79 Ill. 441; 53 Ga. 162; 31 Ark. 307; but should not undertake to decide the facts; 7 J. J. Marsh. 410; 3 Dana, 66; 7 Cow. 29; 10 Ala. N. S. 599; 10 Gill & J. 346; 5 R. I. 295; unless in the entire absence of opposing proof; 5 Gray, 440; 7 Wend. 160; 17 Vt. 176; 26 Mo. 523; 1 Penn. 68; 28 Ala. N. S. 675. And see 3 Dana, 566.

For the effect of an omission or refusal to charge on important points of law, see 1 Wash. C. C. 198; 4 Halst. 149; 10 Mo. 354; 5 Ohio, 375; 15 *id.* 123; 5 Wend. 289; 12 Conn. 219; 11 N. H. 547; 4 Jones, No. C. 23; 10 Miss. 268; 6 Penn. 61; 17 Ga. 351. Erroneous instructions in matters of law which might have influenced the jury in forming a verdict are a cause for a new trial; 5 Mass. 365; 12 Pick. 177; 9 Conn. 107; 4 Hawks, 64; even though on hypothetical questions; 11 Wheat. 59; 14 Tex. 483; 6 Cal. 214; on which no opinion can be required to be given; 5 Ohio, 88; 11 Gill & J. 388; 3 Ired. 470; 5 Jones, No. C. 388; 5 Ala. N. S. 383; 28 *id.* 100; 3 Humphr. 466; 6 *id.* 317; 6 Mo. 6; 20 N. H. 354; 16 Me. 171; 23 *id.* 246; 5 Cal. 478; 5 Blackf. 112; 16 Miss. 401; 9 Tex. 536; 16 *id.* 229; 3 Iowa, 509; 18 Ga. 411; Hilliard, New Trials; but the rule does not apply where the instructions could not prejudice the cause; 11 Conn. 342; 1 McLean, 509; 2 How. 457. Any decision or declaration by the court upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term "instructions;" Hilliard, New Trials, 255.

See Thompson, Charging Juries.

CHARGE DES AFFAIRES. CHARGE D'AFFAIRES. In International Law. The title of a diplomatic representative or minister of an inferior grade, to whose care are confided the affairs of his nation.

He has not the title of minister, and is generally introduced and admitted through a verbal presentation of the minister at his departure, or through letters of credence addressed to the minister of state of the court to which he is sent. He has the essential rights of a minister; 1 Kent, 39, n.; 4 Dall. 321. The first form of the phrase here given is the one used in the act of congress of May 1,

1810, by which the president is authorized to allow such officer a sum not greater than at the rate of four thousand five hundred dollars per annum, as a compensation for his personal services and expenses; 2 Story, U. S. Laws, 1171.

CHARGE TO ENTER HEIR. In Scotch Law. A writ commanding a person to enter heir to his predecessor within forty days, otherwise an action to be raised against him as if he had entered.

The heir might appear and renounce the succession, whereupon a decree *cognitionis causa* passed, ascertaining the creditor's debt. If the heir did not appear, he then became personally liable to the creditor. A charge was either general, or special, or general-special. Charges are now abolished, by 10 & 11 Vict. c. 48, § 16, and a summons of constitution against the unentered heir substituted.

CHARGES. The expenses which have been incurred in relation either to a transaction or to a suit. Thus, the *charges* incurred for his benefit must be paid by a hirer; the defendant must pay the *charges* of a suit. In relation to actions, the term includes something more than the costs, technically so called.

CHARITABLE USES, CHARITIES. Gifts to general public uses, which may extend to the rich as well as the poor. Ambl. 651; 2 Sneed, 305.

Gifts to such purposes as are enumerated in the act 43 Eliz. c. 4, or which, by analogy, are deemed within its spirit or intendment. Boyle, Charity, 17.

They had their origin under the Christian dispensation, and were regulated by the Justinian Code. Code Just. i. 3, *De Episc. et Cler.*; Domat, b. 2, t. 2, § 6, 1, b. 4, t. 2, § 6, 2; 1 Eq. Cas. Abr. 96; Mr. Binney's argument on the Girard will, p. 40; Chastel on the Charity of the Primitive Churches, b. 1, c. 2, b. 2, c. 10; *Codex donationem piarum, passim.* Under that system, donations for pious uses which had not a regular and determined destination were liable to be adjudged invalid, until the edicts of Valentinian III. and Marcian declared that legacies in favor of the poor should be maintained even if the legatees were not designated. Justinian completed the work by sweeping all such general gifts into the coffers of the church, to be administered by the bishops. It should seem that, by the English rule before the statute, general and indefinite trusts for charity, especially if no trustees were provided, were invalid. If sustainable, it was under the king's prerogative, exercising in that respect a power analogous to that of the ordinary in the disposition of *bona vacantia* prior to the Statute of Distributions; F. Moore, 882, 890; Duke, Char. Uses, 72, 362; 1 Vern. 224, note; 1 Eq. Cas. Abr. 96, pl. 8; 1 Ves. Sen. 225; Hob. 136; 1 Am. L. Reg. 545. The main purpose of the stat. 43 Eliz. c. 4 was to define the uses which were charitable, as contradistinguished from those which, after the Reformation in England, were deemed superstitious, and to secure their application; Shelf. Mortm. 89, 103. This statute, as a mode of proceeding, fell into disuse, although under its influence and by its mere operation many charities were upheld which would otherwise have been void; Shelf. Mortm. 278, 279, and notes; 3 Leigh, 470; Nelson, Lex Test. 137; Boyle, Char. 18 *et seq.*; 1 Burn, Eccl. Law, 317 *a*. Under this statute, courts of chancery are empowered to appoint commissioners to superintend the application and enforcement of charities; and if, from any cause, the charity cannot be applied precisely as the testator has declared, such courts exercise the power in some cases of appropriating it, according to the principles indicated in the devise, as near as they can to the purpose expressed. And this is called an application *cy pres*; 3 Washb. R. P. 514. See CY PRES.

There is no need of any particular persons or objects being specified; the generality and indefiniteness of the object constituting the charitable character of the donation; Boyle, Char. 23.

They embrace gifts to the poor of every class, including poor relations, where the intention is manifest; 33 Penn. 9; 2 Sneed, 305; 4 Wheat. 518; 1 Sumn. 276; 10 Penn. 23; 35 N. H. 445; 28 Penn. 23; for every description of college and school, and their instructors and pupils, where nothing contrary to the fundamental doctrine of Christianity is taught; to all institutions for the advancement of the Christian religion; 7 B. Monr. 351, 481; 4 Ired. Eq. 19; 30 Penn. 425; to all churches; 10 Cush. 129; 7 S. & R. 559; 4 Iowa, 180; chapels, hospitals, orphan-asylums; 33 Penn. 9; 12 La. An. 301; 8 Rich. Eq. 190; 125 Mass. 321; even when discrimination is made in favor of members of one religious denomination; 90 Penn. 21; dispensaries; 27 Barb. 260; and the like; 2 Sandf. Ch. 46; to general public purposes; 30 Penn. 437; as supplying water or light to towns, building roads and bridges, keeping them in repair, etc.; 24 Conn. 350; and to other charitable purposes general in their character; 4 R. I. 414; 12 La. An. 301; 5 Ohio St. 237; 33 Penn. 415; 81 Penn. 445; 5 Ind. 465; L. R. 10 Eq. 246; L. R. 1 Eq. 585; L. R. 4 Ch. App. 309; L. R. 20 Eq. 483.

When the purposes of a charity may be best sustained by alienating the specific property bequeathed and investing the proceeds in a different manner, a court of equity has jurisdiction to direct such sale and investment, taking care that no deviation of the gift be permitted; 6 Wall. 169.

Before the recent acts, charities in England were interpreted, sustained, controlled, and applied by the court of chancery, in virtue of its general jurisdiction in equity, aided by the stat. 43 Eliz. c. 4 and the prerogative of the crown; the latter being exercised by the lord chancellor, as the delegate of the sovereign acting as *parens patriæ*; Spence, Eq. Jur. 439, 441; 12 Mass. 537. The subject has since been regulated by various statutes; the Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, amended by 18 & 19 Vict. c. 124; 20 & 21 Vict. c. 76; Tudor's Charitable Trust Act, *passim.* By the Toleration Act, 1 Wm. & M. c. 18, charitable trusts for promoting the religious opinions of Protestant Dissenters have been held valid; 2 Ves. Sen. 273. Roman Catholics share in their benefits · 2 & 3

Will. IV. c. 115; and Jews, by 9 & 10 Vict. c. 59, § 2. The stat. 43 Eliz. c. 4 has not been re-enacted or generally followed in the United States. In some of them it has been adopted by usage; but, with several striking exceptions, the decisions of the English Chancery upon trusts for charity have furnished the rule of adjudication in our courts, without particular reference to the fact that the most remarkable of them were only sustainable under the peculiar construction given to certain phrases in the statute; Boyle, Char. 18 *et seq.* The opinion prevailed extensively in this country that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. These views were assailed in 1833 by Baldwin, J. (in Bright. 346), in 1835 in 7 Vt. 241, and in 1844 by Mr. Binney in the Girard will case in 2 How. 128; 95 U. S. 304. It is now conceded as settled that courts of equity have an inherent and original jurisdiction over charities, independent of the statute; Perry, Trusts, § 694; 45 Me. 122; 28 Ala. 299; 29 Mo. 543; 35 Ind. 246; 27 Tex. 173.

In Virginia and New York, that statute, with all its consequences, seems to have been repudiated; 3 Leigh, 450; 22 N. Y. 70, & App. So in North Carolina, Connecticut, Maryland, and the District of Columbia; 1 Dev. Eq. 276; 1 Hawks, 96; 4 Ired. Ch. 26; 6 Conn. 293; 22 *id.* 31; 5 Harr. & J. 392; 6 *id.* 1; 8 Md. 551; 7 Am. Dec. 339; 95 U. S. 304. In Georgia, Indiana, Iowa, Kentucky, Massachusetts, Rhode Island, Vermont, and perhaps some other states, the English rule is acted on; 8 Blackf. 15; 18 B. Monr. 635; 4 Ga. 404; 4 Iowa, 252; 16 Pick. 107; 4 R. I. 414; 12 La. An. 301; 7 Vt. 211, 241; 4 Wheat. 1; 2 How. 127; 17 *id.* 369; 24 *id.* 465. See 16 Ill. 225; 19 Ala. N. S. 814; 1 Swan, 348.

It is said that charitable uses are favorites with courts of equity; the construction of all instruments when they are concerned is liberal in their behalf; 95 U. S. 313; and even the rule against perpetuities is relaxed for their benefit; *ibid.; contra*, 34 N. Y. 504. A gift may be made to a charity not *in esse* at the time; *ibid.;* Perry, Trusts, § 736.

Generally, the rules against accumulations do not apply; Perry, Trusts, § 738; 10 Allen, 1; 45 Penn. 1. Where there is no trustee appointed or none capable of acting, the trust will be sustained, and a trustee appointed; 3 Hare, 191; 3 Pet. 99.

Legacies to pious or charitable uses are not, by the law of England, entitled to a preference in distribution; although such was the doctrine of the civil law. Nor are they in the United States, except by special statute.

See, generally, 3 Washburn, Real Prop. 687, 690; Boyle, Char.; Duke, Char. Uses; 2 Kent, 361–365; 4 *id.* 616; 2 Ves. Ch. 52, 272; 6 *id.* 404; 7 *id.* 86; Ambl. 715; 2 Atk. 88; 24 Penn. 84; 3 Rawle, 170; 1 Penn. 49; 17 S. & R. 88; 2 Dana, 170; 9 Cow. 437; 9 Wend. 394; 1 Sandf. Ch. 439; 9 Barb. 324; 17 *id.* 104; 27 *id.* 376; 30 *id.* 124; 9 N. Y. 554; 9 Ohio, 203; 5 Ohio St. 237; 24 Conn. 350; 6 Pet. 435; 9 *id.* 566; 9 Cra. 331; 2 How. 127; 20 Miss. 165; 1 Ill. 225; 2 Strobh. Eq. 379. Dwight's argument, Rose will case; Dwight's Charity Cases; a very full article in 1 Am. L. Reg., N. S. 129, 321, 385; 9 Am. Dec. 577.

CHARTA. A charter or deed in writing. Any signal or token by which an estate was held.

CHARTA CHYROGRAPHATA. An indenture. The two parts were written on the same sheet, and the word chyrograph written between them in such a manner as to divide the word in the separation of the two parts of the indenture.

CHARTA COMMUNIS. An indenture.

CHARTA PARTITA. A charter-party.

CHARTA DE UNA PARTE. A deed poll. A deed of one part.

Formerly this phrase was used to distinguish a *deed poll*—which is an agreement made by one party only; that is, only one of the parties does any act which is binding upon him—from a deed *inter partes*. Co. Litt. 229. See DEED POLL.

CHARTA DE FORESTA. A collection of the laws of the forest, made in the 9th Hen. III., and said to have been originally a part of Magna Charta.

CHARTEL. A challenge to single combat. Used at the period when trial by single combat existed. Cowel.

CHARTER. A grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. 1 Story, Const. § 161; 1 Bla. Com. 108.

A charter differs from a constitution in this, that the former is granted by the sovereign, while the latter is established by the people themselves: both are the fundamental law of the land.

A deed. The written evidence of things done between man and man. Cowel. Any conveyance of lands. Any sealed instrument. Spelman. See Co. Litt. 6; 1 Co. 1; F. Moore, 687.

The act of legislature creating a corporation. Dane, Abr. *Charter*. By statutory provision in Pennsylvania, charters may be granted by the courts of the different counties, for the purpose of creating corporations of various sorts; Act April 29, 1874, P. L. 75.

CHARTER-LAND. In English Law. Land formerly held by deed under certain rents and free services. It differed in nothing from free socage land; and it was also called bookland. 2 Bla. Com. 90.

CHARTER-PARTY. A contract of affreightment, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight.

The term is derived from the fact that the contract which bears this name was formerly writ-

ten on a card (*charta-partita*), and afterwards the card was cut into two parts from top to bottom, and one part was delivered to each of the parties, which was produced when required, and by this means counterfeits were prevented. Abb. Ship. 175; but see Pothier, Traité de Charte-partie, for a different explanation.

It is in writing not generally under seal, in modern usage; 1 Parsons, Adm. & Ship. 270; but may be by parol; 16 Mass. 336; 5 Pick. Mass. 422; 16 *id.* 401; 9 Metc. 233; Ware, Dist. Ct. 263; 3 Sumn. C. C. 144. It should contain, *first*, the name and tonnage of the vessel, see 14 Wend. 195; 7 N. Y. 262; *second*, the name of the captain; 2 B. & Ald. 421; *third*, the names of the letter to freight and the freighter; *fourth*, the place and time agreed upon for the loading and discharge; *fifth*, the price of the freight; 2 Gall. 61; *sixth*, the demurrage or indemnity in case of delay; 9 C. & P. 709; 10 M. & W. 498; 17 Barb. 184; Abb. Adm. 548; 4 Binn. 299; 9 Leigh, 532; 5 Cush. 18; *seventh*, such other conditions as the parties may agree upon; 13 East, 343; 20 Bost. L. Rep. 669; Bee, 124.

It may either provide that the charterer hires the whole capacity and burden of the vessel,—in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide,—or it may provide for an entire surrender of the vessel to the charterer, who then hires her as one hires a house, and takes possession in such a manner as to have the rights and incur the liabilities which grow out of possession. See 2 B. & B. 410; 10 Bingh. 345; 8 Ad. & E. 835; 4 Wash. C. C. 110; 1 Cra. 214; 23 Me. 289; 4 Cow. 470; 17 Barb. 191; 1 Sumn. 551; 2 *id.* 589; 1 Paine, 358. If the object sought can be conveniently accomplished without a transfer of the vessel, the courts will not be inclined to consider the contract as a demise of the vessel; 2 Sumn. 583; 3 Cliff. 339; 1 Cra. 214; 11 Wall. 591; 97 U. S. 379.

When a ship is chartered, this instrument serves to authenticate many of the facts on which the proof of her neutrality must rest, and should therefore be always found on board chartered ships; 1 Marshall, Ins. 407.

CHARTIS REDDENDIS (Lat. for returning charters). A writ which lay against one who had charters of feoffment intrusted to his keeping, which he refused to deliver. Reg. Orig. 159. It is now obsolete.

CHASE. The liberty or franchise of hunting, oneself, and keeping protected against all other persons, beasts of the chase within a specified district, without regard to the ownership of the land. 2 Bla. Com. 414–416.

The district within which such privilege is to be exercised.

A chase is a franchise granted to a subject, and hence is not subject to the *forest* laws; 2 Bla. Com. 38. It differs from a park, because it may be another's ground, and is not enclosed. It is said by some to be smaller than a forest and larger than a park. Termes de la Ley. But this seems to be a customary incident, and not an essential quality.

The act of acquiring possession of animals *feræ naturæ* by force, cunning, or address.

The hunter acquires a right to such animals by occupancy, and they become his property; 4 Toullier, n. 7. No man has a right to enter on the lands of another for the purpose of hunting, without his consent; 14 East, 249; Pothier, *Propriété*, pt. 1, c. 2, a. 2.

CHASTITY. That virtue which prevents the unlawful commerce of the sexes.

A woman may defend her chastity by killing her assailant. See SELF-DEFENCE.

Sending a letter to a married woman soliciting her to commit adultery is an indictable offence; 7 Conn. 266. See 14 Penn. 226. In England, and perhaps elsewhere, the mere solicitation of chastity is not indictable; 2 Chitty, Pr. 478. Words charging a woman with a violation of chastity are actionable in themselves, because they charge her with a crime punishable by law, and of a character to degrade, disgrace, and exclude her from society; 2 Conn. 707; 8 Pick. 384; 5 Gray, 2, 5; 2 N. H. 194; Heard, Lib. & Sland. § 36.

CHATTEL (Norm. Fr. *goods*, of any kind). Every species of property, movable or immovable, which is less than a freehold.

In the *Grand Coustumier* of Normandy it is described as a mere movable, but is set in opposition to a fief or *feud*; so that not only goods, but whatever was not a *feud* or fee, were accounted chattels; and it is in this latter sense that our law adopts it. 2 Bla. Com. 385.

Real chattels are interests which are annexed to or concern real estate: as, a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description; and so in fact will be found to be any other interest in real estate whose duration is limited to a time certain beyond which it cannot subsist, and which is, therefore, something less than a freehold.

Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and every thing else that can be put in motion and transferred from one place to another; 2 Kent, 340; Co. Litt. 48 *a*; 4 Co. 6; 5 Mass. 419; 1 N. H. 350.

Chattels, whether real or personal, are treated as personal property in every respect, and, in case of the death of the owner, usually belong to the executor or administrator, and not to the heir at law. There are some chattels, however, which, as Chancellor Kent observes, though they be movable, yet are necessarily attached to the freehold: contributing to its value and enjoyment, they go

along with it in the same path of descent or alienation. This is the case with deeds, and other papers which constitute the muniments of title to the inheritance; the shelves and family pictures in a house; and the posts and rails of an enclosure. It is also understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond, go with the inheritance, as heir-looms, to the heir at law. But fixtures, or such things of a personal nature as are attached to the realty, whether for a temporary purpose or otherwise, become chattels, or not, according to circumstances. See FIXTURES; 2 Kent, 342; Co. Litt. 20 *a*, 118; 12 Price, p. 163; 11 Co. 50 *b*; 1 Chitty, Pr. 90; 8 Viner, Abr. 296; 11 *id.* 166; 14 *id.* 109; Bacon, Abr. *Baron*, etc., C, 2; Dane, Abr. Index; Comyns, Dig. *Biens*, A; Bouvier, Inst. Index.

CHATTEL INTEREST. An interest in corporeal hereditaments less than a freehold. 2 Kent, 342.

There may be a chattel interest in real property, as in case of a lease; Stearns, Real Act. 115. A term for years, no matter of how long duration, is but a chattel interest, unless declared otherwise by statute. See the subject fully treated in 1 Washburn, R. P. 310 *et seq.*

CHATTEL MORTGAGE. A transfer of personal property as security for a debt or obligation in such form that upon failure of the mortgagor to comply with the terms of the contract, the title to the property will be in the mortgagee; Thomas, Mort. 427.

An absolute pledge, to become an absolute interest if not redeemed at a fixed time; 2 Caines, Cas. 200, per Kent, Ch.

Strictly speaking, a conditional sale of a chattel as security for the payment of a debt or the performance of some other obligation; Jones, Chat. Mort. § 1. The condition is that the sale shall be void upon the performance of the condition named. At law, if the condition be not performed, the chattel is irredeemable at law; but it may be otherwise in equity or by statute; *ibid.* The title is fully vested in the mortgagee and can be defeated only by the due performance of the condition; upon a breach, the mortgagee may take possession and treat the chattel as his own; *ibid.*; 43 How. Pr. 445; s. c. 34 N. Y. (Sup. Ct.) 398.

At common law a chattel mortgage may be made without writing; it is valid as between the parties; 4 N. Y. 497; and even as against third parties if accompanied by possession in the mortgagee; 66 Barb. 433; but delivery is not essential in all cases to the validity of a chattel mortgage; 35 Ala. 131; but see 66 Barb. 433. It differs from a *pledge* in that in case of a mortgage the title is vested in the mortgagee, subject to defeasance upon the performance of the condition; while in the case of a pledge, the title remains in the pledgor, and the pledgee holds the possession for the purposes of the bailment; 24 Wend. 116; 28 Vt. 237; 48 Me. 368. By a mortgage the title is transferred; by a pledge, the possession; Jones, Mort. § 4. See 5 Johns. 258; 52 Barb. 367.

Upon default, in cases of pledge, the pledgor may recover the chattel upon tendering the amount of the debt secured; but in case of a mortgage, upon default the chattel, at law, belongs to the mortgagee; 43 How. Pr. 445. In equity he may be held liable to an account; 38 *id.* 296. Apart from statutes, no special form is required for the creation of a chattel mortgage. A bill of sale absolute in form, with a separate agreement of defeasance, constitute together a mortgage, as between the parties; 97 Mass. 452, 489; 38 Ala. 185; 30 Cal. 685. And in equity, the defeasance may be subsequently executed; 26 Ala. 312. A parol defeasance is not good in law; 10 Allen, 332; 36 Me. 562; 10 Mo. 506; *contra*, 3 Mich. 211; but it is in equity; 72 N. Y. 133; 45 Md. 477; 43 Ga. 262; 83 Ill. 470; 6 Oreg. 321, 362; even as to third parties with notice; 6 N. W. Rep. 367.

In a *conditional sale*, the purchaser has merely a right to repurchase, and no debt or obligation exists on the part of the vendor; this distinguishes such a sale from a mortgage; 40 Miss. 462; 4 Daly, 77.

Where there is an absolute sale and a simultaneous agreement of resale, the tendency is to consider the transaction a mortgage; 12 Sm. & M. 306; 11 Tex. 478; 15 Ark. 280; but not when the intention of the parties is clearly otherwise; 6 Gratt. 197; 5 Humph. 575.

It is not necessary that a chattel mortgage should be under seal; 47 Me. 504; 98 Mass. 59.

At *common law* a mortgage can be given only of chattels actually in existence, and belonging to the mortgagor actually or potentially; 32 N. H. 484; 2 Mo. App. 322; 6 Bradw. 162; 38 N. J. L. 253; 42 Wis. 583; 11 R. I. 476, 482; and even though the mortgagor may afterwards acquire title, the mortgage is bad against subsequent purchasers and creditors; but it is otherwise between the parties; 20 Hun, 265.

In *equity* the rule is different; the mortgage, though not good as a conveyance, is valid as an executory agreement; the mortgagor is considered as a trustee for the mortgagee; 11 R. I. 476; 10 H. L. Cas. 191; 2 Story, 630; 94 U. S. 382: 2 Fed. Rep. 747; 1 Woods, 214; 2 Low. 458. See article in 15 Am. L. Rev. 121. But see 13 Metc. 17; 43 Wis. 583. As to mortgages of *rolling stock*, see that title. Under this principle all sorts of future interests in chattels may be mortgaged; Jones, Chat. Mort. § 174.

Independent of statutes, a delivery is necessary to the validity of a chattel mortgage, as against creditors. The registration statutes simply provide a substitute for change of possession. Between the parties, a change of possession is unnecessary; if there is a change of possession, registration is not required; 30 Wis. 81; 49 N. H. 340.

No mortgage of a *vessel* is valid against third parties without notice, unless recorded in the office of the collector of customs of the port where the vessel is enrolled; Rev. Stat. § 4192, etc. As between parties and those who have notice, registration is not required; 100 U. S. 145; 61 N. Y. 71; 3 Woods, 61. See Jones, Chattel Mortgages; Thomas; Jones; Mortgages.

CHAUD-MEDLEY (Fr. *chaud*). The killing of a person in the heat of an affray.

It is distinguished by Blackstone from chance-medley, an accidental homicide. 4 Bla. Com. 184. The distinction is said to be, however, of no great importance. 1 Russell, Cr. 660. Chance-medley is said to be the killing in self-defence, such as happens on a sudden rencounter, as distinguished from an accidental homicide. *Id.*

CHEAT. "Deceitful practices in defrauding or *endeavoring* to defraud another of his known right, by some *wilful device*, contrary to the plain rules of common honesty." Hawk. Pl. Cr. b. 2, c. 23, § 1. "The fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public."

In order to constitute a cheat or indictable fraud, there must be a prejudice received; and such injury must affect the public welfare, or have a tendency so to do; 2 East, Pl. Cr. 817; 1 Deacon, Crim. Law, 225.

It seems to be a fair result of the cases, that a cheat, in order to be indictable at common law, must have been public in its nature, by being calculated to defraud numbers, or to deceive or injure the public in general, or by affecting the public trade or revenue, the public health, or being in fraud of public justice, etc. And the other cases to be found in the books, of cheats apparently private which have been yet held to be indictable at common law, will, upon examination, appear to involve considerations of a public nature also, or else to be founded in conspiracy or forgery. Thus, it is not indictable for a man to obtain goods by false verbal representations of his credit in society, and of his ability to pay for them; 6 Mass. 72; or to violate his contract, however fraudulently it be broken; 1 Mass. 137; or fraudulently to deliver a less quantity of amber than was contracted for and represented; 2 Burr. 1125; 1 W. Blackst. 273; or to receive good barley to grind, and to return instead a musty mixture of barley and oatmeal; 4 Maule & S. 214. See 2 East, Pl. Cr. 816; 7 Johns. 201; 14 *id.* 371; 9 Cow. 588; 9 Wend. 187; 2 Mass. 138; 1 Me. 387; 1 Yerg. 76; 1 Dall. 47; 1 Bennett & H. L. Cr. Cas. 1.

To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial; 3 Greenl. Ev. § 86; 6 Mass. 72. In addition to this, the statute 33 Hen. VIII. 1, which has been adopted and considered as a part of the common law in some of the United States, and the provisions of which have been either recognized as common law or expressly enacted in nearly all of them, was directed, as appears from its title and preamble, against such persons as received money or goods by means of counterfeit letters or privy tokens in other men's names; 6 Mass. 72; 12 Johns. 292; 3 Greenl. Ev. § 86. A "privy token," within the meaning of this statute, was held to denote some real visible mark or thing, as a key, a ring, etc., and not a mere affirmation or promise. And though writings, generally speaking, may be considered as tokens, yet to be within this statute they must be such as were made in the names of third persons, whereby some additional credit and confidence might be gained to the party using them; 2 East, Pl. Cr. 826, 827.

The word "cheat" is not actionable, unless spoken of the plaintiff in relation to his profession or business; Heard, Lib. & Sl. §§ 16, 28, 48; 6 Cush. 185; 2 Chitt. Bail, 657; 2 Penn. 187; 20 Up. Can. Q. B. 382; 5 Wend. 263. See FALSE PRETENCES; TOKEN; ILLITERATE.

CHECK. **Contracts.** A written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money. 2 Dan. Neg. Inst. 528; 28 Gratt. 170. See 6 N. Y. 412.

The chief differences between checks and bills of exchange are: *First*, a check is not due until presented, and, consequently, it can be negotiated any time before presentment, and yet not subject the holder to any equities existing between the previous parties; 3 Johns. Cas. 5, 9; 9 B. & C. 388; Chitty, Bills, 8th ed. 546. *Secondly*, the drawer of a check is not discharged for want of immediate presentment with due diligence; while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only *pro tanto*; 6 Cow. 484; Kent, Comm. Lec. 44, 5th ed. p. 104, note; 3 Johns. Cas. 5, 259; 10 Wend. 306; 2 Hill, 425. See 31 Penn. 100. *Thirdly*, the death of the drawer of a check rescinds the authority of the banker to pay it; while the death of the drawer of a bill of exchange does not alter the relations of the parties; 3 M. & G. 571-573. *Fourthly*, checks, unlike bills of exchange, are always payable without grace; 25 Wend. 672; 6 Hill, 174.

Checks are in use only between banks and bankers and their customers, and are designed to facilitate banking operations. It is of their very essence to be payable on demand, because the contract between the banker and customer is that the money is payable on demand; 21 Wend. 372; 20 *id.* 205; 10 *id.* 306; 2 Stor. 502, 512; 10 Wall. 647.

They ought to be drawn within the state where the bank is situated, because if not so drawn they become foreign bills of exchange, subject to the law merchant. This law requires that they be protested, and that due diligence be used in presenting them, in order to hold the drawer and indorsers. It is not

necessary to use diligence in presenting an ordinary check, in order to charge the drawer, unless he has received damage by the delay; 2 Pet. 586; 2 Hill, 425; 1 Ga. 304; 2 M. & R. 401; 3 Scott, N. R. 555; 3 Kent, 104, n.; 57 N. Y. 641; 22 Gratt. 743; 1 Vroom, 284; Story, Pr. Notes, § 492.

In common with other kinds of negotiable paper, they must contain an order to pay money, and words of negotiability. This enables a *bonâ fide* holder for value to collect the money without regard to the previous history of the paper; 16 Pet. 1; 5 Johns. Ch. 54; 20 Johns. 637; 3 Kent, 81; 42 Ala. 108.

They must be properly signed by the person or firm keeping the account at the banker's, as it is part of the implied contract of the banker that only checks so signed shall be paid.

Post-dated checks are payable on the day of their date, although negotiated beforehand. See 1 Vroom, 284.

Checks, being payable on demand, are not to be accepted, but presented at once for payment. There is a practice, however, of marking checks "good," by the banker, which fixes his responsibility to pay that particular check when presented, and amounts, in fact, to an acceptance; 10 Wall. 648. Such a marking is called certifying; and checks so marked are called certified checks. See 25 N. Y. 143; 73 Penn. 483.

The bank thereby becomes the principal debtor; 52 N. Y. 350; 10 Wall. 648; to the holder, not the drawer; 39 Penn. 92; and the statute of limitation does not run against the check; 39 Penn. 92. The bank cannot refuse to pay, because notified not to pay by the drawer; 12 Hun, 537; nor, generally, can it set up that the check was forged; or that the drawer has no funds; 18 Wall. 621. In New York, it is held that certifying a check warrants only the signature, and not the terms of the check; 67 N. Y. 458; *contra*, 28 La. An. 189.

Giving a check is no payment unless the check is paid; 1 Hall, 56, 78; L. R. 10 Ex. 153; 99 Mass. 277; 4 Hun, 639; 66 Ill. 351; 7 S. & R. 116. See 3 Rand. 481. But a tender was held good when made by a check contained in a letter, requesting a receipt in return, which the plaintiff sent back, demanding a larger sum, without objecting to the nature of the tender; 3 Bouvier, Inst. n. 2436; and receiving a check marked "good" is payment; 2 Dan. Neg. Inst. 559.

A check cannot be the subject of a *donatio mortis causâ*, unless it is presented and paid during the life of the donor; because his death revokes the banker's authority to pay; 4 Brown, Ch. 286; 27 La. An. 465. But in such a case a check has been considered as of a testamentary character; 3 Curt. Eccl. 650; and see 1 P. Wms. 441.

There is a practice of writing across checks "memorandum," or "mem." They are given thus, not as an ordinary check, but as a memorandum of indebtedness; and between the original parties this seems to be their only effect. In the hands of a third party, for value, they have, however, all the force of checks without such word of restriction; 16 Pick. 535; 11 Paige, 612; Story, Pr. Notes, § 499.

See, generally, Shaw, Checks; 4 Johns. 304; 7 *id.* 26; 6 Wend. 445; 13 *id.* 133; 10 *id.* 304; 2 N. & M'C. 251; 1 Blackf. 104; 1 Litt. 194; 2 *id.* 299; 4 H. & J. 276; 7 *id.* 381; 15 Mass. 74; 7 S. & R. 116; 9 *id.* 125; 4 Yerg. 210; 30 N. H. 256; 2 Stor. 502; 5 B. & C. 750; 10 Ad. & E. 449; 4 Bingh. 253; 1 So. L. J. 608; Dan. Neg. Inst.; Morse, Banking.

CHECK BOOK. A book containing blanks for checks.

These books are so arranged as to leave a margin, called by merchants a *stump*, or *stubb*, when the check is filled out and torn off. Upon these stumps a memorandum is made of the date of the check, the payee, and the amount; and this memorandum, in connection with the evidence of the party under oath, is evidence of the facts there recorded.

CHEMIN (Fr.). The road wherein every man goes; the king's highway. Called in law Latin *via regia*. Often spelled *Chimin*. Termes de la Ley; Cowel; Spelman, Gloss.

CHEMIS. In Old Scotch Law. A mansion-house.

CHEVAGE. A sum of money paid by villeins to their lords in acknowledgment of their villenage.

It was paid to the lord in token of his being chief or head. It was exacted for permission to marry, and also permission to remain without the dominion of the lord. When paid to the king, it was called subjection. Termes de la Ley; Co. Litt. 140 *a*; Spelman, Gloss.

CHEVANTIA. A loan, or advance of money on credit. See CHEVISANCE.

CHEVISANCE (Fr. agreement). A bargain or contract. An unlawful bargain or contract.

CHICKASAW NATION, THE. Within certain limits established by treaty between the United States, the Choctaw and the Chickasaw Indians, signed at Washington, June 22, 1855, the Chickasaw nation has exclusive control and jurisdiction.

The following treaties have been made, establishing the rights of this nation: Between the United States and the Chickasaws, concluded October 20, 1832, ratified March 1, 1833; one concluded May 24, 1834, ratified July 1, 1834; one between the United States, the Choctaws, and the Chickasaws, concluded January 17, 1837, ratified March 24, 1837; one between the United States and the Chickasaws, concluded June 22, 1852, ratified February 24, 1853; one between the United States, the Choctaws, and the Chickasaws, concluded June 22, 1855, ratified March 4, 1856. This nation has a written constitution, prefaced by a declaration of rights, which is substantially as follows, viz.: that all political power inheres in the people; that all men should be free to worship God according to the dictates of their conscience, and not be compelled to attend, erect,

or support any ministry against their consent; that there should be freedom of speech; that there should be security from unreasonable searches of property or person; that every person accused of crime should have a speedy trial.

The more important provisions of the constitution are as follows:—

All free males nineteen years old or more, who are Chickasaws by birth or adoption, may vote. But no idiot, or insane person, or person convicted of an infamous crime, may vote.

THE LEGISLATIVE POWER.—*The Senate* is to be composed of not less than one-third nor more than two-thirds the number of representatives, elected by the people for the term of two years. The present number of senators is twelve, elected in each of the four districts of the *state*, each district being also a county. A senator must be thirty years of age at least, must be a Chickasaw by birth or adoption, and must have been a resident of the nation for one year, and for the last six months a citizen of the county from which he is chosen.

The House of Representatives consists of eighteen members, elected by the people of the counties for one year. A representative must be twenty-one years old, and otherwise possess the same qualifications as a senator. Constitution, art. iv.

THE EXECUTIVE POWER.—*The Governor* is elected for two years by the people of the nation. He must be a Chickasaw by birth or adoption, thirty years of age, and must have resided in the nation for one year next before his election. He is to execute the laws; may convene the legislature at unusual times; is to give information and recommend measures to the legislature; may adjourn the legislature in case of disagreement as to the time of adjournment, not beyond the next session.

THE JUDICIAL POWER.—*The Supreme Court* is composed of one chief and two assistant justices, elected by the legislature for the term of four years. A judge must be thirty years old. This court has appellate jurisdiction only, coextensive with the limits of the nation. It may issue the writs necessary to enforce its jurisdiction, and compel any judge of the district court to proceed to trial.

The Circuit Court is held in each of the four counties of the nation. It has original jurisdiction of all criminal cases, and exclusive jurisdiction of all crimes amounting to felony, as well as of all civil cases not cognizable by the county court, and has original jurisdiction of all actions of contract where the amount involved is more than fifty dollars. One circuit judge for the nation is elected by the legislature. He rides four circuits a year, holding court each time in each of the four counties in the state.

A County Court is held in each county by a single judge, elected by the people of the county for the term of two years. It has a civil jurisdiction in all actions where the amount involved is more than fifty dollars. It has also jurisdiction of the probate of wills, the settlement of estates of decedents, the appointment and control of guardians. A probate term is held each month.

CHIEF. One who is put above the rest. Principal. The best of a number of things.

Declaration in chief is a declaration for the principal cause of action. 1 Tidd, Pr. 419.

Examination in chief is the first examination of a witness by the party who produces him. 1 Greenl. Ev. § 445.

Tenant in chief was one who held directly of the king. 1 Washb. R. P. *19.

CHIEF BARON. The title of the chief justice of the English court of exchequer. 3 Bla. Com. 44.

CHIEF CLERK IN THE DEPARTMENT OF STATE. An officer appointed by the secretary of state, whose duties are to attend to the business of the office under the superintendence of the secretary, and, when the secretary is removed from office by the president, or in any other case of vacancy, during such vacancy to take the charge and custody of all records, books, and papers appertaining to the department. See Ab. Dict.

CHIEF JUSTICE. The presiding or principal judge of a court.

CHIEF JUSTICIAR. Under the early Norman kings, the highest officer in the kingdom next to the king.

He was guardian of the realm in the king's absence. His power was diminished under the reign of successive kings, and, finally, completely distributed amongst various courts in the reign of Edward I. 3 Bla. Com. 28. The same as *Capitalis Justiciarius*.

CHIEF LORD. The immediate lord of the fee. Burton, R. P. 317.

CHIEF PLEDGE. The borsholder, or chief of the borough. Spelman, Gloss.

CHILD. The son or daughter, in relation to the father or mother.

Illegitimate children are bastards. *Legitimate children* are those born in lawful wedlock. *Natural children* are illegitimate children. *Posthumous children* are those born after the death of the father.

Children born in lawful wedlock, or within a competent time afterwards, are presumed to be the issue of the father, and follow his condition; but this presumption may be repelled by the proof of such facts tending to establish non-intercourse as may satisfy a jury to the contrary; 2 Kent, 210; 3 C. & P. 215, 427; 12 East, 550; 13 Ves. Ch. 58; 3 Paige, Ch. 139; 6 Binn. 286; 3 Dev. 548. See 3 Wall. 175. Those born out of lawful wedlock follow the condition of the mother. The father is bound to maintain his children, and to educate them, and to protect them from injuries; Schoul. Dom. Rel. *315 *et seq.* The Stat 43 Eliz. c. 2, provided that the father and mother, grandfather and grandmother of a poor, impotent, etc., child should support it. It is said that this act is in force in the U. S.; Schoul. Dom. Rel. *320. See FATHER. But not after majority; 1 Ld. Raym. 699. Children are not liable at common law for the support of infirm and indigent parents; 16 Johns. 281; but generally they are bound by statutory provisions to maintain their parents who are in want, when they have sufficient ability to do so; 2 Kent, 208; Pothier, *Du Mariage*, n. 384, 389; 2 Root, 168; 5 Cow. 284. The child may justify an assault in defence of his parent; 3 Bla. Com. 3. The father, in gene-

ral, is entitled to the custody of minor children; but, under certain circumstances, the mother will be entitled to them when the father and mother have separated; 5 Binn. 520. The courts of U. S. will, in their sound discretion, give the custody to the mother, or to a third party. Considerations as to the age and condition of the child weigh with the court. The well-being of the child, rather than the supposed right of either parent, controls the question of custody; 10 Cent. L. J. 389; s. c. 12 R. I. 462; 21 N. J. Eq. 384. See FATHER; MOTHER. Children are liable to the reasonable correction of their parents. See CORRECTION; ASSAULT.

The term children does not, ordinarily and properly speaking, comprehend grandchildren, or issue generally; yet sometimes that meaning is affixed to it in cases of necessity; 6 Co. 16. And it has been held to signify the same as issue, in cases where the testator, by using the terms children and issue indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grandchildren, etc., to take under it; 1 Ves. Sen. Ch. 196; Ambl. 555, 661; 3 Ves. Ch. 258; 3 V. & B. 69; 7 Paige, Ch. 328; 1 Bail. Eq. 7; 4 Watts, 82; 3 Greenl. Cruise, Dig. 213, note. When legally construed, the term children is confined to legitimate children; 7 Ves. Ch. 458; and when the term is used in a will, there must be evidence to be collected from the will itself, or extrinsically, to show affirmatively that the testator intended that his illegitimate children should take, or they will not be included; 1 V. & B. 422, 469; 1 Madd. 234; 9 Paige, Ch. 88; 1 R. & M. 581; 4 Kent, 346, 414, 419, and notes. The civil code of Louisiana, art. 2522, n. 14, enacts that "under the name of children are comprehended not only children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line."

Posthumous children inherit, in all cases, in like manner as if they had been born in the lifetime of the intestate and had survived him; 2 Greenl. Cruise, Dig. 135; 4 Kent, 412. See 2 Washb. R. P. 412, 439, 699.

In Pennsylvania, and in some other states; Laws of Penn. 1836, p. 250; R. I. Rev. Stat. tit. xxiv. c. 154, § 10; 3 Gray, 367; the will of their fathers or mothers in which no provision is made for them is revoked, as far as regards them, by operation of law; 3 Binn. 498. See, as to the law of Virginia on this subject, 3 Munf. 20, and article IN VENTRE SA MERE. As to their competency as witnesses, see 1 Greenl. Ev. § 367; 2 Stark. Ev. 699.

See, generally, 8 Viner, Abr. 318; 8 Comyns, Dig. 470; Bouvier, Inst. Index; 2 Kent, 172; 4 *id.* 408; 1 Roper, Leg. 45–76; 1 Belt, Supp. to Ves. Jr. 44; 2 *id.* 158.

CHILDWIT (Sax.). A power to take a fine from a bondwoman gotten with child without the lord's consent.

By custom in Essex county, England, every reputed father of a bastard child was obliged to pay a small fine to the lord. This custom is known as childwit. Cowel.

CHILTERN HUNDREDS. A range of hills in England, formerly much infested by robbers.

To exterminate the robbers, a steward of the Chiltern Hundreds was appointed. The office long since became a sinecure, and is now used to enable a member of parliament to resign, which he can do only by the acceptance of some office within the gift of the chancellor. 2 Steph. Com. 403; Whart. Dict.

CHIMIN. See CHEMIN.

CHIMINAGE. A toll for passing on a way through a forest; called in the civil law *pedagium*. Cowel. See Co. Litt. 56 *a*; Spelman, Gloss.; Termes de la Ley.

CHIMINUS. The way by which the king and all his subjects and all under his protection have a right to pass, though the property of the soil of each side where the way lieth may belong to a private man. Cowel.

CHINESE. Stringent laws looking to the entire exclusion of Chinese from the states have been passed in California, Nevada, and Oregon; many of these have been decided to be unconstitutional. An ordinance providing that every male person imprisoned in the county jail should have his hair cut short is unconstitutional, as inflicting cruel and unusual punishment, and as contrary to the XIV amendment of the U. S. constitution; 5 Sawy. 552. A statute forbidding the employment of Chinamen on public works, etc., is void, as contravening the Burlingame treaty and the XIV amendment; 5 Sawy. 566; 1 Fed. Rep. 481. So is an act forbidding Chinamen to fish for the purpose of sale; 2 Fed. Rep. 743. But a state law forbidding the exhumation of dead bodies and their removal, without a permit, is not invalid when applied to the removal of bodies of Chinamen who have been buried in California; it is a merely sanitary regulation; 2 Fed. Rep. 624.

CHINESE INTEREST. Interest for money charged in China. In a case where a note was given in China, payable eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per cent. per month from the expiration of the eighteen months. 2 W. & S. 227, 264.

CHIPPINGAVEL. A toll for buying and selling. A tax imposed on goods brought for sale. Whishaw; Blount.

CHIRGEMOTE (spelled, also, *Chirchgemote*, *Circgemote*, *Kirkmote*; Sax. *circgemote*, from *circ*, *ciric*, or *cyric*, a church, and *gemot*, a meeting or assembly).

In Saxon Law. An ecclesiastical court or assembly (*forum ecclesiasticum*); a synod; a meeting in a church or vestry. Blount; Spelman, Gloss.; LL. Hen. I. cc. 4, 8; Co. 4th Inst. 321; Cunningh. Law Dict.

CHIROGRAPH. In Conveyancing. A deed or public instrument in writing.

Chirographs were anciently attested by the subscription and crosses of witnesses. Afterwards, to prevent frauds and concealments, deeds of mutual covenant were made in a *script* and *rescript*, or in a part and counter-part; and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied, or cut asunder in an indented manner, the sheet or skin of parchment, one of which parts being delivered to each of the parties were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, because that word, instead of the letters of the alphabet or the word *chirographum*, was used. 2 Bla. Com. 296. This method of preventing counterfeiting, or of detecting counterfeits, is now used, by having some ornament or some word engraved or printed at one end of certificates of stocks, checks, and a variety of other instruments, which are bound up in a book, and, after they are executed, are cut asunder through such ornament or word.

The last part of a fine of land.

It is called, more commonly, the foot of the fine. It is an instrument of writing, beginning with these words: "This is the final agreement," etc. It concludes the whole matter, reciting the parties, day, year, and place, and before whom the fine was acknowledged and levied. Cruise, Dig. t. 35, c. 2, s. 52.

In Civil and Canon Law. An instrument written out and subscribed by the hands of the king or prince. An instrument written out by the parties and signed by them.

The Normans, destroying these *chirographa*, called the instruments substituted in their place *charta* (charters), and declared that these *charta* should be verified by the seal of the signer with the attestation of three or four witnesses. Du Cange; Cowel.

In Scotch Law. A written voucher for a debt. Bell, Dict. The possession of this instrument by the debtor raises a presumption of payment by him. Bell, Dict.; Erskine, Inst. 1. 2, t. 4, § 5.

CHIVALRY, TENURE BY. Tenure by knight-service. Coke, Litt.

CHOCTAW NATION, THE. By treaty with the United States, a portion of territory is set apart, over which the Choctaw Indians have exclusive jurisdiction.

They have a written constitution, prefaced by a bill of rights. The bill of rights declares, among other things, that political power is inherent in the people; that there shall be religious freedom; that there shall be freedom of speech and of the press; that the person and property shall be secure from unreasonable searches; that there shall be trial by jury; that no person shall be arrested except for offences defined by the laws; that excessive bail shall not be required in any case.

By the constitution, every free male citizen twenty-one years old, and who has been a citizen of the nation six months and who has lived in the county one month, is entitled to vote.

THE LEGISLATIVE POWER.—*The Senate* is composed of not less than one-third nor more than one-half the number of representatives, elected by the people for the term of four years. They are so classified that one-half the number go out of office every two years. A senator must be thirty years old, and have been a resident of the district for which he is chosen at least one year and of the nation two years preceding his election.

The House of Representatives is composed of not less than seventeen nor more than thirty-five members, apportioned among the counties, and elected by the people for the term of two years.

There are the provisions customary in the constitutions of the various states of the United States for organizing the two houses; making each the judge of the qualification of its members; making each regulate the conduct of its members; providing for the continuance of sessions, for open sessions, for keeping a journal of proceedings, etc. Members are privileged from arrest, except for treason, felony, or breach of the peace, during the session, and going to and returning from the same, allowing one day for each twenty miles the member has to travel.

THE EXECUTIVE POWER.—*The Governor* is elected by the people for the term of two years. He must be thirty years old, and a free and acknowledged citizen of the Choctaw nation, and must have lived in the nation five years. He is eligible for four years only out of any term of six years. He possesses powers substantially the same as those of the governors of the various States.

THE JUDICIAL POWER.—*The Supreme Court* consists of three circuit court judges. It holds two sessions each year, at the capital. It sits as a court of errors and appeals only.

The Circuit Court is composed of three judges, elected by the people, one from each of the districts into which the nation is divided for the purposes of this court. It has original jurisdiction in all criminal cases, and in all civil cases where the amount involved exceeds fifty dollars, except those cases of minor offences where a justice of the peace has exclusive jurisdiction. Two terms a year, at least, must be held in each county.

The Probate Court is held by a judge elected in each county by the people for the term of two years. It has the regulation of the settlement of estates of decedents, the appointment and control of guardians of minors, lunatics, etc., and the probate of wills.

Justices of the Peace are chosen by the electors of each county for the term of two years. They have a civil jurisdiction in all cases where the amount involved is less than fifty dollars. They constitute a board of police for the county, and have charge of the highways, bridges, etc.

CHOSE (Fr. *thing*). Personal property.

Choses in possession. Personal things of which one has possession.

Choses in action. Personal things of which the owner has not the possession, but merely a right of action for their possession. 2 Bla. Com. 389, 397; 1 Chitty, Pr. 99.

CHOSE IN ACTION. A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. Comyns, Dig. *Biens.*

It is one of the qualities of a chose in action that at common law it is not assignable; 10 Co. 47, 48; 2 Johns. 1; 12 Wend. 297; 1 Cra. 367; but in equity, from an early period, the courts have viewed the assignment of a chose in action for a valuable consideration as a contract by the assignor to permit the assignee to use his name for the purpose of

recovery, and, consequently, enforce its specific performance, unless contrary to public policy; 1 P. Wms. Ch. 381; Freem. Ch. 145; 1 Ves. Sen. Ch. 412; 2 Stor. 660; 2 Ired. Eq. 54; 1 Wheat. 236; 15 Mo. 662. And now, at common law, the assignee is entitled to sue and recover in the name of the assignor, and the debtor will not be allowed, by way of defence to such suit, to avail himself of any payment to or release from the assignor, if made or obtained after notice of the assignment; 4 Term, 340; 1 Hill, 483; 4 Ala. N. S. 184; 14 Conn. 123; 29 Me. 9; 13 N. H. 230; 10 Cush. 93; 20 Vt. 25. If, after notice of the assignment, the debtor expressly promise the assignee to pay him the debt, the assignee will then, in the United States, be entitled to sue in his own name; 10 Mass. 316; 3 Metc. Mass. 66; 5 Pet. 597; 2 R. I. 146; 7 H. & J. 213; 2 Barb. 349, 420; 27 N. H. 269; but without such express promise the assignee, except under peculiar circumstances, must proceed, even in equity, in the name of the assignor; 2 Barb. Ch. 596; 1 Johns. Ch. 463; 7 G. & J. 114; 2 Wheat. 373. By statute in England, 36 & 37 Vict. c. 66, s. 25 (6), any absolute assignment by writing under the hand of the assignor of a chose in action, with written notice to the debtor, passes the legal right thereto and all remedies thereon.

But courts of equity will not, any more than courts of law, give effect to such assignments when they contravene any rule of law or of public policy. Thus, they will not give effect to the assignment of the half-pay or full pay of an officer in the army; 2 Anstr. 533; 1 Ball. & B. 389; or of a right of entry or action for land held adversely; 2 Ired. Eq. 54; or of a part of a right in controversy, in consideration of money or services to enforce it; 16 Ala. 488; 4 Dana, 173; 2 Dev. & B. Eq. 24. Neither do the courts, either of law or of equity, give effect to the assignment of mere personal actions which die with the person; 19 Wend. 73; 4 S. & R. 19; 13 N. Y. 322; 6 Cal. 456. But a claim of damages to property, though arising *ex delicto*, which on the death of the party would survive to his executors or administrators as assets, may be assigned; 3 E. D. Sm. 246; 12 N. Y. 622; 15 *id.* 432; 2 Barb. 110; 4 Du. N. Y. 74, 600.

The assignee of a chose in action, unless it be a negotiable promissory note or bill of exchange, although without notice, in general takes it subject to all the equities which subsist against the assignor; 1 P. Wms. 496; 4 Price, 161; 1 Johns. N. Y. 522; 7 Pet. 608; 11 Paige, Ch. 467; 2 Stockt. 146. And a payment made by the debtor, even after the assignment of the debt, if before notice thereof, will be effectual; 3 Day, 364; 10 Conn. 444; 3 Binn. 394; 4 Metc. Mass. 594.

To constitute an assignment, no writing or particular form of words is necessary, if the consideration be proved and the meaning of the parties apparent; 15 Mass. 485; 16 Johns. 51; 19 *id.* 342; 1 Hill, 583; 13 Sim. Ch. 469; 1 M. & C. 690; and therefore the mere delivery of the written evidence of debt; 2 Jones, No. C. 224; 28 Mo. 56; 24 Miss. 260; 13 Mass. 304; 5 Me. 349; 17 Johns. 284; 7 Penn. 251; or the giving of a power of attorney to collect a debt, may operate as an equitable transfer thereof, if such be the intention of the parties; 7 Ves. Ch. 28; 1 Caines, Cas. 18; 19 Wend. 73. See ASSIGNMENT.

Bills of exchange and promissory notes, in exception to the general rule, are by the law merchant transferable, and the legal as well as equitable right passes to the transferee. See BILL OF EXCHANGE. In some states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable; 2 Bouvier, Inst. 192. In New York, the code enables an assignee to maintain an action in his own name in those cases in which the right was assignable in law or in equity before the code was adopted; 4 Du. N. Y. 74.

CHRISTIANITY. The religion established by Jesus Christ.

Christianity has been judicially declared to be a part of the common law of Pennsylvania; 11 S. & R. 394; 5 Binn. 555; of New York, 8 Johns. 291; of Connecticut, 2 Swift, System, 321; of Massachusetts, 7 Dane, Abr. c. 219, a. 2, 19. See 20 Pick. 206. To write or speak contemptuously and maliciously against it is an indictable offence; Cooper, Libel, 59, 114. See 5 Jur. 529; 8 Johns. 290; 20 Pick. 206; 2 Lew. 237.

Archbishop Whately, in his preface to the Elements of Rhetoric, says, "It has been declared, by the highest legal authorities, that 'Christianity is part of the law of the land,' and, consequently, any one who impugns it is liable to prosecution. What is the precise meaning of the above legal maxim I do not profess to determine, having never met with any one who could explain it to me; but evidently the mere circumstance that we have religion by law established does not of itself imply the illegality of arguing against that religion." It seems difficult, says a late accomplished writer (Townsend, St. Tr. vol. ii. p. 389), to render more intelligible a maxim which has perplexed so learned a critic. Christianity was pronounced to be part of the common law, in contradistinction to the ecclesiastical law, for the purpose of proving that the temporal courts, as well as the courts spiritual, had jurisdiction over offences against it. Blasphemies against God and religion are properly cognizable by the law of the land, as they disturb the foundations on which the peace and good order of society rest, root up the principle of positive laws and penal restraints, and remove the chief sanction for truth, without which no question of property could be decided and no criminal brought to justice. Christianity is part of the common law, as its root and branch, its majesty and pillar—as much a component part of that law as the government and maintenance of social order. The inference of the learned archbishop seems scarcely accurate, that all who impugn this part of the law must be prosecuted. It does not follow, because Christianity is part of the law of England, that every one who impugns it is liable to prosecution. The manner of and motives for the assault are the true tests

and criteria. Scoffing, flippant, railing comments, not serious arguments, are considered offences at common law, and justly punished, because they shock the pious no less than deprave the ignorant and young. The meaning of Chief-Justice Hale cannot be expressed more plainly than in his own words. An information was exhibited against one Taylor, for uttering blasphemous expressions too horrible to repeat. Hale, C. J., observed that "such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the court of King's Bench. For, to say religion is a cheat, is to subvert all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and to *reproach* the Christian religion is to speak in subversion of the law." Ventr. 293. To remove all possibility of further doubt, the English commissioners on criminal law, in their sixth report, p. 83 (1841), have thus clearly explained their sense of the celebrated passage: "The meaning of the expression used by Lord Hale, that 'Christianity was parcel of the laws of England,' though often cited in subsequent cases, has, we think, been much misunderstood. It appears to us that the expression can only mean either that, as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law, or that the laws of England, like all municipal laws of a Christian country, must, upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In this sense, Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatever sense the expression is to be understood, it does not appear to us to supply any reason in favor of the rule that arguments may not be used against it; for it is not criminal to speak or write either against the common law of England, generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance; so that the statement that Christianity is parcel of the law of England, which has been so often urged in justification of laws against blasphemy, however true it may be as a general proposition, certainly furnishes no additional argument for the propriety of such laws." If blasphemy mean a railing accusation, then it is, and ought to be, forbidden; Heard, Lib. & Sl. § 338. See 2 How. 127, 197-201; 11 S. & R. 394; 8 Johns. 290; 10 Ark. 259; 2 Harr. Del. 553, 569; 24 Am. L. Reg. 277; 21 Am. L. Reg. 537, 333; 21 Am. L. Reg. 201.

See Cooley, Const. Lim.

CHURCH. A society of persons who profess the Christian religion. 7 Halst. 206, 214; 10 Pick. 193; 3 Penn. 282; 31 *id.* 9.

The place where such persons regularly assemble for worship. 3 Tex. 288.

The term church includes the chancel, aisles, and body of the church. Hammond, N. P. 204; 3 Tex. 288. By the English law, the terms church or chapel, and church-yard, are expressly recognized as in themselves correct and technical descriptions of the building and place, even in criminal proceedings; 8 B. & C. 25; 1 Salk. 256; 11 Co. 25 *b*; 2 Esp. 5, 28.

Burglary may be committed in a church, at common law; 3 Cox, Cr. Cas. 581. The church of England is not deemed a corporation aggregate; but the church in any particular place is so considered, for the purposes at least of receiving a gift of lands; 9 Cra. 292; 2 Conn. 287; 3 Vt. 400; 2 Rich. Eq. 192. See 9 Mass. 44; 11 Pick. 495; 10 *id.* 97; 1 Me. 288; 3 *id.* 400; 4 Iowa, 252; 3 Tex. 288; 2 Md. Ch. Dec. 143.

As to the right of succession to glebe lands, see 9 Cranch, 43, 292; 9 Wheat. 468; or other church property, see 18 N. Y. 395. As to the power of a church to make by-laws, etc., under local statutes, see 5 S. & R. 510; 3 Penn. 282; 4 Des. 578; 30 Vt. 595; 5 Cush. 412.

Controversies in the civil courts concerning property rights of religious societies are generally to be decided by a reference to one or more of three propositions:—

(1st.) Was the property or fund, which is in question, devoted, by the express terms of the gift, grant, or sale, by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society for religious purposes, with no other limitation?

(2d.) Is the society which owned it of strictly congregational or independent form of church government, owing no submission to any organization outside the congregation?

(3d.) Or is it one of a number of such societies, united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed?

In the first class of cases, the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust.

If the property was acquired in the ordinary way of purchase, or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property.

In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society as, by its own rules, constitute its government.

In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government.

In such cases where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its applica-

tion to the case before it; Watson *v.* Jones, 13 Wall. 680; s. c. 11 Am. L. Reg. 430; with a full note by Judge Redfield.

See a learned and full article on the law of church corporations; 12 Am. L. Reg. N. S. 201, 329, 537. See also 15 Am. L. Reg. N. S. 264; 92 Ill. 463; 88 Penn. 60, 503; 89 *id.* 97; 103 U. S. 330.

Where it is apparent from the charter of a church, that it is in full connection with a synodical body, and not independent of it as a congregation, those who secede, whether a majority or not, lose all right and privilege to the corporate property, and those who remain hold them; 10 Paige, 627. Where property is devoted under a trust to a particular religious faith or form of church government, those who adhere, however small in numbers, are entitled to its use, as against those who abandon the doctrines or church government; 1 Speer, Eq. 87; 41 Penn. 9; 48 *id.* 20; 4 N. J. 653; 1 Kern. 243; 6 Ohio, 363; 16 Mass. 506; 10 Pick. 172; 98 Mass. 65; 7 Paige, 281; 3 Meriv. 264.

CHURCH RATE. A tribute by which the expenses of the church are to be defrayed. They are to be laid by the parishioners, in England, and may be recovered before two justices, or in the ecclesiastical court. Wharton, Dict.

CHURCH-WARDEN. An officer whose duty it is to take care of or guard the church.

They are taken to be a kind of corporation in favor of the church for some purposes: they may have, in that name, property in goods and chattels, and bring actions for them for the use and benefit of the church, but may not waste the church property, and are liable to be called to account; 3 Steph. Com. 90; 1 Bla. Com. 394; Cowel.

These officers are created in some ecclesiastical corporations by the charter, and their rights and duties are definitely explained. In England, it is said, their principal duties are to take care of the church or building, the utensils and furniture, the church-yard, certain matters of good order concerning the church and church-yard, the endowments of the church; Bacon, Abr. By the common law, the capacity of church-wardens to hold property for the church is limited to personal property; 9 Cra. 43.

CHURL. See CEORL.

CINQUE PORTS. The five ports of England which lie towards France.

These ports, on account of their importance as defences to the kingdom, early had certain privileges granted them, and in recompense were bound to furnish a certain number of ships and men to serve on the king's summons once in each year. "The service that the barons of the Cinque Ports acknowledge to owe; upon the king's summons, if it shall happen, to attend with their ships fifteen days at their own cost and charges, and so long as the king pleases, at his own charge;" Cowel, *Quinque Portus.* The Cinque Ports are Dover, Sandwich, Hastings, Hithe, and Romney. Winchelsea and Rye are reckoned parts of Sandwich; and the other of the Cinque Ports have ports appended to them in like manner. The Cinque Ports have a lord-warden, who had a peculiar jurisdiction, sending out writs in his own name, and who is also constable of Dover Castle. The jurisdiction was abolished by 18 & 19 Vict. c. 48; 20 & 21 Vict. c. 1. The representatives in parliament and the inhabitants of the Cinque Ports are each termed barons; Brande; Cowel; Termes de la Ley.

CIRCUIT. A division of the country, appointed for a particular judge to visit for the trial of causes or for the administration of justice. See 3 Bla. Com. 58; 3 Bouvier, Inst. n. 2532.

Courts are held in each of these circuits, at stated periods, by judges assigned for that purpose; 3 Steph. Com. 321. The United States are divided into nine circuits; 1 Kent, 301.

The term is oftener applied, perhaps, to the periodical journeys of the judges through their various circuits. The judges, or, in England, commissioners of assize and *nisi prius*, are said *to make their circuit;* 3 Bla. Com. 57. The custom is of ancient origin. Thus, in A. D. 1176, justices in *eyre* were appointed, with delegated powers from the *aula regis*, being held members of that court, and directed to make the circuit of the kingdom once in seven years.

The custom is still retained in some of the states, as well as in England, as, for example, in Massachusetts, where the judges sit in succession in the various counties of the state, and the full bench of the supreme court, by the arrangement of law terms, makes a complete circuit of the state once in each year. See, generally, 3 Steph. Com. 221 *et seq.;* 1 Kent, 301.

CIRCUIT COURTS. In American Law. Courts whose jurisdiction extends over several counties or districts, and of which terms are held in the various counties or districts to which their jurisdiction extends.

The term is applied distinctively to a class of the federal courts of the United States, of which terms are held in two or more places successively in the various circuits into which the whole country is divided for this purpose; see 1 Kent, 301–303; COURTS OF THE UNITED STATES; and, in some of the states, to courts of general jurisdiction of which terms are held in the various counties or districts of the state. Such courts sit in some instances as courts of nisi prius, in others, either at nisi prius or in banc. They may have an equity as well as a common-law jurisdiction, and may be both civil and criminal courts. The systems of the various states are widely different in these respects; and reference must be had to the articles on the different states for an explanation of the system adopted in each. The term is unknown in the classification of English courts, and conveys a different idea in the various states in which it is adopted as the designation of a court or class of courts, although the constitution of such courts, in many instances, is quite analogous to that of the English courts of assize and nisi prius.

CIRCUITY OF ACTION. Indirectly obtaining, by means of a subsequent action, a result which may be reached in an action already pending.

This is particularly obnoxious to the law, as tending to multiply suits; 4 Cow. 682.

CIRCUMDUCTION. In Scotch Law. A closing of the period for lodging papers, or doing any other act required in a cause. Paterson, Comp.

CIRCUMSTANCES. The particulars which accompany an act. The surroundings at the commission of an act.

The facts proved are either possible or impossible, ordinary and probable or extraordinary and improbable, recent or ancient; they may have happened near us, or afar off; they are public or private, permanent or transitory, clear and simple or complicated; they are always accompanied by circumstances which more or less influence the mind in forming a judgment. And in some instances these circumstances assume the character of irresistible evidence: where, for example, a woman was found dead in a room, with every mark of having met with a violent death, the presence of another person at the scene of action was made manifest by the bloody mark of a *left* hand visible on her *left* arm; 14 How. St. Tr. 1324. These points ought to be carefully examined, in order to form a correct opinion. The first question ought to be, Is the fact possible? If so, are there any circumstances which render it impossible? If the facts are impossible, the witness ought not to be credited. If, for example, a man should swear that he saw the deceased shoot himself with his own pistol, and, upon an examination of the ball which killed him, it should be found too large to enter into the pistol, the witness ought not to be credited; 1 Starkie, Ev. 505; or if one should swear that another had been guilty of an impossible crime.

CIRCUMSTANTIAL EVIDENCE. See EVIDENCE.

CIRCUMSTANTIBUS. See TALES.

CIRCUMVENTION. In Scotch Law. Any act of fraud whereby a person is reduced to a deed by decreet. Tech. Dict. It has the same sense in the civil law. Dig. 50. 17. 49. 155; *id.* 12. 6. 6. 2; *id.* 41. 2. 34.

CITACION. In Spanish Law. The order of a legal tribunal directing an individual against whom a suit has been instituted to appear and defend it within a given time. It is synonymous with the term *emplazamiento* in the old Spanish law, and the *in jus vocatio* of the Roman law.

CITATIO AD REASSUMENDAM CAUSAM. In Civil Law. The name of a citation, which issued when a party died pending a suit, against the heir of the defendant, or, when the plaintiff died, for the heir of the plaintiff. Our bill of revivor is probably borrowed from this proceeding.

CITATION (Lat. *citare*, to call, to summon). **In Practice.** A writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not. Proctor, Pract.

The act by which a person is so summoned or cited.

In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely: the insertion of the name of the judge, of the promovert, of the impugnant, of the cause of suit, of the place, and of the time of appearance; to which may be added the affixing the seal of the court, and the name of the register or his deputy. 1 Brown, Civ. Law, 453, 454; Ayliffe, Parerg. xliii. 175; Hall, Adm. Pr. 5; Merlin, Rép.

The process issued in courts of probate and admiralty courts. It is usually the original process in any proceeding where used, and is in that respect analogous to the writ of capias or summons at law, and the subpœna in chancery.

In Scotch Practice. The calling of a party to an action done by an officer of the court under a proper warrant.

The service of a writ or bill of summons. Paterson, Comp.

CITATION OF AUTHORITIES. The production of or reference to the text of acts of legislatures, treatises, or cases of similar nature decided by the courts, in order to support propositions advanced.

As the knowledge of the law is to a great degree a knowledge of precedents, it follows that there must be necessarily a frequent reference to these preceding decisions to obtain support for propositions advanced as being stetements of what the law is. Constant reference to the law as it is enacted is, of course, necessary. References to the works of legal writers are also desirable for elucidation and explanation of doubtful points of law.

In the United States, the laws of the general government are generally cited by their date: as, Act of Sept. 24, 1789, § 35; or, Act of 1819, c. 170, 3 Story, U. S. Laws, 1722; or by the section of the Revised Statutes of 1878, or its supplement. The same practice prevails in Pennsylvania, and in most of the other states, when the date of the statute is important. Otherwise, in most of the states, reference is made to the revised code of laws or the official publication of the laws: as, Va. Rev. Code, c. 26; N. Y. Rev. Stat. 4th ed. 400. Books of reports and text-books are generally cited by the number of the volume and page: as, 2 Washburn, R. P. 350; 4 Penn. 60. Sometimes, however, the paragraphs are numbered, and reference is made to the paragraphs: as, Story, Bailm. § 494; Gould, Pl. c. 5, § 30.

The civilians on the continent of Europe, in referring to the Institutes, Code, and Pandects or Digest, usually give the number, not of the book, but of the law, and the first word of the title to which it belongs; and, as there are more than a thousand of these, it is no easy task for one not thoroughly acquainted with those collections to find the place to which reference is made. The American writers generally follow the natural mode of reference, by putting down the name of the collection, and then the number of the book, title, law, and section. For example, Inst. 4. 15. 2. signifies Institutes, book 4, title 15, and section 2; Dig. 41. 9. 1. 3. means Digest, book 41, title 9, law 1, section 3; Dig. *pro dote*, or *ff pro dote*, signifies section 3, law 1, of the book and title of the Digest or Pandects entitled *pro dote*. It is proper to remark that Dig. and *ff* are equivalent: the former signifies Digest, and the latter—which is a careless mode of writing the Greek letter *π*, the first letter of the word *πανδεχται*—signifies Pandects; and the Digest and Pandects

are different names for one and the same thing. The Code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph: for example, Nov. 185. 2. 4. for *Novella Justiniani* 185, *capite* 2, *paragrapho* 4. Novels are also quoted by the Collation, the title, chapter, and paragraph, as follows: *In Authentico, Collatione* 1, *titulo* 1, *cap.* 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed: for example, *Authentica, cum testator, Codice ad legem fascidiam.* See Mackeldey, Civ. Law, § 65; Domat, Civ. Law, Cush. ed. Index.

In this edition of this work the system of citation adopted in the last edition has been somewhat varied from, in order that citations of authorities might take up as little space as possible. The briefest possible citation, that will avoid ambiguity, has been adopted; the table of abbreviations (see ABBREVIATIONS) gives the full name of the book or volume of reports referred to in all cases.

Statutes of the various states will be cited by giving the number of the volume (where there are more volumes than one), the name of the state (using the common geographical abbreviation), the designation of the code, and the page where the statute or provision in consideration is found: thus, 1 N. Y. Rev. Stat. 4th ed. 63. To this it is desirable to add, when regard for space allows, the chapter and section of the statute referred to.

United States statutes, and statutes of the states not included in the codified collection of the state, are cited as statutes of the year in which they were enacted, or by the proper section of the Revised Statutes.

English statutes are referred to by indicating the year of the reign in which they were enacted, the chapter and section: thus, 17 & 18 Vict. c. 96, § 2.

Text-books are referred to by giving the number of the volume (where there are more volumes than one), and the name of the author, with an abbreviation of the title of the work sufficiently extended to distinguish it from other works by the same author and to indicate the class of subjects of which it treats: thus, 2 Story, Const.

Where an edition is referred to which has been prepared by other persons than the authors, or where an edition subsequent to the first is referred to, this fact is sometimes indicated, and the page, section, or paragraph of the edition cited is given: thus, Angell & A. Corp. Lothrop ed. 96; Smith, Lead. Cas. 5th Hare & W. ed. 173. The various editions of Blackstone's Commentaries, however, have the editor's name preceding the title of the book: thus, Sharswood, Bla. Com.; Coleridge, Bla. Com.; wherever the reference is to a note by the editor cited; otherwise the reference is merely to Blackstone.

Reports of the Federal courts of the United States, and of the English, Irish, and Scotch courts, are cited by the names of the reporters: thus, 3 Cranch, 96; 5 East, 241. In a few instances, however, common usage has given a distinctive name to a series; and wherever this is the case such name has been adopted; as, Term; C. B.; Exch.

The reports of the state courts are cited by the name of the state, wherever a series of such reports has been recognized as existing: thus, 5 Ill. 63; 21 Penn. 96; and the same rule applies to citations of the reports of provincial courts: thus, 6 Low. C. 167.

Otherwise, the reporter's name is used; thus, 5 Rawle, 23, or an abbreviation of it; as, 11 Pick. 23. This rule extends also to the provincial reports; and the principle is applied to the decisions of Scotch and Irish cases.

Where the same reporter reports decisions in courts both of law and equity, an additional abbreviation indicates which series is meant: thus, 3 Paige, Ch. 87.

For a list of abbreviations as used in this book, and as commonly used in legal books, see ABBREVIATIONS. For a list of reports, see REPORTS.

CITIZEN. In English Law. An inhabitant of a city. 1 Rolle, 138. The representative of a city, in parliament. 1 Bla. Com. 174.

In American Law. One who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside; XIV. Amendment, U. S. Const.

One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. 19 How. 404.

A member of the civil state entitled to all its privileges; Cooley, Constit. Law, 77. See 92 U. S. 542; 21 Wall. 162.

Citizens are either native-born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the constitution of the United States, except the offices of president and vice-president. The constitution of the United States (art. 4, s. 2) provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." These are privileges which in their nature are *fundamental;* which belong of right to the citizens of all free states, and which have, at all times, been enjoyed by the citizens of the several states; 4 Wash. C. C. 380. The supreme court will not define these, but will decide each case as it arises; 12 Wall. 418; 94 U. S. 39; 18 How. 591; see 37 N. J. 106; 55 Ill. 185; 16 Wall. 36, 130; 8 *id.* 168; 18 *id.* 129; 92 U. S. 542. The term citizen in the constitution applies only to natural persons; 8 Wall. 168; 1 Woods, 85.

Free persons of color, born in the United States, were always entitled to be regarded as citizens; 1 Abb. U. S. 28; but see 19 How. 393. Negroes born within the United States are citizens; 2 Bond, 389; Chase's Dec. 157 (but not before the 14th Amendment; 19 How. 393; 10 Bush, 681); but the child of a member of one of the Indian tribes within the United States is not a citizen, though born in the United States; 2 Sawy. 118; 1 Dill. 444; but *quære* if the parents had given up their tribal relations; Abb. L. Dict. *sub voce.* The fact that an unnaturalized person of foreign birth is enabled by a state statute to vote and hold office does not make him a citizen;

4 Dill. 425. A Chinaman is not entitled to become naturalized; 5 Sawy. 155.

The *age* of the person does not affect his citizenship, though it may his political rights; 1 Abb. L. Dict. 224; nor the *sex; ibid.;* 21 Wall. 162; 92 U. S. 214; 1 McArthur, 169; the right to vote and the right to hold office are not necessary constituents of citizenship; 21 Wall. 162; 43 Cal. 43.

All natives are not citizens of the United States: the descendants of the aborigines are not entitled to the rights of citizens; see *supra.* Anterior to the adoption of the constitution of the United States, each state had the right to make citizens of such persons as it pleased.

A citizen of the United States residing in any of the states of the Union is a citizen of that state; 6 Pet. 761; Paine, 594; 6 Rob. 33; 12 Blatch. 320; 1 Brock. 391; 1 Paige, Ch. 183.

The child of American parents born in a foreign country, on board an American ship of which his father was the captain, is a citizen of the United States; 5 Blatch. 18; and so is a child born abroad whose father was at the time a citizen of the United States residing abroad; 13 Op. Att.-Gen. 91; 45 Iowa, 99.

A person may be a citizen for commercial purposes and not for political purposes; 7 Md. 209.

Consult 3 Story, Const. § 1687; 2 Kent, 258; Bouvier, Inst.; Vattel, l. 1, c. 19, § 212.

As to citizenship as acquired by naturalization, see ALLEGIANCE.

CITY. In England. An incorporated town or borough which is or has been the see of a bishop. Co. Litt. 108; 1 Bla. Com. 114; Cowel.

A large town incorporated with certain privileges. The inhabitants of a city. The citizens. Worcester, Dict.

Although the first definition here given is sanctioned by such high authority, it is questionable if it is essential to its character as a city, even in England, that it has been at any time a see; and it certainly retains its character of a city after it has lost its ecclesiastical character; 1 Steph. Com. 115; 1 Bla. Com. 114; and in the United States it is clearly unnecessary that it should ever have possessed this character. Originally, this word did not signify a town, but a portion of mankind who lived under the same government—what the Romans called *civitas*, and the Greeks πολις; whence the word *politeia, civitas seu reipublicæ status et administratio.* Toullier, Dr. Civ. Fr. l. 1, t. 1, n. 202; Henrion de Pansey, *Pouvoir Municipal*, pp. 36, 37.

CIVIL. In contradistinction to *barbarous* or *savage*, indicates a state of society reduced to order and regular government: thus, we speak of civil life, civil society, civil government, and civil liberty. In contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government: thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction.

It is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign;* thus, we speak of a civil station, as opposed to a military or an ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war; Story, Const. § 789; 1 Bla. Com. 6, 125, 251; Montesquieu, Sp. of Laws, b. 1, c. 3; Rutherforth, Inst. b. 2, c. 2; *id.* c. 3; *id.* c. 8, p. 359; Heineccius, Elem. Jurisp. Nat. b. 2, ch. 6.

CIVIL ACTION. In Practice.

IN THE CIVIL LAW.—A personal action which is instituted to compel payment, or the doing some other thing which is purely civil. Pothier, Introd. *Gen. aux Cout.* 110.

AT COMMON LAW.—An action which has for its object the recovery of private or civil rights or compensation for their infraction. See ACTION.

CIVIL COMMOTION. An insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power. 2 Marsh. Ins. 793.

In the printed proposals which are considered as making a part of the contract of insurance against fire, it is declared that the insurance company will not make good any loss happening by any civil commotion.

CIVIL DAMAGE ACTS. Acts passed in many of the United States which provide an action for damages against a vender of intoxicating liquors, on behalf of the wife or family of a person who has sustained injuries by reason of his intoxication. Such an act, even if it allows an action against the owner on the property where the liquor was sold, without evidence that he authorized the sale, is constitutional; 74 N. Y. 509; the act in New York creates a new right of action, viz., for injury to the "means of support;" it is not necessary that the injury should be one remediable at common law; *ibid.* 526. The Indiana act is constitutional, even though the liquor-seller was licensed; 57 Ind. 171. So in 41 Mich. 475. If the death of the husband can be traced to an intervening cause, the liquor-seller is not liable; 84 Ill. 195; s. c. 25 Am. Rep. 446; 54 Ind. 559. Damages for injuries resulting in death cannot be recovered; 35 Ohio St. 859; s. c. 35 Am. Rep. 598, 601; *contra*, 9 Neb. 304; 4 Hun, 733; but see 5 *id.* 530; 8 *id.* 128. In some states exemplary damages can be recovered; 50 Iowa, 34; 67 Me. 517; 33 Ohio St. 444; *contra*, 6 Neb. 304; 48 Iowa, 588. The fact that the wife had bought liquor from the defendant under compulsion, or in order to keep her husband at home, does not defeat her right; *ibid.* See, generally, 20 Alb. L. J. 204.

CIVIL DEATH. That change of state of a person which is considered in the law as equivalent to death. See DEATH.

CIVIL LAW. This term is generally used to designate the Roman jurisprudence, *jus civile Romanorum.*

In its most extensive sense, the term Roman Law comprises all those legal rules and principles which were in force among the Romans, without reference to the time when they were

adopted. But in a more restricted sense we understand by it the law compiled under the auspices of the Emperor Justinian, and which are still in force in many of the states of modern Europe, and to which all refer as authority or written reason.

The ancient *leges curiatæ* are said to have been collected in the time of Tarquin, the last of the kings, by a *pontifex maximus* of the name of *Sextus* or *Publius Papirius*. This collection is known under the title of *Jus Civile Papirianum;* its existing fragments are few, and those of an apocryphal character. Mackeldey, § 21.

After a fierce and uninterrupted struggle between the patricians and plebeians, the latter extorted from the former the celebrated law of the *Twelve Tables*, in the year 300 of Rome. This law, framed by the decemvirs and adopted in the *comitia centuriata*, acquired great authority, and constituted the foundation of all the public and private laws of the Romans, subsequently, until the time of Justinian. It is called *Lex Decemviralis*. *Id.* From this period the sources of the *jus scriptum* consisted in the *leges*, the *plebiscita*, the *senatusconsulta*, and the constitutions of the emperors, *constitutiones principum;* and the *jus non scriptum* was found partly in the *mores majorum*, the *consuetudo*, and the *res judicata*, or *auctoritas rerum perpetua similiter judicatorum*. The edicts of the magistrates, or *jus honorarium*, also formed a part of the unwritten law; but by far the most prolific source of the *jus non scriptum* consisted in the opinions and writings of the lawyers—*responsa prudentium*.

The few fragments of the twelve tables that have come down to us are stamped with the harsh features of their aristocratic origin. But the *jus honorarium* established by the prætors and other magistrates, as well as that part of the customary law which was built up by the opinions and writings of the *prudentes*, are founded essentially on principles of natural justice.

Many collections of the imperial constitutions had been made before the advent of Justinian to the throne. He was the first after Theodosius who ordered a new compilation to be made. For this purpose he appointed a committee of ten lawyers, with very extensive powers; at their head was the *ex-quæstor sacri palatii*, Johannes, and among them the afterwards well-known Tribonian. His instructions were to select, in the most laconic form, all that was still of value in the existing collections, as well as in the later constitutions; to omit all obsolete matter; to introduce such alterations as were required by the times; and to divide the whole into appropriate titles. Within fourteen months the committee had finished their labors. Justinian confirmed this new code, which consisted of twelve books, by a special ordinance, and prohibited the use of the older collections of rescripts and edicts. This Code of Justinian, which is now called *Codex vetus*, has been entirely lost.

After the completion of this code, Justinian, in 530, ordered Tribonian, who was now invested with the dignity of *quæstor sacri palatii*, and sixteen other jurists, to select all the most valuable passages from the writings of the old jurists which were regarded as authoritative, and to arrange them, according to their subjects, under suitable heads. These commissioners also enjoyed very extensive powers; they had the privilege, at their discretion, to abbreviate, to add, and to make such other alterations as they might consider adapted to the times; and they were especially ordered to remove all the contradictions of the old jurists, to avoid all repetitions, and to omit all that had become entirely obsolete. The natural consequence of this was, that the extracts did not always truly represent the originals, but were often interpolated and amended in conformity with the existing law. Alterations, modifications, and additions of this kind are now usually called *emblemata Triboniani*. This great work is called the Pandects, or Digest, and was completed by the commissioners in three years. Within that short space of time, they had extracted from the writings of no less than thirty-nine jurists all that they considered valuable for the purpose of this compilation. It was divided into fifty books, and was entitled *Digesta sive Pandectæ juris enucleati ex omni vetere jure collecti*. The Pandects were published on the 16th of December, 533, but they did not go into operation until the 30th of that month. In confirming the Pandects, Justinian prohibited further reference to the old jurists; and, in order to prevent legal science from becoming again so diffuse, indefinite, and uncertain as it had previously been, he forbade the writing of commentaries upon the new compilation, and permitted only the making of literal translations into Greek.

In preparing the Pandects, the compilers met very frequently with controversies in the writings of the jurists. Such questions, to the number of thirty-four, had been already determined by Justinian before the commencement of the collection of the Pandects, and before its completion the decisions of this kind were increased to fifty, and were known as the fifty decisions of Justinian. These decisions were at first collected separately, and afterwards embodied in the new code.

For the purpose of facilitating the study of the law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of Institutes, which should contain the elements of legal science. This work was founded on, and to a great extent copied from, the commentaries of Gaius, which, after having been lost for many centuries, were discovered by the great historian Niebuhr, in 1816, in a palimpsest, or re-written manuscript, of some of the homilies of St. Jerome, in the Chapter Library of Verona. What had become obsolete in the commentaries was omitted in the Institutes, and references were made to the new constitutions of Justinian so far as they had been issued at the time. Justinian published his Institutes on the 21st November, 533, and they obtained the force of law at the same time with the Pandects, December 30, 533. Theophilus, one of the editors, delivered lectures on the Institutes in the Greek language, and from these lectures originated the valuable commentaries known under the Latin title, *Theophili Antecessoris Paraphrasis Græca Institutionum Cæsarearum*. The Institutes consist of four books, each of which contains several titles.

After the publication of the Pandects and the Institutes, Justinian ordered a revision of the Code, which had been promulgated in the year 529. This became necessary on account of the great number of new constitutions which he had issued, and of the fifty decisions not included in the Old Code, and by which the law had been altered, amended, or modified. He therefore directed Tribonian, with the assistance of Dorotheus, Menna, Constantinus, and Johannes, to revise the Old Code and to incorporate the new constitutions into it. This revision was completed in the same year; and the new edition of the Code, *Codex repetitæ prælectionis*, was confirmed on the 16th November, 534, and the Old Code abolished. The Code contains twelve books, subdivided into appropriate titles.

During the interval between the publication of the *Codex repetitæ prælectionis*, in 535, to the end of his reign, in 565, Justinian issued, at different

times, a great number of new constitutions, by which the law on many subjects was entirely changed. The greater part of these constitutions were written in Greek, in obscure and pompous language, and published under the name of *Novellæ Constitutiones*, which are known to us as the Novels of Justinian. Soon after his death, a collection of one hundred and sixty-eight Novels was made, one hundred and fifty-four of which had been issued by Justinian, and the others by his successors.

Justinian's collections were, in ancient times, always copied separately, and afterwards they were printed in the same way. When taken together, they were indeed called, at an early period, the *Corpus Juris Civilis*; but this was not introduced as the regular title comprehending the whole body; each volume had its own title until Dionysius Gothofredus gave this general title in the second edition of his glossed *Corpus Juris Civilis*, in 1604. Since that time this title has been used in all the editions of Justinian's collections.

It is generally believed that the laws of Justinian were entirely lost and forgotten in the Western Empire from the middle of the eighth century until the alleged discovery of a copy of the Pandects at the storming and pillage of Amalfi, in 1135. This is one of those popular errors which had been handed down from generation to generation without question or inquiry, but which has now been completely exploded by the learned discussion, supported by conclusive evidence, of Savigny, in his History of the Roman Law during the Middle Ages. Indeed, several years before the sack of Amalfi the celebrated Irnerius delivered lectures on the Pandects in the University of Bologna. The pretended discovery of a copy of the Digest at Amalfi, and its being given by Lothaire II. to his allies the Pisans as a reward for their services, is an absurd fable. No doubt, during the five or six centuries when the human intellect was in a complete state of torpor, the study of the Roman Law, like that of every other branch of knowledge, was neglected; but on the first dawn of the revival of learning the science of Roman jurisprudence was one of the first to attract the attention of mankind; and it was taught with such brilliant success as to immortalize the name of Irnerius, its great professor.

Even at the present time the Roman Law exercises dominion in every state in Europe except England. The countrymen of Lycurgus and Solon are governed by it, and in the vast empire of Russia it furnishes the rule of civil conduct. In America, it is the foundation of the law of Louisiana, Canada, Mexico, and all the republics of South America. Its influence in the formation of the common law of England cannot be denied by the impartial inquirer. It was publicly taught in England, by Roger Vacarius, as early as 1149; and all admit that the whole equity jurisprudence prevailing in England and the United States is mainly based on the civil law. See CODES; DIGESTS; INSTITUTES; NOVELS.

CIVIL LIST. An annual sum granted by the English parliament at the commencement of each reign, for the expenses of the royal household and establishment as distinguished from the general exigencies of the state. It is the provision for the crown made out of the taxes in lieu of its proper patrimony and in consideration of the assignment of that patrimony to the public use. Wharton, Dict.

CIVIL OBLIGATION. One which binds in law, and which may be enforced in a court of justice. Pothier, Obl. 173, 191.

CIVIL OFFICER. Any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy. Rawle, Const. 213; 1 Story, Const. § 790.

The term occurs in the constitution of the United States, art. 2, sec. 4, which provides that the president, vice-president, and *civil officers* of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. It has been decided that a senator of the United States is not a civil officer within the meaning of this clause in the constitution. Senate Journals, 10th January, 1799; 4 Tucker, Bla. Com. App. 57, 58; Rawle, Const. 213; Sergeant, Const. Law, 376; Story, Const. § 791.

CIVIL REMEDY. In Practice. The remedy which the party injured by the commission of a tortious act has by action against the party committing it, as distinguished from the proceeding by indictment, by which the wrong-doer is made to expiate the injury done to society.

In cases of treason, felony, and some other of the graver offences, this private remedy is suspended, on grounds of public policy, until after the prosecution of the wrong-doer for the public wrong; 4 Bla. Com. 363; 12 East, 409; 35 Ala. 184; 1 N. H. 239. The law is otherwise in Massachusetts, except, perhaps, in case of felonies punishable with death; 15 Mass. 333; North Carolina, 1 Tayl. 58; Ohio, 4 Ohio, 377; South Carolina, 3 Brev. 302; Mississippi, 30 Miss. 492; Tennessee, 6 Humph. 433; Maine, 23 Me. 381; and Virginia. At common law, in cases of homicide the civil remedy is *merged* in the public punishment; 1 Chitty, Pr. 10. See INJURIES; MERGER; Bish. Cr. L. § 267.

CIVIL RIGHTS. A term applied to certain rights secured to citizens of the United States by the 13th and 14th Amendments to the constitution, and by various acts of congress made in pursuance thereof.

The act of April 9, 1866, provided that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States: that such citizens of every race and color shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, etc., and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and be subject to like punishment, etc., and none other. This act is constitutional; 1 Abb. U. S. 28; 1 Am. L. T. 7; and must be liberally construed; 1 Abb. U. S. 28.

It is substantially replaced by the 14th Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; or deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

This provision applies to white as well as colored persons, and is intended to protect them against the action both of their own state and of other states in which they may happen to be. It renders void an act of a state legislature which gives to a few persons the sole right to carry on stock yards near New Orleans; 16 Wall. 36. A statute of West Virginia provided that juries should be composed of "white male citizens," etc. Held, that the object of this amendment was to prevent any discrimination between whites and blacks, and this statute was therefore invalid; 99 U. S. 303. But where a statute of Virginia did not in terms exclude negroes from juries, but entrusted the selection of jurymen to the county judge who habitually excluded negroes in his selection, held that his conduct was a gross violation of the act of congress of March, 1878, which prohibits such discrimination, but that it was not such a denial of the rights of negroes as is contemplated by the statutes for the removal of such causes to the federal courts; a mixed jury in any particular case is not provided for in the act; but it is the right of every colored man that in the selection of jurymen to pass upon his life, etc., negroes shall not be, *by law*, excluded on account of their race; 100 U. S. 313; 17 Alb. L. J. 111.

The provision of the act of March 1, 1875, that no person possessing all other qualifications required by law shall be disqualified from jury service in any state on account of race, color, or previous condition of servitude, and imposing a penalty upon any officer who shall not comply with its provisions, is constitutional; 100 U. S. 339.

Where equally good public schools are provided for white and colored children, a provision that the two races shall attend different schools is not contrary to the 14th Amendment; 3 Woods, 177. So of the separation of white and black persons in public conveyances, when appropriate, though distinct, quarters are provided for each; 9 Cent. L. J. 206. These amendments were designed to secure rights of a civil and political nature only, but not social or domestic rights; a state law forbidding marriages between whites and blacks does not contravene these provisions; 59 Ala. 57; 3 Woods, 367; 3 Hughes, 9; 30 Gratt. 808.

A state is not prohibited by the 14th Amendment from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject matter, amount, or penalties of their respective judgments; 101 U. S. 22.

A state law punishing more severely adultery between a white and a negro is valid; 58 Ala. 190. So is one declaring null and void marriages between whites and negroes; 1 Woods, 537.

A law in Maine that no person shall recover damages from any municipality for injuries caused by a defective highway, if he is a resident of a place by the laws of which such actions will not lie, is invalid under the 14th Amendment; 69 Me. 278.

The right to sell liquor is not one of the rights of citizens protected by the 14th Amendment; 18 Wall. 129.

Negroes born within the United States are entitled to vote under the 14th Amendment, and are protected therein by the act of May 31, 1870; 2 Bond, 389.

This amendment does not add to the privileges and immunities of citizens, but only protects those which they already have. It does not entitle women to vote in the various states; 21 Wall. 162; 1 McArth. 169; 11 Blatch. 200. It does not prohibit a state from passing laws to regulate the charges of warehousemen in their business; 94 U. S. 113.

See also 17 Int. Rev. Rec. 189; 22 *id.* 115; 17 Wall. 446; U. S. Rev. Stat. §§ 1977, 1978, 1979, 1980; article in 1 So. L. Rev. 192; CHINESE.

CIVILIAN. A doctor, professor, or student of the civil law.

CIVILITER. Civilly: opposed to *criminaliter*, or criminally.

When a person does an unlawful act injurious to another, whether with or without an intention to commit a tort, he is responsible *civiliter*. In order to make him liable *criminaliter*, he must have *intended* to do the wrong; for it is a maxim, *actus non facit reum nisi mens sit rea*. 2 East, 104.

CIVILITER MORTUUS. Civilly dead. In a state of civil death.

CLAIM. A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant. Plowd. 359. See 1 Dall. 444; 12 S. & R. 179.

The owner of property proceeded against in admiralty by a suit *in rem* must present a *claim* to such property, verified by oath or affirmation, stating that the claimant by whom or on whose behalf the claim is made, and no other person, is the true and *bonâ fide* owner thereof, as a necessary preliminary to his making defence; 2 Conkl. Adm. 201-210.

A demand entered of record of a mechanic or material-man for work done or material furnished in the erection of a building, in certain counties in Pennsylvania.

The assertion of a liability to the party making it to do some service or pay a sum of money. See 16 Pet. 539.

The possession of a settler upon the wild lands of the government of the United States; the lands which such a settler holds possession of.

The land must be so marked out as to distinguish it from adjacent lands; 10 Ill. 273; 2 *id.* 185. Such claims are considered as personalty in the administration of decedents' estates; 8 Iowa, 463; are proper subjects of sale and transfer; 1 Morr. 70, 80, 312; 8 Iowa, 463; 5 Ill. 531; 14 *id.* 171; the pos-

sessor being required to deduce a regular title from the first occupant to maintain ejectment, 5 Ill. 531, and a sale furnishing sufficient consideration for a promissory note; 1 Morr. 80, 438; 1 Iowa, 23. An express promise to pay for improvements made by "claimants" is good, and the proper amount to be paid may be determined by the jury; 2 Ill. 532.

CLAIM OF CONUSANCE. In Practice. An intervention by a third person demanding jurisdiction of a cause which the plaintiff has commenced out of the claimant's court. Now obsolete. 2 Wils. 409; 3 Bla. Com. 298. See COGNIZANCE.

CLAIMANT. In Admiralty Practice. A person authorized and admitted to defend a libel brought *in rem* against property: thus, for example, Thirty hogsheads of sugar, Bentzon Claimant *v.* Boyle, 9 Cra. 191.

CLAMOR (Lat.). A suit or demand; a complaint. Du Cange; Spelman, Gloss.

In Civil Law. A claimant. A debt; any thing claimed from another. A proclamation; an accusation. Du Cange.

CLARE CONSTAT (Lat. it is clearly evident).

In Scotch Law. A deed given by a mesne lord (subject-superior) for the purpose of completing the title of the vassal's heir to the lands held by the deceased vassal under the grantor. Bell, Dict.

CLARENDON, CONSTITUTIONS OF. The constitutions of Clarendon were certain statutes made in the reign of Henry II. of England, at a parliament held at Clarendon (A. D. 1164) by which the king checked the power of the pope and his clergy, and greatly narrowed the exemption they claimed from secular jurisdiction.

Previous to this time, there had been an entire separation between the clergy and laity, as members of the same commonwealth. The clergy, having emancipated themselves from the laws as administered by the courts of law, had assumed powers and exemptions quite inconsistent with the good government of the country.

This state of things led to the enactment referred to. By this enactment all controversies arising out of ecclesiastical matters were required to be determined in the civil courts, and all appeals in spiritual causes were to be carried from the bishops to the primate, and from him to the king, but no further without the king's consent. The archbishops and bishops were to be regarded as barons of the realm, possessing the privileges and subject to the burdens belonging to that rank, and bound to attend the king in his councils. The revenues of vacant sees were to belong to the king, and goods forfeited to him by law were no longer to be protected in churches or church-yards. Nor were the clergy to pretend to the right of enforcing the payment of debts in cases where they had been accustomed to do so, but should leave all lawsuits to the determination of the civil courts. The rigid enforcement of these statutes by the king was unhappily stopped, for a season, by the fatal event of his disputes with Archbishop Becket; Fitz Stephen, 27; 2 Lingard, 59; 1 Hume, 382; Wilkins, 321; 4 Bla. Com. 422.

CLASS. A number of persons or things ranked together for some common purpose or as possessing some attribute in common.

The term is used of legatees; 3 M'Cord, Ch. 440; of obligees in a bond; 3 Dev. 284; 4 *id.* 382; and of other collections of persons; 17 Wend. 52; 16 Pick. 132.

CLAUSE. A part of a treaty; of a legislative act; of a deed; of a will, or other written instrument. A part of a sentence.

CLAUSUM. In Old English Law. Close. Closed.

A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *literæ patentæ* (open grant) or *literæ clausæ* (close grant); 2 Bla. Com. 346.

A close. An enclosure.

Occurring in the phrase *quare clausum fregit* (4 Blackf. Ind. 181), it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes; 1 Chitty, Pl. 174; 9 Cow. 39; 12 Mass. 127; 6 East, 606.

CLAUSUM FREGIT. See QUARE CLAUSUM FREGIT; TRESPASS.

CLEARANCE. A certificate given by the collector of a port, in which it is stated that the master or commander (naming him) of a ship or vessel named and described, bound for a port named (and having on board goods described, in case the master requires the particulars of his cargo to be stated in such clearance), has entered and cleared his ship or vessel according to law.

This certificate, or clearance, evidences the right of the vessel to depart on her voyage; and clearance has therefore been properly defined as *a permission to sail*. The same term is also used to signify the act of clearing. Worcester, Dict.

The sixteenth section of the act of August 18, 1856 (R. S. § 4207), regulating the diplomatic and consular systems of the United States, makes it the duty of the collector of the customs whenever any clearance is granted to any ship or vessel of the United States, duly registered as such, and bound on any foreign voyage, to annex thereto, in every case, a copy of the rates or tariff of fees which shall be allowed in pursuance of the provisions of that act. See the form of clearance and tariff of fees, Regulations under Revenue Laws, 1857, 90, 91, art. 123, 124, 125.

The act of congress of 2d March, 1799, section 93 (R. S. § 4197), directs that the master of any vessel bound to a foreign port or place shall deliver to the collector of the district from which such vessel shall be about to depart a manifest of all the cargo on board, and the value thereof, by him subscribed, and shall swear or affirm to the truth thereof; whereupon the collector shall grant a clearance for such vessel and her cargo, but without specifying the particulars thereof in such clearance, unless required by the master so to do. And if any vessel bound to any foreign place shall depart on her voyage to such foreign place without delivering such a mani-

fest and obtaining a clearance, the master shall forfeit and pay the sum of five hundred dollars for every such offence: provided, that the collectors and other officers of the customs shall pay due regard to the inspection laws of the states in which they respectively act, in such manner that no vessel having on board goods liable to inspection shall be cleared out until the master or other person shall have produced such certificate, that all such goods have been duly inspected, as the laws of the respective states do or may require to be produced to the collector or other officer of the customs; and provided, that receipts for the payment of all legal fees which shall have accrued on any vessel shall, before any clearance is granted, be produced to the collector or other officer aforesaid.

The 11th section of the act of February 10, 1820 (R. S. § 4200) provides that, before a clearance shall be granted for any vessel bound to a foreign place, the owners, shippers, or consignors of the cargo on board of such vessel shall deliver to the collector manifests of the cargo, or the parts thereof shipped by them respectively, and shall verify the same by oath or affirmation; and such manifests shall specify the kinds and quantities of the articles shipped by them respectively, and the value of the total quantity of each kind of articles; and such oath or affirmation shall state that such manifest contains a full, just, and true account of all articles laden on board of such vessel by the owners, shippers, or consignors respectively, and that the values of such articles are truly stated according to their actual cost or the values which they truly bear at the port and time of exportation. And, before a clearance shall be granted for any such vessel, the master of every such vessel, and the owners, shippers, and consignors of the cargo, shall state, upon oath or affimation, to the collector, the foreign place or country in which such cargo is truly intended to be landed; and the said oath or affirmation shall be taken and subscribed in writing.

According to Boulay-Paty, Dr. Com. t. 2, p. 19, the clearance is imperatively demanded for the safety of the vessel; for if a vessel should be found without it at sea it may be legally taken and brought into some court for adjudication on a charge of piracy. See SHIP'S PAPERS, and the Regulations under the Revenue Laws, above referred to, 88–98.

CLEARING-HOUSE. In Commercial Law. An office where bankers settle daily with each other the balance of their accounts.

The London clearing-house has long been established; and a similar office was opened in New York in 1853. The plan was found so efficient as to recommend it to bankers in all our large cities, and it has been generally introduced. The Clearing-House Association of New York consists of all the incorporated banks—private bankers not being admitted, as in London. Two clerks from each bank attend at the clearing-house every morning, where one takes a position inside of an elliptical counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand fifty-four parcels, containing the checks on each of the other banks received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents—until, having walked around the ellipse, they find themselves at their own desk again. At the end of this process the representative of each bank has handed to the representatives of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing-house a balance in money. The clearing-house is under the charge of a superintendent and several clerks. Balances are paid in coin daily. In London the practice of presenting checks at the clearing-house has been held a good presentment to the banker at law. It is not usual to examine the checks until they are taken to the bank, and if any are then found not good they are returned to the bank which presented them, which settles for such returned checks in coin. In this country, when a check is returned not good through the clearing-house, it is usually again presented at the bank; and no case has arisen to test the validity of a presentment through the clearing-house only.

See Sewell, Banking; Gilbart, Banking; Byles, Bills; Pulling, Laws, etc., of London; Cleveland, Banking Laws of New York; Morse, Banks.

CLEMENTINES. In Ecclesiastical Law. The collection of decretals or constitutions of Pope Clement V., which was published, by order of John XXII., his successor, in 1317.

The death of Clement V., which happened in 1314, prevented him from publishing this collection, which is properly a compilation as well of the epistles and constitutions of this pope as of the decrees of the council of Vienna, over which he presided. The Clementines are divided into five books, in which the matter is distributed nearly upon the same plan as the decretals of Gregory IX. See Dupin, *Bibliothèque*.

CLERGY. The name applicable to ecclesiastical ministers as a class.

Clergymen were exempted by the emperor Constantine from all civil burdens. Baronius, ad ann. 319, § 30. Lord Coke says, 2 Inst. 3, ecclesiastical persons have more and greater liberties than other of the king's subjects, wherein to set down all would take up a whole volume of itself. In the United States the clergy is not established by law, but each congregation or church may choose its own clergyman.

CLERGYABLE. In English Law. Allowing of, or entitled to, the benefit of clergy (*privilegium clericale*). Used of persons or crimes. 4 Bla. Com. 371 *et seq.* See BENEFIT OF CLERGY.

CLERICAL ERROR. An error made by a clerk in transcribing or otherwise. This is always readily corrected by the court.

An error, for example, in the teste of a *fi. fa.*; 4 Yeates, 185, 205; or in the teste and return of a *vend. exp.*; 1 Dall. 197; or in writing Dowell for McDowell; 1 S. & R. 120; 9 *id.* 284; 8 Co. 162 *a*. An error is amendable where there is something to amend by, and this even in a criminal case; 2 Pick. 550; 1 Binn. 367; 2 *id.* 516; 12 Ad. & E.

217; 5 Burr. 2667; Dougl. 377; Cowp. 408. For the party ought not to be harmed by the omission of the clerk; 3 Binn. 102, even of his signature, if he affixes the seal; 1 S. & R. 97.

CLERICUS (Lat.). **In Civil Law.** Any one who has taken orders in church, of whatever rank; monks. A general term including bishops, subdeacons, readers, and cantors. Du Cange. Used, also, of those who were given up to the pursuit of letters, and who were learned therein. Also of the amanuenses of the judges or courts of the king. Du Cange.

In English Law. A secular priest, in opposition to a regular one. Kennett, Paroch. Ant. 171. A clergyman or priest; one in orders. *Nullus clericus nisi causidicus* (no clerk but what is a pleader). 1 Bla. Com. 17. A freeman, generally. One who was charged with various duties in the king's household. Du Cange.

CLERK. In Commercial Law. A person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this, that the latter wholly supplies the place of his principal in respect to the property consigned to him. Pardessus, *Droit Comm.* n. 38; 1 Chitty, Pr. 80; 2 Bouvier, Inst. n. 1287.

In Ecclesiastical Law. Any individual who is attached to the ecclesiastical state and has submitted to the tonsure. One who has been ordained; 1 Bla. Com. 388. A clergyman; 4 Bla. Com. 367.

In Offices. A person employed in an office, public or private, for keeping records or accounts.

His business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs. Some clerks, however, have little or no writing to do in their offices: as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and is also a very ancient signification, being derived, probably, from the office of the *clericus*, who attended, amongst other duties, to the provisioning the king's household. See Du Cange.

CLERKSHIP. The period which must be spent by a law-student in the office of a practising attorney before admission to the bar. 1 Tidd, Pr. 61 *et seq.* See EDUCATION.

CLIENT. In Practice. One who employs and retains an attorney or counsellor to manage or defend a suit or action to which he is a party, or to advise him about some legal matters. See ATTORNEY-AT-LAW.

CLOSE. An interest in the soil; Doctor & Stud. 30; 6 East, 154; 7 *id.* 207; 1 Burr. 133; or in trees or growing crops; 4 Mass. 266; 9 Johns. 113.

In every case where one man has a right to exclude another from his land, the law encircles it, if not already inclosed, with an imaginary fence, and entitles him to a compensation in damages for the injury he sustains by the act of another passing through his boundary—denominating the injurious act a breach of the inclosure; Hammond, N. P. 151; Doctor & Stud. dial. 1, c. 8, p. 30; 2 Whart. 430.

An ejectment will not lie for a close; 11 Co. 55; 1 Rolle, 55; Salk. 254; Cro. Eliz. 235; Adams, Eject. 24. See CLAUSUM.

CLOSE COPIES. Copies which might be written with any number of words on a sheet. Office copies were to contain only a prescribed number of words on each sheet.

CLOSE ROLLS. Rolls containing the record of the close writs (*literæ clausæ*) and grants of the king, kept with the public records. 2 Bla. Com. 346.

CLOSE WRITS. Writs directed to the sheriff instead of to the lord. 3 Reeve, Hist. Eng. Law, 45. Writs containing grants from the crown to particular persons and for particular purposes, which, not being intended for public inspection, are closed up and sealed on the outside, instead of being open and having the seal appended by a strip of parchment. 2 Bla. Com. 346; Sewall, Sher. 372.

CO-ADMINISTRATOR. One who is administrator with one or more others. See ADMINISTRATOR.

CO-ASSIGNEE. One who is assignee with one or more others. See ASSIGNMENT.

CO-EXECUTOR. One who is executor with one or more others. See EXECUTOR.

COADJUTOR. The assistant of a bishop. An assistant.

COADUNATIO. A conspiracy. 9 Coke, 56.

COAL NOTE. In English Law. A species of promissory note authorized by the stat. 3 Geo. II. c. 26, §§ 7, 8, which, having these words expressed therein, namely, "value received in coals," are to be protected and noted as inland bills of exchange.

COALITION. In French Law. An unlawful agreement among several persons not to do a thing except on some conditions agreed upon; a conspiracy.

COAST. The margin of a country bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with water are not, however, comprehended under the name of coast. The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough to support the purposes of life, and are uninhabited, though resorted to for shooting birds, were held to form a part of the coast.

COCKET. A seal appertaining to the king's custom-house. Reg. Orig. 192. A scroll or parchment sealed and delivered by the officers of the custom-house to merchants as an

evidence that their wares are customed. Cowel; Spelman, Gloss. See 7 Low. C. 116. The entry office in the custom-house itself. A kind of bread said by Cowel to be hard-baked; sea-biscuit; a measure.

CODE. A body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subject to which it relates.

The idea of a code involves that of the exercise of the legislative power in its promulgation; but the name has been loosely applied also to private compilations of statutes. The subject of codes and the kindred topics of legal reform have received great attention from the jurists and statesmen of the present century. When it is considered how rapidly statutes accumulate as time passes, it is obvious that great convenience will be found in having the statute law in a systematic body, arranged according to subject-matter, instead of leaving it unorganized, scattered through the volumes in which it was from year to year promulgated. But when the transposition of the statutes from a chronological to a scientific order is undertaken, more radical changes immediately propose themselves. These are of two classes: *first*, amendments for the purpose of harmonizing the inconsistencies which such an arrangement brings to notice, and supplying defects; *second*, the introduction into the system of all other rules which are recognized as the unwritten or common law of the state. The object of the latter class of changes is to embody in one systematic enactment all that is thenceforth to be regarded as the law of the land. It is this attempt which is usually intended by the distinctive term codification.

The first two of the questions thus indicated may be deemed as settled, by general concurrence, in favor of the expediency of such changes; and the process of the collection of the statute law in one general code, or in a number of partial codes or systematic statutes, accompanied by the amendments which such a revision invites, is a process which for some years has been renovating the laws of England and the United States. Although at the same time something has been done, especially in this country, towards embodying in these statutes principles which before rested in the common or report law, yet the feasibility of doing this completely, or even to any great extent, must be deemed an open question. It has been discussed with great ability by Bentham, Savigny, Thibaut, and others. It is undeniable that, however successfully a code might be supposed to embody all existing and declared law, so as to supersede previous sources, it cannot be expected to provide prospectively for all the innumerable cases which the diversity of affairs rapidly engenders, and there must soon come a time when it must be studied in the light of numerous explanatory decisions.

These discussions have called attention to a subject formerly little considered, but which is of fundamental importance to the successful preparation of a code—the matter of statutory expression. There is no species of composition which demands more care and precision than that of drafting a statute. The writer needs not only to make his language intelligible, he must make it incapable of misconstruction. When it has passed to a law, it is no longer his intent that is to be considered, but the intent of the words which he has used; and that intent is to be ascertained under the strong pressure of an attempt of the advocate to win whatever possible construction may be most favorable to his cause. The true safeguard is found not in the old method of accumulating synonyms and by an enumeration of particulars, but rather—as is shown by those American codes of which the Revised Statutes of New York and the revision of Massachusetts are admirable specimens—by concise but complete statement of the full principle in the fewest possible words, and the elimination of description and paraphrase by the separate statement of necessary definitions. One of the rules to which the New York revisors generally adhered, and which they found of very great importance, was to confine each section to a single proposition. In this way the intricacy and obscurity of the old statutes were largely avoided. The reader who wishes to pursue this interesting subject will find much that is admirable in Coode's treatise on Legislative Expression (Lond. 1845) (reprinted in Brightly's Purdon's Digest, Penna.). The larger work of Gael (Legal Composition, Lond. 1840) is more especially adapted to the wants of the English profession.

The course which the discussion upon codification has taken in England has led to the collection and revision of statutes upon particular subjects. Under the direction of Lord Cairns, the statutes of England from 1 Henry III. have been revised by a committee, and published as the "Revised Statutes." Thirteen volumes have been published, bringing the work down to 1861.

In this country the subject has presented obstacles of less magnitude. Codes and revisions have been enacted as follows: the date given is the date of the last revision:—

United States.— The Revision of 1873, which went into effect June 22, 1874, was by act of congress declared to constitute the law of the land; the pre-existing laws were thereby repealed, and ceased to be of effect. By subsequent acts of congress, certain errors in this revision were corrected. A new edition of the Revision of 1873 was authorized by acts of March 2, 1877, and March 9, 1878; this is not a new enactment, but merely a new publication; it contains a copy of the Revision of 1873, with certain specific alterations and amendments made by subsequent enactments of the 43d and 44th congresses, incorporated according to the judgment and discretion of the editor, under the authority of the acts providing for his appointment. These alterations, or amendments, were merely indicated by italics and brackets. The act of March 9, 1878, provides that the edition of 1878 shall be legal evidence of the laws therein contained in all the courts of the United States, and of the several states and territories, "but shall not preclude reference to, nor control in case of any discrepancy the effect of any original act as passed by congress since the first day of December, 1873."

The supplement of 1881 is official to a limited extent. The provisions in regard to it are as follows: "The publication herein authorized shall be taken to be *primâ facie* evidence of the laws therein contained in all the courts of the United States, and of the several states and territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original

act as passed by congress:—*Provided*, that nothing herein contained shall be construed to change or alter any existing law;" 21 Stat. L. 388. See Wright *v.* U. S., 15 Ct. of Cl. 80, where the subject is explained by Richardson, J., one of the compilers.

The first New York Code, the Code of Civil Procedure, went into effect in 1848. A Code of Procedure was adopted in Missouri in 1849; California, 1851; Kentucky, 1851; Ohio, 1853; Iowa, 1855; Wisconsin, 1856; Kansas, 1859; Nevada, 1861; Dakota, 1862; Oregon, 1862; Idaho, 1864; Montana, 1864; Minnesota, 1866; Nebraska, 1866; Arizona, 1866; Arkansas, 1868; North Carolina, 1868; Wyoming, 1869; Washington Territory, 1869; South Carolina, 1870; Utah, 1870; Connecticut, 1879; Indiana, 1881; in England and Ireland by the Judicature Act of 1873. A Code of Criminal Procedure, though not enacted in New York till 1881, was adopted in California in 1850; Kentucky, 1854; Iowa, 1858; Kansas, 1859; Nevada, 1861; Dakota, 1862; Oregon, 1864; Idaho, 1864; Montana, 1864; Washington Territory, 1869; Wyoming, 1869; Arkansas, 1874; Utah, 1876; Arizona, 1877; Wisconsin, 1878; Nebraska, 1881; Indiana, 1881; Minnesota, 1883. A Penal Code was enacted in New York in 1882, and Penal and Civil Codes were enacted in Dakota in 1866 and in California in 1872. See 29 Alb, L. J. 261.

AUSTRIAN. *The Civil Code* was promulgated in 1811,—the code of Joseph II. (1780) having been found wholly unsuited to the purpose and by his successor abrogated. It is founded in a great degree upon the Prussian. *The Penal Code* (1852) is said to adopt to some extent the characteristics of the French Penal Code.

BURGUNDIAN. *Lex Romana*, otherwise known in modern times as the *Papiniani Responsorum*. Promulgated A. D. 517.

It was founded on the Roman law; and its chief interest is the indication which, in common with the other Barbaric codes, it affords of the modifications of jurisprudence under the changes of society amidst which it arose.

CONSOLATO DEL MARE. A code of maritime law of high antiquity and great celebrity.

Its origin is not certainly known. It has been ascribed to the authority of the ancient kings of Arragon; but there is some reason for maintaining the theory that it was gradually collected and handed down as a digest of all the principal rules and usages established among the maritime nations of Europe from the twelfth to the fourteenth century. Since it was first promulgated at Barcelona in the fourteenth century it has been enlarged from time to time by the addition of various commercial regulations. Its doctrines are founded to a large extent on the Greek and Roman law. It seems to have been originally written in the dialect of Catalonia; but it has been translated into every language of Europe, except English. It is referred to at the present day as an authority in respect to the ownership of vessels, the rights and obligations thereto, to the rights and responsibilities of master and seamen, to the law of freight, of equipment and supply, of jettison and average, of salvage, of ransom, and of prize. The edition of Pardessus, in his *Collection de Lois Maritimes* (vol. 2), is deemed the best.

FRENCH CODES. The chief French codes of the present day are five in number, sometimes known as *Les Cinq Codes*. They were in great part the work of Napoleon, and the first in order bears his name. They are all frequently printed in one duodecimo volume. These codes do not embody the whole French law, but minor codes and a number of scattered statutes must also be resorted to upon special subjects.

Code Civil, or *Code Napoléon*, is composed of thirty-six laws, the first of which was passed in 1803 and the last in 1804, which united them all in one body, under the name of *Code Civil des Français*.

The first steps towards its preparation were taken in 1793, but it was not prepared till some years subsequently, and was finally thoroughly discussed in all its details by the court of Cassation, of which Napoleon was president and in the discussions of which he took an active part throughout. In 1807 a new edition was promulgated, the title *Code Napoléon* being substituted. In the third edition (1816) the old title was restored; but in 1852 it was again displaced by that of Napoleon.

Under Napoleon's reign it became the law of Holland, of the Confederation of the Rhine, Westphalia, Bavaria, Italy, Naples, Spain, etc. It has undergone great amendment by laws enacted since it was established. It is divided into three books. Book 1, Of Persons and the enjoyment and privation of civil rights. Book 2, Property and its different modifications. Book 3, Different ways of acquiring property. Prefixed to it is a preliminary title, Of the Publication, Effects, and Application of Laws in General.

One of the most perspicuous and able commentators on this code is Toullier, frequently cited in this work.

Code de Procédure Civil. That part of the code which regulates civil proceedings.

It is divided into two parts. Part First consists of five books: the first of which treats of justices of the peace; the second, of inferior tribunals; the third, of royal (or appellate) courts; the fourth, of extraordinary means of proceeding; the fifth, of the execution of judgments. Part Second is divided into three books, treating of various matters and proceedings special in their nature.

Code de Commerce. The code for the regulation of commerce.

This code was enacted in 1807. Book 1 is entitled, Of Commerce in General. Book 2, Maritime Commerce. The whole law of this subject is not embodied in this book. Book 3, Failures and Bankruptcy. This book was very largely amended by the law of 28th May, 1838. Book 4, Of Commercial Jurisdiction,—the organization, jurisdiction, and proceedings of commercial tribunals. This code is, in one sense, a supplement to the Code Napoléon, applying the principle of the latter to the various subjects of commercial law. Sundry laws amending it have been enacted since 1807. Pardessus is one of the most able of its expositors. See Goirand, Code of Commerce.

Code d'Instruction Criminelle. The code regulating procedure in criminal cases, taking that phrase in a broad sense.

Book 1 treats of the police; Book 2, of the ad-

ministration of criminal justice. It was enacted in 1808 to take effect with the Penal Code in 1811.

Code Pénal. The penal or criminal code.

Enacted in 1810. Book 1 treats of penalties in criminal and correctional cases, and their effects; Book 2, of crimes and misdemeanors, and their punishment; Book 3, offences against the police regulations, and their punishment. Important amendments of this code have been made by subsequent legislation.

There is also a *Code Forestier;* and the name code has been inaptly given to some private compilations on other subjects.

GREGORIAN. An unofficial compilation of the rescripts of the Roman emperors. It was made in the fourth century, and is not now extant.

The Theodosian Code, which was promulgated nearly a century afterwards, was a continuation of this and of the collection of Hermogenes. The chief interest of all of these collections is in their relation to their great successor the Justinian Code.

HANSE TOWNS, LAWS OF THE. A code of maritime law established by the Hanseatic towns.

It was first published in German, at Lubec, in 1597. In an assembly of deputies from the several towns, held at Lubec, May 23, 1614, it was revised and enlarged. The text, with a Latin translation, was published with a commentary by Kuricke; and a French translation has been given by Cleirac in *Us et Coutumes de la Mer.* It is not unfrequently referred to on subjects of maritime law.

HENRI (*French*). The best-known of several collections of ordinances made during the sixteenth, seventeenth, and eighteenth centuries, the number of which in part both formed the necessity and furnished the material for the Code Napoléon.

HENRI (*Haytien*). A very judicious adaptation from the Code Napoléon for the Haytiens. It was promulgated in 1812 by Christophe (Henri I.).

HERMOGENIAN. An unofficial compilation made in the fourth century, supplementary to the code of Gregorius. It is not now extant.

INSTITUTES OF MENU. A code of Hindoo law, of great antiquity, which still forms the basis of Hindoo jurisprudence (Elphinstone's Hist. of India, p. 83), and is said also to be the basis of the laws of the Burmese and of the Laos. Buckle, Hist. of Civilization, vol. 1, p. 54, note 70. "It undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindoostan." Maine, Anc. Law, 16.

The Institutes of Menu are in point of the relative progress of Hindoo jurisprudence, a recent production; Maine, Anc. Law, 17; though ascribed to the ninth century B. C. A translation will be found in the third volume of Sir William Jones's Works. See, also, HINDOO LAW.

JUSTINIAN CODE. A collection of imperial ordinances compiled by order of the emperor Justinian.

All the judicial wisdom of the Roman civilization which is of importance to the American lawyer is embodied in the compilations to which Justinian gave his name, and from which that name has received its lustre. Of these, first in contemporary importance, if not first in magnitude and present interest, was the Code. In the first year of his reign he commanded Tribonian, a statesman of his court, to revise the imperial ordinances. The first result, now known as the *Codex Vetus*, is not extant. It was superseded a few years after its promulgation by a new and more complete edition. Although it is this alone which is now known as the Code of Justinian, yet the Pandects and the Institutes which followed it are a part of the same system, declared by the same authority; and the three together form one codification of the law of the Empire. The first of these works occupied Tribonian and nine associates fourteen months. It is comprised in twelve divisions or books, and embodies all that was deemed worthy of preservation of the imperial statutes from the time of Hadrian down. The Institutes is an elementary treatise prepared by Tribonian and two associates upon the basis of a similar work by Gaius, a lawyer of the second century.

The Pandects, which were made public about a month after the Institutes, were an abridgment of the treatises and the commentaries of the lawyers. They were presented in fifty books. Tribonian and the sixteen associates who aided him in this part of his labors accomplished this abridgment in three years. It has been thought to bear obvious marks of the haste with which it was compiled; but it is the chief embodiment of the Roman law, though not the most convenient resort for the modern student of that law.

Tribonian found the law, which for fourteen centuries had been accumulating, comprised in two thousand books, or—stated according to the Roman method of computation—in three million sentences. It is probable that this matter, if printed in law volumes such as are now used, would fill from three to five hundred volumes. The comparison, to be more exact, should take into account treatises and digests, which would add to the bulk of the collection more than to the substance of the material. The commissioners were instructed to extract a series of plain and concise laws, in which there should be no two laws contradictory or alike. In revising the imperial ordinances, they were empowered to amend in substance as well as in form.

The codification being completed, the emperor decreed that no resort should be had to the earlier writings, nor any comparison be made with them. Commentators were forbidden to disfigure the new with explanations, and lawyers were forbidden to cite the old. The imperial authority was sufficient to sink into oblivion nearly all the previously existing sources of law; but the new statutes which the emperor himself found it necessary to establish, in order to explain, complete, and amend the law, rapidly accumulated throughout his long reign. These are known as the "Novels." The Code, the Institutes, the Pandects, and the Novels, with some subsequent additions, constitute the *Corpus Juris Civilis.*

Among English translations of the Institutes are that by Cooper (Phila. 1812; N. Y. 1841)—which is regarded as a very good one—and that by Sanders (Lond. 1853), which contains the original text also, and copious references to the Digests and Code. Among the modern French commentators are Ortolan and Pasquiere.

LIVINGSTON'S CODE. Edward Livingston, one of the commissioners who prepared the Louisiana Code, prepared and presented

to congress a draft of a penal code for the United States; which, though it was never adopted, is not unfrequently referred to in the books as stating principles of criminal law.

MOSAIC CODE. The code proclaimed by Moses for the government of the Jews, B.C. 1491.

One of the peculiar characteristics of this code is the fact, that, whilst all that has ever been successfully attempted in other cases has been to change details without reversing or ignoring the general principles which form the basis of the previous law, that which was chiefly done here was the assertion of great and fundamental principles in part contrary and in part perhaps entirely new to the customs and usages of the people. These principles, thus divinely revealed and sanctioned, have given the Mosaic Code vast influence in the subsequent legislation of other nations than the Hebrews. The topics on which it is most frequently referred to as an authority in our law are those of marriage and divorce, and questions of affinity and of the punishment of murder and seduction. The commentaries of Michaelis and of Wines are valuable aids to its study.

ORDONNANCE DE LA MARINE. A code of maritime law enacted in the reign of Louis XIV.

It was promulgated in 1681, and with great completeness embodied all existing rules of maritime law, including insurance. Kent pronounces it a monument of the wisdom of the reign of Louis "far more durable and more glorious than all the military trophies won by the valor of his armies." Its compilers are unknown. An English translation is contained in the appendix to Peters's Admiralty Decisions, vol. 2. The ordinance has been at once illustrated and eclipsed by Valin's commentaries upon it.

OLERON, LAWS OF. A code of maritime law which takes its name from the island of Oleron.

Both the French and the English claim the honor of having originated this code,—the former attributing its compilation to the command of Queen Eleanor, Duchess of Guienne, near which province the island of Oleron lies; the latter ascribing its promulgation to her son, Richard I. The latter monarch, without doubt, caused it to be improved, if he did not originate it, and he introduced it into England. Some additions were made to it by king John. It was promulgated anew in the reign of Henry III., and again confirmed in the reign of Edward III. It is most accessible to the American profession in the translation contained in the appendix to the first volume of Peters's Admiralty Decisions. The French version, with Cleirac's commentary, is contained in *Us et Coutumes de la Mer*. The subjects upon which it is now valuable are much the same as those of the Consolato del Mare.

OSTROGOTHIC. The code promulgated by Theodoric, king of the Ostrogoths, at Rome, A. D. 500. It was founded on the Roman law.

PRUSSIAN. *Allgemeines Landrecht*. The former code of 1751 was not successful; but the attempt to establish one was resumed in 1780, under Frederic II.; and, after long and thorough discussion, the present code was finally promulgated in 1794. It is known also as the Code Frederic.

RHODIAN LAWS. A maritime code adopted by the people of Rhodes, and in force among the nations upon the Mediterranean nine or ten centuries before Christ. There is reason to suppose that the collection under this title in Vinnius is spurious, and, if so, the code is not extant. See Marsh. on Ins. b. 1, c. 4, p. 15.

THEODOSIAN. A code compiled by a commission of eight, under the direction of Theodosian the Younger.

It comprises the edicts and rescripts of sixteen emperors, embracing a period of one hundred and twenty-six years. It was promulgated in the Eastern Empire in 438, and quickly adopted, also, in the Western Empire. The great modern expounder of this code is Gothofredus (Godefroi). The results of modern researches regarding this code are well stated in the Foreign Quar. Rev. vol. 9, 374.

TWELVE TABLES. Laws of ancient Rome, compiled on the basis of those of Solon and other Greek legislators.

They first appeared in the year of Rome 303, inscribed on ten plates of brass. In the following year two more were added; and the entire code bore the name of the Laws of the Twelve Tables. The principles they contained were the germ of the body of the Roman law, and enter largely into the modern jurisprudence of Europe. See fragment of the law of the Twelve Tables, in Cooper's Justinian, 656; Gibbon's Rome, c. 44; Maine, Anc. Law.

VISIGOTHIC. The *Lex Romani;* now known as *Breviarum Alaricianum*. Ordained by Alaric II. for his Roman subjects, A. D. 506.

WISBUY, LAWS OF. A concise but comprehensive code of maritime law, established by the "merchants and masters of the magnificent city of Wisbuy."

The port of Wisbuy, now in ruins, was situated on the northwestern coast of Gottland, in the Baltic sea. It was the capital of the island, and the seat of an extensive commerce, of which the chief relic and the most significant record is this code. It is a mooted point whether this code was derived from the Laws of Oleron, or that from this; but the similarity of the two leaves no doubt that one was the offspring of the other. It was of great authority in the northern parts of Europe. "*Lex Rhodia navalis*," says Grotius, "*pro jure gentium in illo mare Mediterraneo vigebat; sicut apud Gallium leges Oleronis, et apud omnes transrhenanos, legis Wisbuenses.*" *De Jure B.* lib. 2, c. 3. It is still referred to on subjects of maritime law. An English translation will be found in the appendix to the first volume of Peters's Admiralty Decisions.

See as to codification, Mathews, Codification (pamphlet); 14 Am. L. Rev. 662; 5 *id.* 1; 1 So. L. Rev. N. S. 192; 6 *id.* 1; Outlines of an International Code, by David Dudley Field; 27 Law Mag. (Engl.) 3d ser. 312; Law Mag. & Rev. (1872) 963; *id.* (1873) 420; 3 *id.* (4th ser. 1877-8) 259; 5 *id.* 59; see 4 *id.* 31; Mr. James C. Carter's pamphlet (N. Y., 1884).

CODEX (Lat.). A volume or roll. The code of Justinian.

CODICIL. Some addition to, or qualification of, a last will and testament.

This term is derived from the Latin *codicillus*, which is a diminutive of *codex*, and in strictness

imports a little code or writing,—a little will. In the Roman Civil Law, codicil was defined as an act which contains dispositions of property in prospect of death, without the institution of an heir or executor. Domat, Civil Law, p. ii. b. iv. tit. i. s. 1; Just. *De Codic.* art. i. s. 2. So, also, the early English writers upon wills define a codicil in much the same way. "A codicil is a just sentence of our will touching that which any would have done after their death, without the appointing of an executor." Swinburne, Wills, pt. i. s. 5, pl. 2. But the present definition of the term is that first given. 1 Williams, Exrs. 8; Swinburne, Wills, pt. i. s. v. pl. 5.

Under the Roman Civil Law, and also by the early English law, as well as the canon law, all of which very nearly coincided in regard to this subject, it was considered that no one could make a valid will or testament unless he did name an executor, as that was of the essence of the act. This was attended with great formality and solemnity, in the presence of seven Roman citizens as witnesses, *omni exceptione majores*. Hence a codicil is there termed an unofficious, or unsolemn, testament. Swinburne, Wills, pt. i. s. v. pl. 4; Godolph. pt. i. c. 1, s. 2; *id.* pt. i. c. 6, s. 2; Plowd. 185; where it is said by the judges, that "without an executor a will is null and void," which has not been regarded as law, in England, for the last two hundred years, probably.

The office of a codicil under the civil law seems to have been to enable the party to dispose of his property, in the near prospect of death, without the requisite formalities of executing a will (or testament, as it was then called). Codicils were strictly confined to the disposition of property; whereas a testament had reference to the institution of an heir or executor, and contained trusts and confidences to be carried into effect after the decease of the testator. Domat, b. iv. tit. i.

In the Roman Civil Law there were two kinds of codicils: the one, where no testament existed, and which was designed to supply its place as to the disposition of property, and which more nearly resembled our *donatio causâ mortis* than any thing else now in use; the other, where a testament did exist, had relation to the testament, and formed a part of it and was to be construed in connection with it. Domat, p. ii. b. iv. tit. i. s. i. art. v. It is in this last sense that the term is now universally used in the English law, and in the American states where the common law prevails.

Codicils owe their origin to the following circumstance. Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation in a will of former date, and in those codicils requested the Emperor Augustus, by way of *fidei commissum*, or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by the advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 2. 25; Bowyer, Com. 155, 156.

All codicils are part of the will, and are to be so construed; 4 Brown, Ch. 55; 17 Sim. 108; 16 Beav. 510; 2 Ves. Sen. Ch. 242, by Lord Hardwicke; 3 Ves. Ch. 107, 110; 4 *id.* 610; 4 Y. & C. Ch. 160; 2 Russ. & M. 117; 8 Cow. 56; 3 Sandf. Ch. 11; 4 Kent, 531; and executed with the same formalities; 4 Kent, 531; 13 Gray, 103.

A codicil properly executed to pass real and personal estate, and in conformity with the statute of frauds, and upon the same piece of paper with the will, operates as a republication of the will, so as to have it speak from that date; 4 Penn. 376; 4 Dane, Abr. c. 127, a. 1, § 11, p. 550; 14 B. Monr. 333; 1 Cush. 118; 3 M. & C. 359. So also it has been held that it is not requisite that the codicil should be on the same piece of paper in order that it should operate as a republication of the will; 1 Hill, 590; 7 *id.* 346; 3 Zabr. 447.

A codicil duly executed, and attached or referring to a paper defectively executed as a will, has the effect to give operation to the whole, as one instrument; 3 B. Monr. 390; 6 Johns. Ch. 374, 375; 14 Pick. 543; 16 Ves. Ch. 167; 7 *id.* 98; 1 Ad. & E. 423. See, also, the numerous cases cited by Mr. Perkins, Piggott *v.* Walker, 7 Ves. Ch. Sumner ed. 98; 1 Cr. & M. 42.

There may be numerous codicils to the same will. In such cases, the later ones operate to revive and republish the earlier ones; 3 Bingh. 614; 12 J. B. Moore, 2.

But in order to set up an informally executed paper by means of one subsequently executed in due form, referring to such informal paper, the reference must be such as clearly to identify the paper; 4 N. Y. 140.

A codicil which depends on the will for interpretation or execution falls, if the will be revoked; 1 Tucker, 436; 5 Bush, 337.

It is not competent to provide by will for the disposition of property to such persons as shall be named in a subsequent codicil, not executed according to the prescribed formalities in regard to wills; since all papers of that character, in whatever form, if intended to operate only in the disposition of one's property after death, are of a testamentary character, and must be so treated; 2 Ves. Ch. 204; 12 *id.* 29; 2 M. & K. 765; 1 V. & B. 422, 445.

See 1 Brown, Civil Law, 292; Domat, *Lois Civ.* l. 4, t. 1, s. 1; *Leçons Elément. du Dr. Civ. Rom.* tit. 25. See WILLS.

COEMPTIO (Lat.). **In Civil Law.** The ceremony of celebrating marriage by solemnities.

The parties met and gave each other a small sum of money. They then questioned each other in turn. The man asked the woman if she wished to be his *mater-familias*. She replied that she so wished. The woman then asked the man if he wished to be her *pater-familias*. He replied that he so wished. They then joined hands; and these were called nuptials by *coëmptio*. Boethius, *Coëmptio;* Calvinus, Lex.; Taylor, Law Gloss.

COERCION. Constraint; compulsion; force.

Direct or positive coercion takes place when a man is by physical force compelled to do an act contrary to his will: for example, when a man falls into the hands of the enemies of his country, and they compel him, by a just fear of death, to fight against it.

Implied coercion exists where a person is legally under subjection to another, and is

induced, in consequence of such subjection, to do an act contrary to his will.

As will is necessary to the commission of a crime or the making of a contract, a person actually coerced into either has no will on the subject, and is not responsible; 1 East, Pl. Cr. 225; 5 Q. B. 279. The command of a superior to an inferior; 3 Wash. C. C. 209, 220; 12 Metc. 56; 1 Blatchf. 549; 13 How. 115; of a parent to a child; Broom, Max. 11; of a master to his servant, or a principal to his agent; 13 Mo. 246; 14 *id.* 137, 340; 3 Cush. 279; 11 Metc. 66; 5 Miss. 304; 14 Ala. 365; 22 Vt. 32; 14 Johns. 119; do not amount to coercion.

As to persons acting under the constraint of superior power, and, therefore, not criminally amenable, the principal case is that of married women, with respect to whom the law recognizes certain presumptions. Thus, if a wife commits a felony, other than treason or homicide, or, perhaps, highway robbery, in company with her husband, the law presumes that she acted under his coercion, and, consequently, without any guilty intent, unless the fact of non-coercion is distinctly proved. See 2 C. & K. 887, 903; Jebb. 93; 103 Mass. 71; 65 N. C. 398; 97 Mass. 547. This presumption appears on some occasions to have been considered conclusive, and is still practically regarded in no very different light, especially when the crime is of a flagrant character; but the better opinion seems to be that in every case the presumption may now be rebutted by positive proof that the woman acted as a free agent; and in one case that was much discussed, the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them; Jebb, 93; 1 Mood. 143. It seems that a married woman cannot be convicted under any circumstances as a receiver of stolen goods, when the property has been taken by her husband and given to her by him; 1 Dearsl. 184.

Husband and wife were jointly charged with felonious wounding with intent to disfigure and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not personally inflict any violence on the prosecutor. On this finding, the wife was held entitled to an acquittal; 1 Dearsl. & B. 553.

Whether the doctrine of coercion extends to any misdemeanor may admit of some doubt; but the better opinion seems to be that, provided the misdemeanor is of a serious nature, as, for instance, the uttering of base coin, the wife will be protected in like manner as in cases of felony; although it has been distinctly held that the protection does not extend to assaults and batteries or to the offence of keeping a brothel; 2 Lew. 229; 8 C. & P. 19, 541; 2 Mood. 384; 10 Mod. 63; 1 Metc. Mass. 151; 10 Mass. 152. Indeed, it is probable that in all inferior misdemeanors this presumption, if admitted at all, would be held liable to be defeated by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony; 8 C. & P. 541; 2 Mood. 53; 1 Taylor, Ev. 152. The law upon responsibility of married women for crime is fully stated in 1 B. & H. Lead. Cr. Cas. 76–87.

COFRADIA. The congregation or brotherhood entered into by several persons for the purpose of performing pious works. No society of this kind can be lawfully formed without license from the king and the bishop of the diocese.

COGNATES. In Civil and Scotch Law. Relations through females. 1 Mackeldey, Civ. Law, 137; Bell, Dict.

COGNATI. In Civil Law. Collateral heirs through females. Relations in the line of the mother; 2 Bla. Com. 235.

The term is not used in the civil law as it now prevails in France. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family.

Originally, the maternal relationship had no influence in the formation of the Roman family, nor in the right of inheritance. But the edict of the prætor established what was called the Prætorian succession, or the *bonorum possessio*, in favor of cognates in certain cases. Dig. 38. 8. See PATER-FAMILIAS; Vicat; Biret, *Vocabulaire.*

COGNATION. In Civil Law. Signifies generally the kindred which exists between two persons who are united by ties of blood or family, or both.

Civil cognation is that which proceeds alone from the ties of families, as the kindred between the adopted father and the adopted child.

Mixed cognation is that which unites at the same time the ties of blood and family, as that which exists between brothers the issue of the same lawful marriage. Inst. 3. 6; Dig. 38. 10.

Natural cognation is that which is alone formed by ties of blood; such is the kindred of those who owe their origin to an illicit connection, either in relation to their ascendants or collaterals.

COGNISANCE. See COGNIZANCE.

COGNITIONIBUS ADMITTENDIS. A writ requiring a justice or other qualified person, who has taken a fine and neglects to certify it in the court of common pleas, to do so.

COGNIZANCE (Lat. *cognitio*, recognition, knowledge; spelled, also, *Conusance* and *Cognisance*). Acknowledgment; recognition; jurisdiction; judicial power; hearing a matter judicially.

Of Pleas. Jurisdiction of causes. A privilege granted by the king to a city or town to hold pleas within the same. Termes de la Ley. It is in frequent use among the older writers on English law in this latter sense, but is seldom used, if at all, in America, except in its more general meaning. The uni-

versities of Cambridge and Oxford possess this franchise; Willes, 233; 1 Sid. 103; 11 East, 543; 1 W. Blackst. 454; 10 Mod. 126; 3 Bla. Com. 298.

Claim of Cognizance (or of Conusance) is an intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of claimant's court; 2 Wils. 409; 2 Bla. Com. 350, n.

It is a question of jurisdiction between the two courts, Fortesc. 157; 5 Viner, Abr. 588, and not between the plaintiff and defendant, as in the case of plea to the jurisdiction, and must be demanded by the party entitled to conusance, or his representative, and not by the defendant or his attorney. 1 Chitty, Pl. 403.

There are three sorts of conusance. *Tenere placita*, which does not oust another court of its jurisdiction, but only creates a concurrent one. *Cognitio placitorum*, when the plea is commenced in one court, of which conusance belongs to another. A conusance of exclusive jurisdiction: as, that no other court shall hold plea, etc.; Hardr. 509; Bacon, Abr. *Courts*, D.

In Pleading. The answer of the defendant in an action of replevin who is not entitled to the distress or goods which are the subject of the action—acknowledging the taking, and justifying it as having been done by the command of one who is so entitled; Lawes, Pl. 35, 36; 4 Bouvier, Inst. n. 3571. An acknowledgment made by the deforciant, in levying a fine, that the lands in question are the right of the complainant; 2 Bla. Com. 350.

COGNOMEN (Lat.). A family name.

The *prænomen* among the Romans distinguished the person, the *nomen* the gens, or all the kindred descended from a remote common stock through males, while the *cognomen* denoted the particular family. The *agnomen* was added on account of some particular event, as a further distinction. Thus, in the designation Publius Cornelius Scipio Africanus, Publius is the prænomen, Cornelius is the nomen, Scipio the cognomen, and Africanus the agnomen. Vicat. These several terms occur frequently in the Roman laws. See Cas. *temp.* Hardw. 286; 6 Co. 65; 1 Tayl. 148.

COGNOVIT ACTIONEM (Lat. he has confessed the action. *Cognovit* alone is in common use with the same significance).

In Pleading. A written confession of an action by a defendant, subscribed, but not sealed, and authorizing the plaintiff to sign judgment and issue execution, usually for a sum named.

It is given after the action is brought to save expense, and differs from a warrant of attorney, which is given before the commencement of any action and is under seal; 3 Bouvier, Inst. 3229.

COHABIT (Lat. *con* and *habere*). To live together in the same house, claiming to be married.

The word does not include in its signification, necessarily, the occupying the same bed; 1 Hagg. Cons. 144; 4 Paige, Ch. 425; though the word is popularly, and sometimes in statutes, used in this latter sense; 20 Mo. 210; Bishop, Marr. & Div. § 506, n.

To live together in the same house.

Used without reference to the relation of the parties to each other as husband and wife, or otherwise. Used of sisters or other members of the same family, or of persons not members of the same family, occupying the same house; 2 Vern. 323; Bishop, Marr. & Div. 506, n.

COIF. A head-dress.

In England there are certain serjeants at law who are called serjeants of the coif, from the lawn coif they wear on their heads under their thin caps when they are admitted to that order. It was anciently worn as a distinguishing badge. Spelman, Gloss.

COLIBERTUS. One who, holding in free socage, was obliged to do certain services for the lord. A middle class of tenants between servile and free, who held their freedom of tenure on condition of performing certain services. Said to be the same as the *conditionales*. Cowel.

COLLATERAL (Lat. *con*, with, *latus*, the side). That which is by the side, and not the direct, line. That which is additional to or beyond a thing.

COLLATERAL ASSURANCE. That which is made over and above the deed itself.

COLLATERAL CONSANGUINITY. That relationship which subsists between persons who have the same ancestors but not the same descendants,—who do not descend one from the other. 2 Bla. Com. 203.

The essential fact of consanguinity (common ancestral blood) is the same in lineal and collateral consanguinity; but the relationship is aside from the direct line. Thus, father, son, and grandson are lineally related; uncle and nephew, collaterally.

COLLATERAL ESTOPPEL. The collateral determination of a question by a court having general jurisdiction of the subject. See 26 Vt. 209.

COLLATERAL FACTS. Facts not directly connected with the issue or matter in dispute.

Such facts are inadmissible in evidence; but, as it is frequently difficult to ascertain, *a priori*, whether a particular fact offered in evidence will or will not clearly appear to be material in the progress of the cause, in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the facts will turn out to be material. But this is always within the sound discretion of the court. It is the duty of the counsel, however, to offer evidence, if possible, in such order that each part of it will appear to be pertinent and proper at the time it is offered; and it is expedient to do so, as this method tends to the success of a good cause.

When a witness is cross-examined as to collateral facts, the party cross-examining will be bound by the answer; and he cannot, in general, contradict him by another witness. Roscoe, Cr. Ev. 139.

COLLATERAL INHERITANCE TAX. A tax levied upon the collateral de-

volution of property by will or under the intestate law.

COLLATERAL ISSUE. An issue taken upon some matter aside from the general issue in the case.

Thus, for example, a plea by the criminal that he is not the person attainted when an interval exists between attainder and execution, a plea in abatement, and other such pleas, each raises a collateral issue. 4 Bla. Com. 396. And see 4 *id.* 338.

COLLATERAL KINSMEN. Those who descend from one and the same common ancestor, but not from one another.

Thus, brothers and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same. All kinsmen are either *lineal* or *collateral*.

COLLATERAL LIMITATION. A limitation in the conveyance of an estate, giving an interest for a specified period, but making the right of enjoyment depend upon some *collateral* event; as an estate to A till B shall go to Rome; Park, Dow. 163; 4 Kent, 128; 1 Washb. R. P. 215.

COLLATERAL SECURITY. A separate obligation attached to another contract to guaranty its performance. The transfer of property or of other contracts to insure the performance of a principal engagement.

The property or securities thus conveyed are also called collateral securities; 1 Powell, Mortg. 393; 2 *id.* 666, n. 871; 3 *id.* 944, 1001. See PLEDGE, CHATTEL MORTGAGE.

COLLATERAL WARRANTY. Warranty as to an estate made by one who was ancestor to the heir thereof, either actually or by implication of law, in respect to other property, but who could not have been so in respect to the estate in question.

Warranty made where the heir's title to the land neither was nor could have been derived from the warranting ancestor. Termes de la Ley.

Thus, if a tenant in tail should discontinue the tail, have issue and die, and the uncle of the issue should release to the discontinuee and die without issue, this is a collateral warranty to the issue in tail. Littleton, § 709. The tenant in tail having discontinued as to his issue before his birth, the heir in tail was driven to his action to regain possession upon the death of his ancestor tenant in tail; and in this action the collateral warranty came in as an estoppel. 2 Washb. R. P. 670.

The heir was barred from ever claiming the land, and, in case he had assets from the warranting ancestor, was obliged to give the warrantee other lands in case of an eviction. 4 Cruise, Dig. 436.

By the statute of Gloucester, 6 Edw. I. c. 3, tenant by the curtesy was restrained from making such warranty as should bind the heir. By a favorable construction of the statute *De Donis*, and by the statute 3 & 4 Will. IV. c. 74, tenants in tail were deprived of the power of making collateral warranty. By statute 11 Hen. VII. c. 20, warranty by a tenant in dower, with or without the assent of her subsequent husband, was prevented; and finally the statute 4 & 5 Anne, c. 16, declares all warranties by a tenant for life void against the heir, unless such ancestor has an estate of inheritance in possession. See Co. Litt. 373, Butler's note [328]; Stearns, R. Act. 135, 372.

It is doubtful if the doctrine has ever prevailed to a great extent in the United States. The statute of Anne has been re-enacted in New York; 4 Kent, 3d ed. 460; and in New Jersey; 3 Halst. 106. It has been adopted and is in force in Rhode Island; 1 Sumn. 235; and in Delaware; 1 Harr. 50. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended; 1 Dana, 59. In Pennsylvania, collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted; 4 Dall. 168; 9 S. & R. 275. See 2 Bla. Com. 301; 2 Washb. R. P. 668–671.

COLLATERALES ET SOCII. The former title of masters in chancery.

COLLATIO BONORUM. A collation of goods.

COLLATION. In Civil Law. The supposed or real return to the mass of the succession, which an heir makes of the property he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. La. Civ. Code, art. 1305.

As the object of collation is to equalize the heirs, it follows that those things are excluded from collation which the heir acquired by an onerous title from the ancestor; that is, where he gave a valuable consideration for them. And, upon the same principle, if a co-heir claims no share of the estate, he is not bound to collate. *Qui non vult hereditatem, non cogitur ad collationem.* La. Civ. Code, art. 1305–1367.

In Ecclesiastical Law. The act by which the bishop who has the bestowing of a benefice gives it to an incumbent.

Where the ordinary and patron were the same person, presentation and institution to a benefice became one and the same act; and this was called collation. Collation rendered the living full except as against the king: 1 Bla. Com. 391. An advowson under such circumstances is termed collative; 2 Bla. Com. 22.

In Practice. The comparison of a copy with its original, in order to ascertain its correctness and conformity. The report of the officer who made the comparison is also called a collation.

COLLECTOR. One appointed to receive taxes or other impositions: as, collector of taxes, collector of militia fines, etc. A person appointed by a private person to collect the credits due him.

COLLECTOR OF THE CUSTOMS. An officer of the United States, appointed for the term of four years. Act of May 15, 1820, sect. 1, 3 Story, U. S. Laws, 1790.

The duties of a collector of the customs are described in general terms as follows: "He shall receive all reports, manifests, and documents to be made or exhibited on the entry of any ship or vessel, according to the regulations of this act; shall record, in books to be kept for the purpose, all manifests; shall receive the entries of all ships or vessels, and of the goods, wares, and merchandise imported in them; shall, together with the naval officer, where there is one, or alone, where there is none, estimate the amount of duties payable thereupon, indorsing the said amounts upon the respective entries; shall receive all moneys paid for duties, and shall take bonds for securing the payment thereof; shall grant all permits for the unlading and delivery of goods; shall, with the approbation of the principal officer of the treasury department, employ persons as weighers, gaugers, measurers, and inspectors, at the several ports within his district, and also, with the like approbation, provide, at the public expense, storehouses for the safe keeping of goods, and such scales, weights, and measures as may be necessary." Act of March 2, 1799, s. 21, 1 Story, U. S. Laws, 590. See, for other duties of collectors, 1 Story, U. S. Laws, 592, 612, 620, 632, 659, and vol. 3, 1650, 1697, 1759, 1761, 1791, 1811, 1848, 1854; 10 Wheat. 246; 97 U. S. 585.

COLLEGE. An organized collection or assemblage of persons. A civil corporation, society, or company, having, in general, some literary object.

The assemblage of the cardinals at Rome is called a college. The body of presidential electors is called the electoral college, although the whole body never come together.

COLLEGIUM (Lat. *colligere*, to collect). **In Civil Law.** A society or assemblage of those of the same rank or honor. An army. A company, in popular phrase. The whole order of bishops. Du Cange.

Collegium illicitum. One which abused its right, or assembled for any other purpose than that expressed in its charter.

Collegium licitum. An assemblage or society of men united for some useful purpose or business, with power to act like a single individual.

All collegia were *illicita* which were not ordained by a decree of the senate or of the emperor; 2 Kent, 269.

COLLISION. In Maritime Law. The act of ships or vessels striking together, or of one vessel running against or foul of another.

It may happen *without fault*, no blame being imputable to those in charge of either vessel. In such case, in the English, American, and French courts, each party must bear his own loss; Pardessus, Droit Comm. p. 4, t. 2, c. 2, § 4; 14 How. 352.

A collision by *inevitable accident* is when a collision is caused exclusively by natural causes, without any fault on the part of the owners or those in charge; 23 Wall. 169; 3 Cliff. 456; 12 Ct. of Cl. 480. It must appear that neither vessel was in fault; 3 Cliff. 636. Where the captain and crew, except the second mate, were taken sick, and a collision occurred, through the absence of a lookout, it was held to be inevitable accident; 8 Reporter, 389. See also 7 Biss. 249.

It may happen by *mutual fault*, that is, by the misconduct, fault, or negligence of those in charge of both vessels. In such case, neither party has relief at common law; 3 Kent, 231; 3 C. & P. 528; 9 *id.* 613; 11 East, 60; 21 Wend. 188, 615; 6 Hill, 592; 12 Metc. 415; 26 Me. 39; (though now otherwise in England by the Judicature Act, 1873;) but the maritime courts aggregate the damages to both vessels and their cargoes, and then divide the same equally between the two vessels; 3 Kent, 232; 1 Conkl. Adm. 374–376; 16 Bost. Law Rep. 686; 17 How. 170; Gilp. 579, 584; 23 Wall. 84; 9 Wall. 505; 3 Ben. 371; 2 Abb. U. S. 495. See 1 Swab. 60–101. But where the collision is by intentional wrong of both parties, the libel will be dismissed; 4 Blatch. 124.

It may happen by *inscrutable fault*, that is, by the fault of those in charge of one or both vessels and yet under such circumstances that it is impossible to determine who is in fault. In such case the American courts of admiralty and the European maritime courts adopt the rule of an equal division of the aggregate damage; 1 Abb. N. S. 451; Daveis, 365; Flanders, Mar. Law, 296. But the English courts have refused a remedy in admiralty; 2 Hagg. Adm. 145; 6 Thornt. 240; and see 2 Hugh. 128.

It may happen *by the fault* of those belonging to one of the colliding vessels, without any fault being imputable to the other vessel. In such case the owners of the vessel in fault must bear the damage which their own vessel has sustained, and are liable as well as their master to a claim for compensation from the owners of the other vessel for the damage done to her; 1 Swab. 23, 173, 200, 211; 3 W. Rob. 283; 1 Blatchf. 211; 2 Wall. Jr. 52; 1 How. 28; 13 *id.* 101; although wilfully committed by the master; Crabbe, 22; 1 Wash. C. C. 13; 3 *id.* 262. But see 1 W. Rob. 399–406; 2 *id.* 502; 1 Hill, 343; 19 Wend. 343; 1 East, 106; 6 Jur. 443.

See the four classes of cases noted in 2 Dods. 85, by Lord Stowell.

Full compensation is, in general, to be made in such cases for the loss and damage which the prosecuting party has sustained by the fault of the party proceeded against; 2 W. Rob. 279; including all damages which are fairly attributable exclusively to the act of the original wrong-doer, or which may be said to be the direct consequence of his wrongful act; 3 W. Rob. 7, 282: 11 M. & W. 228; 1 Swab. 200; 6 N. Y. Leg. Obs. 12; 1 Blatchf. 211; 2 Wall. Jr. 52; 1 How. 28; 13 *id.* 113; 17 *id.* 170.

The personal liability of the owners is, however, limited in some cases to the value of the vessel and freight (but not by common law, or the earlier civil law, or the earlier general maritime law); Code de Comm. art. 216; Stat. 17 & 18 Vict. c. 104 (Merchants' Shipping

Act), pt. 9, § 503 *et seq.;* 9 U. S. Stat. at Large, 635; 10 *id.* 68, 72, 73; 3 W. Rob. 16, 41, 101; 1 E. L. & Eq. 637; 3 Hagg. Adm. 431; 15 M. & W. 391; 3 Stor. 465; Daveis, 172; 16 Bost. L. Rep. 686; 2 Am. L. Reg. 157; 9 Cent. L. J. 285; s. c. 25 Int. Rev. Rec. 361; 13 Wall. 104. See 5 Mich. 368. The owner is not liable in respect of the insurance moneys; 8 Ben. 312; 9 Cent. L. J. 285; s. c. 25 Ind. Rev. Rec. 361. In maritime law the vessel itself is hypothecated as security for the injury done in such cases; 1 Swab. 1, 3; 22 E. L. & Eq. 62, 72; 15 Bost. Law Rep. 560; 14 How. 351; 16 *id.* 469. In England, the owner's liability is the value of the offending ship in her undamaged state; by the American and continental rule, it is the value of the ship immediately after the collision; 9 Cent. L. J. 285; s. c. 25 Int. Rev. Rec. 361. When an owner has neglected to surrender any part of his vessel, he cannot avail himself of this limited liability; 24 Int. Rev. Rec. 198; nor can he where he has parted with his interest in, or title to, the ship before offering to surrender her; *id.* 123.

For the prevention of collisions, certain rules have been adopted (see NAVIGATION RULES) which are binding upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable, as the vessels advance, so long as the means and opportunity to avoid the danger remain; 21 How. 372. But, whatever may be the rules of navigation in force at the place of collision, it is apparent that they must sometimes yield to extraordinary circumstances and cannot be regarded as binding in all cases. Thus, if a vessel necessarily goes so near a rock, or the land, that by following the ordinary rules she would inevitably go upon the rock, or get on shore or aground, no rule should prevail over the preservation of property and life; 1 W. Rob. 478, 485; 4 J. B. Moore, 314. No vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the rule of navigation; 1 W. Rob. 471, 478; 2 Wend. 452; and if it was clearly in the power of one of the vessels which came into collision to have avoided all danger by giving way, she will be held bound to do so, notwithstanding the rule of navigation; 6 N. Y. Leg. Obs. 190; 6 Thornt. Adm. 600, 607; 7 *id.* 127; 15 Bost. Law Rep. 390; 3 Cliff. 117. But a vessel is not required to depart from the rule when she cannot do so without danger; 6 N. Y. Leg. Obs. 190; 2 Curt. C. C. 363; 18 How. 581.

There must be a lookout properly *stationed and kept;* and the absence of such a lookout is *primâ facie* evidence of negligence; 10 How. 557; 12 *id.* 443; 18 *id.* 584; 21 *id.* 548; 23 *id.* 448; Daveis, 359; 16 Bost. Law Rep. 433; 9 N. Y. Leg. Obs. 239. Lights also must be kept, in some cases; though the rule was and is otherwise by general maritime law in regard to vessels on the high seas; 2 W. Rob. 4; 3 *id.* 49; 2 Wall. Jr. 268. See NAVIGATION RULES; 12 How. 443; 17 *id.* 170; 18 *id.* 223, 581; 19 *id.* 56, 48, 201; 21 *id.* 1, 184, 372, 548; 22 *id.* 48, 461; 23 *id.* 287; Daveis, 359; 1 Blatchf. 236, 370; Stu. Adm. Low. C. 222, 242; 21 Pick. 254; 6 Whart. 324; 11 Bost. Law Rep. 80; 16 *id.* 433; 19 *id.* 379; 6 N. Y. Leg. Obs. 374; 1 Thornt. Adm. 592; 2 *id.* 101; 4 *id.* 97, 161; 6 *id.* 176; 7 *id.* 507; 2 W. Rob. 377; 3 *id.* 7, 49, 190; 1 Swab. 20, 233.

The injury to an insured vessel occasioned by a collision is a loss within the ordinary policy of insurance; 4 Ad. & E. 420; 6 N. & M. 713; 14 Pet. 99; 14 How. 352; 8 Cush. 477; but when the collision is occasioned by the fault of the insured vessel, or the fault of both vessels, the insurer is not ordinarily liable for the amount of the injury done to the other vessel which may be decreed against the vessel insured; 4 Ad. & E. 420; 7 E. & B. 172; 40 E. L. & Eq. 54; 11 N. Y. 9; 14 How. 352, and cases cited; but some policies now provide that the insurer shall be liable for such a loss; 40 E. L. & Eq. 54; 7 E. & B. 172.

When the collision was without fault on either side, and occurred in a foreign country, where, in accordance with the local law, the damages were equally divided between the colliding vessels, the amount of the decree against the insured vessel for its share of the damages suffered by the other vessel was held recoverable under the ordinary policy; 14 Pet. 99.

The fact that the libellants in a collision case had received satisfaction from the insurers for the vessel destroyed, furnishes no ground of defence for the respondent; 17 How. 152.

Improper speed on the part of a steamer in a dark night, during thick weather, or in the crowded thoroughfares of commerce, will render such vessel liable for the damages occasioned by a collision; and it is no excuse for such dangerous speed that the steamer carries the mail and is under contract to convey it at a greater average speed than that complained of; 16 Bost. L. Rep. 433; 5 N. Y. Leg. Obs. 293; 11 *id.* 297; 3 Hagg. Adm. 414; 2 W. Rob. 2, 205; 18 How. 89, 223; 19 *id.* 108; 21 *id.* 1; 12 Ct. of Cl. 480; 7 Biss. 35.

As between a steamer and a sailing vessel, the former must keep out of the way of the latter; 14 Blatch. 524; 91 U. S. 200; as between a vessel in motion and one at anchor, with proper lights, the former is ordinarily liable for a collision; 3 Cliff. 636; 2 Low. 220; 4 L. & Eq. Rep. 676; 2 Hugh. 17; 18 Alb. L. J. 151; s. c. 6 Reporter, 577.

Instances of negligence are to be found in 95 U. S. 600; 98 *id.* 440; 3 Cliff. 456, 636; 14 Blatch. 37, 254, 480, 524, 531, 545.

When a collison is occasioned solely by the error or unskilfulness of a pilot in charge of a vessel under the provisions of a law compelling the master to take such pilot and commit to him the management of his vessel, the pilot is solely responsible for the damage, and

neither the master, his vessel, nor her owner is responsible. But the burden of proof is on the vessel to show that the collision is wholly attributable to the fault of the pilot; L. R. 2 Ad. & Ecc. 3. The rule in U. S. is otherwise; 7 Wall. 53; but in this case the pilotage law was not absolutely compulsory.

A cause of collision, or *collision and damage*, as it is technically called, is a suit *in rem* in the admiralty.

In the United States courts it is commenced by the filing of a libel and the arrest of the vessel to the mismanagement or fault of which the injury is imputed. In the English admiralty the suit is commenced by the arrest of the vessel and the filing of a petition. In England, the judge is usually assisted at the hearing of the cause by two of the Masters or Elder Brethren of the Trinity House, or other experienced shipmasters, whose opinions upon all questions of professional skill involved in the issue are usually adopted by the court; 1 W. Rob. 471; 2 *id.* 225; 2 Chitty, Genl. Pr. 514.

In the American courts of admiralty, the judge usually decides without the aid or advice of experienced shipmasters acting as assessors or advisers of the court; but the evidence of such shipmasters, *as experts*, is sometimes received in reference to questions of professional skill or nautical usage. Such evidence is not, however, admissible to establish a usage in direct violation of those general rules of navigation which have been sanctioned and established by repeated decisions; 2 Curt. C. C. 141, 363.

When a party sets up circumstances as the basis of exceptions to the general rules of navigation, he is held to strict proof; 1 W. Rob. 157, 182, 478; 6 Thornt. 607; 5 *id.* 170; 3 Hagg. Adm. 321; and courts of admiralty lean against such exceptions; 11 N. Y. Leg. Obs. 353, 355. The admissions of a master of one of the colliding vessels subsequently to the collision are admissible in evidence; 5 E. L. & Eq. 556; and the masters and crew are admissible as witnesses; 2 Dods. 83; 2 Hagg. Adm. 145; 3 *id.* 321, 325; 1 Conkling, 384.

As to the burden of proof in collision cases, see 9 Jur. 282, 670; 2 W. Rob. 30, 244, 504; 3 *id.* 7; 12 *id.* 131, 371; 2 Hagg. Adm. 356; 4 Thornt. Adm. 161, 356; 1 Conkling, 382, 383; 1 How. 28; 5 *id.* 441; 18 *id.* 570; Olc. 132; 6 Bost. Law Rep. 111; 8 *id.* 275.

The general rules in regard to costs in collision cases, in the admiralty courts, are that if only one party is to blame, he pays the costs of both; if neither is to blame, and the party prosecuting had apparent cause for proceeding, each party pays his own costs, but in the absence of apparent or probable cause the libel will be dismissed with costs; if both parties are to blame, the costs of both are equally divided, or, more generally, each party is left to pay his own costs. But costs in admiralty are always in the discretion of the court, and will be given or withheld in particular cases without regard to these general rules, if the equity of the case requires a departure from them; 2 W. Rob. 213, 244; 5 Jur. 1067; 2 Conkling, 438; 1 *id.* 374.

Consult 2 Parsons, Mar. Law, 187–211; Conkling, Adm. 370–426; Flanders, Mar. Law, c. 9; Abbott, Shipp. Story & Perkins's notes; Marsden, Collisions.

For a revised code of "Regulations for Preventing Collisions at Sea," approved by the leading maritime nations, see Abb. Year Book, 1880, p. 97. It went into effect September 1, 1880; but has not been adopted by act of congress.

COLLISTRIGIUM. The pillory.

COLLOCATION. In French Law. The act by which the creditors of an estate are arranged in the order in which they are to be paid according to law.

The order in which the creditors are placed is also called collocation; 2 Low. C. 9, 139.

COLLOQUIUM. In Pleading. A general averment in an action for slander connecting the whole publication with the previous statement; 1 Stark. Sland. 431; Heard, Lib. & Sl. 228; or stating that the whole publication applies to the plaintiff, and to the extrinsic matters alleged in his declaration; 1 Greenl. Ev. § 417.

An averment that the words were spoken "of or concerning" the plaintiff, where the words are actionable in themselves; 6 Term, 162; 16 Pick. 132; Cro. Jac. 674; Heard, Lib. & Sl. § 212; 1 Greenl. Ev. § 417; or where the injurious meaning which the plaintiff assigns to the words results from some extrinsic matter, or of and concerning, or with reference to, such matter; 2 Pick. 328; 13 *id.* 189; 16 *id.* 1; Heard, Lib. & Sl. §§ 212, 217; 11 M. & W. 287; 7 Bingh. 119.

An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them; Shaw, C. J., 16 Pick. 6.

Whenever words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the *inducement*. There must then be a *colloquium* averring that the slanderous words were spoken of or concerning this fact. Then the word "meaning," or *innuendo*, is used to connect the matters thus introduced by averments and *colloquia* with the particular words laid, showing their identity and drawing what is then the legal inference from the whole declaration, that such was, under the circumstances thus set out, the meaning of the words used. *Per Shaw*, C. J.; 16 Pick. 6. By the Com. L. Proc. Act (1852) in England the colloquium has been rendered unnecessary. See INNUENDO; Odger, Lib. & Sland.

COLLUSION. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.

Collusion and fraud of every kind vitiate all acts which are infected with them, and render them void. See Shelford, Marr. & Div. 415, 450; 3 Hagg. Eccl. 130, 133; 2 Greenl. Ev. § 51; Bousquet, Dict. *Abordage*.

In Divorce Law. An agreement between a husband and wife that one of them will com-

mit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury; 2 Wait, Act. & Def. 591; 2 Lev. & Tr. 302; L. R. 1 P. & M. 121. Such an agreement is a fraud upon the court where the remedy is sought; 39 Wis. 167; and will bar a divorce; L. R. 1 P. & M. 121.

COLONIAL LAWS. The laws of a colony.

In the United States the term is used to designate the body of law in force in the colonies of America at the time of the commencemant of our independence, which was, in general, the common law of England, with such modifications as the colonial experience had introduced. The colonial law is thus a transition-state through which our present law is derived from the English common law.

In England the term colonial law is used with reference to the present colonies of that realm.

COLORADO. One of the states of the American Union.

The territory of which it is composed was ceded by the treaties with France in 1803, and Mexico in 1848. The enabling act was approved March 3, 1875, and the state was finally admitted August 1, 1876. Its boundaries are as follows: Commencing on the thirty-seventh parallel of north latitude where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north on said meridian to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; thence south on said meridian to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel to the place of beginning. The Constitution was adopted in Convention March 14, 1876, and ratified July 1, 1876. For statutory provisions relative to Acknowledgment, Descent, Distribution, Wife, etc., see these articles.

COLONUS (Lat.). **In Civil Law.** A freeman of inferior rank, corresponding with the Saxon ceorl and the German rural slaves.

It is thought by Spence not improbable that many of the *ceorls* were descended from the *coloni* brought over by the Romans. The names of the *coloni* and their families were all recorded in the archives of the colony or district. Hence they were called *adscriptitii*. 1 Spence, Eq. Jur. 51.

COLONY. A union of citizens or subjects who have left their country to people another, and remain subject to the mother-country. 3 Wash. C. C. 287.

The country occupied by the colonists.

A colony differs from a possession or a dependency. For a history of the American colonies, the reader is referred to Story, Const. b. 1; 1 Kent, 77–80; 1 Dane, Abr. Index. See DEPENDENCE.

COLOR. In Pleading. An apparent but legally insufficient ground of action admitted to subsist in the opposite party by the pleading of one of the parties to an action; 3 Bla. Com. 309; 4 B. & C. 547; 1 M. & P. 307. To give color is to give the plaintiff credit for having an apparent or *primâ facie* right of action, independent of the matter introduced to destroy it, in order to introduce new matter in avoidance of the declaration. It was necessary that all pleadings in confession and avoidance should give color. See 3 Bla. Com. 309, n.; 1 Chitty, Pl. 531.

Express color is a feigned matter pleaded by the defendant, from which the plaintiff seems to have a good cause, whereas he has in truth only an appearance or color of cause; Bacon, Abr. *Trespass*, I, 4; 1 Chitty, Pl. 530. It was not allowed in the plaintiff to traverse the colorable right thus given; and it thus became necessary to answer the plea on which the defendant intended to rely.

Implied color is that which arises from the nature of the defence; as where the defence consists of matter of law, the facts being admitted but their legal sufficiency denied by matters alleged in the plea; 1 Chitty, Pl. 528; Steph. Pl. 206.

By giving color the defendant could remove the decision of the case from before a jury and introduce matter in a special plea, which would otherwise oblige him to plead the general issue; 3 Bla. Com. 309.

The colorable right must be plausible or afford a supposititious right such as might induce an unlearned person to imagine it sufficient, and yet it must be in legal strictness inadequate to defeat the defendant's title as shown in the plea; Comyns, Dig. *Pleading;* Keilw. 1036; 1 Chitty, Pl. 531; 4 Dane, Abr. 552; Archbold, Pl. 211.

COLOR OF OFFICE. A pretence of official right to do an act made by one who has no such right. 9 East, 364. See 41 N. Y. 464.

COLOR OF TITLE. In Ejectment. An apparent title founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like; 3 Wait, Act. & Def. 17; 35 Ill. 394; 38 *id.* 327. To give color, the conveyance, etc., must be good in form, and profess to convey the title and be duly executed; 8 Cow. 589; 4 Mart. (N. S.) 224. A conveyance void on its face is not sufficient; 11 How. 424; 21 Tex. 97. An entry is by color of title when it is made under a *bonâ fide* and not pretended claim of title existing in another; 3 Watts, 72. The deed, or color of title, under which a person takes possession of land, serves to define specifically the boundaries of his claims; 10 Pet. 412. When a disseisor enters upon and cultivates part of a tract, he does not thereby hold possession of the whole tract constructively, unless this entry was by color of title by specific boundaries to the whole tract; color of title is valuable only so far as it indicates the extent of the disseisor's claim; 82 Penn. 99.

COLORE OFFICII. By color of office.

COLT. An animal of the horse species, whether male or female, not more than four years old. Russ. & R. 416.

COMBAT. The form of a forcible encounter between two or more persons or bodies of men; an engagement or battle. A duel.

COMBINATION. A union of men for the purpose of violating the law.

A union of different elements. A patent may be taken out for a new combination of existing machines; 2 Mas. 112.

COMBUSTIO DOMORUM. Arson. 4 Bla. Com. 272.

COMES. In Pleading. A word used in a plea or answer which indicates the presence in court of the defendant.

In a plea, the defendant says, "And the said C D, by E F, his attorney, *comes*, and defends," etc. The word comes, *venit*, expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is, accordingly, not considered as, in strictness, constituting a part of the plea; 1 Chitty, Pl. 411; Steph. Pl. 432.

COMES (Lat. *comes*, a companion). An earl. A companion, attendant, or follower.

By Spelman the word is said to have been first used to denote the companions or attendants of the Roman proconsuls when they went to their provinces. It came to have a very extended application, denoting a title of honor generally, always preserving this generic signification of companion of, or attendant on, one of superior rank.

Among the Germans the comites accompanied the kings on their journeys made for the purpose of hearing complaints and giving decisions. They acted in the character of assistant judges. Tac. *de Mor. Germ.* cap. 11, 12; Spence, Eq. Jur. 66; Spelman, Gloss. Among the Anglo-Saxons, the *comites* were the great vassals of the king, who attended, as well as those of inferior degree, at the great councils or courts of their kings. The term included also the vassals of those chiefs. 1 Spence, Eq. Jur. 42. *Comitatus*, county, is derived from *comes*, the earl or earlderman to whom the government of the district was intrusted. This authority he usually exercised through the *vice-comes*, or *shire reeve* (whence our *sheriff*). The *comitates* of Chester, Durham, and Lancaster maintained an almost royal state and authority; and these counties have obtained the title of palatine. See PALATINE; 1 Bla. Com. 116. The title of earl or comes has now become a mere shadow, as all the authority is exercised by the sheriff (*vice-comes*); 1 Bla. Com. 398.

COMITAS (Lat.). Courtesy; comity. An indulgence or favor granted another nation, as a mere matter of indulgence, without any claim of right made.

COMITATUS (Lat. from *comes*). A county. A shire. The portion of the country under the government of a *comes* or count. 1 Bla. Com. 116.

An earldom. Earls and counts were originally the same as the *comitates*. 1 Ld. Raym. 13.

The county court, of great dignity among the Saxons. 1 Spence, Eq. Jur. 42, 66.

The retinue which accompanied a Roman proconsul to his province. Du Cange. A body of followers; a prince's retinue. Spelman, Gloss.

COMITES. Persons who are attached to a public minister. As to their privileges, see 1 Dall. 117; Baldw. 240; AMBASSADOR.

COMITIA (Lat.). The public assemblies of the Roman people at which all the most important business of the state was transacted, including in some cases even the trial of persons charged with the commission of crime. Anthon, Rom. Antiq. 51. The votes of all citizens were equal in the *comitiæ*. 1 Kent, 518.

COMITIA CALATA. A session of the *comitia curiata* for the purpose of *adrogation*, the confirmation of wills, and the adoption by an heir of the sacred rites which followed the inheritance.

COMITIA CENTURIATA (called, also, *comitia majora*). An assemblage of the people voting by centuries. The people acting in this form elected their own officers, and exercised an extensive jurisdiction for the trial of crimes. Anthon, Rom. Antiq. 52.

COMITIA CURIATA. An assemblage of the *populus* (the original burgesses) by tribes. In these assemblies no one of the *plebs* could vote. They were held for the purpose of confirming matters acted on by the senate, for electing certain high officers, and for carrying out certain religious observances.

COMITIA TRIBUTA. Assemblies to create certain inferior magistrates, elect priests, make laws, and hold trials. Their power was increased very materially subsequently to their first creation, and the range of subjects acted on became much more extensive than at first. Anthon, Rom. Antiq. 62; 1 Kent, 518.

COMITY. Courtesy; a disposition to accommodate.

Courts of justice in one state will, out of comity, enforce the laws of another state, when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens: as, for example, the discharge of a debtor under the insolvent laws of one state will be respected in another state, where there is a reciprocity in this respect.

COMMANDITE. In French Law. A partnership in which some furnish money, and others furnish their skill and labor in place of capital. A special or limited partnership.

Those who embark capital in such a partnership are bound only to the extent of the capital so invested. Guyot, *Rep. Univ.*

The business being carried on in the name of some of the partners only, it is said to be just that those who are unknown should lose only the capital which they have invested, from which alone they can receive an advantage. Under the name of limited partnerships, such arrangements are now allowed by many of the states; although no such partnerships are recognized at common law. Troubat, Lim. Partn. cc. 3, 4.

The term includes a partnership containing *dormant* rather than *special* partners. Story, Partn. § 109 *et seq.*

COMMENCEMENT OF A DECLARATION. That part of the declaration which follows the venue and precedes the circumstantial statement of the cause of action. It formerly contained a statement of the names

of the parties, and the character in which they sue or are sued, if any other than their natural capacity; of the mode in which the defendant had been brought into court, and a brief statement of the form of action. In modern practice, however, in most cases, little else than the names and character of the parties is contained in the commencement.

COMMENDA. In French Law. The delivery of a benefice to one who cannot hold the legal title, to keep and manage it for a time limited and render an account of the proceeds. Guyot, *Rép. Univ.*

In Mercantile Law. An association in which the management of the property was intrusted to individuals. Troubat, Lim. Partn. c. 3, § 27.

COMMENDAM. In Ecclesiastical Law. The appointment of a suitable clerk to hold a void or vacant benefice or church living until a regular pastor be appointed. Hob. 144; Latch, 236.

In Louisiana. A species of limited partnership.

It is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more. La. Civ. Code, 2810. A similar partnership exists in France. Code de Comm. 26, 33; Sirey, 12, pt. 2, p. 25. He who makes this contract is called, in respect to those to whom he makes the advance of capital, a partner *in commendam*. La. Civ. Code, art. 2811.

COMMENDATORS. In Ecclesiastical Law. Secular persons upon whom ecclesiastical benefices are bestowed. So called because they are commended and intrusted to their oversight. They are merely trustees.

COMMENDATUS. In Feudal Law. One who by voluntary homage put himself under the protection of a superior lord. Cowel; Spelman, Gloss.

COMMERCE. The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit. Pardessus, Dr. Com. n. 1. Any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration: if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter. Domat, Dr. Pub. liv. 1, tit. 7, s. 1, n. 2.

Congress has power by the constitution to regulate commerce with foreign nations and among the several states, and with the Indian tribes; 1 Kent, 431; Story, Const. § 1052 *et seq.*

Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities; the power conferred upon congress by the above clause is exclusive, so far as it relates to matters within its purview which are national in their character, and admit of a requisite uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation.

State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys, and other improvements of harbors, bays, and rivers within a state, if their free navigation be not thereby impaired; congress by its inaction in such matters virtually declares that till it deems best to act they may be controlled by the states; 102 U. S. 691, per Field, J. See also 3 Cliff. 339, for a definition of commerce.

The powers conferred upon congress to regulate commerce among the several states, are not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances; 96 U. S. 1.

The fact that congress has not legislated in regard to such commerce does not make it lawful for the states to do so. Such inaction shows only that no restrictions are to be put upon commerce in that direction. The right to legislate is exclusively vested in congress; 92 U. S. 259; 91 *id.* 275. But in another case it was held, that, while action by congress prescribing regulations is exclusive of state authority, yet, until action taken by congress, a state may legislate touching the rights, duties, and liabilities of citizens (if not directed against commerce or any of its regulations), notwithstanding such legislation may indirectly and remotely affect foreign or interstate commerce, for instance, to give a right of action against the owners of a vessel engaged in inter-state traffic for the death of a passenger caused by the negligence of those in charge of the vessel; 93 U. S. 99.

"The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that, to whatever extent ground shall be covered by those directions, the exercise of state power is excluded. Congress may establish police regulations, as well as the states; conning their operations

to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authorities, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by congress do not often exclude the establishment of others by the state covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities, state and local policy will demand peculiar regulations with reference to special and peculiar circumstances." Cooley, Const. Lim. 731.

The above provision of the constitution includes authority to regulate navigation in aid of commerce and to make improvements in navigable waters, such as building a lighthouse in the bed of a stream or requiring navigators of a stream to follow a prescribed course, or directing the water of a navigable stream from one channel to another; 93 U. S. 4. See also 1 Dill. 469. It renders invalid a state statute regulating the arrival of passengers from a foreign port with a view practically to exclude Chinese emigration to the United States, and not merely to exclude pauper or convict emigrants from the state; 92 U. S. 275. See also 3 Sawy. 144. It invalidates a state statute which requires the payment of a license tax by commercial travellers selling goods manufactured in other states, but not by those selling goods manufactured in the state itself; 103 U. S. 344; 91 U. S. 275; (but not when the same tax is levied upon peddlers selling goods made in or out of the state; 100 U. S. 676; and see 102 *id.* 123.) So of an act requiring importers of foreign goods to take out a license, in the exercise of a power of taxation; 12 Wheat. 419. Also a city ordinance of Baltimore laying wharf fees upon vessels laden with the products of other states, which are not exacted from vessels laden with Maryland products; 100 U. S. 434. Also a state statute imposing a burdensome condition upon a shipmaster as a prerequisite for landing his passengers, with the alternative of the payment of a small sum for each of them; 92 U. S. 259. Also a state tonnage tax on foreign vessels, 20 Wall. 577, levied to defray quarantine expenses, 19 Wall. 581; but this does not extend to a tax for city purposes levied upon a vessel owned by a resident of the city, which is not imposed for the privilege of trading; 6 Biss. 505; 99 U. S. 273. It invalidates a state law granting a telegraph company exclusive right to maintain telegraph lines in such state, as contrary to the act of July 24, 1866, which practically forbids a state to exclude from its borders a telegraph company building its lines in pursuance of this act of congress; 96 U. S. 1; also one providing for inspection of sea-going vessels arriving at a port, and of damaged goods found thereon, by a state officer, with a view to furnishing official evidence to the parties immediately concerned, and when goods are damaged, to provide for their sale; 94 U. S. 246; also a state law which requires those engaged in the transportation of passengers among the states upon vessels within the state to give all persons travelling among the states equal rights and privileges in all parts of the vessels without distinction on account of race or color; 95 U. S. 485; also a state law laying a tax on foreign corporations engaged in carrying passengers or merchandise upon their gross receipts outside of the state; 15 Wall. 284; 7 Biss. 227; also a law of Missouri prohibiting the driving of cattle from Texas and other states into Missouri, during certain months; 95 U. S. 465.

A state law, requiring the master of every vessel in the foreign trade to pay a certain sum to a state officer for every passenger brought from a foreign country into the state, is void as infringing this provision of the constitution; 7 How. 283. No state can grant an exclusive monopoly for the navigation of any portion of the waters within its limits upon which commerce is carried on under coasting licenses granted under the authority of congress; Gibbons *v.* Ogden, 9 Wheat. 1; the rights here in controversy were the exclusive right to navigate the Hudson river with steam vessels. See also, on this point, 3 Wall, 713; 10 *id.* 557; 65 Penn. 399; s. c. 3 Am. Rep. 636. But a state law granting to an individual an exclusive right to navigate the upper waters of a stream which is wholly within the limits of a state, separated from tide waters by falls impassable for purposes of navigation, and not forming a part of a continuous track of navigation between two or more states, or with a foreign country, is not invalid under the above clause of the constitution; 14 How. 568; and see 8 Bush, 447.

The state may authorize the building of bridges over navigable waters, notwithstanding the fact that they may, to some extent, interfere with the navigation of the stream. If the stream is one over which the regulation of congress extends, the question arises whether the bridge will interfere with navigation or not; it is not necessarily unlawful if properly built, and if the general traffic of the country will be benefited rather than injured by its construction. There are many cases in which a bridge may be vastly more important than the navigation of the stream which it crosses. It may be said that a state may authorize such constructions, provided they do not constitute a material obstruction to navigation; and each case depends upon its own particular facts. The decision of the state legislature is not conclusive; the final decision rests with the federal courts, who may cause the structure to be abated if it be found to obstruct unnecessarily the traffic on the stream. Those who build the bridge must show the state authority that the construction of the bridge is proper, and that it benefits more than it impedes the general commerce; Cooley, Const.

Lim. 738, 739, 740; the Wheeling Bridge Case, 13 How. 518; see also 6 McLean, 72, 209, 237; 5 Ind. 13.

The states may establish ferries; 1 Black, 603; 41 Miss. 27; 11 Mich. 43; and dams; 2 Pet. 245; 42 Penn. 219; 28 Ind. 257; 1 Biss. 546.

The state has also the power to regulate the speed and general conduct of vessels navigating its waters, provided such regulations do not conflict with regulations prescribed by congress for foreign commerce, or commerce among the states; Cooley, Const. Lim. 740; 1 Hill, 467, 470.

This constitutional provision does not apply to regulations as to life preservers, boiler inspections, etc., on steamboats which confine their business to ports wholly within a state; 6 Ben. 42; nor to any commerce entirely within a state; 10 Wall. 557; nor to a condition in a railroad charter granted by a state that the company shall pay a part of its earnings to the state, from time to time, as a bonus; 21 Wall. 456; nor to a state law prescribing regulations for warehouses, carrying on business within the state exclusively, notwithstanding they are used as instruments of inter-state traffic; 94 U. S. 113; nor to a law of Virginia by which only such persons as are not citizens of that state are prohibited from planting oysters in the soil covered by her tide-waters. Subject to the paramount right of navigation, each state owns the beds of all tide-waters within its jurisdiction, and may appropriate them to be used by its own citizens; 94 U. S. 291. It does not forbid a state from enacting, as a police regulation, a law prohibiting the manufacture and sale of intoxicating liquors; 97 U. S. 25; nor a state act prescribing maximum rates of transportation within the state; 94 U. S. 155; and see *id.* 164. Nor is a city ordinance, exacting a license fee, for the maintenance of its office in the city, from an express company doing busines beyond the limits of a state, invalid; 16 Wall. 479.

COMMERCIA BELLI. Compacts entered into by belligerent nations to secure a temporary and limited peace. 1 Kent, 159.

Contracts made between citizens of hostile nations in time of war. 1 Kent, 104.

COMMERCIAL LAW. A phrase employed to denote those branches of the law which relate to the rights of property and relations of persons engaged in commerce.

This term denotes more than the phrase "maritime law," which is sometimes used as synonymous, but which more strictly relates to shipping and its incidents.

As the subjects with which commercial law, even as administered in any one country, has to deal are dispersed throughout the globe, it results that commercial law is less local and more cosmopolitan in its character than any other great branch of municipal law; and the peculiar genius of the common law, in adapting recognized principles of right to new and ever-varying combinations of facts, has here found a field where its excellence has been most clearly shown. The various systems of commercial law have been well contrasted by Leone Levi in his collection entitled "Commercial Law, its Principles and Administration, or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of all the Important Mercantile Countries of the Modern World, and with the Institutes of Justinian;" London, 1850–52; a work of great interest both as a contribution to the project of a mercantile code and as a manual of present use.

As to the existence of a distinct commercial law in the federal courts, see 12 Am. L. Reg. (N. S.) 473.

COMMISSARIA LEX. A principle of the Roman law relative to the forfeiture of contracts. It was not unusual to restrict a sale upon credit, by a clause in the agreement that if the buyer should fail to make due payment the seller might rescind the sale. In the mean time, however, the property was the buyer's and at his risk. A debtor and his pledgee might also agree that if the debtor did not pay at the day fixed, the pledge should become the absolute property of the creditor. 2 Kent, 583. This was abolished by a law of Constantine. Cod. 8. 35. 3.

COMMISSARY. An officer whose principal duties are to supply an army, or some portion thereof, with provisions.

The act of April 14, 1818, s. 6, requires that the president, by and with the consent of the senate, shall appoint a commissary-general, with the rank, pay, and emoluments of colonel of ordnance, and as many assistants, to be taken from the subalterns of the line, as the service may require. The commissary-general and his assistants shall perform such duties, in the purchasing and issuing of rations to the armies of the United States, as the president may direct. The duties of these officers are further detailed in the subsequent sections of this act, and in the act of March 2, 1821.

By act of Aug. 3, 1861, four commissaries of subsistence, each with the rank, pay, and emoluments of a major of cavalry, and eight each with the rank, pay, and emoluments of a captain of cavalry, are added to the subsistence department. 12 U. S. Stat. at Large, 287.

By act of Feb. 9, 1863, it is provided that there be added to the subsistence department of the army one brigadier-general, to be selected from the subsistence department, who shall be commissary-general of subsistence, and by regular promotion, one colonel, one lieutenant-colonel, and two majors; the colonels and lieutenant-colonels to be assistant commissaries-general of subsistence, and that vacancies in said grades shall be filled by regular promotions in said department. 12 U. S. Stat. at Large, 648.

COMMISSARY COURT. In Scotch Law. A court of general ecclesiastical jurisdiction. It was held before four commissioners, appointed by the crown from among the faculty of advocates.

It had a double jurisdiction: *first*, that exercised within a certain district; *second*, another, universal, by which it reviewed the sentences of inferior commissioners, and confirmed the testaments of those dying abroad or dying in the country without having an established domicil. Bell, Dict.

It has been abrogated, its jurisdiction in

matters of confirmation being given to the sheriff, and the jurisdiction as to marriage and divorce to the court of session. Paterson, Comp. See 4 Geo. IV. c. 47; 1 Will. IV. c. 69; 6 & 7 Will. IV. c. 41; 13 and 14 Vict. c. 36.

COMMISSION (Lat. *commissio;* from *committere*, to intrust to).

An undertaking without reward to do something for another, with respect to a thing bailed; Rutherforth, Inst. 105.

A body of persons authorized to act in a certain matter; 5 B. & C. 850.

The act of perpetrating an offence. An instrument issued by a court of justice, or other competent tribunal, to authorize a person to take depositions, or do any other act by authority of such court or tribunal, is called a commission. For a form of a commission to take depositions, see Gresley, Eq. Ev. 72.

Letters-patent granted by the government, under the public seal, to a person appointed to an office, giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it, and, as soon as it is signed and sealed, vests the office in the appointee; 1 Cra. 137; 2 N. & M'C. 357; 1 M'Cord, 233, 238. See 1 Pet. C. C. 194; 2 Sumn. 299; 8 Conn. 109; 1 Penn. 297; 2 Const. 696; 2 Tyl. 235.

In Common Law. A sum allowed, usually a certain per cent. upon the value of the property involved, as compensation to a servant or agent for services performed. See COMMISSIONS.

COMMISSION OF ASSIZE. In English Practice. A commission which formerly issued from the king, appointing certain persons as commissioners or judges of assize to hold the assizes in association with discreet knights during those years in which the justices in eyre did not come.

Other commissions were added to this, which has finally fallen into complete disuse. See COURTS OF ASSIZE AND NISI PRIUS.

COMMISSION OF LUNACY. A writ issued out of chancery, or such court as may have jurisdiction of the case, directed to a proper officer, to inquire whether a person named therein is a lunatic or not. 1 Bouvier, Inst. n. 382 *et seq.*

COMMISSION OF REBELLION. In English Law. A writ formerly issued out of chancery to compel an attendance. It was abolished by the order of Aug. 8, 1841.

COMMISSIONER OF PATENTS. The title given by law to the head of the patent office bureau. Prior to 1836 the business of that office was under the immediate charge of a clerk in the state department, who was generally known as the superintendent of the patent office. He performed substantially the same duties which afterwards devolved upon the commissioner, except that he was not required to decide upon the patentability of any contrivance for which a patent was sought, inasmuch as the system of examinations had not then been introduced and the applicant was permitted to take out his patent at his own risk. See PATENT OFFICE, EXAMINERS IN.

For a fuller understanding of the duties of the commissioner of patents, see PATENTS; PATENT OFFICE.

COMMISSIONERS OF BAIL. Officers appointed by some courts to take recognizances of bail in civil cases.

COMMISSIONERS OF HIGHWAYS. Officers having certain powers and duties concerning the highways within the limits of their jurisdiction. They are usually three in number. In some of the states they are county officers, and their jurisdiction is coextensive with the county. In others, as in New York, Michigan, Illinois, and Wisconsin, they are town or township officers. They have power to establish, alter, and vacate highways; and it is their duty to cause them to be kept in repair.

COMMISSIONERS OF SEWERS. In English Law. A court of record of special jurisdiction in England.

It is a temporary tribunal, erected by virtue of a commission under the great seal, which formerly was granted *pro re natâ* at the pleasure of the crown, but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers, 23 Hen. VIII. c. 5.

Its jurisdiction is to overlook the repairs of the banks and walls of the sea-coast and navigable rivers and the streams communicating therewith, and is confined to such county or particular district as the commission shall expressly name. The commissioners may take order for the removal of any annoyances or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise, at their own discretion. They are also to assess and collect taxes for such repairs and for the expenses of the commission. They may proceed with the aid of a jury or upon their own view; Consult 7 Anne, c. 10; 4 & 5 Vict. c. 45; 11 & 12 Vict. c. 50; 18 & 19 Vict. c. 120; 3 & 4 Will. IV. cc. 10, 19–22; 3 Bla. Com. 73, 74; Crabb, Hist. Eng. Law, 469.

In American Law. Commissioners have been appointed for the purpose of regulating the flow of water in streams. Their duties are discharged in the different states by county courts, county commissioners, etc.

COMMISSIONS. In Practice. Compensation allowed to agents, factors, executors, trustees, receivers, and other persons who manage the affairs of others, in recompense for their services.

The *right* to such allowance may either be the subject of a special contract, may rest upon an implied contract to pay *quantum meruit*, or may depend upon statutory provisions; 7 C. & P. 584; 9 *id.* 559; 3 Smith, 440; Sugden, V. & P. Index, tit. *Auctioneer.*

See the statutes of the various states. The right does not generally accrue till the completion of the services; 1 C. & P. 384; 4 *id.* 289; 7 Bingh. 99; and see 10 B. & C. 438; does not then exist unless proper care, skill, and perfect fidelity have been employed; 3 Campb. 451; 1 Stark. 113; 3 Taunt. 32; 9 Bingh. 287; 12 Pick. 328; and the services must not have been illegal nor against public policy; 1 Campb. 547; 4 Esp. 179; 5 Taunt. 521; 3 B. & C. 639; 11 Wheat. 258.

The *amount* of such commissions is generally a percentage on the sums paid out or received. When there is a usage of trade at the particular place or in the particular business in which the agent is engaged, the amount of commissions allowed to auctioneers, brokers, and factors is regulated by such usage, in the absence of special agreement; 10 B. & C. 438; 3 Chitty, Com. Law, 221; 1 Parsons, Contr. 84, 85; Story, Ag. § 326; where there is no agreement and no custom, the jury may fix the commission as a *quantum meruit;* 9 C. & P. 620; 43 Miss. 288. The amount which executors, etc., are to receive is frequently fixed by statute, subject to modification in special cases by the proper tribunal; 12 Barb. 671; Edwards, Receiv. 176, 302, 643. And see the statutes of the various states. In England, no commissions are allowed to executors or trustees; 1 Vern. Ch. 316; 4 Ves. Ch. 72, n; 9 Cl. & F. 111; even where he carries on the testator's business by his direction; 6 Beav. 371. See the cases in all the states in 2 Perry, Trusts, § 918, note.

In case the factor guaranties the payment of the debt, he is entitled to a larger compensation (called a *del credere* commission) than is ordinarily given for the transaction of similar business where no such guaranty is made; Paley, Ag. 88 *et seq.*

COMMITMENT. In Practice. The warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison.

The act of sending a person to prison by means of such a warrant or order. 9 N. H. 204.

A commitment should be in writing under the hand and seal of the magistrate, and should show his authority and the time and place of making it; 2 R. I. 436; 3 Harr. & M'H. 113; T. U. P. Charlt. 280; 3 Cra. 448. See Harp. 313; Wright, Ohio, 690. It must be made in the name of the United States or of the commonwealth or people, as required by the constitution of the United States or of the several states.

It should be directed to the keeper of the prison, and not generally to carry the party to prison; 2 Stra. 934; 1 Ld. Raym. 424. It should describe the prisoner by his name and surname, or the name he gives as his.

It ought to state that the party has been charged on oath; 14 Johns. 371; 3 Cra. 448; but see 2 Va. Cas. 504; 2 Bail. 290; and should mention with convenient certainty the particular crime charged against the prisoner; 3 Cra. 448; 11 St. Tr. 304, 318; Hawk. Pl. Cr. b. 2, c. 16, s. 16; 1 Chitty, C. Law, 110; 4 Md. 262; 1 Rob. 744; 5 Ark. 104; 26 Vt. 205. See 17 Wend. 181; 23 *id.* 638. It should point out the place of imprisonment, and not merely direct that the party be taken to prison; 2 Stra. 934; 1 Ld. Raym. 424.

It may be for further examination, or final. If final, the command to the keeper of the prison should be to keep the prisoner "until he shall be discharged by due course of law," when the offence is not bailable, see 3 Conn. 502; 29 E. L. & E. 134; when it is bailable, the gaoler should be directed to keep the prisoner in his "said custody for want of sureties, or until he shall be discharged by due course of law." When the commitment is not final, it is usual to commit the prisoner "for further hearing."

See, generally, 4 Cra. 129; 2 Yerg. 58; 6 Humphr. 391; 9 N. H. 185; 5 Rich. So. C. 255.

COMMITTEE. In Legislation. One or more members of a legislative body, to whom is specially referred some matter before that body, in order that they may investigate and examine into it and report to those who delegated this authority to them.

In Practice. A guardian appointed to take charge of the person or estate of one who has been found to be non compos.

For committee of the person, the next of kin is usually selected; and, in case of the lunacy of a husband or wife, the one who is of sound mind is entitled, unless under very special circumstances, to be the committee of the other; Shelford, Lun. 137, 140. It is the duty of such a person to take care of the lunatic.

For committee of the estate, the heir at law is favored. Relations are preferred to strangers; but the latter may be appointed; Shelf. Lun. 144. It is the duty of such committee to administer the estate faithfully and to account for his administration. He cannot, in general, make contracts in relation to the estate of the lunatic, or bind it, without a special order of the court or authority that appointed him. See 1 Bouvier, Inst. n. 389–391.

COMMITTITUR PIECE. In English Law. An instrument in writing, on paper or parchment, which charges a person already in prison, in execution at the suit of the person who arrested him.

COMMIXTION. In Civil Law. A term used to signify the act by which goods are mixed together.

The matters which are mixed are dry or liquid. In the commixtion of the former, the matter retains its substance and individuality; in the latter, the substance no longer remains distinct. The commixtion of liquids is called *confusion* (q. v.), and that of solids a mixture. Leg. Elém. du Dr. Rom. §§ 370, 371; Story, Bailm. § 40; 1 Bouvier, Inst. n. 506.

COMMODATE. In Scotch Law. A loan for use. Erskine, Inst. b. 3, t. 1, § 20; 1 Bell, Com. 225.

Judge Story regrets that this term has not been adopted and naturalized, as mandate has been from *mandatum*. Story, Bailm. § 221. Ayliffe, in his Pandects, has gone further and terms the bailor the *commodant*, and the bailee the *commodatory*, thus avoiding those circumlocutions which, in the common phraseology of our law, have become almost indispensable. Ayliffe, Pand. b. 4, t. 16, p. 517. Browne, in his Civil Law, vol. 1, 352, calls the property loaned "*commodated* property."

COMMODATO. In Spanish Law. A contract by which one person lends gratuitously to another some object not consumable, to be restored to him in kind at a given period.

COMMODATUM. A contract by which one of the parties binds himself to return to the other certain personal chattels which the latter delivers to him to be used by him without reward; loan for use.

COMMON. An incorporeal hereditament, which consists in a profit which one man has in connection with one or more others in the land of another; 12 S. & R. 32; 10 Wend. 647; 11 Johns. 498; 16 *id.* 14, 30; 10 Pick. 364; 3 Kent, 403.

Common of estovers is the liberty of taking necessary wood, for the use of furniture of a house or farm, from another man's estate. This right is inseparably attached to the house or farm, and is not apportionable. If, therefore, a farm entitled to estovers be divided by the *act of the party* among several tenants, neither of them can take estovers, and the right is extinguished; 2 Bla. Com. 34; Plowd. 381; 10 Wend. 639; 1 Barb. 592. It is to be distinguished from the right to estovers which a tenant for life has in the estate which he occupies. See ESTOVERS.

Common of pasture is the right of feeding one's beast on another's land. It is either appendant, appurtenant because of vicinage, or in gross.

Common of piscary is the liberty of fishing in another man's water. 2 Bla. Com. 34. See FISHERY.

Common of shack. The right of persons occupying lands lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field. Whart. Dict.; 2 Steph. Com. 6; 1 B. & Ald. 710.

Common of turbary is the liberty of digging turf in another man's ground. Common of turbary can only be appendant or appurtenant to a house, not to lands, because turves are to be spent in the house; 4 Co. 37; 3 Atk. 189; Noy, 145; 7 East, 127.

The taking seaweed from a beach is a commonable right in Rhode Island; 2 Curt. C. C. 571; 1 R. I. 106; 2 *id.* 218. The constitution of Illinois provides for the continuance of certain commons in that state. Ill. Const. art. 8, § 8. In Virginia it is declared by statute that all unappropriated lands on the Chesapeake Bay, on the shore of the sea, or of any river or creek, and the bed of any river or creek in the eastern part of the commonwealth, ungranted and used as common, shall, etc. Va. Code, c. 62, § 1.

In most of the cities and towns in the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants.

Where land thus appropriated has been accepted by the public, or where individuals have purchased lots adjoining land so appropriated, under the expectation excited by its proprietors that it should so remain, the proprietors cannot resume their exclusive ownership; 3 Vt. 521; 10 Pick. 310; 4 Day, 328; 1 Ired. 144; 7 Watts, 394. And see 14 Mass. 440; 2 Pick. 475; 12 S. & R. 32; 6 Vt. 355.

COMMON APPENDANT. Common of pasture appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. It can only be claimed by prescription: so that it cannot be pleaded by way of custom; 1 Rolle, Abr. 396; 6 Coke, 59. It is regularly annexed to arable land only, and can only be claimed for such cattle as are necessary to tillage: as, horses and oxen to plough the land, and cows and sheep to manure it; 2 Greenl. Cruise, Dig. 4. 5; 10 Wend. 647. Common appendant may by usage be limited to any certain number of cattle; but where there is no such usage, it is restrained to cattle *levant* and *couchant* upon the land to which it is appendant; 8 Term, 396; 5 *id.* 46; 2 M. & R. 205; 2 Dane, Abr. 611, § 12. It may be assigned; and by assigning the land to which it is appended, the right passes as a necessary incident to it. It may be apportioned by granting over a parcel of the land to another, either for the whole or a part of the owner's estate; Willes, 227; 4 Co. 36; 8 *id.* 78. It may be extinguished by a release of it to the owner of the land, by a severance of the right of common, by unity of possession of the land, or by the owner of the land, to which the right of common is annexed, becoming the owner of any part of the land subject to the right; 25 Penn. 161; 16 Johns. 14; Cro. Eliz. 592. Common of estovers or of piscary, which may also be appendant, cannot be apportioned; 8 Co. 78. But see 2 R. I. 218.

COMMON APPURTENANT. Common appurtenant differs from common appendant in the following particulars, viz.: it may be claimed by grant or prescription, whereas common appendant can only arise from prescription; it does not arise from any connection of tenure, nor is it confined to arable land, but may be claimed as annexed to any kind of land; it may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, etc.; it may be severed from the land to which it is appurtenant; it may be commenced by grant; and an uninterrupted usage for twenty years is evidence of a grant. In most other re-

spects commons appendant and appurtenant agree; 2 Greenl. Cruise, Dig. 5; Bouvier, Inst. n. 1650; 30 E. L. & Eq. 176; 15 East, 108.

COMMON BECAUSE OF VICINAGE. The right which the inhabitants of two or more contiguous townships or vills have of intercommoning with each other. It ought to be claimed by prescription, and can only be used by cattle *levant* and *couchant* upon the lands to which the right is annexed; and cannot exist except between *adjoining* townships, where there is no intermediate land; Co. Litt. 122 *a*; 4 Co. 38 *a*; 7 *id.* 5; 10 Q. B. 581, 589, 604; 19 *id.* 620; 18 Barb. 523.

COMMON IN GROSS. A right of common which must be claimed by deed or prescription. It has no relation to land, but is annexed to a man's person, and may be for a certain or indefinite number of cattle. It cannot be aliened so as to give the entire right to several persons to be enjoyed by each in severalty. And where it comes to several persons by operation of law, as by descent, it is incapable of division among them, and must be enjoyed jointly. Common appurtenant for a limited number of cattle may be granted over, and by such grant becomes common in gross; Co. Litt. 122 *a*, 164 *a*; 5 Taunt. 244; 16 Johns. 30; 2 Bla. Com. 34.

See, generally, Viner, Abr. *Common;* Bacon, Abr. *Common;* Comyns, Dig. *Common;* 2 Bla. Com. 34 *et seq.;* 2 Washb. R. P.; Williams, Rights of Common (1880).

COMMON ASSURANCES. Deeds which make safe or assure to a man the title to his estate, whether they are deeds of conveyance or to charge or discharge.

COMMON BAIL. Fictitious sureties entered in the proper office of the court. See BAIL; ARREST.

COMMON BAR. In Pleading. A plea to compel the plaintiff to assign the particular place where the trespass has been committed. Steph. Pl. 256. It is sometimes called a blank bar.

COMMON BARRATRY. See BARRATRY.

COMMON BENCH. The ancient name for the court of common pleas. See BENCH; BANCUS COMMUNIS.

COMMON CARRIERS. A common carrier is one whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him; 1 Pick. 50; 2 Kelly, 353; Schouler, Bailm. 297.

The definition includes carriers by land and water. They are, on the one hand, stage-coach proprietors, railway-companies, truckmen, wagoners, and teamsters, carmen and porters; and express companies, whether such persons undertake to carry goods from one portion of the same town to another, or through the whole extent of the country, or even from one state or kingdom to another. And, on the other hand, this term includes the owners and masters of every kind of vessel or water-craft who set themselves before the public as the carriers of freight of any kind for all who choose to employ them, whether the extent of their navigation be from one continent to another or only in the coasting trade or in river or lake transportation, or whether employed in lading or unlading goods or in ferrying, with whatever mode of motive power they may adopt; Story, Bailm. §§ 494–496; 2 Kent, 598, 599; Redf. Railw. § 124; 1 Salk. 249; 2 Ga. 348; 14 Ala. N. S. 261. It has been doubted whether carmen; 8 C. & P. 207; and coasters; 6 Cow. 266; were common carriers; but these cases stand alone, and are contradicted by many authorities; 19 Barb. 577; 24 *id.* 533; 9 Rich. 193.

But the liability of the owner of a tug-boat to his tow, is not that of a common carrier; 77 Penn. 238; 13 Wend. 387; 24 La. An. 165; 1 Black, 62; 6 Cal. 462.

And although the carrier receives the goods as a forwarder only, yet if his contract is to transport and to deliver them at a specified address, he is liable as a common carrier; 5 Am. Law Reg. N. S. 16; 48 N. H. 339.

Common carriers are responsible for all loss or damage during transportation, from whatever cause, except the act of God or the public enemy; Angell, Carr. 70, § 67; 1 Term, 27; 2 Ld. Raym. 909, 918; 1 Wils. 281; 1 Salk. 18, and cases cited; 4 Bingh. N. C. 314; 25 E. L. & Eq. 595; 1 Term, 27; 2 Kent, 597, 598; 7 Yerg. 340; 3 Munf. 239; 1 Dev. & B. 273; 2 Bail. 157; 6 Johns. 160; 21 Wend. 190; 23 *id.* 306; 5 Strobh. 119; Rice, 108; 4 Zabr. 697; 2 *id.* 273; 1 Conn. 487; 12 *id.* 410; 4 N. H. 259; 11 Ill. 579. The act of God is held to extend only to such inevitable accidents as occur without the intervention of man's agency; 1 Term, 27; 21 Wend. 192; 3 Esp. 127; 4 Dougl. 287; which could not be avoided by the exercise of due skill and care; 2 Watts, 114; 10 Wall. 176. See ACT OF GOD.

The carrier is not responsible for losses occurring from natural causes, such as frost, fermentation, evaporation, or natural decay of perishable articles, or the natural and necessary wear in the course of transportation, or the shipper's carelessness, provided the carrier exercises all reasonable care to have the loss or deterioration as little as practicable; Bull. N. P. 69; 2 Kent, 299, 300; Story, Bailm. § 492 *a*; 6 Watts, 424; Redf. Railw. § 141.

Carriers, both by land and water, when they undertake the general business of carrying every kind of goods, are bound to carry all which offer; and if they refuse, without just excuse, they are liable to an action; 2 Show. 332; 5 Term, 143; 4 B. & Ald. 32; 8 M. & W. 372; 1 Pick. 50; 5 Mo 36; 15 Conn. 539; 2 Sumn. 221; 6 Railw. Cas. 61; 6 Wend. 335; 2 Stor. 16; 12 Mod. 484; 4 C. B. 555; 6 *id.* 775; 2 Ball & B. 54; 9 Price, 408. But the business of a common

carrier may be restricted within such limits as he may deem expedient, if an individual, or which may be prescribed in its grant of powers, if a corporation, and he is not bound to accept goods out of the line of his usual business. But should the carrier accept goods not within the line of his business, he assumes the liability of a common carrier as to the specific goods accepted; 23 Vt. 186; 14 Penn. 48; 10 N. H. 481; 30 Miss. 231; 4 Exch. 369; 12 Mod. 484; 17 Wall. 357; 6 Wend. 335; 26 Vt. 248; 11 Am. Law Reg. N. S. 126; Schouler, Bailm. 359; Redf. Railw. Ca. 116. The carrier may require freight to be paid in advance; but in an action for not carrying, it is only necessary to allege a readiness to pay freight; 2 Show. 81; 8 M. & W. 372; 18 Ill. 488; 14 Ala. N. S. 249. It is not required to prove or allege a tender, if the carrier refuse to accept the goods for transportation. The carrier is entitled to a lien upon the goods for freight; 2 Ld. Raym. 752; and for advances made to other carriers; 6 Humphr. 70; 16 Ill. 408; 18 *id.* 488; 16 Johns. 356; 13 B. Monr. 243. The consignor is *primâ facie* liable for freight; but the consignee may be liable when the consignor is his agent, or when the title is in him and he accepts the goods; 13 East, 399; 3 Bingh. 383; 4 Denio, 110; 3 E. D. Sm. 187; Schouler, Bailm. 541, 542.

Common carriers may qualify their common-law responsibility by special contract; 4 Coke, 83; Angell, Carr. § 220; 1 Ventr. 238; Story, Bailm. § 549, and note 5; 17 Wall. 357; 16 Wall. 318; 21 Wall. 264; 63 Penn. 14. Such a contract may be shown by proving a notice, brought home to and assented to by the owner of the goods or his authorized agent, wherein the carrier stipulates for a qualified liability; 5 East, 507; 5 Bingh. 207; 8 M. & W. 243; 6 How. 344; 3 Me. 228; 11 *id.* 422; 11 N. Y. 491; 9 Watts, 87; 6 W. & S. 495; 8 Penn. 479; 31 *id.* 209; 2 Rich. 286; 12 B. Monr. 63; 23 Vt. 186; 4 H. & J. 317. Or it may be reduced to writing, in the form of a bill of lading. See BILL OF LADING.

But the carrier cannot contract against his own negligence or the negligence of his employés and agents; 15 Am. Law Reg. N. S. 140; 50 Penn. 313; 1 Fed. Rep. 382; 41 Conn. 333; 17 Wall. 357, 54 Penn. 53.

Railway-companies, steamboats, and other carriers who allow express companies to carry parcels and packages on their cars, or boats, or other vehicles, are liable as common carriers to the owners of goods for all loss or damage which occurs, without regard to the contract between them and such express carriers; 6 How. 344; 23 Vt. 186.

Railways, steamboats, packets, and other common carriers of passengers, although not liable for injuries to their passengers without their fault, are nevertheless responsible for the baggage of such passengers intrusted to their care as common carriers of goods; and such responsibility continues for a reasonable time after the goods have been placed in the warehouse or depot of the carrier, at the place of destination, for delivery to the passenger or his order; 1 C. B. 839; 2 B. & P. 416; 4 Bingh. 218; 6 Hill, 586; 26 Wend. 591; 10 N. H. 481; 7 Rich. 158. Where one company checks baggage through a succession of lines owned by different companies, each company becomes responsible for the whole route; 8 N. Y. 37; 2 E. D. Sm. 184. The baggage-check given at the time of receiving such baggage is regarded as *primâ facie* evidence of the liability of the company. It stands in the place of a bill of lading; 7 Rich. 158; Redf. Railw. § 128. Baggage will not include merchandise; 9 Eng. L. & Eq. 477; 25 Wend. N. Y. 459; 6 Hill, N. Y. 586; 12 Ga. 217; 10 Cush. 506. Jewelry and a watch in a trunk, being female attire, are regarded as proper baggage; 4 Bingh. 218; 3 Penn. 451. But money, except a reasonable amount for expenses, is not properly baggage; 9 Wend. 85; 19 *ia.* 554; 5 Cush. 69; 9 Humphr. 621; 20 Mo. 513; 15 Ala. 242. See BAGGAGE.

The responsibility of common carriers begins upon the delivery of the goods for immediate transportation. A delivery at the usual place of receiving freight, or to the employés of the company in the usual course of business, is sufficient; 20 Conn. 534; 2 C. & K. 680; 2 M. & S. 172; 16 Barb. 383; Angell, Carr. §§ 129–147. But where carriers have a warehouse at which they receive goods for transportation, and goods are delivered there not to be forwarded until some event occur, the carriers are, in the mean time, only responsible as depositaries; 24 N. H. 71; and where goods are received as wharfingers, or warehousers, or forwarders, and not as carriers, liability will be incurred only for ordinary negligence; 7 Cow. 497.

The responsibility of the carrier terminates after the arrival of the goods at their destination and a reasonable time has elapsed for the owner to receive them in business hours. After that, the carrier may put them in warehouse, and is only responsible for ordinary care; 10 Metc. 472; 27 N. H. 86; 4 Term, 581; 2 M. & S. 172; 2 Kent, 591, 592; Story, Bailm. § 444. In carriage by water, the carrier is, as a general rule, bound to give notice to the consignee of the arrival of the goods; Redf. Railw. § 130.

Where goods are so marked as to pass over successive lines of railways, or other transportation, having no partnership connection in the business of carrying, the successive carriers are only liable for damage or loss occurring during the time the goods are in their possession for transportation; 48 N. H. 339; 22 Wall. 129; 52 Vt. 335; 23 Vt. 186; 6 Hill, 158; 22 Conn. 502; 1 Gray, 502; 4 Am. Law Reg. 234. The English courts hold the first carrier, who accepts goods marked for a place beyond his route, responsible for the entire route, unless he stipulates expressly for the extent of his own route only; 8 M. & W. 421; 3 E. L. & Eq. 497; 18 *id.* 553, 557.

Where one of the carriers has contracted clearly and unequivocally to deliver goods at their destination, *i. e.*, to carry them over the whole route, his liability will continue until final delivery; 33 Conn. 178; 68 Penn. 272; 3 Fed. Rep. 768; 51 N. H. 9; 48 N. H. 339; 49 Vt. 255; but the carrier upon whose line the damage or loss has occurred will also be liable; 1 Am. Law Reg. o. s. 119; 28 Wis. 209; 32 Vt. 665.

A contract to transport goods from or to points not on the carrying line, and without the state by which it is incorporated, is held to be good; 2 Am. Law Reg. N. S. 184; 47 Me. 573; 27 Vt. 110; 19 Wend. 534; Redf. Railw. Cases, 110; 48 N. H. 339; *contra*, 24 Conn. 468.

The agents of corporations who are common carriers, such as railway and steamboat companies, will bind their principals to the full extent of the business intrusted to their control, whether they follow their instructions or not; 14 How. 468, 483. Nor will it excuse the company because the servant or agent acted wilfully in disregard of his instructions; 5 Du. N. Y. 193; Redf. Railw. § 137, and cases cited in notes.

The contracts of common carriers, like all other contracts, are liable to be controlled and qualified by the known usages and customs and course of the business in which they are engaged; and all who do business with them are bound to take notice of such usages and customs as are uniform, of long standing, and generally known and understood by those familiar with such transactions; 25 Wend. 660; 6 Hill, 157; 23 Vt. 186, 211, 212; 21 Ga. 526.

By the common law, live stock was not included among the articles which a transporter accepted with the liability of a common carrier. Such freight is now generally carried on special terms; but the liability of a carrier who accepts live stock for transportation, without a special contract, is that of a common carrier; 26 Vt. 248; 52 N. H. 355. But for accidents necessarily incident to live stock in transportation, the carrier is not so liable; 13 Am. L. Reg. N. S. 145 (with note by Mr. Hunter); S. C. 9 Barb. 645.

The carrier has an insurable interest in the goods, both in regard to fire and marine disasters, measured by the extent of his liability for loss or damage; 12 Barb. 595.

The carrier is not bound, unless he so stipulate, to deliver goods by a particular time, or to do more than to deliver in a reasonable time under all the circumstances attending the transportation; Story, Bailm. § 545 *a*; 5 M. & G. 551; 6 McLean, 296; 19 Barb. 36; 12 N. Y. 245. What is a reasonable time is to be decided by the jury, from a consideration of all the circumstances; 7 Rich. 190, 409.

But if the carrier contract specially to deliver in a prescribed time, he must perform his contract, or suffer the damages sustained by his failure; 1 Du. N. Y. 209; 12 N. Y. 99.

He is liable, upon general principles, where the goods are not delivered through his default, to the extent of their market value at the place of their destination; 4 Whart. 204; 11 La. An. 324; Sedgwick, Dam. 356; 2 B. & Ad. 932. See, also, 12 S. & R. 183; 1 Cal. 108.

If the goods are only damaged, or not delivered in time, the owner is bound to receive them. He will be entitled to damages, but cannot repudiate the goods and recover from the carrier as for a total loss; 5 Rich. 462; 12 N. Y. 509; 35 N. H. 390.

For the authorities in the civil law on the subject of common carriers, the reader is referred to Dig. 4. 9. 1 to 7; Pothier, Pand. lib. 4, t. 9; Domat, liv. 1, t. 16, ss. 1 and 2; Pardessus, art. 537 to 555; Code Civil, art. 1782, 1786, 1952; Moreau & Carlton, Las Partidas, c. 5, t. 8. 1. 26; Erskine, Inst. b. 2, t. 1, § 28; 1 Bell, Comm. 465; Abbott, Shipp. part 3, c. 3, § 3, note (1); 1 Voet, ad Pand. lib. 4, t. 9; Merlin, Rép. *Voiture, Voiturier;* Goirand, Code of Commerce (1880), 163.

Consult Angell on Carriers; Chitty & Temple on Carriers; Story; Schouler; Bailments; Redfield, Railways; and articles COMMON CARRIERS OF PASSENGERS; RAILWAYS; BAGGAGE; LUGGAGE; BAILMENTS.

COMMON CARRIERS OF PASSENGERS. Common carriers of passengers are such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. Thompson, Carriers of Passengers, 26, n. § 1; 11 Allen, 304; 19 Wend. 239; 10 N. H. 486; 15 Ill. 472; 2 Sumn. 221; 3 B. & B. 54; 9 Price, 408.

They may excuse themselves when there is an unexpected press of travel and all their means are exhausted. But see Redfield, Railw. 344, § 155, and notes, and cases cited; Story, Bailm. § 591; 10 N. H. 486; and they may for good cause exclude a passenger: thus, they are not required to carry drunken and disorderly people, or one affected with a contagious disease, or those who come on board to assault passengers, commit a crime, flee from justice, gamble, or interfere with the proper regulations of the carrier, and disturb the comfort of the passengers; 4 Dill, 321; 4 Wall. 605; 15 Gray, 20; 11 Allen, 304; 57 Ind. 576; 76 Penn. 510; or one whose purpose is to injure the carrier's business; 2 Sumn. 221; 11 Blatch. 233; but if a carrier receives a passenger, knowing that a good cause exists for his exclusion, he cannot afterwards eject him for such cause; 4 Wall. 605; 34 Cal. 616.

A company owning palace and sleeping cars, who enter into no contract of carriage with the passenger, but only give him superior accommodations during the journey, is not a common carrier; 73 Ill. 360.

Passenger-carriers are not held responsible as insurers of the safety of their passengers, as common carriers of goods are. But they are bound to the very highest degree of care and watchfulness in regard to all their appli-

ances for the conduct of their business; so that, as far as human foresight can secure the safety of passengers, there is an unquestionable right to demand it of all who enter upon the business of passenger-carriers; 2 Esp. 533; 17 Ill. 496.

The carrier is not excused because the passenger does not pay fare; 14 How. 483; common carriers must exercise the same degree of care in carrying passengers free, on pass or otherwise, as in carrying them for hire, and cannot in such case exempt themselves from liability for negligence; 37 Mich. 111; 1 Cal. 348; 40 Barb. 546; 21 Ind. 48; 30 Allen, 9; 30 Ill. 9; 24 N. Y. 196. *Aliter* in England as to negligence; 13 Ir. L. T. 100; 9 Ir. L. T. 69; L. R. 10 Q. B. 437. When live stock is shipped upon a railroad it is customary to issue to the persons in charge "drover's" passes, which entitle the holder to accompany the stock and return. By the terms of such a pass the carrier may restrict his liability for injury done to the holder, but cannot, by any limitation therein contained, relieve himself from accountability for injury caused by his own or his servants' negligence; 17 Wall. 357; 19 Ohio, 1, 221, 260; 51 Penn. 315; 47 Ind. 471; 41 Ala. 486; 39 Iowa, 246; 20 Minn. 125. *Aliter* as to negligence in England; L. R. 8 Q. B. 57; L. R. 10 Q. B. 212; and in New York; 24 N. Y. 181, 196; 25 N. Y. 442; 32 N. Y. 333; 49 N. Y. 263. But see 13 Ala. 234, in regard to slaves carried without hire. One who carries slaves as a common carrier is only responsible as a carrier of passengers; 2 Pet. 150; 4 M'Cord, 223; Ang. Carr. §§ 122, 522. The passenger must be ready and willing to pay such fare as is required by the established regulations of the carriers in conformity with law. But an actual tender of fare or passage-money does not seem requisite in order to maintain an action for an absolute refusal to carry, and much less is it necessary in an action for any injury sustained; 6 C. B. 775; Story, Bailm. § 591; 1 East, 203; 2 Kent, 598, 599, and note. The rule of law is the same in regard to paying fare in advance that it is as to freight, except that, the usage in the former case being to take pay in advance, a passenger is expected to have procured his ticket before he had taken passage; and the law will presume payment according to such usages; 3 Penn. 451.

Passenger-carriers are responsible as common carriers for the baggage of their passengers; 13 Wend. 626; but may limit their common law liability by express contract, and by specific and reasonable regulations made known to the public, but they cannot relieve themselves from liability from loss occasioned by their own or their servants' negligence; 19 Wend. 234, 251; 2 Ohio, 132; 8 Penn. 479; 47 Ind. 471; 41 Ala. 488. *Aliter* in England as to negligence; L. R. 10 Q. B. 437. The term baggage includes such articles as the traveller's comfort, convenience, and amusement require. See BAGGAGE. The carrier may make such reasonable regulations as seem to him proper for the checking, custody, and carriage of baggage; 7 Allen, 329. But a steamship company is not responsible as a carrier for the baggage retained by a passenger; 1 Stra. 690; 2 N. Y. 355; 7 Cush. 155; 32 Wis. 85; 2 Abb. C. C. 49; 7 Hill, 47; 3 H. & C. 137; L. R. 6 C. P. 44; 83 Penn 446

Where the servants of common carriers of passengers—as the drivers of stage-coaches, etc., the captains of steamboats, and the conductors of railway trains—are allowed to carry parcels, the carriers are responsible for their safe delivery, although such servants are not required to account for what they receive by way of compensation: 2 Wend. 327; 6 *id.* 351; 23 Vt. 186, 203; 2 Stor. 16; 2 Kent, 609.

In regard to the particulars of the duty of carriers of passengers as to their entire equipment both of machinery and servants, the decisions are very numerous; but they all concur in the result that if there was any thing more which could have been done by the carrier to insure the safety of his passengers, and injury occurs in consequence of the omission, he is liable. The consequence of such a rule naturally is, that, after any injury occurs, it is more commonly discovered that it was in some degree owing to some possible omission or neglect on the part of the carrier or his servants, and that he is, therefore, held responsible for the damage sustained; but where the defect was one which no degree of watchfulness in the carrier will enable him to discover, he is clearly not liable; Redf. Railw. § 149, notes; Ang. Carr. § 534; Story, Bailm. §§ 592–596; 2 B. & Ad. 169; 3 Bingh. 319; 11 Gratt. 697; 9 Metc. 1; 1 McLean, 540; 2 *id.* 157; 4 Gill, 406; 13 N. Y. 9; 16 How. 469; 97 Mass. 361. They must also furnish safe and convenient stations and approaches; 26 Iowa, 124; 29 Ohio St. 374.

The degree of speed allowable upon a railway depends upon the condition of the road; 5 Q. B. 747.

But passenger-carriers are not responsible where the injury resulted directly from the negligence of the passenger; 11 East, 60; 22 Vt. 213; 95 U. S. 439; 23 Penn. 147; Ang. Carr. 556 *et seq.*; Redf. Railw. 330, § 150, and cases cited in notes.

Where there is intentional wrong on the part of the defendant, the plaintiff may recover, notwithstanding negligence on his part; 5 Hill, 282. So, also, where the plaintiff's negligence contributed but remotely to the injury, and the defendant's culpable want of care was its immediate cause, a recovery may still be had; 43 Mo. 480; 10 M. & W. 564; 5 C. & P. 190. So, also, if the defendant is guilty of such a degree of negligence that the plaintiff could not have escaped its consequences, he may recover, notwithstanding there was want of prudence on his part; 3 M. & W. 244; 18 Ga. 679, 686; 1 Dutch. 556; Redf. Railw. § 150, and cases cited in notes.

Passengers leaping from cars or other vehicles, either by land or water, from any just sense of peril, may still recover; 9 La. An. 441; 15 Ill. 468; 17 *id.* 406; 23 Penn. 147, 150; 13 Pet. 181; Redf. Railw. § 151.

Carriers of passengers are bound to carry for the whole route for which they stipulate, and according to their public advertisements and the general usage and custom of their business; 1 Campb. 167; Story, Bailm. § 600; 19 Wend. 534; 8 E. L. & Eq. 362. The carrier's liability extends over the entire route for which he has contracted to carry, though the destination is reached over connecting lines; 29 N. H. 49; 4 Cush. 400; 11 Minn. 277; 21 Wis. 582. But the carrier is also liable on whose line the loss or injury is suffered; 22 Conn. 502; 29 Vt. 421; 19 Barb. 222

Passenger-carriers are liable for reasonable damages for a failure to deliver passengers in reasonable time, according to their public announcements; 8 E. L. & Eq. 362; 34 *id.* 154; 1 Cal. 353; 18 N. Y. 534; 63 Barb. 260; 1 Hurl. & N. 408; L. R. 1 C. P. D. 286.

Passenger-carriers may establish reasonable regulations in regard to the conduct of passengers, and discriminate between those who conform to their rules in regard to obtaining tickets, and those who do not,—requiring more fare of the latter; 18 Ill. 460; 34 N. H. 230; 29 Vt. 160; 7 Metc. 596; 12 *id.* 482; 4 Zabr. 435; 29 E. L. & Eq. 143; Redf. Railw. § 28, and notes; 24 Conn. 249. Passengers may be required to go through in the same train or forfeit the remainder of their tickets; 11 Metc. 121; 1 Am. Railw. Cas. 601; 7 Penn. 423; 72 *id.* 231; 46 N. H. 213; 4 Zabr. 438; 11 Ohio St. 462. The words "good this trip only" upon a ticket will not limit the undertaking of the company to any particular day or any specific train,—they relate to a journey and not to a time; 24 Barb. 514. See article in 5 So. L. R. N. S. 765.

Railway passengers, when required by the regulations of the company to surrender their tickets in exchange for the conductor's checks, are liable to be expelled from the cars for a refusal to comply with such regulation, or to pay fare again; 22 Barb. 130. A passenger is liable to be expelled from the cars for refusal to exhibit his ticket at the request of the conductor in compliance with the standing regulations of the company; 15 N. Y. 455.

Railway companies may exclude merchandise from their passenger trains. The company are not bound to carry a passenger daily whose trunk or trunks contain merchandise, money, or other things known as "express matter;" 5 Am. Law Reg. 364. See, also, upon the subject of by-laws to passengers on railways, Redf. Railw. § 28, and notes.

Where a stage-coach is overturned when laden with passengers, it is regarded as *primâ facie* evidence of negligence in the proprietor or his servants; 13 Pet. 181. And where any injury occurs to a passenger upon a railway, it has been considered *primâ facie* evidence of the culpable neglect of the company; 5 Q. B. 747; 8 Penn. 483; 15 Ill. 471; 16 Barb. 113, 356; 20 *id.* 282.

The general rules above laid down, so far as they are applicable, *mutatis mutandis*, control the rights and duties of passenger-carriers both by land and water. There are many special regulations, both in regard to the conduct of sailing and steam vessels, which it is the duty of masters to observe in order to secure the safety of passengers, and which it will be culpable negligence to disregard; but they are too minute to be here enumerated; see Ang. Carr. § 633 *et seq.* And a pilot being on board and having the entire control of the vessel will not exonerate the owner from responsibility any more than if the master had charge of the vessel,—the pilot being considered the agent of the owner; 8 Pick. 22; 5 B. & P. 182. But in 1 How. 28, it was considered that the owner is not responsible, while a pilot licensed under the acts of parliament is directing the movements of his ship in the harbor of Liverpool, for an injury to another ship by collision, such being the English law and the collision occurring in British waters; but it was held that the vessel was liable for the negligence of a pilot which it was obliged to take under a state law, or pay full pilotage; 7 Wall. 53.

As to damages for injuries, see 5 So. L. R. 540.

By act of congress (R. S. § 4252), it is provided as follows: "No master of any vessel, owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place other than foreign contiguous territory of the United States, passengers contrary to the provisions of this section, with intent to bring such passengers to the United States, and leave such port or place and bring such passengers, or any number thereof, within the jurisdiction of the United States. The number of such passengers shall not be greater than in the proportion of one to every two tons of such vessel, not including children under the age of one year in the computation, and computing two children over one and under eight years of age as one passenger. The spaces appropriated for the use of such passengers, and which shall not be occupied by stores or other goods not the personal baggage of such passengers, shall be in the following proportions: On the main and poop decks or platforms, and in the deck-houses, if there be any, one passenger for each sixteen clear superficial feet of deck, if the height or distance between the decks or platforms shall not be less than six feet; and on the lower deck, not being an orlop deck, if any, one passenger for eighteen such clear superficial feet, if the height or distance between the decks or platforms shall not be less than six feet, but so as that no passenger shall be carried on any other deck or platform, nor upon any deck where the height or distance between decks is less than six feet. But on board two deck ships, where the height between the decks is seven and one-half feet or more, fourteen clear superficial feet of deck shall be the proportion required for each passenger. The term 'contiguous territory,' as used in this section, shall not be held to extend to any port or place connecting with any interoceanic route through Mexico."

In New York, statutory regulations have been made in relation to their canal navigation. See 6 Cow. 698. As to the conduct of carrier vessels on the ocean, see Story, Bailm. § 607 *et seq.*; Edwards, Bailm.; Marshall, Ins. b. 1, c. 12, s. 2; Abb. Shipping; Parsons, Ship. & Adm.

And see, generally, 1 Viner, Abr. 219; Bacon, Abr.; 1 Comyns, Dig. 423; Petersdorf, Abr.; Dane, Abr. Index; 2 Kent, 464; 16 East, 247, note; Thompson, Pass. Carriers; 2 So. L. Rev. 593; 5 *id.* N. S. 451; 1 *id.* 445.

COMMON COUNCIL. The more numerous house of the municipal legislative assembly, in some American cities.

The English parliament is the common council of the whole realm.

COMMON COUNTS. Certain general counts, not founded on any special contract, which are introduced in a declaration, for the purpose of preventing a defeat of a just right by the accidental variance of the evidence.

These are, in an action of assumpsit, counts founded on implied promises to pay money in consideration of a precedent debt, and are of four descriptions: the *indebitatus assumpsit*, the *quantum meruit*, the *quantum valebant*, and the account stated.

COMMON FISHERY. A fishery to which all persons have a right. A common fishery is different from a *common of fishery*, which is the right to fish in another's pond, pool, or river. See FISHERY.

COMMON HIGHWAY. By this term is meant a road to be used by the community at large for any purpose of transit or traffic. Hammond, N. P. 239. See HIGHWAY.

COMMON INFORMER. One who, without being specially required by law or by virtue of his office, gives information of crimes, offences, or misdemeanors which have been committed, in order to prosecute the offender; a prosecutor.

COMMON INTENT. The natural sense given to words.

It is the rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which have been omitted; 2 H. Blackst. 530. In pleading, certainty is required; but certainty to a common intent is sufficient—that is, what upon a reasonable construction may be called certain, without recurring to *possible* facts; Co. Litt. 203 *a*; Dougl. 163. See CERTAINTY.

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or Civil Law.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent, 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that in the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden changes of a present arbitrary power, are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other; so that the will of the people, as it is gathered both from long-established custom and from the expression of the legislative power, gradually forms a system—just, because it is the deliberate will of a free people—stable, because it is the growth of centuries—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used.

Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law. When it is spoken of as the *lex non scripta*, it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law: it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage: its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible; 1 Gray, 263; 1 Swan, 42; 5 Cow. 587, 628, 632.

It naturally results from the inflexible form of the statute or written law, which has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands,

and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence supports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law, technically so called, in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. See 1 Bishop, Crim. Law, § 15, note 4, § 45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state; 4 Denio, 305; 29 Ind. 458; 11 Mich. 181; *contra*, in Pennsylvania, in cases where that state has changed from the common law; the presumption being that the law of the sister state has made the same change, if there is no proof to the contrary. The term common law as thus used may be deemed to include the doctrine of equity; 8 N. Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state; 1 Gall. 20; 1 Baldw. 554, 558; 3 Wheat. 223; 3 Pet. 446. The term is used in contradistinction to equity, admiralty, and maritime law; 3 Pet. 446; 1 Baldw. 554.

The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation; 2 Pet. 144; 8 *id.* 659; 9 Cra. 333; 9 S. & R. 330; 1 Kirb. 117; 5 H. & J. 356; 2 Aik. 187; T. U. P. Charlt. 172; 1 Ohio, 243. See 5 Cow. 628; 5 Pet. 241; 8 *id.* 658; 7 Cra. 32; 1 Wheat. 415; 3 *id.* 223; 1 Dall. 67; 2 *id.* 297, 384; 1 Mass. 61; 9 Pick. 532; 3 Me. 162; 6 *id.* 55; 3 G. & J. 62; Sampson's Discourse before the N. Y. Hist. Soc.; 1 Gall. 489; 3 Conn. 114; 33 *id.* 260; 28 Ind. 220; 5 W. Va. 1; 24 Miss. 343; 1 Nev. 40; 37 Barb. 15; 15 Cal. 226; 28 Ala. 704. In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. Especially not those passed since the settlement of the colony; if these were suitable to the condition of the colony they were usually accepted; Quincy, 72; 5 Pet. 280; 2 Gratt. 579. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

See works of Franklin, by Sparks, vol. 4, p. 271, as to the adoption of the common law in America; see also Cooley, Const. Lim. 28 *et seq.*

COMMON NUISANCE. One which affects the public in general, and not merely some particular person; 1 Hawkins, Pl. Cr. 197. See NUISANCE.

COMMON PLEAS. The name of a court having jurisdiction generally of civil actions.

Such pleas or actions as are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from *pleas of the crown*.

The Court of Common Pleas in England consists of one chief and four puisné (associate) justices. It is thought by some to have been established by king John for the purpose of diminishing the power of the *aula regis*, but is referred by Lord Coke to a much earlier period. 8 Coke, 289; Termes de la Ley; 3 Blackstone, Comm. 39. It exercises an exclusive original jurisdiction in many classes of civil cases. See 3 Sharswood, Blackst. Comm. 38, n. The right of practising in this court was for a long time confined to two classes of practitioners, limited in number, but is now thrown open to the bar generally. See 3 C. B. 537.

A court or courts of the same name exist in many states of the United States. See the articles on the states under their respective names.

COMMON RECOVERY. A judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in the suit, which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoverer.

A common recovery is a kind of conveyance, and is resorted to when the object is to create an absolute bar of estates tail, and of the remainders and reversions expectant on the determination of such estates; 2 Bla. Com. 357. Though it has been used in some of the states, this form of conveyance is nearly obsolete, easier and less expensive modes of making conveyances, which have the same effect, having been substituted: 2 Bouvier, Inst. nn. 2092, 2096; 7 N. H. 9; 9 S. & R.

390; 2 Rawle, 168; 4 Yeates, 413; 1 Whart. 151; 6 Mass. 328.

COMMON SCHOOLS. Schools for general elementary instruction, free to all the public. 2 Kent, 195–202.

COMMON SCOLD. One who, by the practice of frequent scolding, disturbs the neighborhood. Bishop, Crim. Law, § 147.

The offence of being a common scold is cognizable at common law. It is a particular form of nuisance, and was punishable by the ducking-stool at common law, in place of which punishment fine and imprisonment are substituted in the United States; 12 S. & R. 220; 3 Cra. C. C. 620. See 1 Term, 748; 6 Mod. 11; 4 Rog. 90; 1 Russell, Cr. 302; Roscoe, Cr. Ev. 665.

COMMON SEAL. The seal of a corporation. See SEAL.

COMMON SERJEANT. A judicial officer of the city of London, who aids the recorder in disposing of the criminal business of the Old Bailey Sessions. Holthouse.

COMMON TRAVERSE. See TRAVERSE.

COMMON VOUCHEE. In common recoveries, the person who is vouched to warranty. In this fictitious proceeding the crier of the court usually performs the office of a common vouchee. 2 Bla. Com. 358; 2 Bouvier, Inst. n. 2093.

COMMONALTY. The common people of England, as distinguished from the king and nobles.

The body of a society or corporation, as distinguished from the officers. 1 Perr. & D. 243. Charters of incorporation of the various tradesmen's societies, etc., in England are usually granted to the master, wardens, and commonalty of such corporation.

COMMONER. One possessing a right of common.

COMMONS. Those subjects of the English nation who are not noblemen. They are represented in parliament by the house of commons.

COMMONWEALTH. A word which properly signifies the common weal or public policy; sometimes it is used to designate a republican form of government.

The English nation during the time of Cromwell was called a commonwealth. It is the legal title of the states of Kentucky, Massachusetts, Pennsylvania, and Virginia.

COMMORANT. One residing in a particular town, city, or district. Barnes, 162.

COMMORIENTES. Those who perish at the same time in consequence of the same calamity.

Where several persons die by the same accident, in the lack of evidence there is no presumption as to who survived; Cro. Eliz. 503; 1 Mer. 308; 5 B. & Ad. 91; 2 Phill. Eccl. 261; Bacon, Abr. *Execution*. See SURVIVOR; DEATH.

COMMUNI DIVIDUNDO. In Civil Law. An action which lies for those who have property in common, to procure a division. It lies where parties hold land in common but not in partnership. Calvinus, Lex.

COMMUNINGS. In Scotch Law. The negotiations preliminary to a contract.

COMMUNIO BONORUM (Lat.). **In Civil Law.** A community of goods.

When a person has the management of common property, owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum*. Vicat; 1 Bouvier, Inst. n. 907, note.

COMMUNITY (Lat. *communis*, common).

In Civil Law. A corporation or body politic. Dig. 3. 4.

In French Law. A species of partnership which a man and woman contract when they are lawfully married to each other.

Conventional community is that which is formed by express agreement in the contract of marriage.

By this contract the legal community which would otherwise subsist may be modified as to the proportions which each shall take, and as to the things which shall compose it. La. Civ. Code, 2393.

Legal community is that which takes place by virtue of the contract of marriage itself.

The community embraces the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them, or by purchase, or in any other similar way, even although the purchase be made in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. 10 La. 146, 172, 181; 1 Mart. La. N. S. 325; 4 *id.* 212. The debts contracted during the marriage enter into the community, and must be acquitted out of the common fund; but not the debts contracted before the marriage.

The effects which compose the community of gains are divided into two equal portions between the heirs at the dissolution of the marriage; La. Civ. Code, 2375. See Pothier, Contr.; Toullier.

COMMUTATION. The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides.

COMMUTATIVE CONTRACT. In Civil Law. One in which each of the contracting parties gives and receives an equivalent.

The contract of sale is of this kind. The

seller gives the thing sold, and receives the price, which is the equivalent. The buyer gives the price, and receives the thing sold, which is the equivalent. Such contracts are usually distributed into four classes, namely: *Do ut des* (I give that you may give); *Facio ut facias* (I do that you may do); *Facio ut des* (I do that you may give); *Do ut facias* (I give that you may do). Pothier, Obl. n. 13. See La. Civ. Code, art. 1761.

COMPACT. An agreement. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. b. 3, c. 3; Rutherf. Inst. b. 2, c. 6, § 1.

The parties may be nations, states, or individuals; but the constitution of the United States declares that "no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See 11 Pet. 1, 185; 8 Wheat. 1; Baldw. 60.

COMPANIONS. In French Law. A general term, comprehending all persons who compose the crew of a ship or vessel. Pothier, Mar. Contr. n. 163.

COMPANY. An association of a number of individuals for the purpose of carrying on some legitimate business.

This term is not synonymous with partnership, though every such unincorporated company is a partnership. Usage has reserved the term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risk or importance.

When these companies are authorized by the government, they are known by the name of corporations.

Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm. See 12 Toullier, 97.

COMPARISON OF HANDWRITING. A mode of deducing evidence of the authenticity of a written instrument, by showing the likeness of the handwriting to that of another instrument proved to be that of the party whom it is sought to establish as the author of the instrument in question; 1 Greenl. Ev. § 578.

At common law, as a general rule, this manner of obtaining evidence was not allowed; see cases below. It was otherwise in the ecclesiastical courts; 5 A. & E. 708; 1 Phill. 78. Exceptions existed, however: *first*, where the writings were of such antiquity that living witnesses could not be procured, but were not old enough to prove themselves; 7 East, 282; 14 *id.* 328; Ry. & M. 143; 8 Gill, 86; 8 Wend. 426; *second*, where other writings admitted to be genuine were already in the case; 1 M. & R. 133; 5 Ad. & E. 514; 7 C. & P. 548, 595; 2 Me. 33; 48 N. Y. 458; 64 Ill. 358; 63 Barb. 154; 91 U. S. 270. But see 8 Jones, L. No. C. 407.

The rule on the subject of admitting documents irrelevant to the matter in issue for the purpose of instituting a comparison of handwriting is not settled uniformly. In England, and in the federal courts, such documents are not admissible; 5 Ad. & E. 514, 703; 11 *id.* 322; 7 C. & P. 548, 595; 8 M. & W. 123; 10 Cl. & F. 193; 2 M. & R. 536; 91 U. S. 270; but see 12 Blatch. 390. This rule is adopted in New York, Maryland, Illinois, Michigan, North Carolina, Rhode Island, and Virginia; 9 Cow. 94, 112 (now altered by statute); 1 Hawks, 6; 1 Ired. 16; 2 R. I. 319; 1 Leigh, 216; 8 Gill, 86; 64 Ill. 358; 14 Mich. 287; 8 Am. L. T. Rep. 412. In other states it is the rule to admit any writings, whether relevant or not, if it appear that they are beyond doubt the handwriting of the person whose signature is in question; 53 N. H. 452; 39 Vt. 225; 108 Mass. 344; 105 *id.* 62; 43 Penn. 9; 19 Ohio St. 407; 30 Ala. 32; 23 La. An. 429; 45 Mo. 307. In Pennsylvania, this comparison is to be made by the jury, not by experts; 43 Penn. 9. In South Carolina, this sort of testimony is not considered as of much value; 5 S. C. 478.

COMPATIBILITY. Such harmony between the duties of two offices that they may be discharged by one person.

COMPENSACION. In Spanish Law. The extinction of a debt by another debt of equal dignity between persons who have mutual claims on each other.

COMPENSATIO CRIMINIS. The compensation or set-off of one crime against another: for example, in questions of divorce, where one party claims the divorce on the ground of adultery of his or her companion, the latter may show that the complainant has been guilty of the same offence, and, having himself violated the contract, cannot complain of its violation on the other side. This principle is incorporated in the codes of most civilized nations. See 1 Hagg. Cons. 144; 1 Hagg. Eccl. 714; 2 Paige, Ch. 108; 2 D. & B. 64; Bishop, Marr. & D. §§ 393, 394.

COMPENSATION (Lat. *compendere*, to balance). **In Chancery Practice.** Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying.

When a simple mistake, not a fraud, affects a contract, but does not change its essence, a court of equity will enforce it, upon making compensation for the error. "The principle upon which courts of equity act," says Lord Chancellor Eldon, "is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not strictly complied with the terms so as to entitle him to an action (as to time, for instance), yet if the time, though introduced (as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other), is not the essence of the contract, a material object, to which they looked in the first conception of it,

even though the lapse of time has not arisen from accident, a court of equity will compel the execution of the contract upon this ground, that one party is ready to perform, and that the other may have a performance in substance if he will permit it;" 13 Ves. Ch. 287. See 10 *id.* 505; 13 *id.* 73, 81, 426; 6 *id.* 575; 1 Cox, Ch. 59.

In Civil Law. A reciprocal liberation between two persons who are both creditors and debtors of each other. *Est debiti et crediti inter se contributio.* Dig. 16. 2. 1.

It resembles in many respects the common-law set-off. The principal difference is that a set-off must be pleaded to be effectual; whereas compensation is effectual without any such plea. See 2 Bouvier, Inst. n. 1407.

It may be *legal*, by *way of exception*, or by *reconvention*. 8 La. 158; Dig. 16. 2; Code, 4. 31; Inst. 4. 6. 30; Burge, Suret. b. 2, c. 6, p. 181.

It takes place by mere operation of law, and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the *cause* of the debts, except in case, *first*, of a demand of restitution of a thing of which the owner has been unjustly deprived; *second*, of a demand of restitution of a deposit and a loan for use; *third*, of a debt which has for its cause aliments declared not liable to seizure. La. Civ. Code, 2203–2208.

In Criminal Law. Recrimination, which see.

COMPERUIT AD DIEM (Lat. he appeared at the day).

In Pleading. A plea in bar to an action of debt on a bail bond. The usual replication to this plea is, *nul tiel record:* that there is not any such record of appearance of the said ——. For forms of this plea, see 5 Wentworth, 470; Lilly, Entr. 114; 2 Chitty, Pl. 527.

When the issue is joined on this plea, the trial is by the record. See 1 Taunt. 23; Tidd, Pr. 239. And see, generally, Comyns, Dig. *Pleader* (2 W. 31); 7 B. & C. 478.

COMPETENCY. The legal fitness or ability of a witness to be heard on the trial of a cause. That quality of written or other evidence which renders it proper to be given on the trial of a cause.

There is a difference between competency and credibility. A witness may be competent, and, on examination, his story may be so contradictory and improbable that he may not be believed; on the contrary, he may be incompetent, and yet be perfectly credible if he were examined.

The court are the sole judges of the competency of a witness, and may, for the purpose of deciding whether the witness is or is not competent, ascertain all the facts necessary to form a judgment; 1 Greenl. Ev. § 426 *et seq.*

Primâ facie every person offered is a competent witness, and must be received, unless his incompetency appears; 9 State Tr. 652.

In French Law. The right in a court to exercise jurisdiction in a particular case: as, where the law gives jurisdiction to the court when a thousand francs shall be in dispute, the court is competent if the sum demanded is a thousand francs or upwards, although the plaintiff may ultimately recover less.

COMPETENT WITNESS. One who is legally qualified to be heard to testify in a cause. In Kentucky, Michigan, and Missouri, a will must be attested, for the purpose of passing lands, by competent witnesses; but, in Kentucky, if wholly written by the testator, it need not be so attested. See WITNESS.

COMPILATION. A literary production, composed of the works of others and arranged in a methodical manner.

When a compilation requires, in its execution, taste, learning, discrimination, and intellectual labor, it is an object of copyright: as for example, Bacon's Abridgment. Curtis, Copyr. 186.

COMPLAINANT. One who makes a complaint. A plaintiff in a suit in chancery is so called.

COMPLAINT. In Criminal Law. The allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated offence, with an offer to prove the fact, and a request that the offender may be punished. It is a technical term, descriptive of proceedings before a magistrate; 11 Pick. 436.

To have a legal effect, the complaint must be supported by such evidence as shows that an offence has been committed and renders it certain or probable that it was committed by the person named or described in the complaint.

COMPOS MENTIS. See NON COMPOS MENTIS.

COMPOSITION. An agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole. See COMPOUNDING A FELONY.

COMPOSITION OF MATTER. A mixture or chemical combination of materials. The term is used in the act of congress, July 4, 1836, § 6, in describing the subjects of patents. It may include both the substance and the process, when the compound is new.

COMPOUND INTEREST. Interest upon interest: for example, when a sum of money due for interest is added to the principal, and then bears interest. This is not, in general, allowed. See INTEREST.

COMPOUNDER. In Louisiana. He who makes a composition.

An amicable compounder is one who has undertaken by the agreement of the parties to compound or settle differences between them. La. Code of Pract. art. 444.

COMPOUNDING A FELONY. The act of a party immediately aggrieved, who agrees with a thief or other felon that he will not prosecute him, on condition that he return to him the goods stolen, or who takes a reward not to prosecute.

This is an offence punishable by fine and imprisonment, and at common law rendered the person committing it an accessary; Hawk. Pl. Cr. 125. A failure to prosecute for an assault with an intent to kill is not compounding a felony; 29 Ala. N. S. 628. The accepting of a promissory note signed by a party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute the offence; 16 Mass. 91. The mere retaking by the owner of stolen goods is no offence, unless the offender is not to be prosecuted; Hale, Pl. Cr. 546; 1 Chitty, Cr. Law, 4.

The compounding of *misdemeanors*, as it is also a perversion or defeating of public justice, is in like manner an indictable offence at common law; 18 Pick. 440. But the law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it; 6 Q. B. 308; 9 *id.* 371; 2 Benn. & H. Lead. Cr. Cas. 258, 262.

In the United States, compounding a felony is an indictable offence, and no action can be supported on any contract of which such offence is the consideration in whole or in part; 16 Mass. 91; 18 Pick. 440; 5 Vt. 42; 9 *id.* 23; 5 N. H. 553; 2 South. N. J. 578; 13 Wend. N. Y. 592; 6 Dana, 338. A receipt in full of all demands given in consideration of stifling a criminal prosecution is void; 11 Vt. 252.

COMPRA Y VENTA (Span.). Buying and selling. The laws of contracts arising from purchase and sale are given very fully in Las Partidas, part 3, tit. xviii. ll. 56 *et seq.*

COMPRINT. The surreptitious printing of the copy of another to the intent to make a gain thereby. Strictly, it signifies to print together. There are several statutes in prevention of this act. Jacob; Cowel.

COMPRIVIGNI (Lat.). Step-brothers or step-sisters. Children who have one parent, and only one, in common. Calvinus, Lex.

COMPROMISARIUS. In Civil Law. An arbitrator.

COMPROMISE. An agreement made between two or more parties as a settlement of matters in dispute between them.

Such settlements are sustained at law; 2 Strobh. Eq. 258; 2 Mich. 145; 1 Watts, 216; 2 Penn. 531; and are highly favored; 6 Munf. 406; 1 Bibb, 168; 2 *id.* 448; 4 Hawks, 178; 6 Watts, 321; 14 Conn. 12; 4 Metc. Mass. 270. See, also, 21 E. L. & Eq. 199; 6 T. B. Monr. 91; 2 Rand. Va. 442; 5 Watts, 259. The amount in question must, it seems, be uncertain; 2 B. & Ad. 889; 1 Ad. & E. 106. And see 5 Pet. 114; 21 Penn. 237; 20 Mo. 102; 13 Pick. 284; 6 Bingh. N. C. 62; 3 M. & W. 648; 1 Bouvier, Inst. 798. There can be no compromise of a criminal charge. 1 Chitty, Pr. 17.

In Civil Law. An agreement between two or more persons, who, wishing to settle their disputes, refer the matter in controversy to arbitrators, who are so called because those who choose them give them full powers to arbitrate and decide what shall appear just and reasonable, to put an end to the differences of which they are made the judges. 1 Domat, Lois, Civ. liv. 1, t. 14.

COMPTROLLER. An officer of a state, or of the United States, who has certain duties to perform in the regulation and management of the fiscal matters of the government under which he holds office.

In the treasury department of the United States there are two comptrollers. It is the duty of the *first* to examine all accounts settled by the first auditor, except those relating to receipts from customs, and all accounts settled by the fifth auditor and by the commissioner of the general land-office, and certify the balances arising thereon to the register; to countersign all warrants drawn by the secretary of the treasury, which shall be warranted by law; to superintend the preservation and adjustment of the public accounts subject to his revision; to superintend the recovery of all debts certified by him to be due to the United States, to direct suits and legal proceedings, and to take such measures as may be authorized by law and are adapted to enforce prompt payment thereof; to lay before congress annually a list of such officers as shall have failed in that year to make the settlement required by law; he shall, in every case where, in his opinion, further delays would be injurious to the United States, direct the first and fifth auditors of the treasury forthwith to audit and settle any particular account which such officers may be authorized to audit and settle, and to report such audit and settlement for final revision to him.

Besides these, this officer is required to perform minor duties, which the plan of this work forbids to be enumerated here. His salary is five thousand dollars per annum. Rev. Stat. §§ 268–272.

The duties of the *second* comptroller are to examine all accounts settled by the second, third, and fourth auditors, and certify the balances arising thereon to the secretary of the department in which the expenditure had been incurred; to countersign all warrants drawn by the secretaries of the war and navy departments, which shall be warranted by law; to report to the said secretaries the official forms to be issued in the different offices for disbursing public money in those departments, and the manner and form of keeping and stating the accounts of the persons employed therein; and to superintend the preservation of public accounts subject to his revision. He may prescribe rules for the payment of arrears due to seamen, etc., on United States vessels, in case of the death of such seamen, etc.

His salary is five thousand dollars per annum. Rev. Stat. § 273.

COMPULSION. Forcible inducement to the commission of an act.

Acts done under compulsion are not, in general, binding upon a party; but when a man is compelled by lawful authority to do that which he ought to do, that compulsion does not affect the validity of the act: as, for example, when a court of competent jurisdiction compels a party to execute a deed, under the pain of attachment for contempt, the grantor cannot object to it on the ground of compulsion. But if the court compelled a party to do an act forbidden by law, or had not jurisdiction over the parties or the subject-matter, the act done by such compulsion would be void. See COERCION; DURESS.

COMPULSORY PILOTAGE. See PILOTAGE.

COMPURGATOR. One of several neighbors of a person accused of a crime or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath. 3 Bla. Com. 341.

Formerly, when a person was accused of a crime, or sued in some kinds of civil actions, he might purge himself upon oath of the accusation made against him, whenever the proof was not the most clear and positive; and if upon his oath he declared himself innocent, he was absolved.

This usage, so eminently calculated to encourage perjury by impunity, was soon found to be dangerous to the public safety. To remove this evil, the laws were changed, by requiring that the oath should be administered with the greatest solemnity; but the form was soon disregarded, for the mind became easily familiarized to those ceremonies which at first imposed on the imagination, and those who cared not to violate the truth did not hesitate to treat the form with contempt. In order to give a greater weight to the oath of the accused, the law was again altered so as to require that the accused should appear before the judge with a certain number of his neighbors, relations, or friends, who should swear that they believed the accused had sworn truly. This new species of witnesses were called compurgators.

The number of compurgators varied according to the nature of the charge and other circumstances. See Du Cange, *Juramentum;* Spelman, Gloss. *Assarth;* Termes de la Ley; 3 Bla. Com. 341-348.

COMPUTUS (Lat. *computare*, to account). A writ to compel a guardian, bailiff, receiver, or accountant, to yield up his accounts. It is founded on the stat. Westm. 2, cap. 12; Reg. Orig. 135.

CONCEALED WEAPONS. As to validity of statutes against carrying concealed deadly weapons, see 8 Am. Rep. 22; 14 *id.* 380; ARMS.

CONCEALERS. Such as find out concealed lands: that is, lands privily kept from the king by common persons having nothing to show for them. They are called "*a troublesome, disturbant sort of men; turbulent persons.*" Cowel.

CONCEALMENT. The improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known.

The omission by an applicant for insurance preliminarily to state facts known to him, or which he is bound to know, material to the risk proposed to be insured against, or omission to state truly the facts expressly inquired about by the underwriters to whom application for insurance is made, whether the same are or are not material to the risk.

Concealment when fraudulent avoids the contract, or renders the party using it liable for the damage arising in consequence thereof; 7 Metc. 252; 16 Me. 30; 2 Ill. 344; 3 B. & C. 605; 10 Cl. & F. 934. But it must have been of such facts as the party is bound to communicate; 3 E. L. & Eq. 17; 3 Conn. 413; 5 Ala. N. S. 596; 1 Yeates, 307; 5 Penn. 467; 8 N. H. 463; 1 Dev. 351; 18 Johns. 403; 6 Humphr. 36. See REPRESENTATION; MISREPRESENTATION. A concealment of extrinsic facts is not, in general, fraudulent, although peculiarly within the knowledge of the party possessing them; 2 Wheat. 195; 1 Baldw. 331; 14 Barb. 72; 2 Ala. N. S. 181. But see 1 Miss. 72; 1 Swan, 54; 4 M'Cord, 169. And the rule against the concealment of latent defects is stricter in the case of personal than of real property; 6 Woodb. & M. 358; 3 Campb. 508; 3 Term, 759.

Where there is confidence reposed, concealment becomes more fraudulent; 9 B. & C. 577; 4 Metc. Mass. 381. See, generally, 2 Kent, 482; MISREPRESENTATION; REPRESENTATION.

CONCESSI (Lat. I have granted). A term formerly used in deeds.

It is a word of general extent, and is said to amount to a grant, feoffment, lease, release, and the like; 2 Saund. 96; Co. Litt. 301, 302; Dane, Abr. Index; 5 Whart. 278.

It has been held in a feoffment or fine to imply no warranty; Co. Litt. 384; 4 Co. 80; Vaughan's Argument in Hayes *v.* Bickersteth, Vaugh. 126; Butler's Note, Co. Litt. 384. But see 1 Freem. 339, 414.

CONCESSIMUS (Lat. we have granted). A term used in conveyances. It created a joint covenant on the part of the grantors. 5 Co. 16; 3 Kebl. 617; Bacon, Abr. *Covenant.*

CONCESSION. A grant. The word is frequently used in this sense when applied to grants made by the French and Spanish governments in Louisiana.

CONCESSOR. A grantor.

CONCILIUM. A council.

CONCILIUM REGIS. A tribunal which existed in England during the times of Edward I. and Edward II., composed of the judges and sages of the law. To them were

referred cases of great difficulty. Co. Litt. 304.

CONCLUSION (Lat. *con claudere*, to shut together). The close; the end.

In Pleading. In Declarations. That part which follows the statement of the cause of action. In personal or mixed actions, where the object is to recover damages, the conclusion is, properly, *to the damage* of the plaintiff, etc. Comyns, Dig. *Pleader*, c. 84; 10 Co. 1156. And see 1 M. & S. 236; Damages.

The form was anciently, in the King's Bench, "To the damage of the said A B, and thereupon he brings suit;" in the Exchequer, "To the damage," etc., "whereby he is the less able to satisfy our said lord the king the debts which he owes his said majesty at his exchequer, and therefore he brings his suit;" 1 Chitty, Pl. 356–358. It is said to be mere matter of form, and not demurrable; 7 Ark. 282.

In Pleas. The conclusion is either *to the country*—which must be the case when an issue is tendered, that is, whenever the plaintiff's material statements are contradicted—or by verification, which must be the case when new matter is introduced. See Verification. Every plea in bar, it is said, must have its proper conclusion. All the formal parts of pleadings have been much modified by statute in the various states and in England within the last few years.

In Practice. Making the last argument or address to the court or jury. The party on whom the *onus probandi* is cast, in general, has the conclusion.

In Remedies. An estoppel; a bar; the act of a man by which he has confessed a matter or thing which he can no longer deny.

For example, the sheriff is concluded by his return to a writ; and, therefore, if upon a capias he return *cepi corpus*, he cannot afterwards show that he did not arrest the defendant, but is concluded by his return. See Plowd. 276 *b*; 3 Thomas, Co. Litt. 600.

CONCLUSION TO THE COUNTRY. **In Pleading.** The tender of an issue for trial by a jury.

When the issue is tendered by the defendant, it is as follows: "And of this the said C D puts himself upon the country." When tendered by the plaintiff, the formula is, "And this the said A B prays may be inquired of by the country." It is held, however, that there is no material difference between these two modes of expression, and that if the one be substituted for the other the mistake is unimportant. 10 Mod. 166.

When there is an affirmative on one side and a negative on the other, or *vice versâ*, the conclusion should be to the country; T. Raym. 98; Carth. 87; 2 Saund. 189; 2 Burr. 1022; 16 Johns. 267. So it is though the affirmative and negative be not in express words, but only tantamount thereto; Co. Litt. 126 *a*; Yelv. 137; 1 Saund. 103; 1 Chitty, Pl. 592; Comyns, Dig. *Pleader*, E, 32.

CONCLUSIVE EVIDENCE. That which cannot be controlled or contradicted by any other evidence.

CONCLUSIVE PRESUMPTION. A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise. 1 Greenl. Ev. § 15. Thus, for example, the possession of land under claim of title for a certain period of time raises a conclusive presumption of a grant.

In the civil law, such presumptions are said to be *juris et de jure*.

CONCORD. An agreement or supposed agreement between the parties in levying a fine of lands, in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of complainant; and from the acknowledgment or admission of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee; 2 Bla. Com. 350; Cruise, Dig. tit. 35, c. 2, § 33; Comyns, Dig. *Fine* (E, 9).

CONCORDAT. A convention; a pact; an agreement. The term is generally confined to the agreements made between independent governments, and most usually applied to those between the pope and some prince.

CONCUBINAGE. A species of marriage which took place among the ancients, and which is yet in use in some countries. See Concubinatus.

The act or practice of cohabiting, in sexual commerce, without the authority of law or a legal marriage. See 1 Brown, Civ. Law, 80; Merlin, Rép.; Dig. 32. 49. 4; 7. 1. 1; Code, 5. 27. 12.

CONCUBINATUS. A natural marriage, as contradistinguished from the *justæ nuptiæ*, or *justum matrimonium*, the civil marriage.

The *concubinatus* was the only marriage which those who did not enjoy the *jus connubii* could contract. Although this natural marriage was authorized and regulated by law, yet it produced none of those important rights which flowed from the civil marriage,—such as the paternal power, etc.; nor was the wife entitled to the honorable appellation of *mater-familias*, but was designated by the name of *concubina*. After the exclusive and aristocratic rules relative to the *connubium* had been relaxed, the *concubinatus* fell into disrepute; and the law permitting it was repealed by a constitution of the Emperor Leo the Philosopher, in the year 886 of the Christian era. See Pater-familias.

CONCUBINE. A woman who cohabits with a man as his wife, without being married.

CONCUR. **In Louisiana.** To claim a part of the estate of an insolvent along with other claimants, 6 Mart. La. N. S. 460: as, "the wife concurs with her husband's creditors, and claims a privilege over them."

CONCURRENCE. In French Law. The equality of rights or privileges which several persons have over the same thing: as, for example, the right which two judgment-creditors, whose judgments were rendered at the same time, have to be paid out of the proceeds of real estate bound by them. Dict. de Jur.

CONCURRENT. Running together; having the same authority: thus, we say, a concurrent consideration occurs in the case of mutual promises; such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

Concurrent writs. Duplicate originals, or several writs running at the same time for the same purpose, for service on or arrest of a person, when it is not known where he is to be found; or for service on several persons, as when there are several defendants to an action; Mozley & W. Dict.

CONCUSSION. In Civil Law. The unlawful forcing of another by threats of violence to give something of value. It differs from robbery in this, that in robbery the thing is taken by force, while in concussion it is obtained by threatened violence. Heineccius, Leç. El. § 1071.

CONDEDIT. In Ecclesiastical Law. The name of a plea entered by a party to a libel filed in the ecclesiastical court, in which it is pleaded that the deceased made the will which is the subject of the suit, and that he was of sound mind. 2 Eccl. 438; 6 *id.* 431.

CONDEMN. To sentence; to adjudge. 3 Bla. Com. 291.

To declare a vessel a prize. To declare a vessel unfit for service; 1 Kent, 102; 5 Esp. 65.

CONDEMNATION. The sentence of a competent tribunal which declares a ship unfit for service. This sentence may be re-examined and litigated by the parties interested in disputing it; 5 Esp. 65; Abb. Shipp. 15; 30 L. J. Ad. 145.

The judgment, sentence, or decree by which property seized and subject to forfeiture for an infraction of revenue, navigation, or other laws is condemned or forfeited to the government. See CAPTOR.

The sentence or judgment of a court of competent jurisdiction that a ship or vessel taken as a prize on the high seas was liable to capture, and was properly and legally captured and held as prize.

Some of the grounds of capture and condemnation are: *Violation of neutrality* in time of war; 2 Gall, 261; *carrying contraband goods;* 5 Wall. 1, 28; 3 *id.* 514. *Breach of Blockade; id.* 28, 170; 3 *id.* 603.

By the general practice of the law of nations, a sentence of condemnation is at present generally deemed necessary in order to divest the title of a vessel taken as a prize. Until this has been done, the original owner may regain his property, although the ship may have been in possession of the enemy twenty-four hours, or carried *infra præsidia;* 1 Rob. 139; 3 *id.* 97, n.; Carth. 423; 1 Kent, 101–104; Chitty, Law of Nat. 99, 100; 10 Mod. 79; Abb. Shipp. 17 Weskett, Ins.; Marsh. Ins. 402. A sentence of condemnation is generally binding everywhere; Marsh. Ins. 402; 3 Kent, 103; 3 Wheat. 246; 4 Cra. 434. But see 1 Binn. 299, n.; 7 Bingh. 495. Title vests completely in the captors, and relates back to the time of capture; 2 Russ. & M. 35; 15 Ves. 139.

The condemnation of prize property while lying in a neutral port or the port of an ally is valid; 13 How. 498. *Contra,* in England; 5 Rob. 285.

See BLOCKADE.

In Civil Law. A sentence or judgment which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded.

The word is used in this sense by common-law lawyers also; though it is more usual to say conviction, both in civil and criminal cases; 3 Bla. Com. 291. It is a maxim that no man ought to be condemned unheard and without the opportunity of being heard.

CONDICTIO (Lat. from *condicere*).

In Civil Law. An assignment; a summons.

A personal action. An action arising from an obligation to do or give some certain, precise, and defined thing; Inst. 3. 15. pr.

Condictio is a general name given to personal actions, or actions arising from obligations, and is distinguished from *vindicatio* (real action), an action to regain possession of a thing belonging to the *actor,* and from mixed actions (*actiones mixtæ*). *Condictio* is also distinguished from an action *ex stipulatu,* which is a personal action which lies where the thing to be done or given is uncertain in amount or identity. See Calvinus, Lex.; Hallifax, Anal. 117.

CONDICTIO EX LEGE. An action arising where the law gave a remedy but provided no appropriate form of action. Calvinus, Lex.

CONDICTIO INDEBITATI. An action which lies to recover that which the plaintiff has paid to the defendant, by mistake, and which he was not bound to pay, either in fact or in law.

This action does not lie if the money was due *ex æquitate,* or by a natural obligation, or if he who made the payment knew that nothing was due; for *qui consulto dat, quod non debetat, præsumitur donare.* Bell, Dict.; Calvinus, Lex.; 1 Kames, Eq. 307.

CONDICTIO REI FURTIVÆ. An action against the thief or his heir to recover the thing stolen.

CONDICTIO SINE CAUSA. An action by which any thing which has been parted with without consideration may be recovered. It also lay in case of failure of consideration, under certain circumstances. Calvinus, Lex.

CONDITION. In Civil Law. The situation of every person in some one of the

different orders of persons which compose the general order of society and allot to each person therein a distinct, separate rank. Domat, tom. ii. l. 1, tit. 9, sec. i. art. viii.

A paction or agreement which regulates that which the contractors have a mind should be done if a case which they foresee should come to pass. Domat, tom. i. l. 1, tit. 1, sec. 4.

Casual conditions are such as depend upon accident, and are in no wise in the power of the person in whose favor the obligation is entered into.

Mixed conditions are such as depend upon the joint wills of the person in whose favor the obligation is contracted and of a third person: as, "If you marry my cousin, I will give," etc. Pothier.

Potestative conditions are those which are in the power of the person in whose favor the obligation was contracted: as, if I contract to give my neighbor a sum of money in case he cuts down a tree.

Resolutory conditions are those which are added not to suspend the obligation till their accomplishment, but to make it cease when they are accomplished.

Suspensive obligations are those which suspend the obligation until the performance of the condition. They are casual, mixed, or potestative.

Domat says conditions are of three sorts. The *first* tend to accomplish the covenants to which they are annexed. The *second* dissolve covenants. The *third* neither accomplish nor avoid, but create some change. When a condition of the first sort comes to pass, the covenant is thereby made effectual. In case of conditions of the second sort, all things remain in the condition they were in by the covenant, and the effect of the *condition* is in suspense until the condition comes to pass and the covenant is void. Domat, lib. i. tit. 1, § 4, art. 6 *et seq.* See Pothier, Obl. pt. i. c. 2, art. 1, § 1; pt. ii. c. 3, art. 2.

In Common Law. The status or relative situation of a person in the state arising from the regulations of society. Thus, a person under twenty-one is an infant, with certain privileges and disabilities. Every person is bound to know the condition of the person with whom he deals.

A qualification, restriction, or limitation modifying or destroying the original act with which it is connected.

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in a case of a will, to suspend, revoke, or modify the devise or bequest. 1 Bouvier, Inst. n. 730.

A modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event. Co. Litt. 201 *a*.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Greenl. Cruise, Dig. tit. xiii. c. i. § 1.

A future uncertain event on the happening or the non-happening of which the accomplishment, modification, or rescission of a testamentary disposition is made to depend.

A condition annexed to a bond is usually termed a defeasance, which see. A condition defeating a conveyance of land in a certain event is generally a mortgage. See MORTGAGE. Conditions annexed to the realty are to be distinguished from *limitations;* a stranger may take advantage of a *limitation*, but only the grantor or his heirs of a condition; 2 Dutch. 1; 3 *id.* 376; 2 Paine, 545; a limitation always determines an estate without entry or claim, and so doth not a condition; Sheppard, Touchst. 121; 2 Bla. Com. 155; 4 Kent, 122, 127; 3 Gray, 142; 19 N. Y. 100: from *conditional limitations;* in case of a condition, the entire interest in the estate does not pass from the grantor, but a possibility of reverter remains to him and to his heirs and devisees; in case of a conditional limitation, the possibility of reverter is given over to a third person; 3 Gray, 142: from *remainders;* a condition operates to defeat an estate before its natural termination, a remainder takes effect on the completion of a preceding estate; Co. Litt. Butler's note 94: from *covenants;* a covenant may be said to be a contract, a condition, something affixed *nomine pœnæ* for the non-fulfilment of a contract; the question often depends upon the apparent intention of the parties, rather than upon fixed rules of construction; if the clause in question goes to the whole of the consideration, it is rather to be held a condition; 2 Parsons, Contr. 31; Platt, Cov. 71; 10 East, 295; see 2 Stockt. 489; 6 Barb. 386; 4 Harr. Del. 117; a covenant may be made by a grantee, a condition by the grantor only; 2 Co. 70: from *charges;* if a testator create a charge upon the devisee personally in respect of the estate devised, the devisee takes the estate on condition, but where a devise is made of an estate and also a bequest of so much to another person, payable "thereout" or "therefrom" or "from the estate," it is rather to be held a charge; 4 Kent, 604; 12 Wheat. 498; 4 Metc. 523; 1 N. Y. 483; 14 M. & W. 698. Where a forfeiture is not distinctly expressed or implied, it is held a charge; 10 Gill & J. 480; 10 Leigh, 172. See, also, 38 Me. 18; 1 Powell, Dev. 664.

Affirmative conditions are positive conditions.

Affirmative conditions implying a negative are spoken of by the older writers; but no such class is now recognized. Shep. Touchst. 117.

Collateral conditions are those which require the doing of a collateral act. Shep. Touchst. 117.

Compulsory conditions are such as expressly require a thing to be done.

Consistent conditions are those which agree with the other parts of the transaction.

Copulative conditions are those which are composed of distinct parts or separate conditions, all of which must be performed. They are generally conditions precedent, but may be subsequent. Powell, Dev. c. 15.

Covert conditions are implied conditions.

Conditions in deed are express conditions.

Disjunctive conditions are those which re-

quire the doing of one of several things. If a condition become impossible in the copulative, it may be taken in the disjunctive. Viner, Abr. *Condition* (S b) (Y b 2).

Express conditions are those which are created by express words. Co. Litt. 328.

Implied conditions are those which the law supposes the parties to have had in mind at the time the transaction was entered into, though no condition was expressed. Shep. Touchst. 117.

Impossible conditions are those which cannot be performed in the course of nature.

Inherent conditions are such as are annexed to the rent reserved out of the land whereof the estate is made. Shep. Touchst. 118.

Insensible conditions are repugnant conditions.

Conditions in law are implied conditions. The term is also used by the old writers without careful discrimination to denote limitations, and is little used by modern writers. Littleton, § 380; 2 Bla. Com. 155.

Lawful conditions are those which the law allows to be made.

Positive conditions are those which require that the event contemplated should happen.

Possible conditions are those which may be performed.

Precedent conditions are those which are to be performed before the estate or the obligation commences, or the bequest takes effect. Powell, Dev. c. 15. A bond to convey land on the payment of the purchase-money furnishes a common example of a condition precedent. 9 Cush. 95. They are distinguished from conditions subsequent.

Repugnant conditions are those which are inconsistent with, and contrary to, the original act.

Restrictive conditions are such as contain a restraint: as, that a lessee shall not alien. Shep. Touchst. 118.

Single conditions are those which require the doing of a single thing only.

Subsequent conditions are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation.

A mortgage with a condition defeating the conveyance in a certain event is a common example of a condition subsequent. All conditions must be either precedent or subsequent. The character of a condition in this respect does not depend upon the precise form of words used; 7 Gill & J. 227, 240; 2 Dall. 317; 2 Johns. 148; 20 Barb. 425; 6 Me. 106; 10 *id.* 318; 1 Va. Cas. 138; 4 Rand. 352; 6 J. J. Marsh. 161; 6 Litt. 151; 1 Spenc. 435; 1 La. An. 424; 1 Wisc. 527; nor upon the position of the words in the instrument; 1 Term, 645; 6 *id.* 668; Cas. *temp.* Talb. 166; the question is whether the conditional event is to happen before or after the principal; 4 Rand. 358. The word "if" implies a condition precedent, however, unless controlled by other words; Crabb, R. P. § 2152.

Unlawful conditions are those which are forbidden by law.

They are those which, *first*, require the performance of some act which is forbidden by law, or which is *malum in se*; or, *second*, require the omission of some act commanded by law; or, *third*, those which encourage such acts or omissions; 1 P. Wms. 189.

Void conditions are those which are of no validity or effect.

Creation of. Conditions must be made at the same time as the original conveyance or contract, but may be by a separate instrument, which is then considered as constituting one transaction with the original; 5 S. & R. 375; 7 W. & S. 335; 3 Hill, 95; 3 Wend. 208; 10 Ohio, 433; 10 N. H. 64; 2 Me. 132; 7 Pick. 157; 6 Blackf. 113. Conditions are sometimes annexed to and depending upon estates, and sometimes annexed to and depending upon recognizances, statutes, obligations, and other things, and are also sometimes contained in acts of parliament and records; Shep. Touchst. 117.

Unlawful conditions are void. Conditions in restraint of marriage *generally* are held void; 13 Mo. 211; see 10 Penn. 350; otherwise of conditions restraining from marriage to a particular person, or restraining a widow from a second marriage; 10 E. L. & Eq. 139; 2 Sim. 255; 6 Watts, 213; 10 *id.* 348. A condition in general restraint of alienation is void; 1 Denio, 449; 14 Miss. 730; 24 *id.* 203; 6 East, 173; and see 21 Pick. 42; but a condition restraining alienation for a limited time may be good; Co. Litt. 223; 2 S. & R. 573; 1 Watts, 389; 10 *id.* 325.

Where land is devised, there need be no limitation over to make the condition good; 1 Mod. 300; 1 Atk. 361; but where the subject of the devise is personalty without a limitation over, the condition, if subsequent, is held to be *in terrorem* merely, and void; 3 Whart. 575. But if there be a limitation over, a non-compliance with the condition divests the bequest; 1 Eq. Cas. Abr. 112. A limitation over must be to persons who could not take advantage of a breach; 2 Caines, 346; 1 Wend. 388; 2 Conn. 196. A gift of personalty may not be on condition subsequent at common law, except as here stated; 1 Rolle, Abr. 412. See 21 Mo. 277.

Any words suitable to indicate the intention of the parties may be used in the creation of a condition: "On condition" is a common form of commencement.

Formerly, much importance was attached to the use of particular and formal words in the creation of a condition. Three phrases are given by the old writers by the use of which a condition was created without words giving a right of re-entry. These were *Sub conditione* (On condition), *Proviso ita quod* (Provided always), *Ita quod* (So that). Littleton, 331; Shep. Touchst. 125.

Amongst the words used to create a condition where a clause of re-entry was added were, *Quod si contingat* (If it shall happen), *Pro* (For), *Si* (If), *Causa* (On account of); sometimes, and in case of the king's grants, but not of any other person, *ad faciendum* or *faciendo*, *ea intentione*, *ad effectum* or *ad propositum*. For avoiding a lease for years, such precise words of condition are not required. Co. Litt. 204 *b*. In a gift, it is said, may be present a modus, a condition, and a consideration: the words of creation are *ut* for the

modus, *si* for the condition, and *quid* for the consideration.

Technical words in a will will not create a condition where it is unreasonable to suppose that the testator intended to create a technical condition; 7 N. H. 142. The words of condition need be in no particular place in the instrument; 1 Term, 645; 6 *id.* 668.

Construction of. Conditions which go to defeat an estate or destroy an act are strictly construed; while those which go to vest an estate are liberally construed; Crabb, R. P. § 2130; 17 N. Y. 34; 4 Gray, 140; 35 N. H. 445; 18 Ill. 431; 15 How. 323. The condition of an obligation is said to be the language of the obligee, and for that reason to be construed liberally in favor of the obligor; Co. Litt. 42 *a*, 183 *a*; 2 Parsons, Contr. 22; Shep. Touchst. 375, 376; Dy. 14 *b*, 17 *a*; 1 Johns. 267. But wherever an obligation is imposed by a condition, the construction is to be favorable to the obligee; 1 Sumn. 440.

Performance should be complete and effectual; 1 Rolle, Abr. 425. An inconsiderable casual failure to perform is not non-performance; 6 Dana, 44; 17 N. Y. 34. Any one who has an interest in the estate may perform the condition; but a stranger gets no benefit from performing it; 10 S. & R. 186. Conditions precedent, if annexed to land, are to be strictly performed, even when affecting marriage; 1 Mod. 300; 1 Atk. 361. Conditions precedent can generally be exactly performed; and, at any rate, equity will not generally interfere to avoid the consequences of non-performance; 3 Ves. Ch. 89; 1 Atk. 361; 3 *id.* 330; West, 350; 2 Brown, Ch. 431. But in cases of conditions subsequent, equity will interfere where there was even a partial performance, or where there is only a delay of performance; Crabb, R. P. § 2160; 4 Ind. 628; 26 Me. 525. This is the ground of equitable jurisdiction over mortgages.

Generally, where there is a gift over in case of non-performance, the parties will be held more strictly to a performance than where the estate or gift is to revert to the grantor or his heirs.

Where conditions are liberally construed, a strict performance is also required; and it may be said, in the same way, that a non-exact performance is allowed where there is a strict construction of the condition.

Generally, where no time of performance is limited, he who has the benefit of the contract may perform the condition when he pleases, at any time during his life; Plowd. 16; Co. Litt. 208 *b*; and need not do it when requested; Co. Litt. 209 *a*. But if a prompt performance be necessary to carry out the will of a testator, the beneficiary shall not have a lifetime in which to perform the condition; 5 S. & R. 384. In this case, no previous demand is necessary; 5 S. & R. 385. But even then a reasonable time is allowed; 1 Rolle, Abr. 449.

If the place be agreed upon, neither party alone can change it, but either may with consent of the other. See CONTRACT; PERFORMANCE; 1 Rolle, 444; 11 Vt. 612; 3 Leon. 260.

Non-performance of a condition which was possible at the time of its making, but which has since become impossible, is excused if the impossibility is caused by act of God; 10 Pick. 507; or by act of law, if it was lawful at its creation; 4 Monr. 158; 1 Penn. 495; or by the act of the party; as, when the one imposing the obligation accepts another thing in satisfaction or renders the performance impossible by his own default; 21 Pick. 389; 1 Paine, 652; 6 Pet. 745; 1 Cow. 339. If performance of one part becomes impossible by act of God, the whole will, in general, be excused; 1 B. & P. 242; Cro. Eliz. 280; 5 Co. 21; 1 Ld. Raym. 279.

The effect of conditions may be to *suspend* the obligation; as, if I bind myself to convey an estate to you on condition that you first pay one thousand dollars, in which case no obligation exists until the condition is performed: or may be to *rescind* the obligation; as, if you agree to buy my house on condition that it is standing unimpaired on the tenth of May, or I convey to you my farm on condition that the conveyance shall be void if I pay you one thousand dollars, in such cases the obligation is rescinded by the non-performance of the condition: or it may *modify* the previous obligation; as, if I bind myself to convey my farm to you on the payment of four thousand dollars if you pay in bank stock, or of five thousand if you pay in money: or, in case of gift or bequest, may qualify the gift or bequest as to amount or persons.

The effect of a condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested; 12 Barb. 440. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law; Co. Litt. 42; 2 Bla. Com. 157; 4 Kent, 125; 4 Jones, No. C. 249. Not so if prevented by the party imposing it; 13 B. Monr. 163; 2 Vt. 469.

If a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate or obligation remains intact and absolute; 2 Bla. Com. 157; 15 Ga. 103.

In case of a condition broken, if the grantor is in possession, the estate revests at once; 5 Mass. 321; 5 S. & R. 375; 32 Me. 394. But see 2 N. H. 120. But if the grantor is out of possession, he must enter; 8 Blackf. 138; 12 Ired. 194; 18 Conn. 535; 8 N. H. 477; 34 Me. 322; 8 Exch. 67; and is then in, as of his previous estate; Co. Litt. Butler's note 94.

It is usually said in the older books that a condition is not assignable, and that no one but the grantor and his heirs can take advantage of a breach; Gilbert, Ten. 26. Statutory, have equal rights in this respect with common-law, heirs; 2 Conn. 196; 18 *id.* 635; 25 Me. 625; and in some of the United States the common-law rule has been broken in upon,

and the devisee may enter; 13 S. & R. 172; 16 Penn. 150; 5 Pick. 528; 10 *id.* 306; *contra*, 2 Caines, 345; 20 Barb. 455; while in others even an assignment of the grantor's interest is held valid, if made after breach; 4 Harr. Del. 140; and of a particular estate; 19 N. Y. 100. In *equity*, a condition with a limitation over to a third person will be regarded as a trust, and, though the legal rights of the grantor and his heirs may not be destroyed, equity will follow him and compel a performance of the trust; Co. Litt. 236 *a*; 6 Pick. 306; 9 Watts, 60; 2 Conn. 201.

Consult Blackstone; Kent, Commentaries; Crabb; Washburn; Leake; Real Prop.; Parsons, Contracts.

CONDITIONAL FEE. A fee which, at the common law, was restrained to some particular heirs, exclusive of others.

It was called a conditional fee by reason of the condition, expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land return to its ancient proprietor.

Such a gift, then, was held to be a gift upon condition that it should revert to the donor, if the donee had no heirs of his body, but, if he had, it should then remain to the donee. It was, therefore, called a fee simple, on condition that the donee had issue. As soon as the donee had issue born, his estate was supposed to become absolute, by the performance of the condition,—at least so far absolute as to enable him to charge or to alienate the land, or to forfeit it for treason. But on the passing of the statute of Westminster II., commonly called the statute *De Donis Conditionalibus*, the judges determined that the donee had no longer a conditional fee simple which became absolute and at his own disposal as soon as any issue was born; but they divided the estate into two parts, leaving the donee a new kind of particular estate, which they denominated a *fee tail;* and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue, which expectant estate was called a reversion. And hence it is said that tenant in fee tail is by virtue of the statute *De Donis*. 2 Bla. Com. 112.

CONDITIONAL LIMITATION. A condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it.

A condition determines an estate after breach, upon entry or claim by the proper person; a limitation marks the period which determines an estate without any act on the part of him who has the next expectant interest. A conditional limitation is, therefore, of a mixed nature, partaking of that of a condition and a limitation. 3 Gray, 143. The limitation over need not be to a stranger; 2 Bla. Com. 155; 11 Metc. 102; Watk. Conv. 204.

Consult CONDITION; LIMITATION; 1 Washburn, Real Prop. 459; 4 Kent, 122, 127; 1 Preston, Est. §§ 40, 41, 93.

CONDITIONAL STIPULATION. In Civil Law. A stipulation on condition. Inst. 3, 16, 4.

CONDITIONS OF SALE. The terms upon which the vendor of property by auction proposes to sell it.

The instrument containing these terms, when reduced to writing or printing.

It is always prudent and advisable that the conditions of sale should be printed and exposed in the auction-room: when so done, they are binding on both parties, and nothing that is *said* at the time of sale, to add to or vary such printed conditions, will be of any avail; 1 H. Blackst. 289; 12 East, 6; 6 Ves. Ch. 330; 15 *id.* 521; 2 Munf. 119; 1 Des. Ch. 573; 2 *id.* 320; 11 Johns. 555; 3 Campb. See forms of conditions of sale in Babington, Auct. 233-243; Sugden, Vend. Appx. no. 4.

CONDONACION. In Spanish Law. The remission of a debt, either expressly or tacitly; 14 Am. L. Reg. 641.

CONDONATION. The conditional forgiveness or remission, by a husband or wife, of a matrimonial offence which the other has committed.

"A blotting out of an offence [against the marital relation] imputed so as to restore the offending party to the same position he or she occupied before the offence was committed;" 1 Sw. & Tr. 334. See, as to this definition, 2 Bish. Mar. & Div. § 35.

While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; Bish. Mar. & Div. § 354.

The doctrine of condonation is chiefly, though not exclusively, applicable to the offence of adultery. It may be either express, *i. e.* signified by words or writing, or implied from the conduct of the parties. The latter, however, is much the more common; and it is in regard to that that the chief legal difficulty has arisen. The only general rule is, that any cohabitation with the guilty party, after the commission of the offence, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation. The construction, however, is more strict when the wife than when the husband is the delinquent party; Bish. Mar. & Div. §§ 355-371. But a mere promise to condone is not in itself a condonation; 1 Sw. & Tr. 183; 3 Grant, N. C. Ch. 431; 19 Ala. 363; but see, *contra*, 3 Blackf. 202, where there was only an unaccepted inducement held out to the wife to return. Knowledge of the offence is essential; 60 Ind. 259; 1 Bradw. 245; 23 Ark. 615.

Every implied condonation is upon the implied condition that the party forgiven will abstain from the commission of the like offence thereafter, and also treat the forgiving party, in all respects, with conjugal kindness. Such, at least, is the better opinion; though the latter branch of the proposition has given rise to much discussion. It is not necessary, therefore, that the subsequent injury be of the same kind, or proved with the same clearness, or sufficient of itself, when proved, to warrant

a divorce or separation. Accordingly, it seems that a course of unkind and cruel treatment will revive condoned adultery, though the latter be a ground of divorce *a vinculo matrimonii*, while the former will, at most, only authorize a separation from bed and board; 1 Edw. Ch. 439; 4 Paige, Ch. 460; 14 Wend. 637; 31 N. J. Eq. 225; 6 Mo. App. 572; 8 Oreg. 224.

Condonation is not so strict a bar against the wife as the husband; 3 Md. Ch. 21; 32 Miss. 279; 1 Bradw. 245; 1 Hag. Ec. 773.

The presumption of condonation from cohabitation in cases of cruelty is not so strong as in cases of adultery; 2 Bish. Mar. & Div. § 50 *et seq.* See 5 Am. L. Reg. N. S. 641.

CONDUCTIO (Lat.). A hiring; a bailment for hire.

It is the correlative of *locatio*, a letting for hire. *Conducti actio*, in the civil law, is an action which the hirer of a thing or his heir had against the latter or his heir to be allowed to use the thing hired. *Conducere*, to hire a thing. *Conductor*, a hirer, a carrier; one who undertakes to perform labor on another's property for a specified sum. *Conductus*, the thing hired. Calvinus, Lex.; Du Cange; 2 Kent, 586.

CONE AND KEY. A woman at fourteen or fifteen years of age may take charge of her house and receive *cone* and *key* (that is, keep the accounts and keys). Cowel. Said by Lord Coke to be *cover* and *keye*, meaning that at that age a woman knew what in her house should be kept under lock and key. Co. 2d Inst. 203.

CONFECTIO (Lat. from *conficere*). The making and completion of a written instrument. 5 Co. 1.

CONFEDERACY. In Criminal Law. An agreement between two or more persons to do an unlawful act or an act which, though not unlawful in itself, becomes so by the confederacy. The technical term usually employed to signify this offence is *conspiracy*.

In Equity Pleading. An improper combination alleged to have been entered into between the defendants to a bill in equity.

A general charge of confederacy is made a part of a bill in chancery, and is the fourth part, in order, of the bill; but it has become merely formal, except in cases where the complainant intends to show that such a combination actually exists or existed, in which case a special charge of such confederacy must be made. Story, Eq. Pl. §§ 29, 30; Mitf. Eq. Pl. 41; Cooper, Eq. Pl. 9.

In International Law. An agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such an agreement made between two independent nations; but it is also used to signify the union of different states of the same nation: as, the confederacy of the states.

The original thirteen states, in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the states." These were completed on the 15th of November, 1777, and, with the exception of Maryland, which, however, afterwards also agreed to them, were speedily adopted by the United States, and by which they were formed into a federal body, and went into force on the first day of March, 1781, 1 Story, Const. § 225, and so remained until the adoption of the present constitution, which acquired the force of the supreme law of the land on the first Wednesday of March, 1789. 5 Wheat. 420. See ARTICLES OF CONFEDERATION.

CONFEDERATE MONEY. Contracts made during the rebellion in Confederate money may be enforced in the United States courts, and parties compelled to pay in lawful money of the United States the actual value of the notes at the time and place of contract. These notes were currency imposed upon the community by irresistible force, and a contract payable in such notes was not invalid; 8 Wall. 1; 15 *id.* 448; 19 *id.* 556; 111 U. S. 50.

CONFEDERATE STATES. The Confederate States were a *de facto* government in the sense that its citizens were bound to render the government obedience in civil matters, and did not become responsible, as wrong-doers, for such acts of obedience; 8 Wall. 9; but it was not strictly a *de facto* government; *ibid.*; see 96 U. S. 176. During the war, the inhabitants of the Confederate States were treated as belligerents; 8 Wall. 10; 2 *id.* 404. Land sold to the Confederate government, and captured by the Federal government, became the property of the United States; 16 Wall. 414.

The Confederate States was an illegal organization, within the provision of the constitution of the United States prohibiting any treaty, alliance, or confederation of one state with another; whatever efficacy, therefore, its enactments possessed in any state entering into that organization, must be attributed to the sanction given to them by that state; 96 U. S. 176. The laws of the *several states* were valid except so far as they tended to impair the national authority or the rights of citizens under the constitution; *ibid.*

Unless suspended or superseded by the commanders of the United States forces which occupied the insurrectionary states, the laws of those states, so far as they affected the inhabitants, remained in force during the war, and over them their tribunals continued to exercise their ordinary jurisdiction; 97 U. S. 509. See articles in 2 So. L. Rev. 313; 3 *id.* 47.

CONFEDERATION. The name given to the form of government which the American colonies during the revolution devised for their mutual safety and government.

CONFERENCE. In French Law. A similarity between two laws or two systems of laws.

In International Law. Verbal explanations between the representatives of at least two nations, for the purpose of accelerating matters by avoiding the delays and other difficulties necessarily attending written communications.

In Legislation. Mutual consultations by two committees appointed, one by each house

of a legislature, in cases where the houses cannot agree in their action.

CONFESSION. In Criminal Law. The voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same.

An admission or acknowledgment by a prisoner, when arraigned for an offence, that he committed the crime with which he is charged.

Judicial confessions are those made before a magistrate or in court in the due course of legal proceedings.

Extra-judicial confessions are those made by the party elsewhere than before a magistrate or in open court.

Voluntary confessions are admissible in evidence; 20 Ga. 60; 12 La. An. 805; 28 Ala. N. S. 9; 3 Ind. 552; 30 Miss. 593; but a confession is not admissible in evidence where it is obtained by temporal inducement, by threats, promise or hope of favor held out to the party in respect of his escape from the charge against him, by a person in authority; 1 Mood. 465; 4 C. & P. 570; 8 *id.* 140, 187; 4 Harr. Del. 503; 37 N. H. 175, 196; 5 Fla. 285; 10 Ind. 106; 10 Gratt. 734; 40 Mich. 706; 38 Ala. 422; 55 Ga. 136; 50 Miss. 147; 1 Mont. 394; 2 Col. 186; see 18 N. Y. 9; 108 Mass. 285; 44 L. T. Rep. N. S. 687; 29 Penn. 429; or where there is reason to presume that such person appeared to the party to sanction such threat or inducement; 1 Mood. 410; 5 C. & P. 539; 8 *id.* 140, 733; 2 Crawf. & D. 347; 2 C. & K. 225; 1 Dev. 259; but it is admissible if such inducements proceed from a person not in authority over the prisoner; 1 C. & P. 97, 129; 4 *id.* 543; 7 *id.* 776; 8 *id.* 734; Russ. & R. 153; 1 Leach, 291; 2 *id.* 559; 19 Pick. 491; 1 Gray, 461; 1 Strobh. 155; 9 Rich. 428; 14 Gratt. 652; 19 Vt. 116; but see 5 Jones, No. C. 432; 32 Miss. 382; 2 Ohio St. 583; or if the inducement be spiritual merely; 1 Mood. 197; Jebb, Ir. 15; 15 Mass. 161; 8 Ohio St. 98; or an appeal to the party to speak the truth; L. R. 1 C. C. 362; 44 Miss. 333; 125 Mass. 210; even if the appeal comes from an officer of the law; 15 Ir. L. R. N. S. 60; 121 Mass. 61; 54 Ind. 359; 44 Iowa, 82; 2 Tex. Ap. 588; but see 2 Crawf. & D. 152; Tayl. Ev. § 804. Mere advice to confess and tell the truth does not exclude; 75 N. C. 356; 54 Mo. 192; 55 Ga. 592; and the temporal inducement must have been held out by the person to whom the confession was made; Phill. Ev. 430; 4 C. & P. 223; Jebb, 15; unless collusion be suspected; 4 C. & P. 550; but the inducement must be held out by a person in authority; 12 E. L. & Eq. 591; 10 Gray, 173; 3 Heisk. 232; but see 4 C. & P. 570.

A confession is admissible though elicited by questions put to a prisoner by a constable, magistrate, or other person; 1 Mood. 27, 452, 465; Jebb, 15; 1 Crawf. & D. 115; 2 *id.* 152; 5 C. & P. 312; 7 *id.* 569, 832; 8 *id.* 179, 621; 14 Ark. 556; 19 *id.* 156; 23 Ala. N. S. 28; 119 Mass. 305; 63 N. Y. 590; 57 Mo. 102; 16 Kans. 14; even though the question assumes the prisoner's guilt or the confession is obtained by trick or artifice; 1 Mood. 28; Phill. Ev. 427; 33 Miss. 347; see 8 C. & P. 622; and although it appears that the prisoner was not warned that what he said would be used against him; 8 Mod. 89; 1 C. & P. 261; 5 *id.* 312, 318; 6 *id.* 179; 7 *id.* 487; 9 *id.* 124.

A statement not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath; 2 Mood. 45; 1 C. & K. 657; 5 C. & P. 530; 9 *id.* 240; 1 Mood. & R. 297; 7 Ired. 96; 5 Rich. 391; 122 Mass. 454; 71 N. Y. 602; 41 Tex. 39; 59 Ind. 105; *contra*, 39 Miss. 615; see 8 C. & P. 250; otherwise, if the answers are compulsory; 1 Den. Cr. Cas. 236; 4 Campb. 10; 6 C. & P. 161, 177; 15 N. Y. 384; 3 Wisc. 823; 2 Park. Cr. Cas. 663; 2 Dill. 405; 49 Cal. 69. A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself; 5 C. & P. 332; 7 *id.* 832; 12 Metc. 235; 21 Pick. 515; see 32 Ala. N. S. 560; unless such statement is made in the deposition of a witness or examination of another prisoner before a magistrate; 1 Mood. 347; Mood. & M. 336; 6 C. & P. 164.

Where a confession has been obtained, or an inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence; unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled; 2 Lew. 123; 4 C. & P. 225; 5 *id.* 318, 535; 6 *id.* 404; 1 Wheel. Cr. Cas. 67; 5 Halst. 163; 3 Jones, No. C. 443; 5 Rich. 391; 24 Miss. 512; and the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected; 1 Dev. 259; 12 Miss. 31; 5 Cush. 605; 18 Conn. 166; 2 Leigh, 701; 32 Ala. N. S. 560; 1 Sneed, 75. And see 6 C. & P. 404; 5 Jones, No. C. 315; 12 La. An. 895.

Under such circumstances, contemporaneous declarations of the party are receivable in evidence, or not, according to the attending circumstances; but any act of the party, though done in consequence of such confession, is admissible if it appears from a fact thereby discovered that so much of the confession as immediately relates to it is true; 1 Leach, 263, 386; 9 C. & P. 364; 1 Mood. 338; Russ. & R. 151; 9 Pick. 496; 32 Miss. 382; 1 Sneed, 75; 7 Rich. 327.

A confession made before a magistrate is admissible though made before the evidence of the witnesses against the party was concluded; 4 C. & P. 567; 5 *id.* 163.

Parol evidence, precise and distinct, of a

statement made by a prisoner before a magistrate during his examination, is admissible though such statement neither appears in the written examination nor is vouched for by the magistrate; 61 Me. 171; 2 Russell, Cr. 3d ed. 876–878; 1 Mood. 338; 7 C. & P. 188; but not if it is of a character which it was the duty of the magistrate to have noted; 1 Greenl. Ev. § 227, n. Parol evidence of a confession before a magistrate may be given where the written examination is inadmissible through informality; 1 Lew. 46; 4 C. & P. 550, n.; 6 *id.* 183; 1 M. & M. 403; Busb. 239.

The whole of what the prisoner said must be taken together; 2 C. & K. 221; 2 Ball & B. 297; 2 C. & P. 629; 4 *id.* 215, 397; 9 Leigh, 633; 2 Dall. 86; 5 Miss. 364. See 3 Park. Cr. Cas. 256; 26 Ala. N. S. 107.

The prisoner's confession, when the *corpus delicti* is not otherwise proved, is insufficient to warrant his conviction; 1 Hayw. 455; 5 Halst. 163, 185; 18 Miss. 229; 17 Ill. 426; 2 Tex. 79. See, *contra*, Russ. & R. 481, 509; 1 Leach, 311; 3 Park. Cr. Cas. 401; 11 Ga. 225. Consult Greenleaf; Phillipps, Evidence; Wharton, Criminal Evidence; Joy, Confessions; and note in 1 Bennett & H. Lead. Cr. Cas. 112, which note is the basis of this article.

CONFESSION AND AVOIDANCE. In Pleading. The admission in a pleading of the truth of the facts as stated in the pleading to which it is an answer, and the allegation of new and related matter of fact which destroys the legal effect of the facts so admitted. The plea and any of the subsequent pleadings may be by way of confession and avoidance, or, which is the same thing, *in* confession and avoidance. Pleadings in confession and avoidance must give color; see COLOR; 1 East, 212. They must admit the material facts of the opponent's pleading, either expressly in terms; Dy. 171 *b*; or in effect. They must conclude with a verification; 1 Saund. 103, n. For the form of statement, see Steph. Pl. 72, 79.

Pleas in confession and avoidance are either in justification and excuse, which go to show that the plaintiff never had any right of action, as, for example, son assault demesne, or in discharge, which go to show that his right has been released by some matter subsequent.

See, generally, 1 Chitty, Pl. 540; 2 *id.* 644; Co. Litt. 282 *b*; Archb. Civ. Pl. 215; Dane, Abr. Index; 3 Bouvier, Inst. nn. 2921, 2931.

CONFESSOR. A priest of some Christian sect, who receives an account of the sins of his people, and undertakes to give them absolution of their sins. The common law does not recognize any such relation, at least so as to exempt or prevent the confessor from disclosing such communications as are made to him in this capacity, when he is called upon as a witness. (See next title.)

CONFIDENTIAL COMMUNICATIONS. Those statements with regard to any legal transaction made by one person to another during the continuance of some relation between them which calls for or warrants such communications.

At law, certain classes of such communications are held not to be proper subjects of inquiry in courts of justice, and the persons receiving them are excluded from disclosing them when called upon as witnesses, upon grounds of public policy.

Of this character are all communications made between a husband and his lawful wife in all cases in which the interests of the other party are involved; Bull. N. P. 218; 13 Pet. 223; 10 Pick. 57; 117 Mass. 90; 41 Ga. 613; 21 La. An. 343; 15 Me. 104; 2 Leigh, 142; 6 Binn. 488; 6 H. & J. 153; 4 Term, 678; 5 Esp. 107. See 10 Metc. 287; 3 Day, 37; 4 Vt. 116; 1 Dougl. 48; 2 Ashm. 31; 3 Harring. 88; 8 C. & P. 284. Nor does it make any difference which party is called upon as a witness; Ry. & M. 352; or when the relation commenced; 3 C. & P. 558; or whether it has terminated; 13 Pet. 209; 3 Dev. & B. 110; 1 Barb. 392; 6 East, 192; 1 Ry. & M. 198; 1 C. & P. 364. And see 13 Pick. 445; 7 Vt. 506; 4 Penn. 364; 5 Ala. N. S. 224; 1 B. Monr. 224. A third party who overheard such a conversation may testify as to it; 110 Mass. 181. The wife may be examined as to a conversation with her husband in the presence of a third party; 35 Vt. 379; 46 Barb. 158; but not if the third person is a person incapable of taking part in the conversation; 113 Mass. 160.

The confidential counsellor, solicitor, or attorney of any party cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him, in that capacity; 4 B. & Ad. 876; 2 M. & W. 100; 4 Term, 753; 6 C. & P. 728; 45 N. Y. 57; 63 Barb. 468; 33 Wis. 205; 12 Pick. 89; 23 Mo. 474; 11 Wheat. 295; nor will he be permitted to make such communications against the will of his client; 4 Term, 756, 759; 12 J. B. Moore, 520; 3 Barb. Ch. 528; 8 Mass. 370; nor will the client be compelled to disclose such communications; 43 Ind. 112; 34 Ohio St. 91; 28 Vt. 701; not even when the client takes the witness stand in his own behalf; 43 Ind. 112; 38 Iowa, 395; 34 Ohio St. 91; *contra*, 101 Mass. 193. The privilege extends to all matters made the subject of professional intercourse, without regard to the pendency of legal proceedings; 9 Beav. 16; 11 *id.* 59; 2 Brod. & B. 4; 3 Bingh. N. C. 235; 5 C. & P. 592; 6 Madd. 47; 1 De Gex & S. 12; 22 Penn. 89; 12 Pick. 89; 38 Me. 581; 25 Vt. 47; 24 Miss. 134; but see 28 Vt. 701, 750; and to matters discovered by the counsellor, etc., in consequence of this relation; 5 Esp. 52. See 1 M. & K. 102; 3 M. & C. 515; Story, Eq. Pl. § 601; 13 Ga. 260. See 29 Ala. N. S. 254; 21 Ga. 301.

Interpreters; 4 Term, 756; 3 Wend. 337; 4 Munf. 273; 7 Ind. 202; 1 Pet. C. C. 356; and agents; 2 Stark. 239; 2 Beav. 173; 1 Phill. Ch. 471, 687; are considered as stand-

ing in the same relation as the attorney; so, also, is a barrister's clerk; 2 C. & P. 195; 1 *id.* 545; 5 *id.* 177; 5 M. & G. 271; 8 D. & R. 726; 12 Pick. 93; 3 Wend. 337; 16 N. Y. 180; 5 Cal. 450; but not a student at law in an attorney's office; 7 Cush. 576.

The cases in which communications to counsel have been holden not to be privileged may be classed under the following heads: When the communication was made before the attorney was employed as such; 1 Ventr. 197; 2 Atk. 524; see 38 Me. 581; after the attorney's employment has ceased; 4 Term, 431; 12 La. An. 91; when the attorney was consulted because he was an attorney, yet was not acting as such; 4 Term, 753; 4 Mich. 414; 14 Ill. 89; 7 Rich. 459; where his character of attorney was the cause of his being present at the taking place of a fact, but there was nothing in the circumstances to make it amount to a communication; Cowp. 846; 2 Ves. Ch. 189; 2 Curt. Eccl. 866; 29 N. H. 163; see 46 Iowa, 88; when the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential communication; 7 East, 357; 2 Brod. & B. 176; 3 Johns. Cas. 198; when the things disclosed had no reference to professional employment, though disclosed while the relation of attorney and client subsisted; Peake, 77; when the attorney made himself a subscribing witness; 10 Mod. 40; 2 Curt. Eccl. 866; 3 Burr. 1687; when he is a party to the transaction; 3 Wisc. 274; Story, Eq. Pl. § 601; when he was directed to plead the facts to which he is called to testify; 7 Mart. La. N. S. 179. The attorney may be called upon to prove his client's handwriting; 120 Mass. 215; L. R. 8 Eq. 575; L. R. 5 Ch. Ap. 703; to identify his client; 2 D. & R. 347; 2 Cowp. 846; though not to disclose his client's address; L. R. 15 Eq. 257; unless the client be a ward of court; L. R. 8 Eq. 575; or a bankrupt; L. R. 5 Ch. 703. He may be required to testify as to whether he was retained by his client, and in what capacity; 12 Penn. 304; but see 11 Wheat. 280.

Communications between a party or his legal adviser and witnesses are privileged; L. R. 8 Eq. 522; 16 *id.* 112; so are communications between parties to a cause touching the preparation of evidence; Hare, Discov. 152; 43 L. J. C. P. 206; but see 6 B. & S. 888; 3 H. & N. 871.

The rule of privilege does not extend to confessions made to *clergymen;* 4 Term, 753; 2 Skinn. 404; 15 Mass. 161; though judges have been unwilling to enforce a disclosure; 3 C. & P. 519; 6 Cox, C. C. 219; and see 92 U. S. 105; and the rule is otherwise by statute in some states; Iowa Code, 1851, art. 23, 93; Michigan Rev. Stat. 1846, c. 102, § 85; Missouri Rev. Stat. 1845, c. 186, § 19; 2 New York Rev. Stat. 406, § 72; 13 Wend. 311; Wisconsin Rev. Stat. 1849, c. 98, § 75; nor to *physicians;* 11 Hargr. St. Tr. 243; 20 How. St. Tr. 643; 1 C. & P. 97; 3 *id.* 518; L. R. 6 C. P. 252; but in some states this has been changed by statute; Whart. Ev. § 606; 5 Hun, 1; see 14 Wend. 637; nor to *confidential friends;* 4 Term, 758; 1 Caines, 157; 3 Wis. 456; 14 Ill. 89; L. R. 18 Eq. 649; *clerks.;* 3 Campb. 337; 1 C. & P. 337; *bankers;* 2 C. & P. 325; *stewards;* 2 Atk. 524; 11 Price, 455; nor *servants;* 6 How. Miss. 35. Consult Wharton; Starkie; Greenleaf; Evidence; 17 Am. Jur. 304.

CONFIRMATIO. (Lat. *confirmare*). The conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged. Shep. Touchst. 311; 2 Bla. Com. 325.

Confirmatio crescens tends and serves to increase or enlarge a rightful estate, and so to pass an interest.

Confirmatio diminuens tends or serves to diminish and abridge the services whereby the tenant holds.

Confirmatio perficiens tends and serves to confirm and make good a wrongful and defeasible estate, by adding the right to the possession or defeasible seisin, or to make a conditional estate absolute, by discharging the condition.

CONFIRMATIO CHARTARUM (Lat. confirmation of the charters). A statute passed in the 25 Edw. I., whereby the Great Charter is declared to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral-churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word or deed or counsel, act contrary thereto or in any degree infringe it; 1 Bla. Com. 128.

CONFIRMATION. A contract by which that which was voidable is made firm and unavoidable.

A species of conveyance.

Where a party, acting for himself or by a previously authorized agent, has attempted to enter into a contract, but has done so in an informal or invalid manner, he confirms the act and thus renders it valid, in which case it will take effect as between the parties from the original making. See 2 Bouvier, Inst. nn. 2067–2069.

To make a valid confirmation, the party must be apprized of his rights; and where there has been a fraud in the transaction he must be aware of it and intend to confirm his contract. See 1 Ball & B. 353; 2 Sch. & L. 486; 12 Ves. Ch. 373; 1 *id.* 215; 1 Atk. 301; 8 Watts, 280.

A confirmation does not strengthen a void estate. For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law; Co. Litt. 295. The canon law agrees with this rule;

and hence the maxim, *qui confirmat nihil dat.* Toullier, Dr. Civ. Fr. l. 3, t. 3, c. 6, n. 476. See Viner, Abr.; Comyns, Dig.; Ayliffe, Pand. *386; 1 Chitty, Pr. 315; 3 Gill & J. 290; 3 Yerg. 405; 1 Ill. 236; 9 Co. 142 *a*; 2 Bouvier, Inst. nn. 2067–69; RATIFICATION.

CONFIRMEE. He to whom a confirmation is made.

CONFIRMOR. He who makes a confirmation to another.

CONFISCARE. To confiscate.

CONFISCATE. To appropriate to the use of the state.

Especially used of the goods and property of alien enemies found in a state in time of war. 1 Kent, 52 *et seq.* *Bona confiscata* and *forisfacta* are said to be the same (1 Bla. Com. 299), and the result to the individual is the same whether the property be forfeited or confiscated; but, as distinguished, an individual forfeits, a state confiscates goods or other property. Used also as an adjective—forfeited. 1 Bla. Com. 299.

It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government without notice, unless there be a treaty to the contrary; 1 Gall. 563; 3 Dall. 199. It has been frequently provided by treaty that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they conducted themselves innocently; and when there was no such treaty, such a liberal permission has been announced in the very declaration of war. Vattel, l. 3, c. 4, § 63. Sir Michael Foster (Discourses on High Treason, pp. 185, 6) mentions several instances of such declarations by the king of Great Britain; and he says that alien enemies were thereby enabled to acquire personal chattels and to maintain actions for the recovery of their personal rights in as full a manner as alien friends; 1 Kent, 57.

In the United States, the broad principle has been assumed "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found. The mitigations of this rigid rule which the policy of modern times has introduced into practice will more or less affect the exercise of this right, but cannot impair the right itself;" 8 Cra. 122. Commercial nations have always considerable property in the possession of their neighbors; and when war breaks out, the question what shall be done with enemies' property found in the country is one rather of policy than of law, and is properly addressed to the consideration of the legislature, and not to courts of law. The strict right of confiscation exists in congress; and without a legislative act authorizing the confiscation of enemies' property, it cannot be condemned; 8 Cra. 128, 129

The right of confiscation exists as fully in case of a civil war as it does when the war is foreign, and rebels in arms against the lawful government, or persons inhabiting the territory exclusively within the control of the rebel belligerents, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory; 11 Wall. 269. Proceedings under the Confiscation Act of July 17, 1862, were justified as an exercise of belligerent rights against a public enemy, but were not, in their nature, a punishment for treason. Therefore, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value; 91 U. S. 21.

The claim of a right to confiscate debts contracted by individuals in time of peace, and which remain due to subjects of the enemy in time of war, rests very much upon the same principles as that concerning the enemy's tangible property found in the country at the commencement of the war. But it is the universal practice to forbear to seize and confiscate debts and credits; 1 Kent, 64, 65. See 4 Cra. 415; 6 *id.* 286; T. U. P. Charlt. 140; 2 H. & J. 101, 112, 286, 471; 7 Conn. 428; 1 Day, 4; Kirb. 228, 291; 2 Tayl. 115; Cam. & N. 77, 492; 2 Dill. 555; 15 Wall. 591; Chase, Dec. 259.

See, generally, Chitty, Law of Nations, c. 3; Marten, Law of Nat. lib. 8, c. 3, s. 9; Burlamaqui, Pol. Law, part 4, c. 7; Vattel, liv. 3, c. 4, § 63; Twiss, Law of Nations.

CONFLICT OF LAWS. A contrariety or opposition in the laws of states or countries in those cases where, from their relations to each other or to the subject-matter in dispute, the rights of the parties are liable to be affected by the laws of both jurisdictions.

As a term of art, it also includes the deciding which law is in such cases to have superiority. It also includes many cases where there is no opposition between two systems of law, but where the question is how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case.

An opposition or inconsistency of domestic laws upon the same subject.

Among the leading canons on the subject are these: the laws of every state affect and bind directly all property, real or personal, situated within its territory, all contracts made and acts done and all persons resident within its jurisdiction, and are supreme within its own limits by virtue of its sovereignty. Ambassadors and other public ministers while in the state to which they are sent, and members of an army marching through or stationed in a friendly state, are not subject to this rule; 4 Barb. 522; 4 Cra. 173.

Possessing exclusive authority, with the above qualification, a state may regulate the manner and circumstances under which property, whether real or personal, in possession or in action, within it, shall be held, trans-

mitted, or transferred, by sale, barter, or bequest, or recovered or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done there; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases; Story, Confl. Laws, § 18; Vattel, b. 2, c. 7, §§ 84, 85.

Whatever force and obligation the laws of one country have in another depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent; Huberus, lib. 1, t. 3, § 2. When a statute or the unwritten or common law of the country forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect.

Generally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*.

The broad rule as to contracts is thus stated by Mr. Wharton (Confl. Laws, § 401 p.): "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above, supplies the applicatory law." This rule is quoted by Hunt, J., in 91 U. S. 411. In a later part of his opinion, in the same case, he says: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought. A careful consideration of the decisions of this country and of England will sustain these positions;" cited in 125 Mass. 374.

Mr. Wharton has since expressed the rule in the following terms, in the second edition (1881) of his Confl. Laws, § 401: "A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized unless the *lex situs* of property disposed of otherwise requires; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in view; so far as concerns the remedy, by the law of the place of suit; and so far as concerns its performance, by the law of the place of performance." See 62 Ga. 241; 62 Ala. 518; 48 N. H. 176; 74 Ill. 197; as to *lex solutionis:* 22 Kan. 89; 4 McLean, 440; 76 Ark. 356; as to *lex fori:* 80 N. C. 294; 26 Ark. 356; 11 La. 465; 1 Pet. 312; 4 McLean, 540; as to *lex loci:* where a contract is a fraud on the laws of the *lex fori*, it will not be enforced; 47 Me. 120; nor will it be enforced if contrary to public policy; Whart. Confl. Laws, § 490.

Real Estate. In general, the mode of conveying, incumbering, transmitting, devising, and controlling real estate is governed by the law of the place of situation of the property. See Lex Rei Sitæ.

Perhaps an exception may exist in the case of mortgages; 23 Miss. 175; 3 McLean, 397. But the point cannot be considered as settled; 1 Washb. R. P. 524; Story, Confl. Laws, § 363; Westl. Priv. Int. Law, 75. It is said by Wharton (Confl. Laws, § 368) that the law governing the mortgage, as such, is the law of *situs* of the land which the mortgage covers; but the *debt* is governed by the law of the domicil of the party to whom it is due, no matter where the property be situated; see 46 N. H. 300; 5 Sawy. 32; 41 N. Y. 313; 21 Wis. 340; and that when the money is invested on the land for which the mortgage is given, the *lex sitæ* prevails. For the purposes of taxation a *debt* has its *situs* at the domicil of the creditor; 100 U. S. 490.

Personal Property. For the general rules as to the disposition of personal property, see Domicil. *Bills of exchange and promissory notes* are to be governed, as to validity and interpretation, by the law of the place of making, as are other contracts. The residence of the drawee of a bill of exchange, and the place of making a promissory note, where no other place of payment is specified, is the *locus contractus;* 10 B. & C. 21; 1 Woodb. & M. 381; 4 C. & P. 35; 4 Mich. 450; 6 McLean, 622; 35 N. J. L. 285; 9 Cush. 46; 26 Vt. 698; 11 Gratt. 477; 3 Gill, 430; 18 Conn. 138; 6 Ind. 107; see 11 Tex. 54; 17 Miss. 220, where the place of address is said to be the place of making. As between the drawee and drawer and other parties (but not as between an indorser and indorsee, 19 N. Y. 436; but see 14 Vt. 33), each indorsement is considered a new contract; 14 B. Monr. 556; 5 Sandf. 330; 2 Ga. 158; 3 McLean, 397. See Lex Loci.

The place of payment is, however, to be considered as the place of making; 30 Miss. 59; 7 Ohio, St. 134; 4 Mich. 450; 5 McLean, 448; 3 Gill, 430; 8 B. Monr. 306; 14 Ark. 189; 17 Miss. 220; 13 Gray, 597. But see 4 N. J. 319.

The better rule as to the rate of interest to be allowed on bills of exchange and promissory notes, where no place of payment is specified and no rate of interest mentioned, seems to be the interest of the *lex loci;* 6 Johns. 183; 5 C. & F. 1, 12; 6 Cra. 221; 3 Wheat. 101; 1 Dall. 191; 12 La. An. 815. And see 9 Gratt. 31; 24 Miss. 463; 24 Mo. 65; 1 Parsons, Contr. 238. The damages recov-

erable on a bill of exchange not paid are those of the place where the plaintiff is entitled to reimbursement. In the United States, these are generally fixed by statute; 4 Johns. 119; 6 Mass. 157; 2 Wash. C. C. 167; 3 Sumn. 523.

Where a place of payment is specified, the interest of that place must be allowed; 126 Mass. 360; 14 Vt. 33; 22 Barb. 118; 77 N. Y. 573; except that when a contract is made in one state, to be performed in another, parties may contract for the legal rate of interest allowable in either state, provided such contract is entered into in good faith, and not merely to avoid the usury laws; 20 Mart. La. 1; 46 N. H. 300; 1 Wall. 310; 26 Barb. 213; 25 Ohio St. 413; 22 Iowa, 194; 35 N. J. L. 285; *contra*, Story, Confl. Laws, § 298.

Chattel mortgages, valid and duly registered under the laws of the state in which the property is situated at the time of the mortgage, will be held valid in another state to which the property is removed, although the regulations there are different; 13 Pet. 107; 62 Mo. 524; 25 Miss. 471; 53 N. H. 562; 7 Ohio St. 134; 12 Barb. 631; but it is said by Whart. (Confl. Laws, § 317), that the law in regard to chattel mortgages is governed by the *lex sitæ*. That a lien is extinguished when goods are taken from the place where the lien was created to a place where such a lien is not recognized, see Whart. Confl. Laws, § 318; 9 Phila. 615 (where a chattel mortgage made in Maryland was held invalid in Pennsylvania as against a *bona fide* purchaser without notice); and a Louisiana court refused to enforce a chattel mortgage made in another state, such mortgages being unknown in Louisiana; 26 La. An. 185. See 37 Penn. 508, where it was held that a trust of personalty valid in the domicil would be protected if the parties removed to another state.

The law of the *situs* governs a mortgage of chattels in one state, executed in another; Jones, Chat. Mortg. § 305; 58 N. H. 88; 7 Wall. 139; 22 Kan. 89; 38 Ala. 67; *contra*, 12 N. J. Eq. 86; 10 Ind. 28. The *lex fori* determines the remedies on the mortgage; 37 N. H. 86; *contra*, Story, Confl. Laws, § 402; 50 Ill. 370 (where there appears to have been notice). See 38 N. Y. 153, where a mortgage on a ship, made and shown to be invalid in Pennsylvania, was held invalid in New York; 8 Humphr. 542.

The registration of chattel mortgages and transfer of government and local stocks are frequently made subjects of positive law, which then suspends the law of the domicil.

As to whether such mortgages will be respected in preference to claims of citizens of the state into which the property is removed, that they will, 30 Vt. 42, overruling 23 Vt. 279; 7 Ohio St. 134; 12 Barb. 631; 8 Humphr. 542.

Questions of priority of liens and other claims are, in general, to be determined by the *lex rei sitæ* even in regard to personal property; 5 Cra. 289; 4 Binn. 353; 14 Mart. La. 93; 2 H. & J. 193, 224; 3 Pick. 128; 3 Rawle, 312; 13 Pet. 312; 17 Ga. 491; 4 Rich. 561; 13 Ark. 543; 3 Barb. 89; see 33 Ala. 536.

The existence of the lien will generally depend on the *lex loci;* Story, Confl. Laws, §§ 322 *b*, 402; 5 Cra. 289.

Marriage comes under the general rule in regard to contracts, with some exceptions. See LEX LOCI.

The scope of a marriage settlement made abroad is to be determined by the *lex loci contractus;* 1 Bro. P. C. 129; 2 M. & K. 513; where not repugnant to the *lex rei sitæ;* 31 E. L. & Eq. 443; 4 Bosw. 266.

When the contract for marriage is to be executed elsewhere, the place of execution becomes the *locus contractus;* 23 E. L. & Eq. 288.

Movables in general. Personal property follows the owner; and hence its disposition and transfer are to be determined by the law of his domicil; 2 Kent, 428. See DOMICIL.

PARTICULAR PERSONAL RELATIONS.

Executors and *administrators* have no power to sue or be sued by virtue of a foreign appointment as such; Westl. Priv. Int. Law, 279; 2 Jones, Eq. 276; 10 Rich. 393; L. R. 5 Ch. App. 315; 1 Woolw. 383; 110 Mass. 369; 61 Penn. 478; 3 W. Va. 154; 55 Ga. 253; 54 Mo. 408. It seems to be otherwise where a foreign executor has brought assets into the state; 18 B. Monr. 582; 1 Bradf. Surr. 241; and see 16 Ark. 28; 15 La. An. 243; and is otherwise by statute in Ohio; 5 McLean, 4; and in Pennsylvania as to stocks and bonds of corporations of that state; 87 Penn. 139.

In the United States, however, payment to such executor will be a discharge, it seems; 7 Johns. Ch. 49; 18 How. 104; *contra*, 3 Sneed, 55; otherwise in England; Dy. 305; 3 Kebl. 163; 1 M. & G. 159; 3 Q. B. 493. But see Westl. Priv. Int. Law, 272.

And an executor who has so changed his situation towards the action as to render it his own may sue in a foreign court; Westl. Priv. Int. Law, 286; 1 Hare, 84; 4 Beav. 506.

Administration must be taken out in the *situs* (place of situation) of the property; 12 Wheat. 109; 20 Johns. 229; 1 Mas. 381; 1 Bradf. Surr. 69.

But, in general, administration is granted as of course to the executor or administrator entitled under the *lex domicilii* (but not it seems to a minor; 1 Sw. & T. 253; or a creditor; Ambl. 416). In such cases the probate granted in the place of domicil is the principal, that in the *situs* is ancillary; 3 Bradf. Surr. 233; L. R. 2 P. & M. 89; 1 Woolw. 383; 10 Gray, 162; 10 H. L. Cas. 1; 3 Rawle, 312; 61 Penn. 478; 21 Conn. 577. There is no legal privity between them; 35 N. H. 484.

All property of the decedent which is in the jurisdiction of the court granting principal or ancillary administration, or which comes into it if not already taken possession of

under a grant of administration, comes under its operation; 3 Paige, Ch. 459.

Ships and cargoes and the proceeds thereof complete their voyages and return to the home port; Story, Confl. Laws, § 520; 45 Ill. 382; 1 Strobh. 25.

The property in each jurisdiction is held liable for debts due in that jurisdiction, and the surplus is to be remitted to the principal administrator for distribution under the *lex domicilii;* 8 Cl. & F. 1; L. R. 4 Ch. App. 735; 88 Penn. 131; but whether the court of the ancillary jurisdiction will decree a distribution or remit the property to the domiciliary jurisdiction, has been held to be a matter of judicial discretion; 53 N. Y. 192; 52 Ala. 124. See 57 Miss. 566; 24 Beav. 100; 3 Pick. 145; 3 Bradf. Surr. 233; 21 Conn. 577. See DOMICIL.

In case of insolvency, it is said the assets would be retained for an equitable distribution among the creditors here of an amount proportioned to the whole amount of assets and claims; 3 Pick. 147; but this rule has been doubted; Whart. Confl. Laws, § 623.

Each administrator must give priority to claims according to the law of his jurisdiction; Story, Confl. Laws, § 524; 5 Pet. 518; 20 Johns. 265.

But a transmission of effects or their proceeds to another jurisdiction does not devest a creditor's precedence; 7 L. J. Ch. 135; Westl. Priv. Int. Law, 293.

Guardians have no power over the property, whether real or personal, of their wards, by virtue of a foreign appointment; 4 Cow. 52; 1 Johns. Ch. 153; they must have the sanction of the appropriate local tribunal; 6 Blatch. 537; 9 Wal. 394; 4 Allen, 321; Whart. Confl. Laws, §§ 260, 265; L. R. 2 Eq. 74. As to the relations of foreign and domestic guardians, see 14 B. Monr. 544.

As to the power of a guardian over the domicil of his ward, see DOMICIL.

Receivers in equity have no extra-territorial powers by virtue of their appointment; 17 How. 322; 52 Mo. 17; 25 N. Y. 577; but see 3 Biss. 513. A receiver appointed for an insolvent corporation in one state has no title to its property in another state; 52 Tex. 396; 28 Conn. 274.

Sureties come under the general rules, and their contracts are governed by the *lex loci;* but in the case of a bond with sureties, given to the government by a navy agent for the faithful performance of his duties, the liability of the sureties is governed by the common law, as the accountability of the principal was at Washington, the seat of government; 6 Pet. 172 (the case coming up from Louisiana). See 7 Pet. 435.

JUDGMENTS AND DECREES OF FOREIGN COURTS relating to immovable property within their jurisdiction are held binding everywhere. And the rule is the same with regard to movables actually within their jurisdiction; Story, Confl. Laws, § 592; 79 Penn. 354; 23 Wall. 458; 2 C. & P. 155. See 95 U. S. 714.

Thus, *admiralty* proceedings *in rem* are held conclusive everywhere if the court had a rightful jurisdiction founded on actual possession of the subject-matter; 4 Cra. 241, 293, 433; 7 *id.* 423; 9 *id.* 126; 4 Johns. 34; 3 Sumn. 600; 1 Stor. 157; 1 Johns. Cas. 341; 1 H. & J. 142; 1 Binn. 299; 3 *id.* 220; 6 Mass. 277; 7 *id.* 275; L. R. 5 Q. B. 599; 1 Low. 253; 10 Nev. 47.

But such decree may be avoided for matter apparently erroneous on the face of the record; 7 Term, 523; 8 *id.* 444; 1 Caines, Cas. 21; or if there be an ambiguity as to grounds of condemnation; 7 Bingh. 495; 1 Greenl. Ev. § 541, n.; 14 Cow. 520, n. 3; 2 Kent, 120.

Proceedings under the garnishee process are held proceedings *in rem;* and a decree may be pleaded in bar of an action against the trustee or garnishee; 1 Greenl. Ev. § 542; 4 Cow. 520, n. But the court must have rightful jurisdiction over the *res* to make the judgment binding; and then it will be effectual only as to the *res*, unless the court had actual jurisdiction over the person also; 31 Me. 314; 7 B. Monr. 376; 9 Mass. 498; Story, Confl. Laws, § 592; Greenl. Ev. § 542; 10 Nev. 47; 95 U. S. 714.

Foreign judgments are admitted as conclusive evidence of all matters directly involved in the case decided, where the same question is brought up incidentally; 1 Greenl. Ev. § 547, and note; 12 Pick. 572; 7 Bost. L. Rep. 461.

It seems to be the better opinion that judgments *in personam* regular on their face, which are sought to be enforced in another country, are conclusive evidence, subject to a re-examination, in the courts where the new action is brought, only for irregularity, fraud, or lack of jurisdiction as to the cause or parties; 1 Greenl. Ev. § 546; Westl. Priv. Int. Law, 372; Story, Confl. Laws, § 607; 2 Swanst. 325; Dougl. 6, n.; 3 Sim. 458; 6 Q. B. 288; 16 *id.* 717; 4 Munf. 241; 15 N. H. 227; that they are *primâ facie* evidence merely; see 2 H. Blackst. 410; Dougl. 1, 6; 3 Maule & S. 20; 9 Mass. 462; 8 *id.* 273.

Any foreign judgment may be impeached for error apparent on its face; 21 B. & Ad. 757; 1 Greenl. Ev. § 547, n.

Under the United States coustitution, "full force and effect" are to be given the decrees of the courts of any state in those of all other states. See JUDGMENT.

The constitution and rules of comity apply only to civil judgments, and not to criminal decisions; 17 Mass. 515.

ASSIGNMENTS AND TRANSFERS.—Voluntary assignments of personal property, valid where made, will transfer property everywhere; 15 N. Y. 320; 4 N. J. 162, 270; 17 Penn. 91; not as against citizens of the state of the *situs* attaching prior to the assignees' obtaining possession; 13 Mass. 146; 6 Pick. 97; 5 Harring. 31. Otherwise, by 12 Md. 54; 4 N. J. 162.

An involuntary assignment by operation of law as under bankrupt or insolvent laws will not avail as against attaching creditors in the place of situation of the property; 20 Johns. 229; 5 N. Y. 320; 4 Zabr. 162, 270; 6 Pick. 286, 302; 2 Hayw. 24; 4 M'Cord, 519; 5 N. H. 213; 14 Mart. La. 93; 6 Binn. 353; 5 Cra. 289; 5 Me. 245; 1 Harr. & McH. 236; 19 N. Y. 207; 32 Miss. 246.

It may be a question whether the same rule would hold if the assignees had obtained possession; Dougl. 161. An assignment by operation of law is good so as to vest property in the assignees by comity of nations; 6 M. & S. 126; 1 East, 6; 20 Johns. 262; 6 Binn. 363; 3 Mass. 517.

In England it is firmly settled that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England, and that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment; but this rule does not prevail in the United States, either as regards a foreign assignee or an assignee under the laws of another state in the Union; Story, Confl. Laws, § 409; 17 How. 322.

The assignment by marriage is held valid; Story, Confl. Laws, § 423. See DOMICIL.

Discharges by the *lex loci contractus* are valid everywhere; 4 Bosw. 459; 7 Cush. 15; 40 Me. 204. This rule is restricted in the United States by the clause in the constitution forbidding the passage of any law impairing the obligation of contracts.

Under this provision, it is held that a state insolvent or bankrupt law may not have any extra-territorial effect to discharge the debtor; 5 How. 307; 7 N. Y. 500. See LEX FORI. It may, however, take away the remedy for non-performance of the contract in the *locus contractus*, on contracts made subsequently.

Foreign laws have, as such, no extra-territorial force, but have an effect by comity. See LEX LOCI CONTRACTUS. Until the fact is shown, they will be assumed to be the same as those of the *forum;* 1 Harr. & J. 687. See LEX FORI.

A person claiming title under a foreign corporation is chargeable with knowledge of its chartered powers and restrictions; 19 N. Y. 207.

FOREIGN LAWS must be proved as matters of fact; 4 Mood. Parl. Cas. 21; 1 D. & L. 614; 1 Tex. 434; 9 Humphr. 546; 2 Barb. Ch. 582; 19 Vt. 182; 9 Mo. 3; *written laws*, by the text, or a collection printed by authority, or a copy certified by a proper officer, or, in their absence, perhaps, by opinion of experts as secondary evidence; Story, Confl. Laws, § 641; 1 Greenl. Ev. § 486; 14 How. 426; 2 Cra. 237; 8 Ad. & E. 208; 1 Campb. 65; 6 Wend. 475; 10 Ala. N. S. 885; 1 Tex. 93; 10 Ark. 516; they may be construed with the aid of text-books as well as of experts; 2 Low. 142; where experts are called, the sanction of an oath is said to be required; 4 Conn. 517; 12 *id.* 384; see 12 Vt. 396; Story, Confl. Laws, § 641; 1 Greenl. Ev. § 488, note. As to the manner of proving *unwritten* laws of foreign countries, the decisions show a divergence of opinion; the rule, as laid down by Lowell, J., in the case of The Pashawick, 2 Low. 142, where the reasoning of Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 54, is cited with approval, is, that the unwritten law of *England* may be proved in the United States courts not by experts only, but also by text-writers of authority, and by the printed reports of adjudged cases. But in respect to the laws of other foreign countries, where a system obtains wholly different from our own, the rigid proof by the testimony of experts alone should be insisted on. See 11 Cl. & F. 85; 14 E. L. & Eq. 249; 4 Cow. 508, n.; 1 Wall., Jr., C. C. 47; 4 Johns. Ch. 507; as to who can prove such laws; 48 N. H. 176 (it need not be a lawyer); 74 Ill. 197.

CONFRONTATION. In Practice. The act by which a witness is brought into the presence of the accused, so that the latter may object to him, if he can, and the former may know and identify the accused and maintain the truth in his presence. In criminal cases no man can be a witness unless confronted with the accused, except by consent.

CONFUSIO (Lat. *confundere*). **In Civil Law.** A pouring together of liquids; a melting of metals; a blending together of an inseparable compound.

It is distinguished from *commixtion* by the fact that in the latter case a separation may be made, while in a case of *confusio* there cannot be. 2 Bla. Com. 405.

CONFUSION OF GOODS. Such a mixture of the goods of two or more persons that they cannot be distinguished.

When this takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares; 6 Hill, 425. Where it is caused by the wilful act of one party without the other's consent, the one causing the mixture must separate them at his own peril; 30 Me. 237, 295; 19 Ohio, 337; 9 Barb. 630; 3 Kent, 365; and must bear the whole loss; 2 Blackf. 377; 3 Ind. 306; 2 Johns. Ch. 62; 11 Metc. 493; 30 Me. 237; otherwise, it is said, if the confusion is the result of negligence merely, or accident; 20 Vt. 333. The rule extends no further than necessity requires; 2 Campb. 575; 1 Vt. 286; 24 Penn. 246.

CONFUSION OF RIGHTS. A union of the qualities of debtor and creditor in the same person. The effect of such a union is, generally, to extinguish the debt; 1 Salk. 306; Cro. Car. 551; 1 Ld. Raym. 515. See 5 Term, 381; Comyns, Dig. *Baron et Feme* (D).

CONGE. In French Law. A clearance. A species of passport or permission to navigate.

CONGE D'ACCORDER (Fr. leave to accord). A phrase used in the process of levying a fine. Upon the delivery of the original writ, one of the parties immediately asked for a *congé d'accorder*, or leave to agree with the plaintiff. Termes de la Ley; Cowel. See LICENTIA CONCORDANDI; 2 Bla. Com. 350.

CONGE D'EMPARLER (Fr. leave to imparl). The privilege of an imparlance (*licentia loquendi*). 3 Bla. Com. 299.

CONGE D'ESLIRE (Fr.). The king's permission royal to a dean and chapter in time of vacation to choose a bishop, or to an abbey or priory of his own foundation to choose the abbot or prior.

Originally, the king had free appointment of all ecclesiastical dignities whensoever they chanced to be void. Afterwards he made the election over to others, under certain forms and conditions: as, that at every vacation they should ask of the king *congé d'eslire;* Cowel; Termes de la Ley; 1 Bla. Com. 379, 382. The permission to elect is a mere form; the choice is practically made by the crown.

CONGEABLE (Fr. *congé*, permission, leave). Lawful, or lawfully done, or done with permission: as, entry congeable, and the like. Littleton, § 279.

CONGREGATION. A society of a number of persons who compose an ecclesiastical body.

In the ecclesiastical law, this term is used to designate certain bureaus at Rome, where ecclesiastical matters are attended to.

In the United States, by congregation is meant the members of a particular church who meet in one place to worship. See 2 Russ. 120.

CONGRESS. An assembly of deputies convened from different governments to treat of peace or of other international affairs.

The name of the legislative body of the United States, composed of the senate and house of representatives (*q. v.*). U. S. Const. art. 1, sec. 1.

2. Each house of congress is made the judge of the election, returns, and qualifications of its own members. Art. 1, s. 5. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members in such manner and under such penalties as each may provide. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. Each house is bound to keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy, and to enter the yeas and nays on the journal, on any question, at the desire of one-fifth of the members present. Art. 1, s. 5.

3. The members of both houses are in all cases, except treason, felony, and breach of the peace, privileged from arrest during their attendance at the session of their respective houses and in going to and returning from the same; and no member can be questioned in any other place for any speech or debate in either house. U. S. Const. art. 1, s. 6.

Each house of congress claims and exercises the power to punish contempts of its mandates lawfully issued, and also to punish breaches of its privileges. This power rests upon no express law, but is claimed as of necessity, on the ground that all public functionaries are essentially invested with the powers of self-preservation, and that whenever authorities are given, the means of carrying them into execution are given by necessary implication. Jefferson, Manual, § 3, art. *Privilege;* Duane's Case, Senate Proceedings, Gales and Seaton's Annals of Cong., 6th Congress, pp. 122–124, 184, and Index; Wolcott's Case, Journal Hou. Reps. 1st Sess. 35th Congress, pp. 371–374, 386–389, 535–539; Irwin's Case, 2d Sess. 43d Congress, Index; Kilbourn's Case, 103 U. S. 138, where it was held that although the house can punish its own members for disorderly conduct or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may when the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness,—there is not found in the constitution any general power vested in either house to punish for contempt. The order of the house ordering the imprisonment of a witness for refusing to answer certain questions put to him by the house, concerning the business of a real estate partnership of which he was a member, and to produce certain books in relation thereto, was held void and no defence on the part of the sergeant-at-arms in an action by the witness for false imprisonment. The members of the committee, who took no actual part in the imprisonment, were held not liable to such action. The cases in which the power has been exercised are numerous. See Barclay, Dig. Rules of Hou. Reps. U. S. tit. *Privilege.* This power, however, extends no further than imprisonment; and that will continue no further than the duration of the power that imprisons. The imprisonment will therefore terminate with the adjournment or dissolution of congress.

4. The rules of proceeding in each house are substantially the same: the house of representatives choose their own speaker; the vice-president of the United States is, *ex officio*, president of the senate. For rules of proceeding and forms observed in passing laws, see Barclay's Dig.

5. When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on its journal and proceeds to reconsider it. If, after such reconsideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two-thirds of that house, it becomes a law. But in all such cases the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return; in which case it shall not be a law. See Kent, Lect. XI.

The house of representatives has the exclusive right of originating bills for raising revenue; and

this is the only privilege that house enjoys in its legislative character which is not shared equally with the other; and even those bills are amendable by the senate in its discretion. Art. 1. s. 7.

One of the houses cannot adjourn, during the session of congress, for more than three days without the consent of the other; nor to any other place than that in which the two houses shall be sitting. Art. 1, s. 5.

All the legislative powers granted by the constitution of the United States are vested in the congress. These powers are enumerated in art. 1, s. 8, as follows: To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states and with the Indians; to establish a uniform rule of naturalization and uniform laws of bankruptcy throughout the United States; to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures; to provide for the punishment of counterfeiting the securities and current coin of the United States; to establish post-offices and post-roads; to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; to constitute tribunals inferior to the supreme court; to define and punish piracies and felonies on the high seas and offences against the laws of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; 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; to exercise exclusive legislation over such district as may in due form become the seat of government of the United States, and also over all forts, magazines, arsenals, dock-yards, and other needful buildings ceded and acquired for those purposes; and to make all laws necessary and proper for carrying into execution the powers vested in the Government or any Department or Officer thereof.

CONJECTIO CAUSÆ. **In Civil Law.** A statement of the case. A brief synopsis of the case given by the advocate to the judge in opening the trial. Calvinus, Lex.

CONJECTURE. A slight degree of credence, arising from evidence too weak or too remote to cause belief. 1 Mascardus, *De Prob.* quæst. 14, n. 14.

An idea or notion founded on a probability without any demonstration of its truth.

CONJOINTS. Persons married to each other. Story, Confl. Laws, § 71; Wolffius, *Droit de la Nat.* § 858.

CONJUGAL RIGHTS. Rights arising from the relation of husband and wife.

In England, a writ lies for restitution to conjugal rights in case of intentional desertion, including, perhaps, a refusal to consummate marriage, under some circumstances; but this remedy has never been adopted in the United States. Bishop, Mar. & Div. § 503 *et seq.*; 3 Bla. Com. 94.

CONJUNCTIVE. Connecting in a manner denoting union.

There are many cases in law where the conjunctive *and* is used for the disjunctive *or*, and *vice versâ*.

An obligation is conjunctive when it contains several things united by a conjunction to indicate that they are all equally the object of the matter or contract. For example, if I promise for a lawful consideration to deliver to you my copy of the Life of Washington, my Encyclopædia, and my copy of the History of the United States, I am then bound to deliver all of them, and cannot be discharged by delivering one only. There are, according to Toullier, tom. vi. n. 686, as many separate obligations as there are things to be delivered; and the obligor may discharge himself *pro tanto* by delivering either of them, or, in case of refusal, the tender will be valid. It is presumed, however, that only one action could be maintained for the whole. But if the articles in the agreement had not been enumerated, I could not, according to Toullier, deliver one in discharge of my contract without the consent of the creditor: as if, instead of enumerating the books above mentioned, I had bound myself to deliver all my books, the very books in question. See Bacon, Abr. *Conditions* (P); 1 B. & P. 242; 4 Bingh. N. C. 463; 1 Bouvier, Inst. 657.

CONJURATION (Lat. a swearing together).

A plot, bargain, or compact, made by a number of persons under oath, to do some public harm.

Personal conference with the devil or some evil spirit, to know any secret or effect any purpose.

The laws against conjuration and witchcraft were repealed in 1736, by stat. 9 Geo. II., c. 5; Mozley & W. Law Dict.

CONNECTICUT. The name of one of the original states of the United States of America.

It was not until the year 1665 that the whole territory now known as the state of Connecticut was under one colonial government. The charter was granted by Charles II. in April, 1662. Previous to that time there had been two colonies, with separate governments.

As this charter to the colony of Connecticut embraced the colony of New Haven, the latter resisted it until about January, 1665, when the two colonies, by mutual agreement, became indissolubly united. In 1687, Sir Edward Andros attempted to seize and take away the charter; but it was secreted and preserved in the famous Charter Oak at Hartford, and is now kept in the office of the secretary of state. 1 Hollister, Hist. Conn. 315. It remained in force, with a temporary suspension, as a fundamental law of the state, until the present constitution was adopted. Story, Const. 386; Comp. Stat. Conn. Rev. of 1875, iii. xlv.

The present constitution was adopted on the 15th of September, 1818.

Every (white) male citizen of the United States who has attained the age of twenty-one years, who has resided in the state for the term of one year next preceding, and in the town in which he may offer himself to be admitted to the privileges of an elector at least six months next preceding, the time he may offer himself, who sustains a

good moral character, and is able to read any article of the constitution or any section of the statutes of the state, may be admitted to the privileges of an elector. Comp. Stat. Conn. lviii.

THE LEGISLATIVE POWER.—This is vested in two distinct houses or branches, the one styled the senate, the other the house of representatives, and both together, the General Assembly.

The Senate consists of twenty-four members, one elected biennially from each of the twenty-four senatorial districts into which the state is divided.

The House of Representatives consists of two members from each town which was in existence when the constitution was adopted, unless the right to one of them has been voluntarily relinquished, and from every other town having five thousand inhabitants, and of one member from each of the towns which have been organized since the adoption of the constitution. The representatives are elected annually, on the Tuesday after the first Monday in November. The whole number in 1881 was two hundred and forty-eight.

THE EXECUTIVE POWER.—This is vested in a governor and lieutenant-governor.

The Governor is chosen biennially on the Tuesday after the first Monday in November by the electors of the state. He is to hold his office for two years from the Wednesday after the first Monday of January succeeding his election, and until his successor is duly qualified. He is captain-general of the militia of the state, except when called into the service of the United States; may require information in writing from the executive officers; may adjourn the general assembly, when the two houses disagree as to time of adjournment, not beyond the next session; must take care that the laws be faithfully executed; may grant reprieves after conviction, except in cases of impeachment, till the end of the next session of the general assembly, and no longer; may veto any bill, but must return it with his objections, and it may then be passed over his objections by a majority in both houses.

The Lieutenant-Governor is elected at the same time, in the same way, for the same term, and must possess the same qualifications, as the governor.

He is president of the senate by virtue of his office, and in case of the death, resignation, refusal to serve, or removal from office of the governor, or of his impeachment or absence from the state, the lieutenant-governor exercises all the powers and authority appertaining to the office of governor until another be chosen at the next periodical election for governor and be duly qualified, or until the governor, if impeached, shall be acquitted, or, if absent, shall return. Const. art. 4, § 14; xvi. Amendment (1875).

THE JUDICIAL POWER.—This is vested in a supreme court of errors, a superior court, and such inferior courts as the general assembly may from time to time establish.

The courts of general jurisdiction are the supreme court of errors, superior court, court of common pleas, and district courts. No person can hold a judicial office after the age of seventy.

The Supreme Court of Errors is held by five judges. The judges hold office for eight years. They are elected by the general assembly on nomination by the governor. This court has final and conclusive jurisdiction of all proceedings in error, from judgments of inferior courts, and may carry into complete execution all judgments and decrees.

The Superior Court is composed of these judges and six others, elected in the same way and for the same term. It is the principal *nisi prius* court, and has also jurisdiction of petitions for change of name.

The Court of Common Pleas exists only in New Haven, Hartford, Fairfield, and New London counties; and there are two *District Courts* having jurisdiction respectively over certain towns in Litchfield and New Haven counties. These courts are *nisi prius* courts with a limited jurisdiction, regulated mainly by the value of the amount in controversy, which can in no case exceed $1000. Legal and equitable remedies are granted in all these courts in the same proceeding, there being a code of civil practice, partly resembling that of New York.

County Commissioners, three in number in each county, are appointed annually by the general assembly. They have power to remove deputy sheriffs, enter upon county lands, levy county taxes, take care of the highways, administer the poor debtor's oath, and appoint county treasurers.

Probate Courts are held, in the districts into which the state is divided for this purpose, by judges elected biennially by the people of the district.

Justices of the Peace are elected biennially in November, by the electors of the several towns.

CONNIVANCE. An agreement or consent, indirectly given, that something unlawful shall be done by another.

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offence has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted; 3 Hagg. Eccl. 350.

Connivance differs, also, from collusion: the former is generally collusion for a particular purpose, while the latter may exist without connivance; 3 Hagg. Eccl. 130.

The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce, or of recovering damages from the seducer; 4 Term, 657. It may be satisfactorily proved by implication. See Shelford, Mar. & Div. 449; 2 Bish. Mar. & Div. § 6; 2 Hagg. Eccl. 278, 376; 3 *id.* 58, 82, 107, 119, 312; 3 Pick. 299; 2 Caines, 219.

CONNOISSEMENT. In French Law. An instrument, signed by the master of a ship or his agent, containing a description of the goods loaded on a ship, the persons who have sent them, the persons to whom they were sent, and the undertaking to transport them. A bill of lading. Guyot, *Répert. Univ.; Ord. de la Marine*, l. 3, t. 3, art. 1.

CONNUBIUM (Lat.). A lawful marriage.

CONOCIMIENTO. In Spanish Law. A bill of lading. In the Mediterranean ports it is called *poliza de cargamiento*. For the requisites of this instrument, see the Code of Commerce of Spain, arts. 799–811.

CONQUEST (Lat. *conquiro*, to seek for). **In Feudal Law.** Purchase; any means

of obtaining an estate out of the usual course of inheritance.

The estate itself so acquired.

According to Blackstone and Sir Henry Spelman, the word in its original meaning was entirely dissociated from any connection with the modern idea of military subjugation, but was used solely in the sense of purchase. It is difficult and quite profitless to attempt a decision of the question which has arisen, whether it was applied to William's acquisition of England in its original or its popular meaning. It must be allowed to offer a very reasonable explanation of the derivation of the modern signification of the word, that it was still used at that time to denote a technical *purchase*—the prevalent method of *purchase* then, and for quite a long period subsequently, being by driving off the occupant by superior strength. The operation of making a *conquest*, as illustrated by William the Conqueror, was no doubt often afterwards repeated by his followers on a smaller scale; and thus the modern signification became established. On the other hand, it would be much more difficult to derive a general signification of *purchase* from the limited modern one of military subjugation. But the whole matter must remain mainly conjectural; and it is undoubtedly going too far to say, with Burrill, that the meaning assigned by Blackstone is "demonstrated," or, with Wharton, that the same meaning is a "mere idle ingenuity." Fortunately, the question is not of the slightest importance in any respect.

In International Law. The acquisition of the sovereignty of a country by force of arms, exercised by an independent power which reduces the vanquished to the submission of its empire.

It is a general rule that, where conquered countries have laws of their own, those laws remain in force after the conquest until they are abrogated, unless contrary to religion or *mala in se*. In this case, the laws of the conqueror prevail; 1 Story, Const. § 150.

The conquest and occupation of a part of the territory of the United States by a public enemy renders such conquered territory during such occupation a foreign country with respect to the revenue laws of the United States; 4 Wheat. 246; 2 Gall. 486. The people of a conquered territory change their allegiance, but not their relations to each other; 7 Pet. 86. Conquest does not *per se* give the conqueror *plenum dominium et utile*, but a temporary right of possession and government; 2 Gall. 486; 3 Wash. C. C. 101; 8 Wheat. 591; 2 Bay, 229; 2 Dall. 1; 12 Pet. 410.

The right which the English government claimed over the territory now composing the United States was not founded on conquest, but discovery. Story, Const. § 152 *et seq.*

In Scotch Law. Purchase. Bell, Dict.; 1 Kames, 210.

CONQUETS. In French Law. The name given to every acquisition which the husband and wife, jointly or severally, make during the conjugal community. Thus, whatever is acquired by the husband and wife, either by his or her industry or good fortune, enures to the extent of one half for the benefit of the other. Merlin, Rép. *Conquêt;* Merlin, Quest. *Conquêt.* In Louisiana, these gains are called *aquets*. La. Civ. Code, art. 2369. The *conquêts* by a former marriage may not be settled on a second wife to prejudice the heirs; 2 Low. C. 175.

CONSANGUINEOUS FRATER. A brother who has the same father. 2 Bla. Com. 231.

CONSANGUINITY (Lat. *consanguis*, blood together).

The relation subsisting among all the different persons descending from the same stock or common ancestor.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root or stock, but in different branches.

Lineal consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upwards in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line.

In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree; and the rule is the same by the canon, civil, and common law.

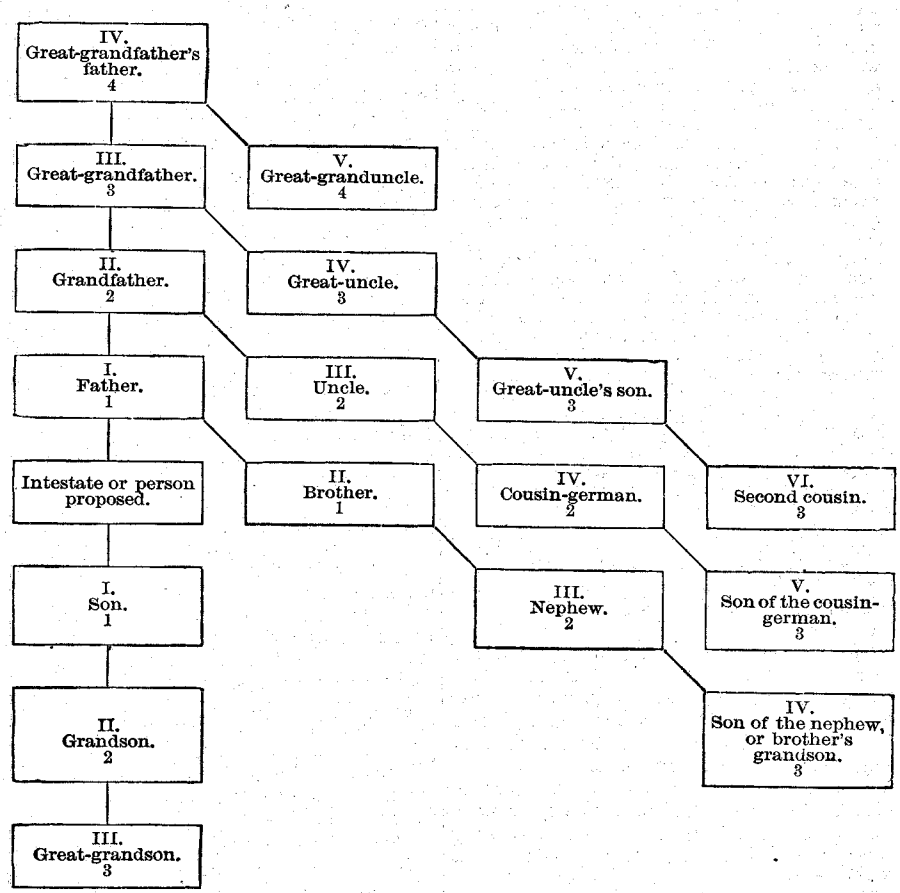
The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and the rule of computation is extended to the remotest degrees of collateral relationship.

The method of computing by the civil law is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. Thus, from a nephew to his father is one degree; to the grandfather, two degrees; and then to the uncle three; which points out the relationship.

The following table, in which the Roman numeral letters express the degrees by the civil law, and those in Arabic figures those by the common law, will fully illustrate the subject.

The mode of the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the com-

mon law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial; for both will establish the same erson to be the heir; 2 Bla. Com. 202.



CONSENSUAL CONTRACT. In Civil Law. A contract completed by the consent of the parties merely, without any further act.

The contract of sale, among the civilians, is an example of a consensual contract, because the moment there is an agreement between the seller and the buyer as to the thing and the price, the vendor and the purchaser have reciprocal actions. On the contrary, on a loan, there is no action by the lender or borrower, although there may have been consent, until the thing is delivered or the money counted; Pothier, Obl. pt. 1, c. 1, s. 1, art. 2; 1 Bell, Comm. 5th ed. 435.

CONSENT (Lat. *con*, with, together, *sentire*, to feel). A concurrence of wills.

Express consent is that directly given, either *viva voce* or in writing.

Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given.

Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Fonblanque, Eq. b. 1, c. 2, s. 1. Consent is implied in every agreement. See AGREEMENT; CONTRACT.

Where a power of sale requires that the sale should be with the consent of certain specified individuals, the fact of such consent having been given ought to be evinced in the manner pointed out by the creator of the power, or such power will not be considered as properly executed; 10 Ves. Ch. 308, 378. See further, as to the matter of consent in vesting or devesting legacies; 2 V. & B. 234; Ambl. 264; 2 Freem. 201; 1 Phill. Ch. 200; 3 Ves. Ch. 239; 12 *id.* 19; 3 Brown, Ch. 145; 1 Sim. & S. 172. As to the matter of implied consent arising from acts, see ESTOPPEL IN PAIS.

CONSENT RULE. An entry of record by the defendant, confessing the lease, entry, and ouster by the plaintiff, in an action of

ejectment. This was, until recently, used in England and in those of the United States in which the action of ejectment is still retained as a means of acquiring possession of land.

The consent rule contains the following particulars, viz.: *first*, the person appearing consents to be made defendant instead of the casual ejector; *second*, he agrees to appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail; *third*, to receive a declaration in ejectment, and to plead not guilty; *fourth*, at the trial of the case, to confess lease, entry, and ouster, and to insist upon his title only; *fifth*, that if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the cost of the *non pros.*, and suffer judgment to be entered against the casual ejector; *sixth*, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant; *seventh*, that, when the landlord appears alone, the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order; Adams, Ej. 233, 234. See, also, 2 Cow. 442; 6 *id.* 587; 4 Johns. 311; 1 Caines, Cas. 102; 12 Wend. 105.

CONSEQUENTIAL DAMAGES. Those damages or those losses which arise not from the immediate act of the party, but in consequence of such act. See DAMAGES; CASE.

CONSERVATOR (Lat. *conservare*, to preserve). A preserver; one whose business it is to attend to the enforcement of certain statutes.

A delegated umpire or standing arbitrator, chosen to compose and adjust difficulties arising between two parties. Cowel.

A guardian. So used in Connecticut. 3 Day, 472; 5 Conn. 280; 12 *id.* 376.

CONSERVATOR OF THE PEACE. He who hath an especial charge, by virtue of his office, to see that the king's peace be kept.

Before the reign of Edward III., who created justices of the peace, there were sundry persons interested to keep the peace, of whom there were two classes: one of which had the power annexed to the office which they hold; the other had it merely by itself, and were hence called wardens or conservators of the peace. Lambard, *Eirenarchia*, l. 1, c. 3. This latter sort are superseded by the modern justices of the peace. 1 Bla. Com. 349.

The judges and other similar officers of the various states, and also of the United States, are conservators of the public peace, being entitled "to hold to the security of the peace and during good behavior." 1 Sharsw. Bla. Com. 349.

CONSERVATOR TRUCIS (Lat.). An officer whose duty it was to inquire into all offences against the king's truces and safe-conducts upon the main seas out of the liberties of the Cinque Ports.

Under stat. 2 Hen. V. stat. 1, c. 6, such offences are declared to be treason, and such officers are appointed in every port, to hear and determine such cases, "according to the antient maritime law then practised in the admiral's court as may arise upon the high seas, and with two associates to determine those arising upon land." 4 Bla. Com. 69, 70.

CONSIDERATION (L. Latin, *consideratio*). The material cause which moves a contracting party to enter into a contract. 2 Bla. Com. 443.

The price, motive, or matter of inducement to a contract,—whether it be the compensation which is paid, or the inconvenience which is suffered by the party from whom it proceeds. A compensation or equivalent. A cause or occasion meritorious, requiring mutual recompense in deed or in law. Viner, Abr. *Consideration* (A).

It is defined as "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant;" Tindal, C. J., in 3 Scott, 250. See a full definition in L. R. 10 Ex. 162, and see 5 Pick. 380.

Concurrent considerations are those which arise at the same time or where the promises are simultaneous.

Continuing considerations are those which are performed only in part.

Equitable considerations are moral considerations. See 1 Pars. Contr. 431.

Executed considerations are acts done or values given at the time of making the contract; Leake, Contr. 18, 612.

Executory considerations are promises to do or give something at a future day; *ibid.*

Good considerations are those of blood, natural love or affection, and the like.

Motives of natural duty, generosity, and prudence come under this class; 2 Bla. Com. 297; 2 Johns. 52; 7 *id.* 26; 10 *id.* 293; 2 Bail. 588; 1 M'Cord, 504; 2 Leigh, 337; 20 Vt. 595; 19 Penn. 248; 1 C. & P. 401. The only purpose for which a *good* consideration may be effectual is to support a covenant to stand seized to uses; Shep. Touchst. 512. The term is sometimes used in the sense of a consideration valid in point of law; and it then includes a valuable as well as a meritorious consideration; 3 Cra. 140; 2 Aik. 601; 24 N. H. 302; 2 Madd. 430; 3 Co. 81; Ambl. 598; 1 Ed. Ch. 167. Generally, however, *good* is opposed to *valuable*.

Gratuitous considerations are those which are not founded on such a deprivation or injury to the promisee as to make the consideration valid at law; 2 Mich. 381.

Illegal considerations are agreements to do things in contravention of law.

Impossible considerations are those which cannot be performed.

Moral considerations are such as are based upon a moral duty to perform an act.

Past consideration is an act done before the contract is made, and is really by itself no consideration for a promise; Anson, Contr. 82.

Valuable considerations are those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made; Chitty, Contr. 7; Doct. & Stud. 179; 1 Selw. N. P. 39, 40; 2 Pet. 182; 5 Cra. 142, 150; 1 Litt. 183; 3 Johns. 100; 14 *id.* 466; 8 N. Y. 207; 6 Mass. 58; 2 Bibb, 30; 2 J. J. Marsh. 222; 2 N. H. 97; Wright, Ohio, 660, 5 W. & S. 427; 13 S. & R. 29; 12 Ga. 52; 24 Miss. 9; 4 Ill. 33; 5 Humphr. 19; 4 Blackf. 388; 3 C. B. 321; 4 East, 55.

"A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other;" L. R. 10 Ex. 162. See 5 Pick. 380.

A valuable consideration is usually in some way pecuniary, or convertible into money; and a very slight consideration, provided it be valuable and free from fraud, will support a contract; 2 How. 426; 1 Metc. Mass. 84; 12 Mass. 365; 12 Vt. 259; 23 *id.* 532; 29 Ala. N. S. 188; 20 Penn. 303; 22 N. H. 246; 11 Ad. & E. 983; 6 *id.* 438, 456; 16 East, 372; 9 Ves. Ch. 246; 2 Cr. & M. 623; Ambl. 18; 2 Sch. & L. 395, n. *a*. These valuable considerations are divided by the civilians into four classes, which are given, with literal translations: *Do ut des* (I give that you may give), *Facio ut facias* (I do that you may do), *Facio ut des* (I do that you may give), *Do ut facias* (I give that you may do).

Consideration is the very life and essence of a contract; and a contract or promise for which there is no consideration cannot be enforced at law: such a promise is called a *nudum pactum* (*ex nudo pacto non oritur actio*), or *nude pact;* because a *gratuitous promise* to do or pay any thing on the one side, without any compensation on the other, could only be enforced, in the Roman law, when made (or clothed) with proper words or formalities—*pactum verbis prescriptis vestitum;* 7 W. & S. 317; Plowd. 308; Smith, Lead. Cas. 456; Doctor & Stud. 2, c. 24; 3 Call, 439; 7 Conn. 57; 1 Stew. 51; 5 Mass. 301; 4 Johns. 235; 6 Yerg. 418; Cooke, 467; 6 Halst. 174; 4 Munf. 95; 11 Md. 281; 25 Miss. 66; 30 Me. 412; Brooke, Abr. *Action sur le Case*, 40; Vinnius, Com. de Inst. lib. 3, *de verborum obligationibus*, tit. 16, p. 677; Cod. lib. 7, tit. 52. This solemnity had much the force of our seal, which imports consideration, as it is said, meaning that the formality implies *consideration* in its ordinary sense, *i. e.*, deliberation, caution, and fulness of assent; 3 Bingh. 111; Term, 477; 3 Burr. 1639; 4 Md. Ch. Dec. 176; 35 Me. 260, 491; 42 *id.* 322; 25 Miss. 86.

Therefore, the consideration is generally conclusively presumed from the nature of the contract, when sealed; 11 S. & R. 107; but it seems that in some of the states by usage, and in others by statute, the want or failure of a consideration may be a good defence against an action on a sealed instrument or contract; 1 Bay, 275; 2 *id.* 11; 1 Dall. 17; 5 Binn. 232; 11 Wend. 106; 1 Blackf. 173; 3 J. J. Marsh. 473; 1 Bibb, 500; 13 Ired. 235; 8 Rich. 437.

Negotiable instruments also, as bills of exchange and promissory notes, by statute 3 & 4 Anne (adopted as common law or by re-enactment in the United States), carry with them *primâ facie* evidence of consideration; 4 Bla. Com. 445. *Vide* BILLS OF EXCHANGE, etc.

The consideration, if not expressed (when it is *primâ facie* evidence of consideration), in all parol contracts (oral or written), must be proved; this may be done by evidence *aliunde;* 2 Ala. 51; 16 *id.* 72; 21 Wend. 628; 9 Cow. 778; 3 N. Y. 335; 7 Conn. 57, 291; 13 *id.* 170; 16 Me. 394, 458; 4 Munf. 95; Cooke, 499; 4 Pick. 71; 26 Me. 397; 1 La. An. 192; 21 Vt. 292; 4 Mo. 33.

A contract upon a *good* consideration is considered merely *voluntary*, but is good both in law and equity as against the grantor himself when it has once been executed; Fonbl. Eq. b. 1, ch. 5, § 2; Chitty, Contr. 28; but void against creditors and subsequent *bonâ fide* purchasers for value; Stat. 27 Eliz. c. 4; Cowp. 705; 9 East, 59; 7 Term, 475; 10 B. & C. 606.

Moral or equitable considerations are not sufficient to support an express or implied promise. They are only sufficient as between the parties in conveyances by deed, and in transfers, not by deed, accompanied by possession; 9 Yerg. 418. These purely moral obligations are wisely left by the law to the conscience and good faith of the individual. Mr. Baron Parke says, "A mere moral consideration is *nothing;*" 9 M. & W. 501; 8 Mo. 698. It was at one time held in England that an express promise made in consequence of a previously existing moral obligation created a valid contract; per Mansfield, C. J., Cowp. 290; 5 Taunt. 36; 24 Penn. 370.

It is often said that a moral obligation is sufficient consideration; but it is a rule, that such moral obligation must have once been valuable and enforceable at law, but has ceased to be so by the operation of the statute of limitations, or by the intervention of bankruptcy for instance. The claim, in this case, remains equally strong on the conscience of the debtor.

The rule amounts only to a permission to waive certain positive rules of law as to *remedy;* 2 Bla. Com. 445; Cowp. 290; 3 B. & P. 249, n.; 2 East, 506; 3 Taunt. 312; 5 *id.* 36; Yelv. 41 *b*, n.; 2 Ex. 90; 8 Q. B. 487; 8 Mass. 127; 3 Pick. 207; 19 *id.* 429; 6 Cush. 238; 20 Ohio, 332; 5 *id.* 58; 24 Wend. 97; 24 Me. 561; 38 Penn. 306; 13

Johns. 259; 19 *id.* 147; 14 *id.* 178-378; 1 Cow. 249; 7 Conn. 57; 1 Vt. 420; 5 *id.* 173; 3 Penn. 172; 5 Binn. 33; 12 S. & R. 177; 17 *id.* 126; 14 Ark. 267; 1 Wis. 131; 21 N. H. 129; 4 Md. 476. But now by statute in England mere promise to pay a debt barred by bankruptcy or one contracted during infancy is void; Leake, Contr. 618. If the *moral duty* were once a *legal* one which could have been made available in defence, it is equally within the rule; 5 Barb. 556; 2 Sandf. 311; 25 Wend. 389; 10 B. Monr. 382; 8 Tex. 397.

An express promise to perform a previous legal obligation, without any new consideration, does not create a new obligation; 7 Dowl. 781; 4 Taunt. 602; 25 Ind. 328.

A valuable consideration only is good as against subsequent purchasers and attaching creditors; and these are always sufficient if rendered at the request, express or implied, of the promisor; Dy. 172, n.; 1 Rolle, Abr. 11, pl. 2, 3; 1 Ld. Raym. 312; 1 Wms. Saund. 264, n. (1); 3 Bingh. N. C. 710; 6 Ad. & E. 718; 3 C. & P. 36; 6 M. & W. 485; 2 Stark. 201; 2 Stra. 933; 3 Q. B. 234; Cro. Eliz. 442; F. Moore, 643; 1 M'Cord, 22.

Among valuable considerations may be mentioned these:—

In general, the waiver of any legal or equitable right at the request of another is sufficient consideration for a promise; 3 Pick. 452; 4 *id.* 97; 13 *id.* 284; 2 N. H. 97; Wright, Ohio, 660; 20 Wend. 184; 14 Johns. 466; 9 Cow. 266; 4 Ired. Eq. 207; 4 Harr. 311; 1 Salk. 171; 12 Mod. 455; 4 B. & C. 8; 5 Pet. 114; 2 Perr. & D. 477; 2 Nev. & P. 114; 7 Ad. & E. 108.

Forbearance for a certain or reasonable time to institute a suit upon a valid or doubtful claim, but not upon one utterly unfounded. This is a benefit to one party, the promisor, and an injury to the other, the promisee; 1 Rolle, Abr. 24, pl. 33; Comyns, Dig. *Action on the Case upon Assumpsit* (B, 1); 3 Chitty, Com. Law, 66; 1 Bingh. N. C. 444; L. R. 7 Ex. 235; L. R. 10 Q. B. 92; *id.* 3 Q. B. 77; *id.* 2 C. P. 196; 8 Md. 55; 4 Me. 387; 4 Johns. 237; 1 Cush. 168; 9 Penn. 147; 3 W. & S. 420; 20 Wend. 201; 13 Ill. 140; Wright, Ohio, 434; 5 Humphr. 19; 6 Leigh, 85; 1 Dougl. 188; 20 Ala. N. S. 309; 6 Ind. 528; 4 Dev. & B. 209; 21 E. L. & Eq. 199; 6 T. B. Monr. 91; 2 Rand. 442; 5 Watts, 259; 15 Ga. 321; 5 Gray, 553; 3 Md. 346; 25 Barb. 175; 9 Yerg. 436; 35 Caines, 329; 15 Me. 138; 5 B. & Ad. 117; 6 Munf. 406; 11 Vt. 483; 4 Hawks, 178; 6 Conn. 81; 1 Bulstr. 41; 2 Binn. 506; 4 Wash. C. C. 148; 1 Penn. 385; 5 Rawle, 69; 23 Vt. 235; 3 Watts, 213.

An invalid or not enforceable agreement to forbear is not a good consideration; for suit may be brought immediately after the promise is made. The forbearance must be an enforceable agreement for a reasonable time; Hardr. 5; 4 East, 455; 4 M. & W. 795; 4 Me. 387; 3 Penn. 282; 9 Vt. 233; L. R. 8 Eq 36.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a compromise or mutual submission of demands to arbitration is a highly favored consideration at law; 1 Ch. Rep. 158; 1 Atk. 3; 4 Pick. 507; 17 *id.* 470; 2 Strobh. Eq. 258; 2 Mich. 145; 1 Watts, 216; 6 *id.* 421; 2 Penn. 531; 6 Munf. 406; 1 Bibb, 168; 2 *id.* 448; 4 Hawks, 178; 1 W. & S. 456; 8 *id.* 31; 9 *id.* 69; 14 Conn. 12; 4 Metc. 270; 35 N. H. 556; 11 Vt. 483; 28 *id.* 796; 28 Miss. 56; 4 Jones, No. C. 359; 27 Me. 262; 18 Ala. 549; 21 Ala. N. S. 424; 14 Conn. 12; 2 M'Mull. 356; 4 Ill. 378; 5 Dana, 45; 21 E. L. & Eq. 199; 2 Rand. 442; 5 Watts, 259; 5 B. & Ald. 117.

The giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise; Leake, Contr. 626; 5 B. & Ald. 117; L. R. 5 Q. B. 241.

Incurring a legal liability to a third party is a valid consideration for a promise by the party at whose request the liability was incurred; L. R. 8 Eq. 134.

The assignment of a debt or chose in action (unless void by reason of maintenance) with the consent of the debtor, is a good consideration for the debtor's promise to pay the assignee. It is merely a promise to pay a debt due, and the consideration is the discharge of the debtor's liability to the assignor; 1 Sid. 212; 2 W. Blackst. 820; 4 B. & C. 525; 7 D. & R. 14; 13 Q. B. 548; 23 Vt. 532; 7 Tex. 47, 22 N. H. 185; 10 J. B. Moore, 34; 2 Bingh. 437; 1 Cr. M. & R. 430; 5 Tyrwh. 116; 4 Term, 690; 4 Taunt. 326; 22 Me. 484; 7 N. H. 549. Work and service are perhaps the most common considerations.

In the case of deposit or mandate, it seems that the bailee is bound to restore the thing bailed to its owner; Jones, Bailm.; Edw. Bailm.; Story, Bailm. 75, 76; Yelv. 50; Cro. Jac. 667; 2 Ld. Raym. 920; Doct. & Stud. 2, c. 24. Though it was once held that in these contracts there was no consideration; Yelv. 4, 128; Cro. Eliz. 883; the reverse is now usually maintained; 10 J. B. Moore, 192; 2 Bingh. 464; 2 M. & W. 143; M'Cl. & Y. 205; 6 Dowl. & R. 443; 4 B. & C. 345; 13 Ired. 39; 24 Conn. 484; 1 Perr. & D. 3; 1 Smith, Lead. Cas. 96.

In these cases there does not appear to be any benefit arising from the bailment to the promisor. The definitions of mandate and deposit exclude this. Nor does any injury at the time accrue to the promisee; the bailment is for his benefit entirely.

Trust and confidence in another are said to be the considerations which support this contract. But we think parting with the possession of a thing may be considered an injury to the promisee, for which the prospect of return was the consideration held out by the promisor.

Mutual promises made at the same time are concurrent considerations, and will support each other if both be legal and binding; Hob. 188; 1 Sid. 180; 4 Leon. 3; Cro. Eliz. 543; 6 B. & C. 255; 9 *id.* 840; 3 B. & Ad. 703; 9 Bingh. 68; Peake, 227; 3 E. L. & Eq. 420; 2 Maule & S. 205; 5 M. & W. 241; 12 How. 126; 8 Miss. 508; 17 Me. 372; 19 *id.* 74; 4 Ind. 257; 6 *id.* 252; 3 Iowa, 527; 4 Jones, No. C. 527; 7 Ohio St. 270; 3 Humphr. 19; 5 Tex. 572; 2 Hall, 405; 12 Barb. 502; 1 Caines, 45; 1 Murph. 287; 13 Ill. 140; 8 Mo. 574. Yet the promise of an infant is a consideration for the promise of an adult. The infant may avoid his contract, but the adult cannot; 9 Metc. 519; 7 Watts, 412; 5 Cow. 475; 7 *id.* 22; 1 D. Chipm. 252; 1 A. K. Marsh. 76; 2 Bail. 497; 3 Maule & S. 205; 2 Stra. 937.

Marriage is now settled to be a *valuable* consideration, though it is not convertible into money or pecuniarily valuable; 3 Cow. 537; 1 Johns. Ch. 261; Add. Penn. 276; 11 Leigh, 136; 7 Pet. 348; 6 Dana, 89; 22 Me. 374; 2 D. F. & J. 566.

Subscriptions to take shares in a chartered company are said to rest upon sufficient consideration; for the company is obliged to give the subscriber his shares, and he must pay for them; Parsons, Contr. 377; 16 Mass. 94; 8 *id.* 138; 21 N. H. 247; 34 Me. 360; 15 Barb. 249; 5 Ala. N. S. 787; 22 Me. 84; 9 Vt. 289.

On the subject of voluntary subscriptions for charitable purposes there is much confusion among the authorities; 6 Metc. 310.

The subscriptions to a common object are not usually *mutual* or really *concurrent*, and can only be held binding on grounds of public policy. See 4 N. H. 533; 6 *id.* 164; 7 *id.* 435; 5 Pick. 506; 2 Vt. 48; 9 *id.* 289; 5 Ohio, 58.

The subscription, to be binding, should be a promise to some particular person or committee; and there should be an agreement on the part of such person or committee to do something on their part: as, to provide materials or erect a building; 11 Mass. 114; 2 Pick. 579; 24 Vt. 189; 9 Barb. 202; 10 *id.* 309; 9 Gratt. 633; 42 Am. Jur. 281–283; 4 Me. 382; 2 Denio, 403; 1 N. Y. 581; 2 Cart. 555; 12 Pick. 541.

If advances were fairly authorized, and have been made on the strength of the subscriptions, it will be deemed sufficient to make them obligatory; 12 Mass. 190; 14 *id.* 172; 1 Metc. Mass. 570; 5 Pick. 228; 19 *id.* 73; 4 Ill. 198; 2 Humphr. 335; 2 Vt. 48; 5 Ohio, 58; they form a consideration for each other; 37 Penn. 210.

Illegal considerations can be no foundation for a contract. Violations of morality, decency, and policy are in contravention of common law: as, contracts to commit, conceal, or compound a crime. So, a contract for *future* illicit intercourse, or in fraud of a third party, will not be enforced. *Ex turpi contractu non oritur actio.* The illegality created by statute exists when the statute either expressly prohibits a particular thing, or affixes a penalty which implies prohibition, or implies such prohibition from its object and nature; 3 Burr. 1568; 3 Ves. Ch. 370; 11 *id.* 535; 2 Atk. 333; 1 Vern. 483; 1 Ball & B. 360; 3 Madd. Ch. 110; Chanc. Pr. 114; 1 Taunt. 136; 10 Ad. & E. 815; 10 Bingh. 107; 2 M. & W. 149; 2 Wils. 347; 2 E. L. & Eq. 113; 10 *id.* 424; 2 M. & G. 167; 6 Dana, 91; 3 Bibb, 500; 9 Vt. 23; 11 *id.* 592; 17 *id.* 105; 21 *id.* 184; 11 Wheat. 258; 22 Me. 488; 14 *id.* 404; 4 Pick. 314; 2 Miss. 18; 2 Ind. 392; 14 Mass. 322; 17 *id.* 258; 4 S. & R. 159; 1 W. & S. 181; 1 Binn. 118; 5 Penn. 452; 4 Halst. 352; 2 Sandf. 186; 4 Humphr. 199; 3 McLean, 214; 14 N. H. 294, 435; 23 *id.* 128; 29 *id.* 264; 5 Rich. 47; 3 Brev. 54. If any part of the consideration is void as against the law, it is void *in toto;* 11 Vt. 592; but *contra*, if the promise be divisible and apportionable to any part of the consideration, the promise so far as not attributable to the illegal consideration might be valid; Leake, Contr. 631; 2 M. & G. 167.

A contract founded upon an impossible consideration is void. *Lex neminem cogit ad vana aut impossibilia;* 5 Viner, Abr. 110, 111, *Condition* (C) *a*, (D) *a*; 1 Rolle, Abr. 419; Co. Litt. 206 *a*; 2 Bla. Com. 341; Shep. Touchst. 164; 3 Term, 17; 2 B. & C. 474; Leake, Contr. 719. But this impossibility must be a natural or physical impossibility; Platt, Cov. 569; 3 Chitty, Com. Law, 101; 3 B. & P. 296, n.; 6 Term, 718; 7 Ad. & E. 798; 1 Pet. C. C. 91, 221; 5 Taunt. 249; 2 Moore & S. 89; 9 Bingh. 68; but it may be otherwise when the consideration is valid at the time the contract was formed, but afterwards became impossible; Leake, Contr. 719.

An executory consideration which has totally failed, will not support a contract when the performance of the consideration forms a condition precedent to the performance of the promise; 2 Burr. 1012; 4 Ad. & E. 605; 7 C. & P. 108; 1 B. & Ad. 604; 2 C. B. 548; 1 Campb. 640, n.; 4 East, 455; 3 Johns. 458; 11 *id.* 50; 7 N. Y. 369; 2 Denio, 139; 1 Vt. 166; 7 Mass. 14; 8 *id.* 46; 10 *id.* 34; 13 *id.* 216; 1 Metc. Mass. 21; 23 Ala. N. S. 320; 1 Cons. 467; 2 Day, 437; 2 Root, 258; 4 Conn. 428; 1 N. & M'C. 210; 2 *id.* 65; 1 Ov. 438; 3 Call, 373; 26 Me. 217; 5 Humphr. 337, 496; 3 Pick. 83; 6 Cra. 53; 4 Dev. & B. 212; 15 N. H. 114; 3 Ind. 289; 7 *id.* 529; Dudl. 161.

Sometimes when the consideration partially fails, the appropriate part of the agreement may be apportioned to what remains, if the contract is capable of being severed; 4 Ad. & E. 605; 11 *id.* 10, 27; 7 C. & P. 108; 1 M. & R. 218; 3 Taunt. 53; 3 Bingh. N. C. 746; 5 *id.* 341; 8 Mees. & W. Exch. 870; 2 Cro. & M. 48, 214; 3 Tyrwh. 907; 14 Pick. 198; 6 Cush. Mass. 508; 28 N. H. 290; 2 W. & S. 235.

A past consideration will not generally be

sufficient to support a contract. It is something done before the obligor makes his promise, and, therefore, cannot be a foundation for that promise, unless it has been executed at the request (express or implied) of the promisor. Such a request plainly implies a promise of fair and reasonable compensation; 3 Bingh. N. C. 10; 6 M. & G. 153; 8 *id.* 538; 2 B. & C. 833; 6 *id.* 439; 8 Term, 308; L. R. 8 Ch. 888; *id.* 5 C. P. 65; 2 Ill. 113; 14 Johns. 378; 22 Pick. 393; 2 Metc. Mass. 180; 3 *id.* 155; 4 Mass. 574; 12 *id.* 328; 9 N. H. 195; 21 *id.* 544; 7 Me. 76, 118; 20 *id.* 275; 24 *id.* 349, 374; 27 *id.* 106; 1 Caines, 584; 7 Johns. 87; 7 Cow. 358; 2 Conn. 404; 1 Sm. L. C. note to Lampleigh *v.* Brathwaite.

As to time, considerations may be of the past, present, or future. Those which are present or future will support a contract not void for other reasons; Story, Contr. 71. When the consideration is to do a thing hereafter, and the promise has been accepted, and a promise in return founded upon it, the latter promise rests upon sufficient foundation, and is obligatory; 3 Md. 67; 17 Me. 303; 24 Wend. 285; 17 Pick. 407; 1 Speers, 368.

The adequacy of the consideration is generally immaterial; L. R. 5 Q. B. 87; S. C. 43 L. J. Q. B. 35; 8 A. & E. 745; L. R. 7 Ex. 235; excepting formerly in England before 31 & 32 Vict. c. 4, in the case of the sale of a reversionary interest. See note to Chesterfield *v.* Jannsen in 1 W. & T. Lead. Cas. See, in general, the text-books which have been cited *supra*, and Anson; Langdell; Contracts.

CONSIDERATUM EST PER CURIAM (Lat. it is considered by the court). A formula used in giving judgments.

A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that "it is decreed," or "resolved," by the court, but that "it is considered by the court," *consideratum est per curiam*, that the plaintiff recover his debt, etc. 3 Bouvier, Inst. n. 3302.

CONSIGN. To send goods to a factor or agent.

In Civil Law. To deposit in the custody of a third person a thing belonging to the debtor, for the benefit of the creditor, under the authority of a court of justice. Pothier, Obl. pt. 3, c. 1, art. 8.

The term to consign, or consignation, is derived from the Latin *consignare*, which signifies to seal; for it was formerly the practice to seal up the money thus received in a bag or box. Aso & M. Inst. b. 2, t. 11, c. 1, § 5.

Generally, the consignation is made with a public officer: it is very similar to our practice of paying money into court. See Burge, Suret.

CONSIGNATIO. See CONSIGN.

CONSIGNEE. One to whom a consignment is made.

When the goods consigned to him are his own, and they have been ordered to be sent, they are at his risk the moment the consignment is made according to his direction; and the persons employed in the transmission of the goods are his agents; 1 Livermore, Ag. 9. When the goods are not his own, if he accept the consignment, he is bound to pursue the instructions of the consignor: as, if the goods be consigned upon condition that the consignee will accept the consignor's bills, he is bound to accept them; *id.* 139; or if he is directed to insure, he must do so; *id.* 325.

It is usual in bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight: in such case the consignee or his assigns, by accepting the goods, by implication become bound to pay the freight; 29 N. Y. 436; 47 N. Y. 619; 3 Bingh. 383; 2 Parsons, Contr. 640.

CONSIGNMENT. The goods or property sent by means of a common carrier by one or more persons, called the consignors, in one place, to one or more persons, called the consignees, who are in another. The goods sent by one person to another, to be sold or disposed of by the latter for and on account of the former. The transmission of the goods.

CONSIGNOR. One who makes a consignment.

CONSILIARIUS (Lat. *consiliare*, to advise). **In Civil Law.** A counsellor, as distinguished from a pleader or advocate. An assistant judge. One who participates in the decisions. Du Cange.

CONSILIUM (called, also, *Dies Consilii*). A day appointed to hear the counsel of both parties. A case set down for argument.

It is commonly used for the day appointed for the argument of a demurrer, or errors assigned; 1 Tidd, Pr. 438; 2 *id.* 684, 1122; 1 Sellon, Pr. 336; 2 *id.* 385; 1 Archbold, Pract. 191, 246.

CONSIMILI CASU (Lat. in like case). **In Practice.** A writ of entry, framed under the provisions of the statute Westminster 2d (13 Edw. I.), c. 24, which lay for the benefit of the reversioner, where a tenant by the curtesy aliened in fee or for life.

Many other new writs were framed under the provisions of this statute; but this particular writ was known emphatically by the title here defined. The writ is now practically obsolete. See CASE; ASSUMPSIT; 3 Bla. Com. 51; 3 Bouvier, Inst. n. 3482.

CONSISTORY. In Ecclesiastical Law. An assembly of cardinals convoked by the pope.

The consistory is either public or secret. It is *public* when the pope receives princes or gives audience to ambassadors; *secret* when he fills vacant sees, proceeds to the canonization of saints, or judges and settles certain contestations submitted to him.

CONSISTORY COURT. In English Law. The courts of diocesan bishops held in their several cathedrals (before the bishop's

chancellor, or commissary, who is the judge) for the trial of all ecclesiastical causes arising within their respective dioceses, and also for granting probates and administrations. From the sentence of these courts an appeal lies to the archbishop of each province respectively. 2 Steph. Com. 230, 237; 3 *id.* 430, 431; 3 Bla. Com. 64; 1 Woodd. Lect. 145; Hallifax, An. b. 3, c. 10, n. 12.

CONSOLATO DEL MARE. A code of sea-laws, held by some to have been compiled by order of the ancient kings of Arragon; by other writers it is ascribed to Pisa; but by Pardessus and Wheaton it is ascribed to Barcelona, about the close of the fourteenth century. It has had great weight in determining the maritime law of Europe. It comprised the ancient ordinances of the Greek and Roman emperors and of the kings of France and Spain, and the laws of the Mediterranean islands and of Venice and Genoa. See ADMIRALTY; CODE. It was originally written in the Catalan dialect; and it has been translated into every language of Europe, except English. This code has been reprinted in the second volume of the Collection de Lois Maritimes antérieures au XVIII^e^ Siècle, par J. M. Pardessus, Paris, 1831;—a collection of sea-laws which is very complete. There is also a French translation by Boucher, Paris, 1808. The original printed edition was published at Barcelona, in 1494. See, also, Reddie, Hist. of Mar. Com. 171; Marvin's Leg. Bibl.; J. Duer, Ins.; 7 N. A. Rev. 330.

CONSOLIDATED FUND. In England. (Usually abbreviated to *Consols*.) A fund for the payment of the public debt.

Formerly, when a loan was made, authorized by government, a particular part of the revenue was appropriated for the payment of the interest and of the principal. This was called the fund; and every loan had its fund. In this manner the Aggregate fund originated in 1715; the South-Sea fund in 1717; the General fund in 1717; and the Sinking fund, into which the surplus of these flowed, which, although intended for the diminution of the debt, was applied to the necessities of the government. These four funds were consolidated into one in the year 1787; and this fund is the Consolidated fund.

It is wholly appropriated to the payment of certain specific charges and the interest on the sums originally lent the government by individuals, which yield an annual interest of three per cent. to the holders. The principal of the debt is to be returned only at the option of the government. All the regular permanent income of the kingdom flows into this fund.

CONSOLIDATION. In Civil Law. The union of the usufruct with the estate out of which it issues, in the same person; which happens when the usufructuary acquires the estate, or *vice versâ*. In either case the usufruct is extinct. Lec. El. Dr. Rom. 424.

It may take place in two ways: first, by the usufructuary surrendering his right to the proprietor, which in the common law is called a surrender; secondly, by the release of the proprietor of his rights to the usufructuary, which in our law is called a release.

In Ecclesiastical Law. The union of two or more benefices in one. Cowel.

In Practice. The union of two or more actions in the same declaration.

CONSOLIDATION RULE. In Practice. An order of the court requiring the plaintiff to join in one suit several causes of action against the same defendant which may be so joined consistently with the rules of pleading, but upon which he has brought distinct suits; 1 Dall. 147; 1 Yeates, 5; 4 *id.* 128; 3 S. & R. 264; 2 Archbold, Pract. 180. The matter is regulated by statute in many of the states.

An order of court, issued in some cases, restraining the plaintiff from proceeding to trial in more than one of several actions brought against different defendants but involving the same rights, and requiring the defendants also, in such actions, to abide the event of the suit which is tried.

It is in reality in this latter case a mere stay of proceedings in all the cases but one.

It is often issued where separate suits are brought against several defendants founded upon a policy of insurance; 2 Marshall, Ins. 701; Park. Ins. xlix.; see 4 Cow. 78, 85; 1 Johns. 29; 9 *id.* 262; or against several obligors in a bond; 3 Chitty, Pr. 645; 3 C. & P. 58. See 1 N. & M'C. C. 417, n.; 2 *id.* 438; 1 Ala. 77; 5 Yerg. 297; 7 Mo. 477; 2 Tayl. 200; 4 Halst. 335; 3 S. & R. 262; 19 Wend. 63.

Where two actions arose upon the same transaction, one for trespass against defendant's property, another against his person, and might have been joined, the court ordered them tried at the same time; 1 Dill. 351.

The federal courts are authorized to consolidate actions of a like nature, or relative to the same question, as they may deem reasonable; Rev. Stat. § 921.

CONSORTIUM (Lat. a union of lots or chances). A lawful marriage. Union of parties in an action.

Company; companionship.

It occurs in this last sense in the phrase *per quod consortium amisit* (by which he has lost the companionship), used when the plaintiff declares for any bodily injury done to his wife by a third person. 3 Bla. Com. 140.

CONSPIRACY (Lat. *con*, together, *spiro*, to breathe). **In Criminal Law.** A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means; 2 Mass. 337, 538; 4 Metc. Mass. 111; 4 Wend. 229; 15 N. H. 396; 5 H. & J. 317; 3 S. & R. 220; 12 Conn. 101; 11 Cl. & F. 155; 4 Mich. 414.

Lord Denman defines conspiracy as a combination for accomplishing an unlawful end, or a lawful end by unlawful means; 4 B. & Ad. 345.

The terms criminal or unlawful are used, because it is manifest that many acts are unlawful which are not punishable by indictment

or other public prosecution, and yet there is no doubt that a combination by numbers to do them is an unlawful conspiracy and punishable by indictment; 12 Conn. 101; 15 N. H. 396; 1 Mich. 216; Dearsl. 337; 11 Q. B. 245; 9 Penn. 24; 8 Rich. 72; 1 Dev. 357.

Of this character was a conspiracy to cheat by false pretences without false tokens, when a cheat by false pretences only by a single person was not a punishable offence; 11 Q. B. 245. So a combination to destroy the reputation of an individual by verbal calumny, which is not indictable; *Per Shaw*, C. J., 4 Metc. Mass. 123. So a conspiracy to induce and persuade a young female, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution; 5 W. & S. 461; 2 Den. C. Cas. 79; and to procure an unmarried girl of seventeen to become a common prostitute; 4 F. & F. 160; to procure a woman to be married by a mock ceremony, whereby she was seduced; 48 Iowa, 562. And see 5 Rand. 627; 6 Ala. N. S. 765; 2 Yeates, 114. So a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; 1 Dearsl. 337. A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; 1 F. & F. 33.

The obtaining of goods on credit by an insolvent person without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act as may be the subject of an action for conspiracy; though it would be otherwise, it seems, in the case of a purchase made without any expectation of payment; 1 Cush. 189. But the obtaining possession of goods under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use in fraud of the seller, is such a fraud or cheat as may be the subject of a charge of conspiracy; 1 Cush. Mass. 189.

A combination to go to a theatre to hiss an actor; 2 Campb. 369; 6 Term, 628; to indict for the purpose of extorting money; 4 B. & C. 329; to charge a person with being the father of a bastard child; 1 Salk. 174; to coerce journeymen to demand a higher rate of wages; 6 Term, 619; 14 Wend. 9; to charge a person with poisoning another; F. Moore, 816; to affect the price of public stocks by false rumors; 3 Maule & S. 67; to prevent competition at an auction; 6 C. & P. 239; to cheat by a fraudulent prospectus of a projected company and by false accounts; 11 Cox. Cr. Ca. 414; by false accounts between partners; L. R. 1 C. C. 274; by a mock auction; 11 Cox, Cr. Ca. 404; have each been held indictable.

Strikes of laborers to raise wages, or lockouts by employers are lawful; 10 Cox, Cr. Ca. 592; if without intimidation; 11 Cox, Cr. Ca. 325. This subject is mostly regulated by statute in England. An *action* will lie for damages for conspiracy where journeymen tailors by concerted action return all their garments unfinished to their employer; 9 Neb. 390; and for the fraudulent use of legal proceedings to injure another; 76 N. Y. 247.

In order to render the offence complete, it is not necessary that any act should be done in pursuance of the unlawful agreement entered into between the parties, or that any one should have been defrauded or injured by it. The conspiracy is the gist of the crime; 9 Co. 55; 28 L. T. N. S. 75; 2 Mass. 337, 538; 6 *id.* 74; 7 Cush. 514; 3 S. & R. 220; 8 *id.* 420; 23 Penn. 355; 4 Wend. 259; 1 Halst. 293; 3 Zabr. 33; 3 Ala. 360; 5 Harr. & J. 317. But see 10 Vt. 353.

By the laws of the United States (R. S. § 5364), a wilful and corrupt conspiracy to cast away, burn, or otherwise destroy any ship or vessel, with intent to injure any underwriter thereon, or the goods on board thereof, or any lender of money on such vessel on bottomry or respondentia, is made felony, and the offender punishable by fine not exceeding ten thousand dollars, and by imprisonment and confinement at hard labor not exceeding ten years.

Conspiracies to prevent witnesses from testifying, to impede the course of justice, to hinder citizens from voting, to prevent persons from holding office, to defraud the United States by obtaining approval of false claims, to levy war against the United States, to impede the enforcement of the laws, etc. etc., are made punishable by act of congress; R. S. Index, *Conspiracy*.

Consult Russell, Crimes, Greaves ed.; Gabbett, Cri. Law; Bish. Cri. Law; Wright, Criminal Conspiracy. See WRIT OF CONSPIRACY.

CONSPIRATORS. Persons guilty of a conspiracy.

CONSTABLE. An officer whose duty it is to keep the peace in the district which is assigned to him.

The most satisfactory derivation of the term and history of the origin of this office is that which deduces it from the French *comestable* (Lat. *comes-stabuli*), who was an officer second only to the king. He might take charge of the army, wherever it was, if the king were not present, and had the general control of every thing relating to military matters, as the marching troops, their encampment, provisioning, etc. Guyot, *Rép. Univ.*

The same extensive duties pertained to the constable of Scotland. Bell, Dict.

The duties of this officer in England seem to have been first fully defined by the stat. Westm. (13 Edw. I); and question has been frequently made whether the office existed in England before that time. 1 Bla. Com. 356. It seems, however, to be pretty certain that the office in England is of Norman origin, being introduced by William, and that subsequently the duties of the Saxon tithing-men, borsholders, etc., were added to its other functions. See Cowel; Wille. Const.; 1 Bla. Com. 356.

High constables were first ordained, according to Blackstone, by the statute of West-

minster, though they were known as efficient public officers long before that time. 1 Sharsw. Bla. Com. 356. They are to be appointed for each franchise or hundred by the leet, or, in default of such appointment, by the justices at quarter-sessions. Their first duty is that of keeping the king's peace. In addition, they are to serve warrants, return lists of jurors, and perform various other services enumerated in Coke, 4th Inst. 267; 3 Steph. Com. 47; Jacob, Law Dict. In some cities and towns in the United States there are officers called high constables, who are the principal police officers in their jurisdiction.

Petty constables are inferior officers in every town or parish, subordinate to the high constable. They perform the duties of headborough, tithing-man, or borsholder, and, in addition, their more modern duties appertaining to the keeping the peace within their town, village, or tithing.

In England, however, their duties have been much restricted by the act 5 & 6 Vict. c. 109, which deprives them of their power as conservators of the peace. 3 Stephen, Com. 47.

In the United States, generally, petty constables only are retained, their duties being generally the same as those of constables in England prior to the 5 & 6 Vict. c. 109, including a limited judicial power as conservators of the peace, a ministerial power for the service of writs, etc., and some other duties not strictly referable to either of these heads. Their immunities and indemnities are proportioned to their powers, and are quite extensive. See 1 Sharsw. Bla. Com. 356, n. They are authorized to arrest without warrant on a reasonable suspicion of felony, for offences against the peace committed in their presence, and in various other cases; 1 Chitty, Cr. Law, 20–24; 4 Sharsw. Bla. Com. 292. See ARREST.

CONSTABLE OF A CASTLE. The warden or keeper of a castle; the castellain. Stat. Westm. 1, c. 7 (3 Edw. I.); Spelman, Gloss.

The constable of Dover Castle was also warden of the Cinque Ports. There was besides a constable of the Tower, as well as other constables of castles of less note. Cowel; Lambard, Const.

CONSTABLE OF ENGLAND (called, also, *Marshal*). His office consisted in the care of the common peace of the realm in deeds of arms and matters of war. Lambard, Const. 4.

He was to regulate all matters of chivalry, tournaments, and feats of arms which were performed on horseback. 3 Steph. Com. 47. He held the court of chivalry, besides sitting in the *aula regis*. 4 Bla. Com. 92.

The office is disused in England, except on coronation-days and other such occasions of state, and was last held by Stafford, Duke of Buckingham, under Henry VIII. His title is Lord High Constable of England. 3 Steph. Com. 47; 1 Bla. Com. 355.

CONSTABLE OF SCOTLAND. An officer who was formerly entitled to command all the king's armies in the absence of the king, and to take cognizance of all crimes committed within four miles of the king's person or of parliament, the privy council, or any general convention of the states of the kingdom. The office was hereditary in the family of Errol, and was abolished by the 20 Geo. III. c. 43. Bell, Dict.; Erskine, Inst. 1. 3. 37.

CONSTABLE OF THE EXCHEQUER. An officer spoken of in the 51 Hen. III. stat. 5, cited by Cowel.

CONSTABLEWICK. The territorial jurisdiction of a constable. 5 Nev. & M. 261.

CONSTABULARIUS (Lat.). An officer of horse; an officer having charge of foot or horse; a naval commander; an officer having charge of military affairs generally. Spelman, Gloss.

The titles were very numerous, all derived, however, from *comes-stabuli*, and the duties were quite similar in all the countries where the civil law prevailed. His powers were second only to those of the king in all matters relating to the armies of the kingdom.

In England his power was early diminished and restricted to those duties which related to the preservation of the king's peace. The office is now abolished in England, except as a matter of ceremony, and in France. Guyot, *Rep. Univ.*; Cowel.

CONSTAT (Lat. it appears). A certificate by an officer that certain matters therein stated appear of record. See 1 Hayw. 410.

An exemplification under the great seal of the enrolment of letters patent. Co. Litt. 225.

A certificate which the clerk of the pipe and auditors of the exchequer make at the request of any person who intends to plead or move in the court for the discharge of any thing; and the effect of it is, the certifying what *constat* (appears) upon record touching the matter in question.

CONSTITUENT (Lat. *constituo*, to appoint). He who gives authority to another to act for him. The constituent is bound by the acts of his attorney, and the attorney is responsible to his constituent.

CONSTITUERE. In Old English Law. To establish; to appoint; to ordain.

Used in letters of attorney, and translated by constitute. Applied generally, also, to denote appointment. Reg. Orig. 172; Du Cange.

CONSTITUTED AUTHORITIES. The officers properly appointed under the constitution for the government of the people. Those powers which the constitution of each people has established to govern them, to cause their rights to be respected, and to maintain those of each of its members.

They are called *constituted*, to distinguish them from the *constituting* authority which has created or organized them, or has dele-

gated to an authority, which it has itself created, the right of establishing or regulating their movements.

CONSTITUTIO. In Civil Law. An establishment or settlement. Used of controversies settled by the parties without a trial. Calvinus, Lex.

A sum paid according to agreement. Du Cange.

An ordinance or decree having its force from the will of the emperor. Dig. 1. 4. 1, Cooper's notes.

In Old English Law. An ordinance or statute. A provision of a statute.

CONSTITUTION. The fundamental law of a state, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise.

Constitution, in the former law of the European continent, signified as much as decree,—a decree of importance, especially ecclesiastical decrees. The decrees of the Roman emperors referring to the *jus circa sacra*, contained in the Code of Justinian, have been repeatedly collected and called the Constitutions. The famous bull *Unigenitus* was usually called in France the Constitution. Comprehensive laws or decrees have been called constitutions; thus, the *Constitutio Criminalis Carolina*, which is the penal code decreed by Charles V. for Germany, the Constitutions of Clarendon (*q. v.*). In political law the word constitution came to be used more and more for the fundamentals of a government,—the laws and usages which give it its characteristic feature. We find, thus, former English writers speak of the constitution of the Turkish empire. These fundamental laws and customs appeared to our race especially important where they limited the power and action of the different branches of government; and it came thus to pass that by constitution was meant especially the fundamental law of a state in which the citizen enjoys a high degree of civil liberty; and, as it is equally necessary to guard against the power of the executive in monarchies, a period arrived—namely, the first half of the present century—when in Europe, and especially on the continent, the term constitutional government came to be used in contradistinction to absolutism.

We now mean by the term constitution, in common parlance, the fundamental law of a free country, which characterizes the organism of the country and secures the rights of the citizen and determines his main duties as a freeman. Sometimes, indeed, the word constitution has been used in recent times for what otherwise is generally called an organic law. Napoleon I. styled himself Emperor of the French by the Grace of God and the Constitutions of the Empire.

Constitutions were generally divided into written and non-written constitutions, analogous to *leges scriptæ* and *non scriptæ*. These terms do not indicate the distinguishing principle; Lieber, therefore, divides political constitutions into accumulated or cumulative constitutions and enacted constitutions. The constitution of ancient Rome and that of England belong to the first class. The latter consists of the customs, statutes, common laws, and decisions of fundamental importance. The Reform act is considered by the English a portion of the constitution as much as the trial by jury or the representative system, which have never been enacted, but correspond to what Cicero calls *leges natæ*. Our constitutions are enacted; that is to say, they were, on a certain day and by a certain authority, enacted as a fundamental law of the body politic. In many cases enacted constitutions cannot be dispensed with, and they have certain advantages which cumulative constitutions must forego; while the latter have some advantages which the former cannot obtain. It has been thought, in many periods, by modern nations, that enacted constitutions and statutory law alone are firm guarantees of rights and liberties. This error has been exposed in Lieber's Civil Liberty. Nor can enacted constitutions dispense with the "grown law" (*lex nata*). For the meaning of much that an enacted constitution establishes can only be found by the grown law on which it is founded, just as the British Bill of Rights (an enacted portion of the English constitution) rests on the common law.

Enacted constitutions may be either *octroyed*, that is, granted by the presumed full authority of the grantor, the monarch; or they may be enacted by a sovereign people prescribing high rules of action and fundamental laws for its political society, such as ours is; or they may rest on contracts between contracting parties,—for instance, between the people and a dynasty, or between several states. We cannot enter here into the interesting inquiry concerning the points on which all modern constitutions agree, and regarding which they differ,—one of the most instructive inquiries for the publicist and jurist. See Hallam's Constitutional History of England; Story on the Constitution; Sheppard's Constitutional Text-Book; Elliot's Debates on the Constitution, etc.; Lieber's article (Constitution), in the Encyclopædia Americana; Rotteck's article Constitution, in the Staats-Lexicon, 2d ed.

CONSTITUTION OF THE UNITED STATES OF AMERICA. The supreme law of the United States.

It was framed by a convention of delegates from all of the original thirteen states (except Rhode Island), which assembled at Philadelphia on the 14th of May, 1787. On September 17, 1787, by the unanimous consent of the states present, a form of constitution was agreed upon, and on September 28th was submitted to the congress of the confederation, with recommendations as to the method of its adoption by the states. In accordance with these recommendations, it was transmitted by the congress to the several state legislatures, in order to be submitted to conventions of delegates chosen in each state by the people thereof. The several states accordingly called conventions, which ratified the constitution upon the following dates: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787: Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June, 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.

Under the terms of the constitution (art. vii.), its ratification by nine states was sufficient to establish it between the states so ratifying it. Accordingly, when, on July 2, 1788, the ratification by the ninth state was read to congress, a committee was appointed to prepare an act for putting the constitution into effect; and on September 13, 1788—in accordance with the recommendations made by the convention in reporting the constitution—congress appointed days for choosing electors, etc., and resolved that the first

Wednesday in March then next (March 4, 1789) should be the time, and the then seat of congress (New York) the place, for commencing government under the new constitution. Proceedings were had in accordance with these directions, and on March 4, 1789, congress met, but, owing to the want of a quorum, the house did not organize until April 1st, nor the senate until April 6th. Washington took the oath of office on April 30th. The constitution became the law of the land on March 4, 1789. 5 Wheat. 420.

The preamble of the constitution declares that the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, do ordain and establish this constitution for the United States of America.

The first article is divided into ten sections. By the *first* the legislative power is vested in congress. The *second* regulates the formation of the house of representatives, and declares who shall be electors. The *third* provides for the organization of the senate, and bestows on it the power to try impeachments. The *fourth* directs the time of meeting of congress, and who may regulate the times, places, and manner of holding elections for senators and representatives. The *fifth* determines the power of the respective houses. The *sixth* provides for a compensation to members of congress, and for their safety from arrests, and disqualifies them from holding certain offices. The *seventh* directs the manner of passing bills. The *eighth* defines the powers vested in congress. The *ninth* contains the following provisions: 1st. That the migration or importation of certain classes of persons shall not be prohibited prior to the year 1808. 2d. That the writ of *habeas corpus* shall not be suspended, except in particular cases. 3d. That no bill of attainder or *ex post facto* law shall be passed. 4th. The manner of levying taxes. 5th. The manner of drawing money out of the treasury. 6th. That no title of nobility shall be granted. 7th. That no officer shall receive a present from a foreign government. The *tenth* forbids the respective states to exercise certain powers there enumerated.

The second article is divided into four sections. The *first* vests the executive power in the president of the United States, and (as amended) provides for his election and that of the vice-president. The *second* section confers various powers on the president. The *third* defines his duties. The *fourth* provides for the impeachment of the president, vice-president, and all civil officers of the United States.

The third article contains three sections. The *first* vests the judicial power in sundry courts, provides for the tenure of office by the judges, and for their compensation. The *second* provides for the extent of the judicial power, vests in the supreme court original jurisdiction in certain cases, and directs the manner of trying crimes. The *third* defines treason, and vests in congress the power to declare its punishment.

The fourth article is composed of four sections. The *first* relates to the faith which state records, etc., shall have in other states. The *second* secures the rights of citizens in the several states, —the delivery of fugitives from justice or from labor. The *third* provides for the admission of new states, and the government of the territories. The *fourth* guarantees to every state in the union a republican form of government, and protection from invasion or domestic violence.

The *fifth article* provides for amendments to the constitution.

The *sixth article* declares that the debts due under the confederation shall be valid against the United States; that the constitution and treaties made under its powers shall be the supreme law of the land; that public officers shall be required by oath or affirmation to support the constitution of the United States; and that no religious test shall be required as a qualification for office.

The *seventh article* directs what shall be a sufficient ratification of this constitution by the states.

In pursuance of the fifth article of the constitution, articles in addition to, and amendment of, the constitution, were proposed by congress, and ratified by the legislatures of the several states. These additional articles are to the following import (the first ten were proposed at the first session of the first congress, in accordance with the recommendations of various states in ratifying the constitution, and were adopted in 1791. The dates of the adoption of the subsequent amendments are given below):—

The *first* relates to religious freedom; the liberty of the press; and the right of the people to assemble and to petition for redress of grievances.

The *second* secures to the people the right to bear arms.

The *third* prohibits the quartering of soldiers except in the manner therein specified.

The *fourth* regulates the right of search, and the manner of arrest on criminal charges.

The *fifth* directs the manner of being held to answer for crimes, and provides for the security of the life, liberty, and property of the citizens.

The *sixth* secures to the accused the right to a fair trial by jury.

The *seventh* provides for a trial by jury in civil cases.

The *eighth* directs that excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The *ninth* secures to the people the rights retained by them.

The *tenth* secures to the states respectively, or to the people, the rights they have not granted.

The *eleventh* (1798) limits the powers of the federal courts as to suits against one of the United States.

The *twelfth* (1804) provides for the mode of electing president and vice-president.

The *thirteenth* (1865) abolishes slavery and involuntary servitude, except as a punishment for crimes.

The *fourteenth* (1868) is composed of five sections. The first defines citizenship and limits the power of the states over citizens of the United States. The second regulates representation; the third disqualification. The fourth provides for the validity of the public debt, and prohibits the United States or any state from assuming certain debts. The fifth gives congress power to enforce this article.

The *fifteenth* (1870) contains certain regulations as to the elective franchise, and gives congress power to enforce this article.

CONSTITUTIONAL. That which is consonant to, and agrees with, the constitution.

Laws made in violation of the constitution are null and void, and it is now well established that it is the function of the courts so to declare them in any case coming before the court, which involves the question of their constitutionality. The presumption is always in favor of the constitutionality of a law, and the party alleging the opposite must clearly

establish it. A part of a law may be unconstitutional, while there is no such objection to the remaining parts, and in this case all of the law stands, except that part which is unconstitutional. This power of the courts to declare a law unconstitutional can only exist where there is a written constitution. No such power is possessed by the English courts, and an act of parliament is absolutely conclusive and binds everybody when once its meaning is ascertained. But, where a written constitution exists, it is the expression of the will of the sovereign power, and no body which owes its existence to that constitution (as does the legislature) can violate this fundamental expression of the will of the people. It was originally much doubted whether the courts possessed this power, even where a written constitution exists, but it is now established beyond doubt. The question may arise with regard to both state and United States laws considered with reference to the United States constitution, and with regard to state laws also as considered in reference to the state.

Certain fundamental principles govern the courts in passing upon the validity of legislative acts under the constitution; among them are the following:—

It is not usual as a *matter of practice* for courts to pass upon constitutional questions excepting before a full bench; 1 Pet. 118.

It has been said that inferior courts will not pass upon these questions; 4 Mich. 291; but see, *contra*, Cooley, Const. Lim. 198, n.; 1 Kan. 116.

Courts will not draw into consideration constitutional questions collaterally, or unless the consideration is necessary to the determination of the very point in controversy; 9 Ind. 287; 50 Ala. 277; 24 Barb. 446; 5 Tex. App. 579.

To justify a court in declaring an act unconstitutional, the case must be so clear that no reasonable doubt can be said to exist; 41 Mo. 63; 17 Abb. Pr. 45; 33 Ark. 17; 16 Pick. 95; 57 N. Y. 473; 52 Penn. 477; 44 Ga. 76; 48 Mo. 468.

The courts cannot pronounce void an act within the general scope of legislative powers, merely because contrary to natural justice; 2 Rawle, 74; 73 Penn. 370; 4 Nev. 178; 60 Ill. 86; 94 U. S. 113; 52 Miss. 52; nor because they violate fundamental principles of republican government, unless these principles are protected by the constitution; 5 Wall. 469; 56 N. H. 514; nor because they are supposed to conflict with the *spirit* of the constitution; 24 Wend. 220. Any legislative act which does not encroach upon the powers vested in the other departments of the government must be enforced by the courts; 62 Ill. 260; 5 W. Va. 22; 6 Cra. 128.

It has, however, been held that statutes against plain and obvious principles of common right and common reason are void; 1 Bay, 98. It is not necessary that the courts, before they can set aside a law as unconstitutional, should find some *specific* prohibition which has been disregarded, or some *specific* command which has not been obeyed; Cooley, Const. Lim. 210. Mr. C. A. Kent, in an article in 11 Am. L. Reg. N. S. 734, says on this subject: "The judiciary of a state cannot declare a legislative act unconstitutional, unless it conflict, expressly or by implication, with some provision of the state or of the federal constitution." Judge Cooley, in the preface to the second edition of his very learned and valuable work on constitutional limitations, says: "There are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restraints which the people impose by their state constitutions." The same view is maintained by Judge Redfield in an article in 10 Am. L. Reg. N. S. 161.

In the consideration of these questions, the distinction between the federal and state constitutions must be borne in mind: "Congress can pass no laws but such as the constitution authorizes expressly or by clear implication; while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited." Cooley, Const. Lim. 210; see 24 N. Y. 427; 52 Penn. 477.

An act may be declared partly valid and partly void as unconstitutional; 24 Pick. 361; 2 Pet. 526; 41 Md. 446.

An act adjudged to be unconstitutional is as if it had never been enacted; 5 Ind. 348; 50 *id.* 341; 34 Mich. 170; 6 McLean, 142; 54 N. Y. 528; though it was held in 86 Penn. 436, that an officer acting under an unconstitutional law was a *de facto* officer. An unconstitutional law must be deemed to have the force of law so far as to protect an officer acting under it, until it is declared void; 34 Tex. 335. If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is considered to have been in force during the whole period since its enactment; 46 Ind. 86; but see 33 Penn. 495; 5 Phila. 180; 9 Am. L. Rev. 402.

See 11 Am. L. Reg. N. S. 730; 9 *id.* 585.

CONSTITUTOR. **In Civil Law.** He who promised by a simple pact to pay the debt of another; and this is always a principal obligation. Inst. 4, 6. 9.

CONSTITUTUM (Lat.). An agreement to pay a subsisting debt which exists without any stipulation, whether of the promisor or another party. It differs from a stipulation in that it must be for an existing debt. Du Cange.

A day appointed for any purpose. A form of appeal; Calvinus, Lex.

CONSTRAINT. **In Scotch Law.** Duress.

It is a general rule, that when one is compelled into a contract there is no effectual consent, though, ostensibly, there is the form of it. In such case the contract will be declared void. The constraint requisite thus to annul a contract must be a *vis aut metus qui cadet*

in constantem virum (such as would shake a man of firmness and resolution); Erskine, Inst. 3. 1. 16; 4. 1. 26; 1 Bell, Com. b. 3, pt. 1, c. 1, s. 1, art. 1, page 295.

CONSTRUCTION (Lat. *construere*, to put together).

In Practice. Determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.

Drawing conclusions respecting subjects that lie beyond the direct expressions of the term; Lieber, Leg. & Pol. Herm. 20.

Construction and interpretation are generally used by writers on legal subjects, and by the courts, as synonymous, sometimes one term being employed and sometimes the other. Lieber, in his Legal and Political Hermeneutics, distinguishes between the two, considering the province of interpretation as limited to the written text, while construction goes beyond, and includes cases where texts interpreted and to be construed are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for; C. 1, § 8; c. 3, § 2; c. 4; c. 5. This distinction needs no higher authority for its accuracy; but it is convenient to adopt the common usage, and consider some common rules and examples on these subjects, without attempting to distinguish exactly cases of construction from those of interpretation.

A *strict* construction is one which limits the application of the provisions of the instrument or agreement to cases clearly described by the words used. It is called, also, literal.

A *liberal* construction is one by which the letter is enlarged or restrained so as more effectually to accomplish the end in view. It is called, also, equitable.

The terms *strict* and *liberal* are applied mainly in the construction of statutes; and the question of strictness or liberality is considered always with reference to the statute itself, according to whether its application is confined to those cases clearly within the legitimate import of the words used, or is extended beyond though not in violation of (*ultra sed non contra*) the strict letter. In contracts, a strict construction as to one party would be liberal as to the other.

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing upon any law of superior binding force.

In regard to cases where this intention is clearly expressed, there is little room for variety of construction; and it is mainly in cases where the intention is indistinctly disclosed, though fairly presumed to exist in the minds of the parties, that any liberty of construction exists.

Words, if of common use, are to be taken in their natural, plain, obvious, and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appear in either case, from the context.

All instruments and agreements are to be so construed as to give effect to the whole or as large a portion as possible of the instrument or agreement.

Statutes, if penal, are to be strictly, and, if remedial, liberally construed; Dwarris, Stat. 246 *et seq.*; but the rule that penal statutes are to be strictly construed, is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature; 6 Wall. 386. The apparent object of the legislature is to be sought for as disclosed by the act itself, the preamble in some cases, similar statutes relating to the same subject, the consideration of the mischiefs of the old law, and perhaps some other circumstances; Wilberforce, Stat. Law, 99.

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly; 2 Black, 358.

In construing statutes of the various states or of foreign countries, the supreme court of the United States adopts the construction put upon them by the courts of the state or country by whose legislature the statute was enacted; 92 U. S. 289; but this does not necessarily include subsequent variations of construction by such courts; 5 Pet. 280. If different interpretations are given in different states to a similar law, that law, in effect, becomes by the interpretations, so far as it is a rule for action by this court, a different law in one state from what it is in the other; 4 Wall. 196. So also in state courts the decisions of the tribunals of other states interpreting legislative enactments are considered as if incorporated therein; 44 N. Y. Sup. Ct. 260. See COURTS OF UNITED STATES.

In contracts, words may be understood in a technical or peculiar sense when such meaning has been stamped upon them by the usage of the trade or place in which the contract occurs. When words are manifestly inconsistent with the declared purpose and object of the contract, they may be rejected; 2 Atk. 32. When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context. When words admit of two senses, that which gives effect to the design of the parties is preferred to that which destroys it; Cowp. 714.

If a contract when made was valid by the laws of the state, as then expounded by all departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired (in the Federal courts) by any subsequent act of the legislature of the state, or decision of its courts altering the construction of the law; 16 How. 432; 1 Wall. 175; 9 Am. Law Rev. 381.

Usages of the trade or place of making the contract are presumed to be incorporated, unless a contrary stipulation occurs. See LEX LOCI.

Numerous other rules for construction exist, for which reference may be had to the following authorities:—

As to the construction of statutes; 1 Kent, 460; Bacon, Abr. *Statutes*, J; Dwarris, Statutes; 1 Bouvier, Inst. nn. 86–90; Sedgwick, Stat. and Const. Law; Lieber, Legal and Polit. Hermeneutics; Cooley, Const. Lim.; Wilberforce, Stat. Law.

As to the construction of contracts, Comyns, Chitty, Parsons, Powell, Story, on Contracts; 2 Blackstone, Comm. 379; 1 Bell, Comm. 5th ed. 431; 4 Kent, Comm. 419; Vattel, b. 2, c. 17; Story, Const. §§ 593–456; Pothier, Obligations; Long, Story, on Sales; 1 Bouvier, Inst. nn. 658, 699.

As to the construction of wills, Bythewood, Jarman, Wigram, on Wills; 6 Cruise, Dig. 171; 2 Fonblanque, Eq. 309; Roper, Legacies; Washburn, Real Property.

For a list of words and phrases, and the definition or construction thereof, see WORDS.

CONSTRUCTION OF POLICY. In Insurance. This is liberal, according to the maxim, *ut res magis valeat quam pereat.* A contract embracing so many interests and parties, and liable to be affected by so many events, cannot but present difficulties of construction; 1 Binn. 98; 32 Penn. 351; 14 Barb. 383; 13 Du. N. Y. 89; 13 B. Monr. 311; 11 Ind. 171; 5 R. I. 38, 426; 27 Ala. N. S. 77; 37 Me. 137; 9 Cush. 479; 2 Gray, 297; 7 *id.* 261; 29 N. H. 132; 4 Zabr. N. J. 447; 22 Mo. 82; 18 Ill. 553; 8 Ohio, St. 458; 22 Conn. 235; 2 Curt. C. C. 322; 29 E. L. & Eq. 111; 33 *id.* 514. On marine insurance, see 4 Cliff. C. Ct. 200; 15 Blatchf. C. Ct. 58; 126 Mass. 70; 78 N. Y. 7; *id.* 400; 19 Hun (N. Y.), 284. Fire, 126 Mass. 389; 18 Hun (N. Y.), 98; 89 Pa. St. 497; 51 Iowa, 553. Life; 127 Mass. 153; 78 N. Y. 114; s. c. 7 Abb. (N. Y.) M. Cas. 198; 31 La. An. 235.

CONSTRUCTIVE. That which amounts in the view of the law to an act, although the act itself is not really performed. For words under this head, such as constructive fraud, etc., see the various titles FRAUD, etc.

CONSUETUDINARIUS (Lat.). **In Old English Law.** A ritual or book containing the rites and forms of divine offices or the customs of abbeys and monasteries.

A record of the *consuetudines* (customs). Blount; Whishaw.

CONSUETUDINARY LAW. Customary or traditional law.

CONSUETUDINES FEUDORUM (Lat. feudal customs). A compilation of the law of feuds or fiefs in Lombardy, made A. D. 1170.

It is called, also, the Book of Fiefs, and is of great and generally received authority. The compilation is said to have been ordered by Frederic Barbarossa, Erskine, Inst. 2. 3. 5, and to have been made by two Milanese lawyers, Spelman, Gloss.; but this is uncertain. It is commonly annexed to the *Corpus Juris Civilis*, and is easily accessible. See 3 Kent, Comm. 10th ed. 665, n.; Spelman, Gloss.

CONSUETUDO (Lat.). A custom; an established usage or practice. Coke, Litt. 58. Tolls; duties; taxes. Coke, Litt. 58 *b*.

This use of *consuetudo* is not correct: *custuma* is the proper word to denote duties, etc. 1 Sharswood, Bla. Com. 313, n. An action formerly lay for the recovery of customs due, which was commenced by a writ *de consuetudinibus et servitiis* (of customs and services). This is said by Blount to be "a writ of right close which lies against the tenant that deforceth the lord of the rent and services due him." Blount; Old Nat. Brev. 77; Fitzherbert, Nat. Brev. 151.

There were various customs: as, *consuetudo Anglicana* (custom of England), *consuetudo curiæ* (practice of a court), *consuetudo mercatorum* (custom of merchants). See CUSTOM.

CONSUL. A commercial agent appointed by a government to reside in a sea-port or other town of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him. The term includes consuls-general and vice-consuls. Rev. Stat. § 4130.

A vice-consul is one acting in the place of a consul.

Among the Romans, consuls were chief magistrates who were annually elected by the people, and were invested with powers and functions similar to those of kings. During the middle ages the term consul was sometimes applied to ordinary judges; and, in the Levant, maritime judges are yet called *consuls*. 1 Boulay Paty, Dr. Mar. tit. *Prél.* s. 2, p. 57. Officers with powers and duties corresponding to those of modern consuls were employed by the ancient Athenians, who had them stationed in commercial ports with which they traded. 3 St. John, Mann. and Cus. of Anc. Greece, 283. They were appointed about the middle of the twelfth century by the maritime states of the Mediterranean; and their numbers have increased greatly with the extension of modern commerce.

As a general rule, consuls represent the subjects or citizens of their own nation not otherwise represented; Bee, 209; 1 Mas. 14; 3 Wheat. 435; 6 *id.* 152; 10 *id.* 66. Their duties and privileges are now generally limited, defined, and secured by commercial treaties, or by the laws of the countries they represent. They are not strictly judicial officers; 3 Taunt. 102; and have no judicial powers except those which may be conferred by treaty and statutes. See 10 U. S. Stat. 909; 11 *id.* 723; Ware, Dist. Ct. 367.

American consuls are nominated by the president to the senate, and by the senate confirmed or rejected. U. S. Const. art. 2, sec. 2.

They have the power and are required to perform many duties in relation to the commerce of the United States and towards masters of ships, mariners, and other citizens of the United States. Among these are the authority to receive protests or declarations which captains, masters, crews, passengers, merchants, and others make relating to American commerce; they are required to admin-

ister on the estate of American citizens dying within their consulate and leaving no legal representatives, when the laws of the country permit it; see 2 Curt. Eccl. 241; to take charge of and secure the effects of stranded American vessels in the absence of the master, owner, or consignee; to settle disputes between masters of vessels and the mariners; to provide for destitute seamen within their consulate, and send them to the United States at the public expense. See Rev. Stat. § 1674 *et seq.* The consuls are also authorized to make certificates of certain facts in certain cases, which receive faith and credit in the courts of the United States; 3 Sumn. 27. But these consular certificates are not to be received in evidence, unless they are given in the performance of a consular function; 2 Cra. 187; Paine, 594; 2 Wash. C. C. 478; 1 Litt. 71; nor are they evidence, between persons not parties or privies to the transaction, of any fact, unless, either expressly or impliedly, made so by statute; 2 Sumn. 355.

Their rights are to be protected agreeably to the laws of nations, and of the treaties made between the United States and the nation to which they are sent. They are entitled, by the act of 14th April, 1792, s. 4, to receive certain fees, which are there enumerated. The act of 18th August, 1856, gives the president power to prescribe and alter from time to time these fees. But by acts passed at various times nearly all consuls now receive an annual salary, and only those not salaried are allowed to take fees for compensation. Rev. Stat. §§ 1690, 1730, 1745.

A consul is liable for negligence or omission to perform seasonably the duties imposed upon him, or for any malversation or abuse of power, to any injured person, for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment.

Of foreign consuls. Before a consul can perform any duties in the United States, he must be recognized by the president of the United States, and have received his *exequatur*.

A consul is clothed only with authority for commercial purposes; and he has a right to interpose claims for the restitution of property belonging to the citizens or subjects of the country he represents; 1 Curt. C. C. 87; 1 Mas. 14; Bee, 209; 6 Wheat. 152; 10 *id.* 66; see 2 Wall. Jr. 59; but he is not to be considered as a minister or diplomatic agent, intrusted by virtue of his office to represent his sovereign in negotiations with foreign states; 3 Wheat. 435.

Consuls are generally invested with special privileges by local laws and usages, or by international compacts; but by the laws of nations they are not entitled to the peculiar immunities of ambassadors. In civil and criminal cases they are subject to the local laws, in the same manner with other foreign residents owing a temporary allegiance to the state. Wicquefort, *De l'Ambassadeur*, liv. 1, § 5; Bynkershoek, cap. 10; Marten, *Droit des Gens*, liv. 4, c. 3, § 148. In the United States, the act of September 24, 1789, s. 13 (R. S. § 687), gives to the supreme court original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party. See 1 Binn. 143; 2 Dall. 299; 2 N. & M'C. 217; 3 Pick. 80; 1 Green, 107; 17 Johns. 10; 6 Wend. 327; 7 N. Y. 576; 2 Du. N. Y. 656; 7 *id.* 276.

His functions may be suspended at any time by the government to which he is sent, and his *exequatur* revoked. In general, a consul is not liable personally on a contract made in his official capacity on account of his government; 3 Dall. 384.

See, generally, Kent, Lect. II.; Abbott, Shipp.; Parsons, Marit. Law; Marten, on Consuls; Worden, on Consuls; Tuson, on Consuls; Azuni, Mar. Law, pt. 1, c. 4, art. 8, § 7; Story, Const. § 1654; Sergeant, Const. Law, 225; 7 Opinions of Atty. Gen.

CONSULTATION. The name of a writ whereby a cause, being formerly removed by prohibition out of an inferior court into some of the king's courts in Westminster, is returned thither again; for, if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false or not proved, and that, therefore, the cause was wrongfully called from the inferior court, then, upon consultation and deliberation, they decree it to be returned, whereupon this writ issues. Termes de la Ley; 3 Bla. Com. 114.

In French Law. The opinion of counsel upon a point of law submitted to them.

CONSUMMATE. Complete; finished; entire.

A marriage is said to be consummate. A right of dower is *inchoate* when coverture and seisin concur, *consummate* upon the husband's death. 1 Washb. R. P. 250, 251. A tenancy by the curtesy is *initiate* upon the birth of issue, and consummate upon the death of the wife. 1 Washb. R. P. 140; 13 Conn. 83; 2 Me. 400; 2 Bla. Com. 128.

A contract is said to be consummated when every thing to be done in relation to it has been accomplished. It is frequently of great importance to know when a contract has been consummated, in order to ascertain the rights of the parties, particularly in the contract of sale. See DELIVERY, where the subject is more fully examined. It is also sometimes of consequence to ascertain where the consummation of the contract took place, in order to decide by what law it is to be governed. See CONFLICT OF LAWS; LEX LOCI.

CONTAGIOUS DISORDERS. Diseases which are capable of being transmitted by mediate or immediate contact.

Persons sick of such disorders may remain in their own houses; 2 Barb. 104; but are indictable for exposing themselves in a public place endangering the public. See 4 M. & S. 73, 272. Nuisances which produce such diseases may be abated; 15 Wend. 397. See 4 M'Cord, 472; 3 Hill, N. Y. 479; 25 Penn. 503; 48 Iowa, 15. See Diseases Prevention

Act, 18 & 19 Vict. c. 116; Contagious Diseases Acts, 11 & 12 Vict. c. 107, 29 Vict. c. 2 & 35, 41 & 42 Vict. c. 74.

CONTANGO. In English Law. The commission received for carrying over or putting off the time of execution of a contract to deliver stocks or pay for them at a certain time. Wharton, Dict.; see Lewis, Stock Exchange.

CONTEK (L. Fr.). A contest, dispute, disturbance, opposition. Britt. c. 42.

CONTEMPLATION OF BANKRUPTCY. An intention or expectation of breaking up business or applying to be decreed a bankrupt. Crabbe, 529; 5 B. & Ad. 289; 4 Bing. 20; 9 *id.* 349.

Contemplation of a *state* of bankruptcy or a known insolvency and inability to carry on business, and a stoppage of business. *Story*, J., 5 Bost. L Rep. 295, 299.

Something more is meant by the phrase than the expectation of insolvency; it includes the making provision against the results of it; 13 How. 150; 8 Bosw. 194. See 1 Dill. 186; *id.* 203.

A conveyance or sale of property made in contemplation of bankruptcy is fraudulent and void; 2 Bla. Com. 285.

CONTEMPT. A wilful disregard or disobedience of a public authority.

By the constitution of the United States, each house of congress may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. The same provision is substantially contained in the constitutions of the several states.

The power to make rules carries that of enforcing them, and to attach persons who violate them, and punish them for contempts; 1 Kent, 236; 37 N. H. 450; 3 Wils. 188; 14 East, 1. But see 4 Moore, P. C. 63; 11 *id.* 347. This power of punishing for contempts is confined to punishment during the session of the legislature, and cannot extend beyond it; 6 Wheat. 204, 230, 231; and it seems this power cannot be exerted beyond imprisonment. And it is often regulated by statute; 1 N. Y. Rev. St. 154, § 13; U. S. Rev. St. §§ 101–103. The arrest of the offending party is made by the sergeant-at-arms, acting by virtue of the speaker's warrant, both in England and the United States; 6 Wheat. 204; 10 Q. B. 359. See CONGRESS.

Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings; Bac. Abr. *Courts* (E); Rolle, Abr. 219; 8 Co. 38 *b*; 11 *id.* 43 *b*; 22 Me. 550; 5 Ired. 199; 37 N. H. 450; 16 Ark. 384; 25 Ala. N. S. 81; 25 Miss. 883; 1 Woodb. & M. 401; 12 Am. Dec. 178; 29 Ohio, 330. See U. S. Dig. tit. Contempt. A court may commit for a period reaching beyond the term at which the contempt is committed; 13 Md. 642.

Contempts of court are of two kinds: such as are committed in the presence of the court, and which interrupt its proceedings, which may be summarily punished by order of the presiding judge; and constructive contempts, arising from a refusal to comply with an order of court; 49 Me. 392.

In some states, as in Pennsylvania, the power to punish for contempts is restricted to offences committed by the officers of the court, or in its presence, or in disobedience of its mandates, orders, or rules; but no one is guilty of a contempt for any publication made or act done out of court which is not in violation of such lawful rules or orders or in disobedience of its process. Similar provisions, limiting the power of the courts of the United States to punish for contempts, are incorporated in the act of March 2, 1831; Rev. St. § 725; 4 Sharsw. Cont. of Stor. U. S. Laws, 2256. See Oswald's Case, 4 Lloyd's Debates, 141 *et seq.*

The power of inferior courts to punish for contempt is usually restricted to contempts committed in the presence of the court; 3 Steph. Com. 342, n. 9; L. R. 8 Q. B. 134. A justice of the peace cannot punish contempts, even committed before him, by summary proceedings; 26 Penn. 99.

It is said that it belongs exclusively to the court offended to judge of contempts and what amounts to them; 37 N. H. 450; 8 Oreg. 487; 26 Am. Rep. 752; and no other court or judge can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction; 3 Wils. 188; 14 East, 1; 2 Bay, 182; 1 Ill. 266; 1 J. J. Marsh. 575; 1 Blackf. 166; T. U. P. Charlt. 136; 14 Ark. 538, 544; 1 Ind. 161; 6 Johns. 337; 9 *id.* 395; 6 Wheat. 204; 7 *id.* 38. But it has been repeatedly held that a court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt; 1 Grant, Cas. 453; 7 Cal. 181; 13 Gratt. 40; 15 B. Mon. 607; though not on *habeas corpus;* 14 Tex. 436; see 53 Cal. 204; 51 Miss. 50; 24 Am. Rep. 624. It should be by direct order of the court; 5 Wis. 227. A proceeding for contempt is regarded as a distinct and independent suit; 22 E. L. & Eq. 150; 25 Vt. 680; 21 Conn. 185. See, generally, 1 Abb. Adm. 508; 5 Duer, 629; 1 Dutch. 209; 16 Ill. 534; 1 Ind. 96; 8 Blackf. 574; 3 Tex. 360; 1 Greene, 394; 18 Miss. 103.

See 20 Am. L. Reg. N. S. 81 *et seq.*, where the whole subject is treated at great length by Mr. Chauncey.

CONTEMPTIBILITER (L. Lat. contemptuously; contemptus, Lat.).

In Old English Law. Contempt, contempts. Fleta, lib. 2, c. 60, § 35.

CONTENTIOUS JURISDICTION. In Ecclesiastical Law. That which exists in cases where there is an action or judicial process and matter in dispute is to be heard and

determined between party and party. It is to be distinguished from *voluntary* jurisdiction, which exists in cases of taking probate of wills, granting letters of administration, and the like. 3 Bla. Com. 66.

CONTENTMENT (or, more properly, *Contenement;* L. Lat. contenementum). A man's countenance or credit, which he has together with, and by reason of, his freehold; or that which is necessary for the support and maintenance of men, agreeably to their several qualities or states of life. Whart. Lex.; Cowel; 4 Bla. Com. 379.

CONTENTS UNKNOWN. A phrase contained in a bill of lading, denoting that the goods are shipped in apparently good condition; 12 How. 273.

CONTENTS AND NOT-CONTENTS. The "contents" are those who, in the house of lords, express assent to a bill; the "not-" or "non-contents," dissent. May, P. L. c. 12, 357.

CONTESTATIO LITIS. In Civil Law. The statement and answer of the plaintiff and defendant, thus bringing the case before the judge, conducted usually in the presence of witnesses. Calvinus, Lex.

This sense is retained in the canon law. 1 Kaufm. Mackeldey, C. L. 205. A cause is said to be *contesta* when the judge begins to hear the cause after an account of the claims, given not through pleadings, but by statement of the plaintiff and answer of the defendant. Calvinus, Lex.

In Old English Law. Coming to an issue; the issue so produced. Steph. Pl. App. n. 39; Crabb. Hist. 216.

CONTEXT (Lat. *contextum*,—*con*, with, *texere*, to weave,—that which is interwoven). Those parts of a writing which precede and follow a phrase or passage in question; the connection.

It is a general principle of legal interpretation that a passage or phrase is not to be understood absolutely, as if it stood by itself, but is to be read in the light of the context, *i. e.* in its connection with the general composition of the instrument. The rule is frequently stated to be that where there is any *obscurity* in a passage the context is to be considered; but the true rule is much broader. It is always proper to look at the context in the application of the most ambiguous expression. Thus, if on a sale of goods the vendor should give a written receipt acknowledging payment of the price, and containing, also, a promise *not* to deliver the goods, the word "not" would be rejected by the court, because it is repugnant to the context. It not unfrequently happens that two provisions of an instrument are conflicting: each is then the context of the other, and they are to be taken together and so understood as to harmonize with each other so far as may be, and to carry out the general intent of the instrument. In the context of a will, that which follows controls that which precedes; and the same rule has been asserted with reference to statutes. Consult, also, CONSTRUCTION; INTERPRETATION; STATUTES.

CONTINGENCY WITH DOUBLE ASPECT. If there are remainders so limited that the second is a substitute for the first in case it should fail, and not in derogation of it, the remainder is said to be in a contingency with double aspect. Fearne, Rem. 373; 1 Steph. Com. 328.

CONTINGENT DAMAGES. Those given where the issues upon counts to which no demurrer has been filed are tried, before demurrer to one or more counts in the same declaration has been decided. 1 Stra. 431.

Inaccurately used to describe consequential damages, *q. v.*

CONTINGENT ESTATE. A contingent estate depends for its effect upon an event which may or may not happen: as, an estate limited to a person not *in esse*, or not yet born. Crabb, R. P. § 946.

CONTINGENT INTEREST IN PERSONAL PROPERTY. It may be defined as a future interest not transmissible to the representatives of the party entitled thereto, in case he dies before it vests in possession. Thus, if a testator leaves the income of a fund to his wife for life, and the capital of the fund to be distributed among such of his children as shall be living at her death, the interest of each child during the widow's lifetime is *contingent*, and in case of his death is not transmissible to his representatives. Moz. & W. Law Dic.

CONTINGENT LEGACY. A legacy made dependent upon some uncertain event. 1 Rop. Leg. 506.

A legacy which has not vested. Will. 1229 *et seq.*

CONTINGENT REMAINDER. An estate in remainder which is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, by which no present or particular interest passes to the remainder-man, so that the particular estate may chance to be determined and the remainder never take effect. 2 Bla. Com. 169.

A remainder limited so as to depend upon an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. Fearne, Cont. Rem. 3; 2 Washb. R. P. 224.

CONTINGENT USE. A use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use.

Such a use as by possibility may happen in possession, reversion, or remainder. 1 Co. 121; Com. Dig. *Uses* (K, 6). A use limited to take effect upon the happening of some future contingent event; as, where lands are conveyed to the use of A and B after a marriage had between them. 2 Bla. Com. 334.

A contingent remainder limited by way of uses. Sugd. Uses, 175. See, also, 4 Kent, 237 *et seq.*

CONTINUAL CLAIM. A formal claim made once a year to lands or tenements of

which we cannot, without danger, attempt to take possession. It had the same effect as a legal entry, and thus saved the right of entry to the heir. Cowel; 2 Bla. Com. 316; 3 *id.* 175. This effect of a continual claim is abolished by stat. 3 & 4 Will. IV. c. 27, § 11. 1 Steph. Com. 509.

CONTINUANCE (Lat. *continuere*, to continue).

In Practice. The adjournment of a cause from one day to another of the same or a subsequent term.

The postponement of the trial of a cause.

In the ancient practice, continuances were entered upon the record, and a variety of forms adapted to the different stages of the suit were in use. See 1 Chitty, Pl. 455; 3 Bla. Com. 316. The object of the continuance was to secure the further attendance of the defendant, who having once attended could not be required to attend again, unless a day was fixed. The entry of continuance became at the time mere matter of form, and is now discontinued in England and most, if not all, of the states of the United States.

Before the declaration, continuance is by *dies datus prece partium;* after the declaration, and before issue joined, by *imparlance;* after issue joined, and before verdict, by *vice-comes non misit breve;* and after verdict or demurrer, by *curia advisare vult.* 1 Chitty, Pl. 455, 749; Bac. Abr. *Pleas* (P), *Trial* (H); Com. Dig. *Pleader* (V); Steph. Pl. 64. In its modern use the word has the second of the two meanings given above.

Among the causes for granting a continuance are *absence of a material witness;* 1 Dall. 270; 4 Munf. 547; 10 Leigh, 687; 3 Harr. N. J. 495; 2 Wash. C. C. 159; and see 1 Mass. 6; 1 Const. 234; 2 Ark. 33; 9 Leigh, 639; 18 B. Monr. 705; that he must have been subpœnaed; 1 Const. 198; 10 Tex. 116; 18 Ga. 383; see 2 Dall. 183; 3 Ill. 454; but in many states the opposite party may oppose and prevent it by admitting that certain facts would be proved by such witness; Harp. Eq. 83; 7 Cow. 369; 1 Meigs, 195; 5 Dana, 298; 2 Ill. 399; 15 Miss. 475; 33 *id.* 47; 9 Ind. 563; and the party asking delay is usually required to make affidavit as to the facts on which he grounds his request; 10 Yerg. 258; 2 Ill. 307; 16 *id.* 507; 7 Ark. 256; 1 Cal. 403; 8 Rich. Eq. 295; and, in some states, as to what he expects to prove by the absent witness; 5 Gratt. 332; 12 Ill. 459; 13 *id.* 76; 10 Tex. 525; 4 McLean, 538; in others, an examination is made by the court; 2 Leigh, 584; 7 Cow. 386; 4 E. D. S. 68; *inability to obtain the evidence* of a witness out of the state in season for trial, in some cases; 1 Wall. C. C. 5; 3 Wash. C. C. 8; 4 McLean, 364; 3 Ill. 629; and see 2 Call, 415; 2 Cai. 384; 1 Miles, 282; 23 Ga. 613; 12 La. An. 3; 1 Pet. C. C. 217; *filing amendments* to the pleadings which introduce new matter of substance; 1 Ill. 43; 2 *id.* 525; 4 Mass. 506; 4 Mo. 279; 8 *id.* 500; 4 Blackf. 387; 6 *id.* 419; 1 Hempst. 17; see 6 Penn. 171; 13 Ga. 190; *filing a bill of discovery* in chancery, in some cases; 3 H. & J. 452; 3 Dall. 512; see 8 Miss. 458; *detention of a party* in the public service; 2 Dall. 108; 4 *id.* 107; see 1 Wall. Jr. 189: *illness of counsel*, sometimes; 1 McLean, 334; 11 Pet. 226; 5 Harring. 107; 4 Cal. 188; 4 Iowa, 146; 19 Ga. 586. See 2 Caines, 384; 1 Wall. C. C. 1.

The request must be made in due season, 4 Cra. 237; 5 Halst. 245; 1 Browne, 240; 2 Root, 25, 45; 5 B. Monr. 314. It is addressed to the discretion of the court; 12 Gratt. 564; 2 Dall. 95; 3 *id.* 305; 3 Mo. 123; Harp. 85, 112; 2 Bailey, 576; 1 Ill. 12; without appeal; 2 Ala. 320; 2 Miss. 100; 14 *id.* 451; 6 Ired. 98; 9 Ark. 108; 16 Penn. 412; 6 How. 1; 13 *id.* 54; but an improper and unjust abuse of such discretion may be remedied by superior courts, in various ways; see 1 Blackf. 50, 64; 3 *id.* 504; 4 Hen. & M. 157, 180; 4 Pick. 302; 1 Ga. 213; 5 *id.* 48; 16 Miss. 401; 9 Mo. 19; 3 Tex. 18; 18 Ill. 439; 7 Cow. 369; 2 South. 518. Reference must be made to the statutes and rules of the courts of the various states for special provisions.

CONTINUANDO (Lat. *continuare*, to continue, *continuando*, continuing).

In Pleading. An averment that a trespass has been continued during a number of days. 3 Bla. Com. 212. It was allowed to prevent a multiplicity of actions, 2 Rolle, Abr. 545, only where the injury was such as could, from its nature, be continued. 1 Wms. Saund. 24, n. 1.

The form is now disused, and the same end secured by alleging divers trespasses to have been committed between certain days. 1 Saund. 24, n. 1. See, generally, Gould, Pl. c. 3, § 86; Hamm. N. P. 90, 91; Bac. Abr. *Trespass*, I, 2, n. 2.

CONTINUING CONSIDERATION. See CONSIDERATION.

CONTINUING DAMAGES. See DAMAGES.

CONTRA (Lat.). Over; against; opposite. *Per contra.* In opposition.

CONTRA BONOS MORES. Against sound morals.

Contracts which are incentive to crime, or of which the consideration is an obligation or engagement improperly prejudicial to the feelings of a third party, offensive to decency or morality, or which has a tendency to mischievous or pernicious consequences, are void, as being *contra bonos mores;* 2 Wils. 447; Cowp. 729; 4 Campb. 152; 1 B. & Ald. 683; 16 East, 150.

CONTRA FORMAM STATUTI (against the form of the statute).

In Pleading. The formal manner of alleging that the offence described in an indictment is one forbidden by statute.

When one statute prohibits a thing and another gives the penalty, in an action for the penalty the declaration should conclude *contra formam statutorum;* Plowd. 206; 2 East, 333; Esp. Pen. Act. 111; 1 Gall. 268. The same rule applies to informations and indictments. 2 Hale, Pl. Cr. 172. But where a

statute refers to a former one, and adopts and continues the provisions of it, the declaration or indictment should conclude *contra formam statuti;* Hale, Pl. Cr. 172. Where a thing is prohibited by several statutes, if one only gives the action and the others are explanatory and restrictive, the conclusion should be *contra formam statuti;* And. 115; 2 Saund. 377.

When the act prohibited was not an offence or ground of action at common law, it is necessary both in criminal and civil cases to conclude against the form of the statute or statutes; 1 Saund. 135 *c*; 2 East, 333; 1 Chitty, Pl. 556; 11 Mass. 280; 1 Gall. 30.

But if the act prohibited by the statute is an offence or ground of action at common law, the indictment or action may be in the common-law form, and the statute need not be noticed even though it prescribe a form of prosecution or of action,—the statute remedy being merely cumulative; Co. 2d Inst. 200; 2 Burr. 803; 3 *id.* 1418; 4 *id.* 2351; 2 Wils. 146; 3 Mass. 515.

When a statute only inflicts a punishment on that which was an offence at common law, the punishment prescribed may be inflicted though the statute is not noticed in the indictment; 2 Binn. 332.

If an indictment for an offence at common law only conclude "against the form of the statute in such case made and provided;" or "the form of the statute" generally, the conclusion will be rejected as surplusage, and the indictment maintained as at common law; 1 Saund. 135 n. 3; 16 Mass. 385; 4 Cush. 143. But it will be otherwise if it conclude against the form of "the statute aforesaid," when a statute has been previously recited; 1 Chitty, Cr. L. 289. See, further, Com. Dig. *Pleader* (C, 76); 5 Viner, Abr. 552, 556; 1 Gall. 26, 257; 5 Pick. 128; 9 *id.* 1; 1 Hawks, 192; 3 Conn. 1; 11 Mass. 280; 5 Me. 79.

CONTRA PACEM (Lat. against the peace).

In Pleading. An allegation in an action of trespass or ejectment that the actions therein complained of were against the peace of the king. Such an allegation was formerly necessary, but has become a mere matter of form and not traversable. See 4 Term, 503; 1 Chitty, Pl. 163, 402; Arch. Civ. Pl. 155; TRESPASS.

CONTRABAND OF WAR. In International Law. Goods which neutrals may not carry in time of war to either of the belligerent nations without subjecting themselves to the loss of the goods, and formerly the owners, also, to the loss of the ship and other cargo, if intercepted. 1 Kent, 138, 143.

Provisions may be contraband of war, and generally all articles calculated to be of direct use in aiding the belligerent powers to carry on the war; and if the use is doubtful, the mere fact of a hostile destination renders the goods contraband; 1 Kent, 140.

The classification of goods best supported by authority, English and American, divides all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war; (2) articles which may be and are used for war or peace according to circumstances; (3) articles exclusively used for peaceful purposes. Articles of the first class destined to a belligerent country are always contraband; articles of the second class are so only when actually destined to the military or naval use of the belligerent; articles of the third class are not contraband, though liable to seizure for violation of blockade or siege. Contraband articles contaminate non-contraband, if belonging to the same owner; in ordinary cases the conveyance of contraband articles attaches only to the freight; it does not subject the vessel to forfeiture. *Per* Chase, C. J., in The Peterhoff, 5 Wall. 28.

The meaning of the term is generally defined by treaty provisions enumerating the things which shall be deemed contraband.

See 2 Wild. Int. L. 210 *et seq.;* Wheat. Int. L. 509; 6 Mass. 102; 2 Johns Cas. 77, 120; 1 Wheat. 382; 8 Pet. 495; 92 U. S. 520; 1 Bond, 446; and also the very important declaration respecting maritime law signed by the plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia, and Turkey, at Paris, April 16, 1856, Appendix to 3 Phill. Int. L. 359; also title Contraband and Free Ships in the index to same vol., and part 9, chap. 10, and part 11, chap. 1, of the same.

CONTRACT (Lat. *contractus*, from *con*, with, and *traho*, to draw. *Contractus ultro utroque obligatio est quam Græci* συνάλλαγμα *vocant.* Fr. *contrat*).

An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., 11 Pet. 420, 572. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., 4 Wheat. 197. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. Com. 5.

It has been variously defined, as follows: A compact between two or more parties. 6 Cranch, 87, 136. An agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc. Amer.; Webster. A contract or agreement is where a promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Steph. Com. 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 2 Kent, 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol, lib. 1, § 10; Cowel; Blount.

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of

parties with the terms and conditions, and which serves as a proof of the obligation. The last is a distinct signification. 2 Hill, N. Y. 551.

A voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing. 9 Cal. 83.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other. Anson, Contr. 9.

The consideration is not properly included in the definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION. 1 Pars. Contr. 7. Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. *First*, that the word *agreement* itself requires definition as much as contract. *Second*, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. *Third*, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise. 2 Steph. Com. 109.

The use of the word *agreement* (*aggregatio mentium*) seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract. It is probably a translation of the civil law *conventio* (*con* and *venio*), a coming together, to which (being derived from *ad* and *grex*) it seems nearly equivalent. We do not think the objection that it is a synonym (or nearly so) a valid one. Some word of the kind is necessary as a basis of the definition. No two synonyms convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and which become obsolete. To one who has no knowledge of a language, it is impossible to define any abstract idea. But to one who understands a language, an abstraction is defined by a synonym properly qualified. By pointing out distinctions and the mutual relations between synonyms, the object of definition is answered. Hence we do not think Blackstone's definition open to the first objection.

As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times. Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is always presumed by law,—the form of the instrument being held to import a consideration. 2 Kent, 450, note.

A contract without consideration is called a *nudum pactum* (nude pact), but it is still a *pactum;* and this implies that consideration is not an essential. The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly open.

There is an idea of mutuality in *con* and *traho*, to draw together, but we think that mutuality is implied in agreement as well. An *aggregatio mentium* seems impossible without mutuality. Blackstone in his analysis appears to have regarded agreement as implying mutuality; for he defines it (2 Bla. Com. 442) "a mutual bargain or convention." In the above definition, however, all ambiguity is avoided by the use of the words "between two or more parties" following agreement.

In its widest sense, "contract" includes records and specialties; but this use as a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement," which is never applied to specialties. Mutuality is of the very essence of both,—not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum;* 2 Co. 15; 7 M. & G. 998, argum. and note.

This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage; and no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality,—no act to be done by the obligee to make the instrument binding. In a judgment there is no mutuality either of act or of assent. It is *judicium redditum in invitum*. It may properly be denied to be a contract, though Blackstone insists that one is implied. *Per Mansfield*, 3 Burr. 1545; 1 Cow. 316; *per Story*, J., 1 Mas. 288. Chitty uses "obligation" as an alternative word of description when speaking of bonds and judgments. Chit. Con. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes. 5 Ohio St. 361. So a charter is a contract between a state and a corporation within the meaning of the constitution of the United States, art. 1, § 10, clause 1. 27 Miss. 417. See IMPAIRING THE OBLIGATION OF CONTRACTS.

At common law, contracts have been divided ordinarily into contracts of record, contracts by specialty, and simple or parol contracts. The latter may be either written (not sealed) or verbal; and they may also be express or implied. Implied contracts may be either implied in law or implied in fact. "The only difference between an express contract and one implied in fact is in the mode of substantiating it. An express agreement is proved by express words, written or spoken * * *; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract;" Leake, Contr. 11; 1 B. & Ad. 415; 1 Aust. Jur. 356, 377.

Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. Louis. Code, art. 1764; Poth. Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. Louis. Code, art. 1767.

Certain contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Louis. Code, art. 1761.

Consensual contracts were contracts of agency, partnership, sale, and hiring in the Roman law, in which a contract arose from the mere consensus of the parties, without other formalities; Maine, Anc. Law, 243.

Entire contracts are those the consideration of which is entire on both sides.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefor is made on the spot.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time; 6 Cranch, 87, 136.

A contract *executed* (which differs in nothing from a grant) conveys a chose in possession; a contract *executory* conveys a chose in action. 2 Bla. Com. 443. As to the importance of grants considered as contracts, see IMPAIRING THE OBLIGATION OF CONTRACTS.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Bla. Com. 443.

Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Louis. Code, 1766. Gratuitous promises are not binding at common law unless executed with certain formalities, viz., by execution under seal.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. Louis. Code, art. 1769.

Implied contracts may be either implied *in law* or *in fact*. A contract implied *in law* arises where some pecuniary inequality exists in one party relatively to the other which justice requires should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation; Leake, Contr. 38. See 2 Burr. 1005; 11 L. J. C. P. 99; 8 C. B. 541. The case of the defendant obtaining the plaintiff's money or goods by fraud, or duress, shows an implied contract to pay the money or the value of the goods.

A contract implied *in fact* arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract; for instance, if one orders goods of a tradesman or employs a man to work for him, without stipulating the price or wages, the law raises an implied contract (*in fact*) to pay the real value of the goods or services. In the former class, the implied contract is a pure fiction, having no real existence; in the latter, it is inferred as an actual fact. See Leake, Contr.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. Louis. Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as sales, exchange, partnership, and the like.

Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These are the highest class of contracts. Statutes merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record. 4 Bla. Com. 465.

Severable (or *separable*) *contracts* are those the considerations of which are by their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure—*i. e.* so much per pound or bushel—does not make a contract severable.

Simple contracts are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract.

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts. They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal* from *written;* for contracts are equally *verbal* whether the words are *written* or spoken,—the meaning of verbal being—*expressed in words.* See 3 Burr. 1670; 7 Term, 350, note; 11 Mass. 27, 30; 5 *id.* 299, 301; 7 Conn. 57; 1 Caines, 386.

Specialties are those which are under seal: as, deeds and bonds.

Specialties are sometimes said to include also contracts of record, 1 Pars. Con. 7; in which case there would be but two classes at common law, viz., specialties and simple contracts. The term specialty is always used substantively.

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but *signed, sealed,* and *delivered* by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity. Plowd. 305; 7 Term, 477; 4 B. & Ad. 652; 3 Bingh. 111; 1 Fonb. Eq. 342, note. Though little of the real solemnity now remains, and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact except when abolished by statute. In 13 Cal. 33, it is said that the distinction is now unmeaning and not sustained by reason. See CONSIDERATION.

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol. 2 Watts, 451; 9 Pick. 298; 13 Wend. 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. Louis. Code, art. 1758. A loan for use and a loan of money are of this kind. Poth. Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts.

Written contracts are those evidenced by writing.

Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Poth. Obl. pt. 1. c. 1, s. 1, art. 2, makes the five following classes: *reciprocal* and *unilateral; consensual* and *real; those of mutual interest, of beneficence* and *mixed; principal* and *accessory; those which* are subjected by the civil law to certain rules and forms, and *those which* are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which is the method taken by the civil law; it has referred the greatest part of the duties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu.* Inst. 3. 14. 2; 2 Bla. Com. 443.

Qualities of. Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms; Peak. 227; 3 Term, 653; 1 B. & Ald. 681; 1 Pick. 278. To the rule that the contract must be obligatory on both parties there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract; Stra. 937. See other instances, 6 East, 307; 3 Taunt. 169; 5 *id.* 788; 3 B. & C. 232. There must be a good and valid consideration (*q. v.*), which must be proved though the contract be in writing; 7 Term, 350, note (*a*); 2 Bla. Com. 444; Fonb. Eq. 335, n. (*a*); Chitty, Bills, 68. There is an exception to this rule in the case of bills and notes, which are of themselves *primâ facie* evidence of consideration. And in other contracts (written) when consideration is acknowledged, it is *primâ facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be omitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void. A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty. Chitty, Com. L. 215, 217, 222, 228, 250; 1 Binn. 110, 118; 4 Dall. 269, 298; 4 Yeates, 24, 84; 28 Ala. 514; 7 Ind. 132; 4 Minn. 278; 30 N. H. 540; 2 Sandf. 146. But see 5 Ala. 250. As to contracts which cannot be enforced from non-compliance with the statute of frauds, see FRAUDS, STATUTE OF.

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject-matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their comprehensive and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat.*

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor —*contra proferentem*—except in the case of the sovereign.

This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law.

Neither false English nor bad Latin invalidates a contract ("which perhaps a classical

critic may think no unnecessary caution"). 2 Bla. Com. 379; 6 Co. 59.

Parties. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of contracts. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for any thing else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real estate will be specifically enforced in equity; performance will be decreed, and conveyances compelled.

See, generally, as to contracts, Bouv. Inst. Index; Parsons, Chitty, Comyns, Leake, Anson, and Story, on Contracts; Com. Dig. *Abatement* (E, 12) (F, 8), *Admiralty* (E, 10, 11), *Action on Case on Assumpsit, Agreement, Bargain and Sale, Baron et Feme* (2), *Condition, Debt* (A, 8, 9), *Enfant* (B, 5), *Idiot* (D, 1), *Merchant* (E, 1), *Pleader* (2 W, 11, 43), *Trade* (D, 3), *War* (B, 2); Bac. Abr. *Agreement, Assumpsit, Condition, Obligation;* Vin. Abr. *Condition, Contract and Agreements, Covenant, Vendor, Vendee;* 2 Belt, Sup. Ves. 260, 295, 376, 441; Yelv. 47; 4 Ves. 497, 671; Arch. Civ. Pl. 22; La. Civ. Code, 3, tit. 3–18; Poth. Obl.; Maine, Anc. Law; Austin, Jurisp.; Sugd. Ven. & P.; Long, Sales (Rand. ed.), and Benj. Sales; Jones, Story, and Edwards, on Bailment; Toull. *Dr. Civ.* tom. 6, 7; Hamm. Part. c. 1; Calv. Par.; Chitty, Prac. Index.

Each subject included in the law of contracts will be found discussed in the separate articles of this Dictionary. See AGREEMENT; APPORTIONMENT; APPROPRIATION; ASSENT; ASSIGNMENT; ASSUMPSIT; ATTESTATION; BAILMENT; BARGAIN AND SALE; BIDDER; BILATERAL CONTRACT; BILL OF EXCHANGE; BUYER; COMMODATE; CONDITION; CONSENSUAL; CONJUNCTIVE; CONSUMMATION; CONSTRUCTION; COVENANT; DEBT; DEED; DELEGATION; DELIVERY; DISCHARGE OF A CONTRACT; DISJUNCTIVE; EQUITY OF REDEMPTION; EXCHANGE; GUARANTY; IMPAIRING THE OBLIGATION OF CONTRACTS; INSURANCE; INTEREST; INTERESTED CONTRACTS; ITEM; MISREPRESENTATION; MORTGAGE; NEGOCIORUM GESTOR; NOVATION; OBLIGATION; PACTUM CONSTITUTÆ PECUNIÆ; PARTIES; PARTNERS; PARTNERSHIP; PAYMENT; PLEDGE; PROMISE; PURCHASER; QUASI CONTRACTUS; REPRESENTATION; SALE; SELLER; SETTLEMENT; SUBROGATION; TITLE.

CONTRACTION (Lat. *con*, together, *traho*, to draw). A form of a word abbreviated by the omission of one or more letters. This was formerly much practised, but in modern times has fallen into general disuse. Much information in regard to the rules for contraction is to be found in the Instructor Clericalis.

CONTRACTOR. One who enters into a contract. Those who undertake to do public work, or the work for a company or corporation on a large scale, at a certain fixed price, or to furnish goods to another at a fixed or ascertained price. 2 Pard. n. 300. See 5 Whart. 366; 14 Ct. of Cl. 280; *id.* 59, 289; 13 *id.* 136; *id.* 392.

CONTRADICT. In Practice. To prove a fact contrary to what has been asserted by a witness.

A party cannot *impeach* the character of his witness, but may contradict him as to any particular fact; 1 Greenl. Ev. § 443; Bull. N. P. 297; 3 B. & C. 746; 4 *id.* 25; 5 Wend. 305; 12 *id.* 105; 21 *id.* 190; 7 Watts, 39; 4 Pick. 179, 194; 17 Me. 19.

CONTRAESCRITURA. In Spanish Law. Counter-letter. An instrument, usually executed in secret, for the purpose of showing that an act of sale, or some other public instrument, has a different purpose from that imported on its face. Acts of this kind, though binding on the parties, have no effect as to third persons.

CONTRAFACTIO (Lat.). Counterfeiting: as, *contrafactio sigilli regis* (counterfeiting the king's seal). Cowel; Reg. Orig. 42. See COUNTERFEIT.

CONTRAROTULATOR (Fr. *contrerouleur*). A controller. One whose business it was to observe the money which the collectors had gathered for the use of the king or the people. Cowel.

CONTRAROTULATOR PIPÆ. An officer of the exchequer that writeth out summons twice every year to the sheriffs to levy the farms (rents) and debts of the pipe. Blount.

CONTRAVENTION. In French Law. An act which violates the law, a treaty, or an agreement which the party has made. That infraction of the law punished by a fine which does not exceed fifteen francs and by an imprisonment not exceeding three days.

CONTRE-MAITRE. In French Law. The second officer in command of a ship. The officer next in command to the master and under him.

CONTRECTATIO. In Civil Law. The removal of a thing from its place, amounting to a theft. The offence is purged by a restoration of the thing taken. Bowy. Com. 268.

CONTREFACON. In French Law. The offence of those who print or cause to be

printed, without lawful authority, a book of which the author or his assigns have a copyright. Merlin, *Répert.*

CONTRIBUTION. At Common Law. The payment by each or any one of several parties who are liable in company with others of his proportionate part of the whole liability or loss, to one or more of the parties so liable upon whom the whole loss has fallen or who has been compelled to discharge the whole liability. 1 Bibb, 562; 4 Johns. Ch. 545; 4 Bouvier, Inst. n. 3935.

A right to contribution exists in the case of debtors who owe a debt jointly which has been collected from one of them; 4 Jones, No. C. 71; 4 Ga. 545; 19 Vt. 59; 3 Denio, 130; 7 Humph. 385. See 1 Ohio St. 327. It also exists where land charged with a legacy, or the portion of a posthumous child, descends or is devised to several persons, when the share of each is held liable for a proportionate part; 3 Munf. 29; 1 Johns. Ch. 425; 1 Cush. 107; 8 B. Mon. 419. As to contribution under the maritime law, see GENERAL AVERAGE. See, generally, 4 Gray, 75; 34 Me. 205; 11 Penn. 325; 8 B. Mon. 137; 51 Vt. 253; 77 N. Y. 280; 82 N. C. 334; 61 Ala. 440; 53 Cal. 686; 52 Iowa, 597; 127 Mass. 396; 16 Blatch. 122. There is no contribution among wrongdoers; 9 Ind. 248; 10 Cush. 287; 2 Ohio St. 203; 18 Ohio, 1; 11 Paige, 18. But "the rule fails when the injury grows out of a duty resting primarily upon one of the parties, and but for his negligence there would have been no cause of action against the other. A servant is consequently liable to his master for the damages recovered against the latter in consequence of the negligence of the servant;" 2 Sm. Lead. Cas. 483. Where a recovery is had against a municipal corporation for an injury resulting from an obstruction to the highway, or other nuisance, occasioned by the act or default of its servant, or even of a citizen, the municipality has a right of action against the wrongdoer for indemnity; 2 Black, 418.

Courts of common law in modern times have assumed a jurisdiction to compel contribution among sureties in the absence of any positive contract, on the ground of an implied assumpsit, and each of the sureties may be sued for his respective quota or proportion; White, Lead. Cas. 66; 7 Gill, 34, 85; 17 Mo. 150. The remedy in equity is, however, much more effective; 12 Ala. N. S. 225; 2 Rich. Eq. 15. For example, a surety who pays an entire debt can, in equity, compel the solvent sureties to contribute towards the payment of the entire debt; 1 Ch. Cas. 246; Finch, 15, 203; while at law he can recover no more than an aliquot part of the whole, regard being had to the number of co-sureties; 2 B. & P. 268; 6 B. & C. 697; 32 Me. 381. See SUBROGATION. See, generally, as to co-sureties, 1 Lead. Cas. Eq. 100; 13 Am. L. Reg. N. S. 529.

In Civil Law. A partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property proportionably to the amount of their respective credits. La. Code, art. 2522, n. 10. It is a division *pro rata.* Merlin, *Répert.*

CONTRIBUTORY. A person liable to contribute to the assets of a company which is being wound up, as being a member or (in some cases) a past-member thereof. 3 Steph. Com. 24; Mozley and W. Law Dict.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONTROLLER. A comptroller, which see.

CONTROVER. One who invents false news. Co. 2d Inst. 227.

CONTROVERSY. A dispute arising between two or more persons.

It differs from case, which includes all suits, criminal as well as civil; whereas controversy is a civil and not a criminal proceeding; 2 Dall. 419, 431, 432; 1 Tuck. Bla. Com. App. 420, 421.

By the constitution of the United States, the judicial power extends to controversies to which the United States shall be a party. Art. III. sec. 2. The meaning to be attached to the word controversy in the constitution is that above given.

CONTUBERNIUM. In Civil Law. A marriage between persons of whom one or both were slaves. Poth. *Contr. du Mar.* pt. 1, c. 2, § 4.

CONTUMACY (Lat. *contumacia*, disobedience). The refusal or neglect of a party accused to appear or answer to a charge preferred against him in a court of justice.

Actual contumacy is the refusal of a party actually before the court to obey some order of the court.

Presumed contumacy is the act of refusing or declining to appear upon being cited. 3 Curt. Ecc. 1.

CONTUMAX. One accused of a crime who refuses to appear and answer to the charge. An outlaw.

CONTUSION. In Medical Jurisprudence. An injury or lesion, arising from the shock of a body with a large surface, which presents no loss of substance and no apparent wound. If the skin be divided, the injury takes the name of a contused wound. See 4 C. & P. 381, 558, 565; 6 *id.* 684; 2 Beck, Med. Jur. 18, 23.

CONUSANCE, CLAIM OF. See COGNIZANCE.

CONUSANT. One who knows: as, if a party knowing of an agreement in which he has an interest makes no objection to it, he is said to be conusant. Co. Litt. 157.

CONUSOR. A cognizor.

CONVENE. In Civil Law. To bring an action.

CONVENTICLE. A private assembly of a few folks under pretence of exercise of religion. The name was first given to the meetings of Wickliffe, but afterwards applied to the meetings of the non-conformists. Cowel.

The meetings were made illegal by 16 Car. II. c. 4, and the term in its later signification came to denote an unlawful religious assembly.

CONVENTIO (Lat. a coming together). **In Canon Law.** The act of summoning or

calling together the parties by summoning the defendant.

When the defendant was brought to answer, he was said to be convened,—which the canonists called *conventio*, because the plaintiff and defendant met to contest. Story, Eq. Pl. 402; 4 Bouv. Inst. no. 4121.

In Contracts. An agreement; a covenant. Cowel.

Often used in the maxim *conventio vincit legem* (the express agreement of the parties supersedes the law). Story, Ag. § 368. But this maxim does not apply, it is said, to prevent the application of the general rule of law. Broom, Max. 690. See MAXIMS.

CONVENTION. In Civil Law. A general term which comprehends all kinds of contracts, treaties, pacts, or agreements. The consent of two or more persons to form with each other an engagement, or to dissolve or change one which they had previously formed. Domat, l. 1, t. 1, s. 1; Dig. lib. 2, t. 14, l. 1; lib. 1, t. 1, l. 1, 4 and 5; 1 Bouvier, Inst. no. 100.

In Legislation. This term is applied to a meeting of the delegates elected by the people for other purposes than usual legislation. It is mostly used to denote an assembly to make or amend the constitution of a state; but it sometimes indicates an assembly of the delegates of the people to nominate officers to be supported at an election. As to the former use, see Jameson, Constit. Conv.; Cooley, Constit. Lim.

CONVENTIONAL. Arising from, and dependent upon, the act of the parties, as distinguished from *legal*, which is something arising from act of law. 2 Bla. Com. 120.

CONVENTUS (Lat. *convenire*). An assembly. *Conventus magnatum vel procerum.* An assemblage of the chief men or nobility; a name of the English parliament. 1 Bla. Com. 148.

In Civil Law. A contract made between two or more parties.

A multitude of men, of all classes, gathered together.

A standing in a place to attract a crowd.

A collection of the people by the magistrate to give judgment. Calvinus, Lex.

CONVENTUS JURIDICUS. A Roman provincial court for the determination of civil causes.

CONVERSANT. One who is in the habit of being in a particular place is said to be conversant there. Barnes, 162.

Acquainted; familiar.

CONVERSION (Lat. *con*, with, together, *vertere*, to turn; *conversio*, a turning to, with, together).

In Equity. The exchange of one species of property for another, which takes place under some circumstances in the consideration of the law, such as, to give effect to directions in a will or settlement, or to stipulations in a contract, although no such change has actually taken place; 1 Bro. Ch. C. 497; 1 Lead. Cas. Eq. 619; *id.* 872; 3 Redf. 235; 46 Wis. 70; *id.* 106; 32 N. J. Eq. 181.

Land is held to be converted into money, in equity, when the owner has contracted to sell; and if he die before making a conveyance, his executors will be entitled to the money, and not his heirs; 2 Vern. 52; 1 W. Bl. 129; 62 Ala. 145.

Money may be held to be converted into land under various circumstances: as where, for example, a man dies before a conveyance is made to him of land which he has bought. 1 P. Wms. 176; 10 Pet. 563; Bouvier, Inst. Index. See 58 How. Pr. 175; 49 Md. 72.

At Law. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights; 44 Me. 197; 36 N. H. 311; 45 Wis. 262.

A constructive conversion takes place when a person does such acts in reference to the goods or personal chattels of another as amount, in view of the law, to appropriation of the property to himself.

A direct conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature.

Every such unauthorized taking of personal property; 2 J. J. Mar. 84; 2 Penn. R. 416; 1 Bailey, 546; 10 Johns. 172; 5 Cow. 323; 6 Hill, 425; 92 Ill. 218; and all intermeddling with it beyond the extent of authority conferred, in case a limited authority over it has been given; 1 Metc. Mass. 555; 14 Vt. 367; 72 N. Y. 188; 46 Conn. 109; 75 N. Y. 547; 1 Ga. 381; with intent so to apply or dispose of it as to alter its condition or interfere with the owner's dominion; 4 Pick. 249; 18 *id.* 227; 8 M. & W. 540; 1 Chip. N. Vt. 241; constitute a conversion, including a *taking* by those claiming without right to be assignees in bankruptcy; 3 Brod. & B. 2; *using* a thing without license of the owner; 8 Vt. 281; 6 Hill, 425; 5 Ill. 495; 44 Me. 497; 11 Rich. Eq. 267; 5 Sneed, 261; 24 Mo. 86; or in excess of the license; 16 Vt. 138; 5 Mass. 104; 4 E. D. Sm. 397; 5 Duer, 40; 5 Jones, No. C. 122; *misuse* or *detention* by a finder or other bailee; 2 Penn. R. 416; 5 Mass. 104; 3 Pick. 492; 2 B. Mon. 339; 10 N. H. 199; 18 Me. 382; 8 Leigh, 565; 3 Ark. 127; 1 Humph. 199; 4 E. D. Sm. 397; 31 Ala. N. S. 26; see 12 Gratt. 153; *delivery* by a bailee in violation of orders; 16 Ala. 466; *non-delivery* by a wharfinger, carrier, or other bailee; 4 Ala. 46; 2 Johns. Cas. 411; 1 Rice, 204; 17 Pick. 1; see 28 Barb. N. Y. 515; *a wrongful sale* by a bailee, under some circumstances; 4 Taunt. 799; 8 *id.* 237; 10 M. & W. 576; 11 *id.* 363; 6 Wend. 603; 16 Johns. 74; 1 Dev. L. 306; 92 Ill. 218; 39 Mich. 413; *a failure to sell* when ordered; 1 H. & J. 579; 13 Ala. N. S. 460; *improper* or *informal* seizure of goods by an officer; 2 Vt. 383; 18 *id.*

590; 5 Cow. 323; 3 Mo. 207; 5 Yerg. 313; 1 Ired. 453; 17 Conn. 154; 2 Blatchf. 552; 37 N. H. 86; see 24 Me. 326; *informal sale* by such officer; 2 Ala. 576; 14 Pick. 356; 3 B. Mon. 457; or appropriation to himself; 2 Penn. R. 416; 3 N. H. 144; as against such officer in the last three cases; the *adulteration* of liquors as to the whole quantity affected; 1 Stra. 586; 3 A. & E. 306; 14 Mass. 500; 8 Pick. 551; but *not including* a *mere trespass* with no further intent; 8 M. & W. 540; 18 Pick. 227; nor an *accidental loss* by mere omission of a carrier; 2 Greenl. Ev. § 643; 5 Burr. 2825; 1 Ventr. 223; 2 Salk. 655; 1 Pick. 50; 6 Hill, 586; see 17 Pick. 1; nor mere *non-feasance;* 2 B. & P. 438; 6 Johns. 9; 12 *id.* 300; 19 Vt. 551; 30 *id.* 436. A manual taking is not necessary.

The intention required is simply an intent to use or dispose of the goods, and the knowledge or ignorance of the defendant as to their ownership has no influence in deciding the question of conversion; 3 Ired. 29; 4 Denio, 180; 30 Vt. 307; 11 Cush. 11; 17 Ill. 413; 33 N. H. 151.

A license may be presumed where the taking was under a necessity, in some cases; 2 Bulstr. 280; 6 Esp. 81; or, it is said, to do a work of charity; 2 Greenl. Ev. § 643; or a *kindness* to the owner; 4 Esp. 195; 11 Mo. 219; 8 Metc. 578; without intent, in the last two cases, to injure or convert it; 8 Metc. 578. As to what constitutes a conversion as between joint owners, see 2 Dev. & B. Eq. 252; 3 *id.* 175; 1 Hayw. 255; 6 Hill, 461; 21 Wend. 72; 2 Murph. 65; 4 Vt. 164; 16 *id.* 382; 1 Dutch. 173; and as to a joint conversion by two or more, see 2 N. H. 546; 15 Conn. 384; 2 Rich. 507; 3 E. D. Sm. 555; 40 Me. 574.

An original unlawful taking is in general conclusive evidence of a conversion; 1 M'Cord, 213; 15 Johns. 431; 8 Pick. 543; 10 Metc. 442; 13 N. H. 494; 17 Conn. 154; 29 Penn. 154; 126 Mass. 132; as is the existence of a state of things which constitutes an actual conversion; 3 Wend. 406; 6 *id.* 603; 7 Halst. 244; 1 Leigh, 86; 12 Me. 243; 3 Mo. 382; 14 Vt. 367; without showing a demand and refusal; but where the original taking was lawful and the detention only is illegal, a demand and refusal to deliver must be shown; 1 Chit. Pl. 179; 3 Bouvier, Inst. n. 3522; Metc. Yelv. 174, n.; 2 East, 405; 6 *id.* 540; 5 B. & C. 146; 2 J. J. Marsh. 84; 16 Conn. 71; 19 Mo. 467; 2 Cal. 571; 7 Reporter, 615; but this evidence is open to explanation and rebuttal; 2 Wms. Saund. 47 *e*; 5 B. & Ald. 847; 16 Conn. 71; 6 S. & R. 300; 8 Metc. 548; 1 Cow. 322; 28 Barb. 75; 8 Md. 148; even though absolute; 2 C. M. & R. 495.

The refusal, to constitute such evidence, must be unconditional, and not a reasonable excuse; 4 Esp. 156; 7 C. & P. 285; 3 Ad. & E. 106; 5 N. H. 225; 8 Vt. 433; 9 Ala. 383; 16 Conn. 76; 1 Rich. 65; 24 Barb. 528; or accompanied by a condition which the party has no right to impose; 6 Q. B. 443; 2 Dev. L. 130; if made by an agent, must be within the scope of his authority, to bind the principal; 2 Salk. 441; 6 Jur. 507; 5 Hill, N. Y. 455; 1 E. D. Sm. 522; but is not evidence of conversion where accompanied by a condition which the party has a right to impose; 2 Bing. N. C. 448; 6 Q. B. 443; 5 B. & Ald. 247; 4 Taunt. 198; 7 Johns. 302; 2 Dev. L. 130; 2 Mas. 77. It may be made at any time prior to bringing suit; 2 Greenl. Ev. § 644; 2 H. Bl. 135; 11 M. & W. 366; 6 Johns. 44; if before he has parted with his possession; 11 Vt. 351. It may be inferred from non-compliance with a proper demand; 7 C. & P. 339; 2 Johns. Cas. 411. The demand must be a proper one; 2 N. H. 546; 1 Johns. Cas. 406; 2 Const. 239; 9 Ala. 744; made by the proper person; see 2 Brod. & B. 447; 2 Mas. 77; 12 Me. 328; and of the proper person or persons; see 13 East, 197; 3 Q. B. 699; 2 N. H. 546; 1 E. D. Sm. 522. The plaintiff must have at least the right to immediate possession; 127 Mass. 64.

CONVEYANCE. The transfer of the title of land from one person or class of persons to another. 21 Barb. 551; 29 Conn. 356.

The instrument for effecting such transfer. It includes leases; 47 Cal. 242; and mortgages; 46 Cal. 603; see 1 N. Y. Rev. Stat. 762, § 38; 2 *id.* 137, § 7.

When there is no express agreement to the contrary, the expense of the conveyance falls upon the purchaser; 2 Ves. 155, note; who must prepare and tender the conveyance. But see, *contra*, 2 Rand. 20. The expense of the execution of the conveyance is, on the contrary, always borne by the vendor; Sudg. Vend. & P. 296; *contra*, 2 Rand. 20; 2 McLean, 495. See 3 Mass. 487; 5 *id.* 472; Eunom. 2, § 12.

The forms of conveyance have varied widely from each other at different periods in the history of the law, and in the various states of the United States. The mode at present prevailing in this country is by bargain and sale. For a fuller account of this subject, see Sugden, Vendors; Geldart; Preston; Thorn. Conv.; Washb. R. P.; Bouvier, Institutes, Index.

CONVEYANCE OF VESSELS. The transfer of the title to vessels.

The act of congress approved the 29th July, 1850, Rev. Stat. § 4192, entitled An act to provide for recording the conveyances of vessels, and for other purposes, enacts that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. Provided, that the lien by bottomry on any vessel created, during her voyage, by a loan of money or materials necessary to repair or enable

such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of the act.

The *second* section enacts that the collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and also all certificates for discharging and cancelling any such conveyances, in a book or books to be kept for that purpose, in the order of their reception,—noting in said book or books, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received; and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance or certificate of discharge, fifty cents.

The *third* section enacts that the collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee; and shall permit said index and books of records to be inspected during office-hours, under such reasonable regulations as they may establish; and shall, when required, furnish to any person a certificate setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrolment, and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel recorded since the issuing of the last register or enrolment,—viz., the date, amount of such incumbrance, and from and to whom or in whose favor made. The collector shall receive for each such certificate one dollar.

The *fourth* section provides that the collectors of the customs shall furnish certified copies of such records, on the receipt of fifty cents for each bill of sale, mortgage, or other conveyance.

The *fifth* section provides that the owner or agent of the owner of any vessel of the United States, applying to a collector of the customs for a register or enrolment of a vessel, shall, in addition to the oath now prescribed by law, set forth, in the oath of ownership, the part or proportion of such vessel belonging to each owner, and the same shall be inserted in the register of enrolment; and that all bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing.

CONVEYANCER. One who makes it his business to draw deeds of conveyance of lands for others. 4 Bouv. Inst. n. 2426; Act of July 13, 1866, § 9, 14 Stat. at L. 118. They frequently act as brokers for the sale of estates and obtaining loans on mortgage.

CONVEYANCING. A term including both the science and act of transferring titles to real estate from one man to another.

It includes the examination of the title of the alienor, and also the preparation of the instruments of transfer. It is, in England and Scotland, and, to a greatly inferior extent, in the United States, a highly artificial system of law, with a distinct class of practitioners. A profound and elaborate treatise on the English law of conveyancing is Mr. Preston's. Geldart and Thornton's works are important works; and an interesting and useful summation of the American law is given in Washburn on Real Property.

CONVEYANCING COUNSEL TO THE COURT OF CHANCERY. Certain counsel, not less than six in number, appointed by the Lord Chancellor, for the purpose of assisting the court of chancery, or any judge thereof, with their opinion in matters of title and conveyancing. Stat. 15 and 16 Vict. c. 80, ss. 40, 41; Mozl. & W. Law Dic.

CONVICIUM. In Civil Law. The name of a species of slander or injury uttered in public, and which charged some one with some act *contra bonos mores*. Vicat; Bac. Abr. *Slander*, 29.

CONVICT. One who has been condemned by a competent court. One who has been convicted of a crime or misdemeanor.

To condemn. To find guilty of a crime or misdemeanor. 4 Bla. Com. 362.

CONVICTION (Lat. *convictio;* from *con*, with, *vincere*, to bind). **In Practice.** That legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded. 48 Me. 123; 109 Mass. 323; 99 *id.* 420.

Finding a person guilty by verdict of a jury. 1 Bish. Cr. L. § 223.

A record of the summary proceedings upon any penal statute before one or more justices of the peace or other persons duly authorized, in a case where the offender has been *convicted* and sentenced. Holthouse, Dic.

The first of the definitions here given undoubtedly represents the accurate meaning of the term, and includes an ascertainment of the guilt of the party by an authorized magistrate in a summary way, or by confession of the party himself, as well as by verdict of a jury. The word is also used in each of the other senses given. It is said to be sometimes used to denote final judgment. Dwar. 2d ed. 683.

Summary conviction is one which takes place before an authorized magistrate without the intervention of a jury.

Conviction must precede judgment or sentence; 1 Cai. 72; 34 Me. 594; see 51 Ill. 311; but is not necessarily or always followed by it; 1 Den. C. C. 568; 14 Pick. 88; 17 *id.* 296; 8 Wend. 204; 3 Park. C. Cas. 567; 4 Ill. 76; 24 How. Pr. 38. Generally, when several are charged in the same indictment, a part may be convicted and the others acquitted; 2 Den. C. C. 86; 4 Hawks, 356; 8 Blackf. 205; see 2 Va. Cas. 227; 3 Yerg. 428; 3 Humph. 289; but not where a joint offence is charged; 14 Ohio, 386; 6 Ired. 340. A person cannot be convicted of part of an offence charged in an indictment, except by statute; 7 Mass. 250; 2 Pick. 506; 19 *id.* 479; 7 Mo. 177; 1 Murph. 134; 13 Ark. 712. See 16 Ala. 495; 5 Ill. 197; 3 Hill, S. C. 92; 9 Ired. 454; 14 Ga. 55. A conviction prevents a second prosecution for the same offence; 1 McLean, 429; 7 Conn. 414; 14 Ohio, 295; 2 Yerg. 24; 28 Penn. 13. See 2 Gratt. 558. But the recovery in a civil suit, of a fine, part of a penalty under a statute, does not prevent the prosecution of the defendant for the purpose of enforcing the full penalty by imprisonment; 16 Blackf. 9. And see 70 Me. 452; 8 Tex. App. 447; 66 Ind. 223. A

conviction of a less offence may be had where the indictment charges a greater offence, which necessarily includes the less; 82 N. C. 621; 8 Tex. App. 71; 8 Baxter, 401; 23 Kan. 244; 52 Iowa, 608. As to the rule where the indictment under which the conviction is procured is defective and liable to be set aside, see 1 Bish. Cr. L. §§ 663, 664; 4 Co. 44 *a;* APPEAL.

At common law conviction of certain crimes when accompanied by judgment disqualifies the person convicted as a witness; 18 Miss. [illegible]. And see 11 Metc. 302. But where a statute making *defendants* witnesses is without exception, a conviction rendering such defendant infamous will not disqualify him; 5 Lans. 332; 63 Barb. 630; see 107 Mass. 403.

Summary convictions, being obtained by proceedings in derogation of the common law, must be obtained strictly in pursuance of the provisions of the statute; 1 Burr. 613; and the record must show fully that all proper steps have been taken; R. M. Charlt. 235; 1 Coxe, 392; 1 Ashm. 410; 2 Bay, 105; 19 Johns. 39, 41; 14 Mass. 224; 10 Metc. 222; 3 Me. 51; 4 Zabr. 142; and especially that the court had jurisdiction; 2 Tyler, 167; 4 Johns. 292; 14 *id.* 371; 7 Barb. 462; 3 Yeates, 475.

As to payment of costs upon conviction, see 1 Bish. Cr. Pr. § 1317, n.

Consult Arnold; Paley; Convictions; Russell; Bishop; Wharton; Criminal Law; Greenleaf; Phillipps; Evidence.

CONVIVIUM. A tenure by which a tenant was bound to provide meat and drink for his lord at least once in the year. Cowel.

CONVOCATION (Lat. *con*, together, *voco*, to call).

In Ecclesiastical Law. The general assembly of the clergy to consult upon ecclesiastical matters. See COURT OF CONVOCATION.

CONVOY. A naval force, under the command of an officer appointed by government, for the protection of merchant-ships and others, during the whole voyage, or such part of it as is known to require such protection. Marsh. Ins. b. 1, c. 9, s. 5; Park, Ins. 388.

Warranties are sometimes inserted in policies of insurance that the ship shall sail with convoy. To comply with this warranty, five things are essential: first, the ship must sail with the regular convoy appointed by the government; secondly, she must sail from the place of rendezvous appointed by the government; thirdly, the convoy must be for the voyage; fourthly, the ship insured must have sailing-instructions; fifthly, she must depart and continue with the convoy till the end of the voyage, unless separated from it by necessity. Marsh. Ins. b. 1, c. 9, s. 5.

COÖBLIGOR. Contracts. One who is bound together with one or more others to fulfil an obligation. As to suing coöbligors, see PARTIES; JOINDER.

COOL BLOOD. Tranquillity, or calmness. The condition of one who has the calm and undisturbed use of his reason. In cases of homicide, it frequently becomes necessary to ascertain whether the act of the person killing was done in cool blood or not, in order to ascertain the degree of his guilt. Bacon, Abr. *Murder* (B); Kel. 56; Sid. 177; Lev. 180.

COOLING-TIME. In Criminal Law. Time for passion to subside and reason to interpose. Cooling-time destroys the effect of provocation, leaving homicide murder the same as if no provocation had been given; 1 Russ. Cr. 667 *et seq.;* Whart. Hom. 448, 449; 3 Gratt. 594.

COPARCENARY, ESTATES IN. Estates of which two or more persons form one heir. 1 Washb. R. P. 414.

The title to such an estate is always by descent. The shares of the tenants need not be equal. The estate is rare in America, but sometimes exists; 3 Ind. 360; 4 Gratt. 16; 17 Mo. 13; 3 Md. 190. See Watk. Conv. 145.

COPARCENERS. Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate. 2 Bla. Com. 187.

In the old English and the American sense the term includes males as well as females, but in the modern English use is limited to females. 4 Kent, 366; 2 Bouvier, Inst. n. 1875, 1876. But the husband of a deceased coparcener, if entitled as tenant by the curtesy, holds as a coparcener with the surviving sisters of his wife, as does also the heir-at-law of his deceased wife upon his own death; Brown, Dict.

COPARTNER. One who is a partner with one or more other persons; a member of a partnership.

COPARTNERSHIP. A partnership.

COPARTNERY. In Scotch Law. The contract of copartnership. Bell, Dict.

COPE. A duty charged on lead from certain mines in England. Blount.

COPIA LIBELLI DELIBERANDA. A writ to enable a man accused to get a copy of the libel from the judge ecclesiastical. Cowel.

COPULATIVE TERM. One which is placed between two or more others to join them together.

COPY. A true transcript of an original writing.

Exemplifications are copies verified by the great seal or by the seal of a court. 1 Gilb. Ev. 19.

Examined copies are those which have been compared with the original or with an official record thereof.

Office copies are those made by officers in trusted with the originals and authorized for that purpose.

The papers need not be exchanged and read alternately; 2 Taunt. 470; 1 Stark. 183; 4 Campb. 372; 1 C. & P. 578. An examined copy of the books of an unincorporated bank is not evidence *per se;* 12 S. & R. 256; 13

id. 135, 334; 2 N. & M'C. 299; 1 Greenl. Ev. § 508.

Copies cannot be given in evidence, unless proof is made that the originals from which they are taken are lost or in the power of the opposite party, and, in the latter case, that notice has been given him to produce the original; 1 Greenl. Ev. § 508; 3 Bouvier, Inst. n. 3055.

A translation of a book is not a copy; 2 Wall. Jr. 547; 2 Am. L. R. 229; and a copy of a book means a transcript of the entire work; 12 Mo. Law Rep. N. S. 339.

COPYHOLD. A tenure by copy of court-roll. Any species of holding by particular custom of the mnnor. The estate so held.

A copyhold estate was originally an estate at the will of the lord, agreeably to certain customs evidenced by entries on the roll of the courts baron. Co. Litt. 58 *a*; 2 Bla. Com. 95. It is a villenage tenure deprived of its servile incidents. The doctrine of copyhold is of no application in the United States. Will. R. Pr. 257, 258, Rawle's note; 1 Washb. R. P. 26.

COPYHOLDER. A tenant by copyhold tenure (by copy of court-roll). 2 Bla. Com. 95.

COPYRIGHT. The exclusive privilege, secured according to certain legal forms, of printing, publishing, and vending copies of certain literary or artistic productions; it extends to books, maps, charts, dramatic or musical compositions, engravings, cuts, prints, or photographs thereof or of paintings, drawings, chromos, statues, statuary, or of models or designs intended to be perfected as works of the fine arts; to the public representations of dramatic compositions; and to the right of authors to dramatize or translate their own works; see Burrill, Worcester, Dic.

The intellectual productions to which the law extends protection are of three classes. *First*, writings or drawings capable of being multiplied by the arts of printing or engraving. *Second*, designs of form or configuration capable of being reproduced upon the surface or in the shape of bodies. *Third*, inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface, and configurations of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing, which may be multiplied by the arts of printing in any of its branches. Property in the other classes of intellectual objects is usually secured by letters-patent, and the interest is called a *patent-right*. But the distinction is arbitrary and conventional.

The foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others. But, as it would be impracticable in civil society to prevent others from copying such characters or forms without the intervention of positive law, and as such intervention is highly expedient, because it tends to the increase of human culture, knowledge, and convenience, it has been the practice of all civilized nations in modern times to secure and regulate the otherwise insecure and imperfect right which, according to the principles of natural justice, belongs to the author of new ideas.

This has been done by securing an exclusive right of multiplying copies for a limited period, as far as the municipal law of the particular country extends. But, inasmuch as the original right, founded in the principles of natural justice, is of an imperfect character, and requires, in order to be valuable, the intervention of municipal law, the law of nations has not taken notice of it as it has of some other rights of property; and therefore all copyright is the result of some municipal regulation, and exists only in the limits of the country by whose legislation it is established. The international copyright which is established in consequence of a convention between any two countries is not an exception to this principle; because the municipal authority of each nation making such convention either speaks directly to its own subjects through the treaty itself, or is exerted in its own limits by some enactment made in pursuance of the international engagement.

It was formerly doubtful in England whether copyright, as applied to books, existed at common law, and whether the first statute (8 Anne, c. 19) which undertook to regulate this species of incorporeal property had taken away the unlimited duration which must have existed at common law if that law recognized any right whatever.

The better opinion seems to be that the common law of England, before the statute of Anne, was supposed to admit the exclusive right of an author to multiply copies of his work by printing, and also his capacity to assign that right; for injunctions were granted in equity to protect it. See, on this subject, 4 Burr. 2303, 2408; 2 Brown, P. C. 145; 1 W. Bl. 301; 3 Swans. 673; 2 Ed. Ch. 327; 4 Hou. L. 815; 4 Exch. 145. But it has long been settled that, whatever the common-law right may have been before the statute, it was taken away by the statute, and that copyright exists only by force of some statutory provision; *Id.*; 8 Pet. 591; 17 How. 454; Drone, Copyright, 1.

In America, before the establishment of the constitution of the United States, it is doubtful whether there was any copyright at common law in any of the states; 8 Pet. 591. But some of the states had passed laws to secure the rights of authors, and the power to do so was one of their original branches of sovereignty, afterwards ceded to congress. By art. 1, sect. 8, of the federal constitution, power was given to congress "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under this authority, an act of May 31, 1790, secured a copyright in maps, charts, and books; and an act of April 29, 1802, gave a similar protection to engravings.

The present statutes on this subject are, Rev. St. §§ 4948–4971.

The persons entitled to secure a copyright, and what may be protected. Any citizen of the United States, or resident therein, who shall be the author, inventor, proprietor, or designer of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, or of models and designs intended to be perfected as works of the fine arts, or the assigns of

such person, may secure the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of performing or representing it, etc.; R. S. § 4952. The printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, photograph, written, composed, or made by any person not a citizen of the United States, nor resident therein, is not to be taken as prohibited by anything in the act; *id.* § 4971. The section does not mention paintings, drawings, chromos, statues, statuary, models, or designs; there appears to be nothing to prevent a resident owner of any of these productions from securing a valid copyright therein, though it be the work of a foreigner; Drone, Copyright, 232.

The term for which a copyright may be obtained is the period of twenty-eight years from the time of recording the title; and at the expiration of that period the author, inventor, or designer, if living and a citizen of the United States, or a resident thereof, or his widow and children, if he be dead, may re-enter for an additional or renewed term of fourteen years; *id.* §§ 4953, 4954.

The formalities requisite to the securing of the original term are: 1. The deposit of a printed copy of the title of the book, map, chart, musical composition, print, cut, or engraving, in the office of the Librarian of Congress, or in the mail addressed to the Librarian, etc.; or a description of the painting, etc.; or a model or design of the work of the fine arts; and the delivery at said office, or in the mail addressed to the Librarian, within ten days after publication, of a copy, etc. 2. The recording of that title by the Librarian of Congress. 3. The deposit of two copies of the best edition of the book, etc., with the Librarian within ten days of the time of publication. 4. The printing of a notice that a copyright has been secured, on the title-page of every copy, or the page immediately following, if it be a book, or on the face, if it be a map, chart, musical composition, print, cut, or engraving, or on the title or frontispiece, if it be a volume of maps, charts, music, or engravings, in the following words:—

"Entered according to Act of Congress, in the year , by A B, in the office of the Librarian of Congress, at Washington." In England the name of the author need not appear on the title-page; 7 Term, 620.

Prior to the act of congress "providing for keeping and distributing all public documents," approved February 5, 1859, the law provided that one copy of each book or other production should be sent to the librarians of the Smithsonian Institution, and one to the Librarian of the Congressional Library. This provision is now repealed; and while in existence it was questionable whether a compliance with its conditions was essential to a valid copyright; 1 Blatchf. 618.

As to what will constitute a sufficient *publication* to deprive an author of his copyright: The public performance of a play is not such publication; 2 Biss. 34; the private circulation of even printed copies of a book is not; 5 McLean, 32; 9 Am. L. Reg. 33; 1 Macn. & G. 25; the deposit of a chart with the secretary of the navy with an express agreement that it was not to be published, is not; 2 Paine, 393; see, generally, 7 Am. Rep. 488.

The remedy for an infringement of copyright is threefold. By an action of debt for certain penalties and forfeitures given by the statute. By an action on the case at common law for damages, founded on the legal right and the injury caused by the infringement. The action must be case, and not trespass; 2 Blatchf. 39. By a bill in equity for an injunction to restrain the further infringement, as an incident to which an account of the profits made by the infringer may be ordered by the court; 6 Ves. 705; 8 *id.* 323; 9 *id.* 341; 1 Russ. & M. 73, 159; 1 Y. & C. 197; 2 Hare, 560; though it cannot embrace penalties; 2 Curt. C. C. 200; 2 Blatchf. 39. The complainant in a bill in equity must show a *primâ facie* legal title; although a strictly legal title is not indispensable to relief. It is sufficient if there be clear color of title founded on long possession; 6 Ves. 689; 8 *id.* 215; 17 *id.* 422; Jac. 314, 471; 2 Russ. 385; 2 Phill. 154. As to the objections that may be taken by general demurrer, see 2 Blatchf. 39. The injunction may go against an entire work or a part; 2 Russ. 393; 3 Stor. 768; 17 Ves. 422; 3 M. & C. 737; 11 Sim. 31; 2 Beav. 6; 2 Brown, Ch. 80; though the court will not interfere where the extracts are trifling; 2 Swanst. 428; 1 Russ. & M. 73; 2 *id.* 247. Original jurisdiction in respect to all these remedies is vested in the circuit courts of the United States; Rev. Stat. § 629, cl. 9. Rev. Stat. § 4968 limits the action for the penalties and forfeitures to the period of two years after the cause of action arose. The remedy for an unauthorized printing or publishing of any manuscript is by a special action on the case, or by a bill in equity for an injunction. Original jurisdiction in these cases is likewise vested in the circuit courts.

Infringement. The statute provides that any person who shall print, publish, or import, or cause to be printed, published, or imported, any *copy* of a book which is under the protection of a copyright, without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, or who shall, knowing the same to be so printed or imported, publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any *copy* of such book, without such consent in writing, shall forfeit every copy of such book to the said proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action brought by the proprietor, etc. In case of infringement of the copyright on maps, charts, and the objects other than books, paintings, statues, or statuary within consent, etc., as above, the in-

fringer shall forfeit to the proprietor all the plates on which the same was copied, and every sheet thereof, and one dollar for every sheet in his possession; in case of paintings, statues, or statuary the infringer shall forfeit ten dollars for every copy; one-half to the proprietor, and one-half to the United States; Rev. Stat. §§ 4964, 4965. The act is confined to the sheets in the possession of the party who prints or exposes them to sale; 7 How. 798. It has been held to be necessary to the recovery of these statutory penalties and forfeitures that the whole of the book should be reprinted; 23 Bost. Law Rep. 397.

But in order to sustain an action at common law for damages, or a bill in equity for an infringement of copyright, an exact reprint is not necessary. There may be a piracy. 1st. By *reprinting* the whole or part of a book *verbatim*. The mere quantity of matter taken from a book is not of itself a test of piracy; 3 M. & C. 737. Extracts and quotations fairly made, and not furnishing a substitute for the book itself, or operating to the injury of the author, are allowable; 17 Ves. 422; 17 Law Jour. 142; 1 Campb. 94; Ambl. 694; 2 Swanst. 428; 2 Stor. 100; 2 Russ. 383; 1 Am. Jur. 212; 2 Beav. 6; 11 Sim. 31. A "fair use" of a book, by way of quotation or otherwise, is allowable; 4 Clifford, 1; L. R. 8 Ex. 1; 31 L. T. N. S. 775; L. R. 18 Eq. 444; L. R. 5 Ch. 251; it may be for purposes of criticism, but so as not to supersede the work itself; 4 Clifford, 1; L. R. 8 Ex. 1; or in a later work to the extent of fair quotation; 11 Sim. 31; 31 L. T. N. S. 775; 2 Stor. 100; in compiling a directory, but not so as to save the compiler all independent labor; L. R. 1 Eq. 697; 7 *id.* 34; *id.* 5 Ch. 279; a descriptive catalogue of fruit, etc.; L. R. 18 Eq. 444; a book on Ethnology; L. R. 5 Ch. 251; a dictionary, provided the new book may fairly be considered a new work; 31 L. T. R. 16; the test in all cases is said to be "substantial identity;" Drone, Copyright, 408. 2d. By *imitating* or copying, with colorable alterations and disguises, assuming the appearance of a new work. Where the resemblance does not amount to identity of parallel passages, the criterion is whether there is such similitude and conformity between the two books that the person who wrote the one must have used the other as a model, and must have copied or imitated it; see 5 Ves. 24; 8 *id.* 215; 12 *id.* 270; 16 *id.* 269, 422; 5 Swanst. 672; 2 Brown, Ch. 80; 2 Russ. 385; 2 S. & S. 6; 3 V. & B. 77; 1 Campb. 94; 1 East, 361; 4 Esp. 169; 1 Stor. 11; 3 *id.* 768; 2 W. & M. 497; 2 Paine, 393, which was the case of a chart. A fair and *bonâ fide* abridgment has in some cases been held to be no infringement of the copyright; 2 Atk. 141; Amb. 403; Lofft, 775; 1 Brown, Ch. 451; 5 Ves. 709; 2 Am. Jur. 491; 3 *id.* 215; 4 *id.* 456, 479; 4 Clifford, 1; 1 Y. & C. 298; 4 McLean, 306; 2 Stor. 105; 2 Kent, 382; see 3 Am. L. Reg. 129. But Mr Drone (Copyright, 440) maintains the contrary doctrine on principle. A translation has been held not to be a violation of the copyright of the original; 2 Wall. Jr. 547; s. c. 2 Am. L. Reg. 231. The correctness of this decision is questioned by Mr. Drone (Copyright, 455).

The title to a copyright is made assignable by that provision of the statute which authorizes it be taken out by the "legal assigns" of the author. An assignment may therefore be made before the entry for copyright; but, as the statute makes a written instrument, signed by the author, etc., and attested by two credible witnesses, necessary to a lawful authority in another to print, publish, and sell, a valid assignment or license, whether before or after the copyright is obtained by entry, must be so made. Whether a general assignment of the first term by the author will carry the interest in the additional or renewed term, see 2 Brown, Ch. 80; Jac. 315; 2 W. & M. 23.

The sole right of publicly performing or representing dramatic compositions, which have been entered for copyright under the act of 1831, by a supplemental act, passed August 18, 1856, is now added to the sole right of printing and publishing, and is vested in the author or proprietor, his heirs or assigns, during the whole period of the copyright; and authors may reserve the right to dramatize or translate their own works. These new rights, being made incident to the copyright, follow the latter whenever the formalities for obtaining it have been complied with. For an unlawful representation, the statute gives an action of damages, to be assessed at a sum not less than one hundred dollars for the first and at fifty dollars for every subsequent performance, as to the court shall seem just. The author's remedy in equity is also saved. The statute does not apply to cases where the right of representation has been acquired before the composition has been made the subject of copyright. For a discussion of these acts, and of the nature and incidents of dramatic literary property, see 9 Am. Law Reg. 33, and 23 Bost. Law Rep. 397. On the general subject, see Curtis; Drone; Copyright; 1 Am. L. Reg. 45; 2 *id.* 129; 4 Clifford, 1.

CORAAGIUM or **CORAAGE.** Measures of corn. An unusual and extraordinary tribute, arising only on special occasions. They are thus distinguished from services. Mentioned in connection with *hidage* and *carvage*. Cowel.

CORAM IPSO REGE (Lat.). Before the king himself. Proceedings in the court of king's bench are said to be *coram rege ipso*. 3 Bla. Com. 41.

CORAM NOBIS. A writ of error on a judgment in the king's bench is called a *coram nobis* (before us). 1 Archb. Pr. 234. See CORAM VOBIS.

CORAM NON JUDICE. Acts done by a court which has no jurisdiction either over

the person, the cause, or the process, are said to be *coram non judice*. 1 Conn. 40. Such acts have no validity. If an act is required to be done before a particular person, it would not be considered as done before him if he were asleep or *non compos mentis;* 5 H. & J. 42; 8 Cra. 9; Paine, 55; 1 Pres. Conv. 266.

CORAM PARIBUS. In the presence of the peers or freeholders. 2 Bla. Com. 307.

CORAM VOBIS. A writ of error directed to the same court which tried the cause, to correct an error in fact. 3 Md. 325; 3 Steph. Com. 642.

If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error *coram nobis* (before us), or *quæ coram nobis residant;* so called from its being founded on the record and process, which are stated in the writ to remain in the court of the king before the king himself. But if the error be in the *judgment* itself, and not in the process, a writ of error does not lie in the same court upon such judgment. 1 Rolle, Abr. 746. In the Common Pleas, the record and proceedings being stated to remain before the king's justices, the writ is called a writ of error *coram vobis* (before you), or *quæ coram vobis residant.* 3 Chitty, Bla. Com. 406, n.

CORD. A measure of wood, containing 128 cubic feet. See 67 Barb. 169.

CO-RESPONDENT. Any person called upon to answer a petition or other proceeding, but now chiefly applied to a person, charged with adultery with the husband or wife, in a suit for divorce, and made jointly a respondent to the suit.

CORN. In its most comprehensive sense, this term signifies every sort of grain, as well as peas and beans: this is its meaning in the memorandum usually contained in policies of insurance. But it does not include rice. Park, Ins. 112; 1 Marsh. Ins. 223, n.; Stev. Av. pt. 4, art. 2; Ben. Av. c. 10; Wesk. Ins. 145. See Com. Dig. *Biens* (G, 1). In the U. S. it usually means maize, or Indian corn; 53 Ala. 474.

CORN RENTS. Rents reserved in wheat or malt in certain college leases. Stat. 18 Eliz. c. 6; 2 Bl. 322.

CORN LAWS. Laws regulating the trade in bread-stuffs.

The object of corn laws is to secure a regular and steady supply of the great staples of food; and for this object the means adopted in different countries and at different times widely vary, sometimes involving restriction or prohibition upon the export, and sometimes, in order to stimulate production, offering a bounty upon the export. Of the former character was the famous system of corn laws of England, initiated in 1773 by Mr. Burke, and repealed in 1846 under Sir Robert Peel. See Cobden's Life.

CORNAGE. A species of tenure in England, by which the tenant was bound to blow a horn for the sake of alarming the country on the approach of an enemy. Bac. Abr. *Tenure* (N).

CORNET. A commissioned officer in a regiment of cavalry, abolished in England in 1871, and not existing in the U. S. army.

CORODY. An allowance of meat, drink, money, clothing, lodging, and such like necessaries for sustenance. 1 Bla. Com. 283; 1 Chitty, Prac. 225. An allowance from an abbey or house of religion, to one of the king's servants who dwells therein, of meat and other sustenance. Fitzh. N. B. 230.

An assize lay for a corody; Cowel. Corodies are now obsolete; Co. 2d Inst. 630; 2 Bla. Com. 40.

CORONATION OATH. The oath administered to a sovereign in England before coronation. Whart. Law Dic.

CORONATOR (Lat.). A coroner. Spel.

CORONATORE EXONERANDO. A writ for the removal of a coroner, for a cause therein assigned.

CORONER. An officer whose principal duty it is to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death, or who has died in prison.

It is his duty also, in case of the death of the sheriff or his incapacity, or when a vacancy occurs in that office, to serve all the writs and processes which the sheriff is usually bound to serve; 20 Ga. 336; 10 Humph. 346; 73 N. Y. 45; 1 Bla. Com. 349. See SHERIFF.

The chief justice of the King's Bench is the sovereign or chief coroner of all England; though it is not to be understood that he performs the active duties of that office in any one county; 4 Co. 57 *b*; Bac. Abr. *Coroner;* 3 Com. Dig. 242; 5 *id.* 212.

It is also his duty to inquire concerning shipwreck, and to find who has possession of the goods; concerning treasure-trove, who are the finders, and where the property is; 1 Bla. Com. 349.

The office has lost much of the honor which formerly appertained to it; but the duties are of great consequence to society, both for bringing murderers to punishment and protecting innocent persons from accusation. It may often happen that the imperfections of the early examination enable one who is undoubtedly a criminal to escape. It is proper in most cases of homicide to procure the examination to be made by a physician, and in many cases it is a coroner's duty so to do; 4 C. & P. 571. See 64 Ind. 524; 49 Iowa, 148; 8 Oreg. 170.

Coroners were abolished in Massachusetts by act 1877, c. 200, and the governor given the power to appoint, in their place, medical examiners, "men learned in the science of medicine," whose duties were to make examinations of dead bodies, to hold autopsies upon the same, and in case of death from violence to notify the district attorney and a justice of the district of the fact.

See Lee, Coroners; 6 Am. L. Reg. 385.

CORPORAL (Lat. *corpus*, body). Bodily; relating to the body: as, corporal punishment.

A non-commissioned officer of the lowest grade in an infantry company.

CORPORAL OATH. An oath which the party takes laying his hand on the gospels. Cowel. It is now held to mean solemn oath. 1 Ind. 184.

CORPORAL TOUCH. Actual, bodily contact with the hand.

It was once held that before a seller of personal property could be said to have stopped it *in transitu*, so as to regain the possession of it, it was necessary that it should come to his corporal touch; but the contrary is now settled. These words were used merely as a figurative expression. 3 Term, 464; 5 East, 184.

CORPORATION (Lat. *corpus*, a body). A body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members.

It is this last characteristic of a corporation, sometimes called its immortality, prolonging its existence beyond the term of natural life, and thereby enabling a long-continued effort and concentration of means to the end which it was designed to answer, that constitutes its principal utility. A corporation is modelled upon a state or nation, and is to this day called a body *politic* as well as corporate,—thereby indicating its origin and derivation. Its earliest form was, probably, the municipality or city, which necessity exacted for the control or local police of the marts and crowded places of the state or empire. The combination of the commonalty in this form for local government became the earliest bulwark against despotic power: and a late philosophical historian traces to the remains and remembrance of the Roman *municipia* the formation of those elective governments of towns and cities in modern Europe, which, after the fall of the Roman empire, contributed so largely to the preservation of order and to the protection of the rights of life and property as to become the foundation of modern liberty. McIntosh, Hist. of Eng. pp. 31, 32.

Aggregate corporations are those which are composed of two or more members at the same time.

Civil corporations are those which are created to facilitate the transaction of business.

Ecclesiastical corporations are those which are created to secure the public worship of God.

Eleemosynary corporations are those which are created for the purposes of charities, such as schools, hospitals, and the like.

Lay corporations are those which exist for secular purposes.

Private corporations are those which are created wholly or in part for purposes of private emolument. 4 Wheat. 668; 9 *id.* 907.

Public corporations are those which are exclusively instruments of the public interest.

Sole corporations are those which by law consist of but one member at any one time.

By both the civil and the common law, the *sovereign* authority only can create a corporation,—a corporation by prescription, or so old that the license or charter which created it is lost, being presumed, from the long-continued exercise of corporate powers, to have been entitled to them by sovereign grant. In England, corporations are created by royal charter or parliamentary act; in the United States, by legislative act of any state, or of the congress of the United States,—congress having power to create a corporation, as, for instance, a national bank, when such a body is an appropriate instrument for the exercise of its constitutional powers; 4 Wheat. 424.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation, which to them are the laws of their being, which they can neither dispense with nor alter. Subject, however, to such limitations as these, or general statute or constitutional law, may impose, every coporation aggregate has, by virtue of incorporation and as incidental thereto, *first*, the power of perpetual succession, including the admission, and, except in the case of mere stock corporations, the removal for cause, of members; *second*, the power to sue and be sued, to grant and to receive grants, and to do all acts which it may do at all, in its corporate name; *third*, to purchase, receive, and to hold lands and other property, and to transmit them in succession; *fourth*, to have a common seal, and to break, alter, and renew it at pleasure; and, *fifth*, to make by-laws for its government, so that they be consistent with its charter and with law. Indeed, at this day, it may be laid down as a general rule that a corportion may, within the limits of its charter or act of incorporation express or implied, lawfully do all acts and enter into all contracts that a natural person may do or enter into, so that the same be appropriate as means to the end for which the corporation was created.

A corporation may be dissolved, if of limited duration, by the expiration of the term of its existence, fixed by charter or general law; by the loss of all its members, or of an integral part of the corporation, by death or otherwise, if the charter or act of incorporation provide no mode by which such loss may be supplied; by the surrender of its corporate franchise to, and the acceptance of the surrender by, the sovereign authority; and, lastly, by the forfeiture of its charter by the neglect of the duties imposed or abuse of the privileges conferred by it; the forfeiture being enforced by proper legal process.

In England, a private as well as a public corporation may be dissolved by act of parliament; but in the United States, although the charter of a public corporation may be altered or repealed at pleasure, the charter of a private corporation, whether granted by the king of Great Britain previous to the revolu-

tion, or by the legislature of any of the states since, is, unless in the latter case express power be for that purpose reserved, within the protection of that clause of the constitution of the United States which, among other things, forbids a state from passing any "law impairing the obligation of contracts." Const. U. S. art. 1, sect. 10; 4 Wheat. 518. Under this clause of the constitution it has been settled that the charter of a private corporation, whether civil or eleemosynary, is an executed contract between the government and the corporation, and that the legislature cannot repeal, impair, or alter it against the consent or without the default of the corporation, judicially ascertained and declared. *Ibid.*

A corporate franchise, however, as to build and maintain a toll-bridge, may, by virtue of the power of eminent domain, be condemned by a state to public uses, upon just compensation, like any other private property; 6 How. 507.

CORPORATOR. A member of a corporation.

The corporators are not the corporation, for either may sue the other; 4 McLean, 547; 19 Vt. 187; 3 Metc. Mass. 44; 97 N. S. 13.

CORPOREAL HEREDITAMENTS. Substantial permanent objects which may be inherited. The term land will include all such. 2 Bla. Com. 17.

CORPOREAL PROPERTY. In Civil Law. That which consists of such subjects as are palpable.

In the common law, the term to signify the same thing is *property in possession*. It differs from *incorporeal property*, which consists of choses in action and easements, as a right of way, and the like.

CORPSE. The *dead body* (*q. v.*) of a human being. 1 Russ. & R. 366, n.; 2 Term, 733; 1 Leach, 497; 8 Pick. 370; Dig. 47. 12. 3. 7; 11. 7. 38; Code, 3. 44. 1. Stealing a corpse is an indictable offence, but not larceny at common law; Co. 3d Inst. 203; 1 Russ. Cr. 629. See DEAD BODY.

CORPUS (Lat.). A body. The substance. Used of a human body, a corporation, a collection of laws, etc. The capital of a fund or estate as distinguished from the income.

CORPUS COMITATUS. The body of the county; the inhabitants or citizens of a whole county, as distinguished from a part of the county or a part of its citizens. 5 Mas. 290.

CORPUS CUM CAUSA. See HABEAS CORPUS CUM CAUSA.

CORPUS DELICTI. The body of the offence; the essence of the crime.

It is a general rule not to convict unless the *corpus delicti* can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body; Best, Pres. § 201; 1 Stark. Ev. 575. See 6 C. & P. 176; 2 Hale, P. C. 290; Whart. Cr. Ev. § 324. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offence, has made his appearance alive. The wisdom of the rule is apparent; but it has been questioned whether, in extreme cases, it may not be competent to prove the basis of the *corpus delicti* by presumptive evidence; 3 Benth. Jud. Ev. 234; Wills, Cir. Ev. 105; Best, Pres. § 204. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: first, the death; and secondly, the existence of criminal agency as its cause; 43 Miss. 472. A like analysis would apply in the case of any other crime. The statement of the nature of the *corpus delicti*, by Dr. Wharton in his work on Criminal Evidence, § 325, appears to be inaccurate.

The presumption arising from the possession of the fruits of crime recently after its commission, which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. Thus, to borrow an apt illustration from Mr. Justice Maule, if a man were to go into the London docks quite sober, and shortly afterwards were to be found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stowed, "I think," says the learned judge, "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached and that any wine had actually been missed." Dears. 284; 1 Tayl. Ev. § 122. In this case it was proved that a prisoner indicted for larceny was seen coming out of the lower room of a warehouse in the London docks, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him from the bulky state of his pockets, and said, "I think there is something wrong about you;" upon which the prisoner said, "I hope you will not be hard upon me;" and then threw a quantity of pepper out of his pocket on the ground. The witness stated that he could not say whether any pepper had been stolen, nor that any pepper had been missed; but that which was found upon the prisoner was of like description with the pepper in the warehouse. It was held by all the judges that the prisoner, upon these facts, was properly convicted of larceny.

A confession alone ought not to be considered sufficient proof of the *corpus delicti;* 26 Miss. 157; 15 Wend. 147.

CORPUS JURIS CANONICI (Lat. the body of the canon law). The name given to the collections of the decrees and canons of the Roman church. See CANON LAW.

CORPUS JURIS CIVILIS. The body of the civil law. The collection comprising the Institutes, the Pandects or Digest, the Code, and the Novels, of Justinian. See those several titles, and also CIVIL LAW, for fuller information. The name is said to have been first applied to this collection early in the seventeenth century.

CORRECTION. Chastisement, by one having authority, of a person who has committed some offence, for the purpose of bringing him into legal subjection.

It is chiefly exercised in a parental manner by parents, or those who are placed *in loco parentis*. A parent may therefore justify the correction of the child either corporally or by confinement; and a schoolmaster, under whose care and instruction a parent has placed his child, may equally justify similar correction; but the correction in both cases must be moderate and in a proper manner; Com. Dig. *Pleader*, 3 M, 19; Hawk. c. 60, s. 23, c. 62, s. 2, c. 29, s. 5; 2 Humph. 283; 2 Dev. & B. L. 365.

The master of an apprentice, for disobedience, may correct him moderately; 1 B. & C. 469; Cro. Car. 179; 2 Show. 289; 10 Mart. La. 38; but he cannot delegate the authority to another.

A master has no right to correct his servants who are not apprentices; 10 Conn. 455; 2 Greenl. Ev. § 97; see ASSAULT for cases of undue correction.

Soldiers are liable to moderate correction from their superiors. For the sake of maintaining discipline in the navy, the captain of a vessel, belonging either to the United States or to private individuals, may inflict moderate correction on a sailor for disobedience or disorderly conduct; Ab. Sh. 160; 1 Ch. Pr. 73; 14 Johns. 119; 15 Mass. 365; 1 Bay, 3; Bee, 161; 1 Pet. Adm. 168; Moll. 209; 1 Ware, 83. Such has been the general rule. But flogging and other degrading punishments are now forbidden in the army, navy, merchant service, and military prisons; R. S. §§ 1342, 1624, 4611, 1354.

The husband, by the old law, might give his wife moderate correction; 1 Hawk. P. C. 2. But in later times this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife; 1 Bla. Com. 444; Stra. 478, 875, 1207; 2 Lev. 128.

Any excess of correction by the parent, master, officer, or captain, may render the party guilty of an assault and battery and liable to all its consequences; 4 Gray, 36. See ASSAULT. In some prisons, the keepers have the right to correct the prisoners.

CORREGIDOR. In Spanish Law. A magistrate who took cognizance of various misdemeanors, and of civil matters. 2 White, New Rec. 53.

CORREI. In Civil Law. Two or more bound or secured by the same obligation.

Correi credendi. Creditors secured by the same obligation.

Correi debendi. Two or more persons bound as principal debtors to pay or perform. Ersk. Inst. 3. 3. 74; Calvinus, Lex.; Bell, Dic.

CORRESPONDENCE. The letters written by one person to another, and the answers thereto. See LETTER; COPYRIGHT.

CORRUPTION. An act done with an intent to give some advantage inconsistent with official duty and the rights of others.

It includes bribery, but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Merlin, *Rép.*

Something against law: as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc.

CORRUPTION OF BLOOD. The incapacity to inherit, or pass an inheritance, in consequence of an attainder to which the party has been subject. Abolished by stats. 3 & 4 Will. IV. c. 106, and 33 & 34 Vict. c. 23; 1 Steph. Com. 446.

When this consequence flows from an attainder, the party is stripped of all honors and dignities he possessed, and becomes ignoble.

The constitution of the United States, art. 3, s. 3, n. 2, declares that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

The act of July 17, 1862 (12 St. at L. 589), for the seizure and condemnation of enemies' estates, with the resolution of the same date, does not conflict with this section, the forfeiture being only during the life of the offender; see 9 Wall, 339; 11 *id.* 268; 18 *id.* 156, 163; 92 U. S. 202. See 4 Bla. Com. 388; 1 Cruise, Dig. 52; 3 *id.* 240, 378–381, 473; 1 Chitty, Cr. L. 740.

CORSE-PRESENT. In Old English Law. A gift of the second best beast belonging to a man at his death, taken along with the corpse and presented to the priest. Stat. 21 Hen. VIII. cap. 6; Cowel; 2 Bla. Com. 425.

CORSNED. In Old English Law. A piece of barley bread, which, after the pronunciation of certain imprecations, a person accused of crime was compelled to swallow.

A piece of cheese or bread of about an ounce weight was consecrated with an exorcism desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty, but might turn to health and nourishment if he was innocent. Spelman, Gloss. 439. It was then given to the suspected person, who at the same time received the sacrament. If he swallowed it easily, he was esteemed innocent; if it choked him, he was esteemed guilty. See 4 Bla. Com. 345.

CORTES. The name of the legislative assemblies of Spain and Portugal.

CORVEE. In French Law. Gratuitous labor exacted from the villages or communities, especially for repairing roads, constructing bridges, etc.

Corvée seigneuriale are *services* due the lord of the manor. Guyot, *Rép. Univ.*; 3 Low. C. 1.

COSBERING. In Feudal Law. A prerogative or seignorial right of a lord, as to lie and feast himself and his followers at his tenants' houses. Cowel.

COSENING. In Old English Law. An offence whereby anything is done deceitfully, whether in or out of contracts, which cannot be fitly termed by any especial name. Called in the civil law *Stellionatus*. West, Symb. pt. 2, *Indictment*, § 68; Blount; 4 Bla. Com. 158.

COSINAGE (spelled, also, *Cousinage*, *Cosenage*). A writ which lay where the father of the great-grandfather of the demandant had been disseised and the heir brought his writ to recover possession. Fitz. N. B. 221.

Relationship; affinity. Stat. 4 Hen. III. cap. 8; 3 Bla. Com. 186; Co. Litt. 160 *a*.

COST. The cost of an article purchased for exportation is the price paid, with all incidental charges paid at the place of exportation; 2 Wash. C. C. 493. Cost price is that actually paid for goods. 18 N. Y. 337.

COST-BOOK. A book in which a number of adventurers who have obtained permission to work a lode, and have agreed to share the enterprise in certain proportions, enter the agreement and from time to time the receipts and expenditures of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares. These associations are called "Cost-book mining companies," and are governed by the general law of partnership. Lindley on Partnership, *147.

COSTS. In Practice. The expenses incurred by the parties in the prosecution or defence of a suit at law.

They are distinguished from fees in being an allowance to a party for expenses incurred in conducting his suit; whereas fees are a compensation to an officer for services rendered in the progress of the cause. 11 S. & R. 248.

No costs were recoverable by either plaintiff or defendant at common law. They were first given to plaintiff by the statute of Gloucester, 6 Edw. I. c. 1, which has been substantially adopted in all the United States.

A party can in no case recover costs from his adversary unless he can show some statute which gives him the right.

Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly; Salk. 206; 2 Stra. 1006, 1069; 3 Burr. 1287; 4 Binn. 194; 4 S. & R. 129; 5 *id.* 344; 1 Rich. 4.

They do not extend to the government; and therefore when the United States, or one of the several states, is a party, they neither pay nor receive costs, unless it be so expressly provided by statute; 1 S. & R. 505; 8 *id.* 151; 3 Cra. 73; 2 Wheat. 395; 12 *id.* 546; 5 How. 29. This exemption is founded on the sovereign character of the state, which is subject to no process; 3 Bla. Com. 400; Cowp. 366; 3 Penn. 153.

In many cases, the right to recover costs is made to depend, by statute, upon the amount of the verdict or judgment. Where there is such a provision, and the verdict is for less than the amount required by statute to entitle the party to costs, the right to costs, in general, will depend upon the mode in which the verdict has been reduced below the sum specified in the act. In such cases, the general rule is that if the amount be reduced by evidence of direct payment, the party shall lose his costs; but if by set-off or other collateral defence, he will be entitled to recover them; 2 Stra. 1911; 1 Wils. 19; 3 *id.* 48; 4 Dougl. 448; 9 Moore, P. C. 623; 2 Chitty, Bl. 394; 8 East, 28, 347; 2 Price, 19; 1 Taunt. 60; 4 Bingh. 169; 1 Dall. 308, 457; 2 *id.* 74; 3 S. & R. 388; 13 *id.* 287; 16 *id.* 253; 4 Penn. 330.

When a case is dismissed for want of jurisdiction over the person, no costs are allowed to the defendant, unless expressly given by statute. The difficulty in giving costs, in such case, is the want of power. If the case be not legally before the court, it has no more jurisdiction to award costs than it has to grant relief; 2 W. & M. 417; 1 Wall. Jr. 187; 2 Wheat. 363; 9 *id.* 650; 3 Sumn. 473; 15 Mass. 221; 16 Penn. 200; 4 Dall. 388; 3 Litt. 332; 2 Yerg. 579; Wright, Ohio, 417; 1 Vt. 488; 2 Halst. 168.

In equity, the giving of costs is entirely discretionary, as well with respect to the period at which the court decides upon them as with respect to the parties to whom they are given.

In the exercise of their discretion, courts of equity are generally governed by certain fixed principles which they have adopted on the subject of costs. It was the rule of the civil law that *victus victori in expensis condemnatus est;* and this is the general rule adopted in courts of equity as well as in courts of law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *primâ facie* claim to costs given by success to the party who prevails; 3 Dan. Ch. Pr. 1515–1521.

An executor or administrator suing at law or in equity in his representative capacity is not personally liable to the opposite party for costs in case he is unsuccessful, if the litigation were carried on in good faith for the benefit of the estate; 11 S. & R. 47; 15 *id.* 239; 23 Penn. 471. But the rule is otherwise where vexatious litigation is caused by the executor or administrator, and where he has been guilty of fraud or misconduct in relation to the suit; 5 Binn. 138; 7 Penn. 136, 137; 3 Penn. L. J. 116.

See DOUBLE COSTS; TREBLE COSTS. Consult Brightly, Hulloch, Merrifield, Sayer, Tidd, Costs; the books of practice adapted to the laws of each state.

COSTS OF THE DAY. Costs incurred in preparing for trial on a particular day. Ad. Eq. 343.

In English practice, costs are ordered to be paid by a plaintiff, who neglects to go to trial according to notice; Mozley & W. Law Dic.; Lush, Pr. 496.

COSTS DE INCREMENTO (increased costs, costs of increase). Costs adjudged by the court in addition to those assessed by the jury. 13 How. 372.

The cost of the suit, etc., recovered originally under the statute of Gloucester is said to be the origin of costs *de incremento;* Bull. N. P. 328 *a.* Where the statute requires costs to be doubled in case of an unsuccessful appeal, costs *de incremento* stand on the same footing as jury costs; 2 Stra. 1048; TAXED COSTS. Costs were enrolled in England in the time of Blackstone as *increase* of damages; 3 Bla. Com. 399.

COTERELLI. Anciently, a kind of peasantry who were outlaws. Robbers. Blount.

COTERELLUS. A cottager.

Coterellus was distinguished from *cotarius* in this, that the *cotarius* held by socage tenure, but the *coterellus* held in mere villenage, and his person, issue, and goods were held at the will of the lord. Cowel.

COTLAND. Land held by a cottager, whether in socage or villenage. Cowel; Blount.

COTSETUS. A cottager or cottage-holder who held by servile tenure and was bound to do the work of the lord. Cowel.

COTTAGE, COTTAGIUM. In Old English Law. A small house without any land belonging to it, whereof mention is made in stat. 4 Edw. I.

But, by stat. 31 Eliz. cap. 7, no man may build such cottage for habitation unless he lay unto it four acres of freehold land, except in market-towns, cities, or within a mile of the sea, or for the habitation of laborers in mines, shepherds, foresters, sailors, etc. Twenty years' possession of cottage gives good title as against the lord; Bull. N. P. 103 *a*, 104. By a grant of a cottage the curtilage will pass; 4 Vin. Abr. 582.

COTTIER TENANCY. A species of tenancy in Ireland, constituted by an agreement in writing, and subject to the following terms: That the tenement consist of a dwelling-house with not more than half an acre of land; at a rental not exceeding 5*l.* a year; the tenancy to be for not more than a month at a time; the landlord to keep the house in good repair. Landlord and Tenant Act (Ireland), 23 & 24 Vict. c. 154, s. 81.

COUCHANT. Lying down. Animals are said to have been *levant* and *couchant* when they have been upon another person's land, damage feasant, one night at least. 3 Bla. Com. 9.

COUNCIL (Lat. *concilium*, an assembly). The legislative body in the government of cities or boroughs. An advisory body selected to aid the executive. See 14 Mass. 470; 3 Pick. 517; 4 *id.* 25.

A governor's council is still retained in some of the states of the United States; 70 Me. 570 It is analogous in many respects to the privy council of the king of Great Britain and of the governors of the British colonies, though of a much more limited range of duties.

See PRIVY COUNCIL.

COUNSEL. The counsellors who are associated in the management of a particular cause, or who act as legal advisers in reference to any matter requiring legal knowledge and judgment.

The term is used both as a singular and plural noun, to denote one or more; though it is perhaps more common, when speaking of one of several counsellors concerned in the management of a case in court, to say that he is "of counsel."

Knowledge. A grand jury is sworn to keep secret "the commonwealth's *counsel*, their fellows', and their own."

COUNSELLOR AT LAW. An officer in the supreme court of the United States, and in some other courts, who is employed by a party in a cause to conduct the same on its trial on his behalf.

He differs from an attorney at law.

In the supreme court of the United States, the two degrees of attorney and counsel were at first kept separate, and no person was permitted to practise in both capacities, but the present practice is otherwise; Weeks, Attorneys, 54. It is the duty of the counsel to draft or review and correct the special pleadings, to manage the cause on trial, and, during the whole course of the suit, to apply established principles of law to the exigencies of the case; 1 Kent, 307. In England the term "counsel" is applied to a barrister.

Generally, in the courts of the United States, the same person performs the duties of counsellor and attorney at law.

In New York, the rules established by the court of appeals, in September, 1877, provide for an examination and admission as a counsellor after two years' practice as an attorney; Throop's Code, § 56. The distinction is also preserved in New Jersey.

In giving their advice to their clients, counsel have duties to perform to their clients, to the public, and to themselves. In such cases they have thrown upon them something which they owe to their administration of justice, as well as to the private interests of their employers. The interests propounded for them ought, in their own apprehension, to be just, or at least fairly disputable; and when such interests are propounded, they ought not to be pursued *per fas et nefas;* 1 Hagg. Adm. 222. An attorney and counsellor is not an officer of the United States, he is an officer of the court. His right to appear for suitors and to argue causes is not a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can be deprived only by the judgment of the court, for moral or professional delinquency; *ex parte* Garland, 4 Wall.

See ATTORNEY AT LAW; PRIVILEGE; CONFIDENTIAL COMMUNICATIONS.

COUNT (Fr. *comte;* from the Latin *comes*). An earl.

It gave way as a distinct title to the Saxon earl, but was retained in countess, viscount, and as the basis of county. T. L.; 1 Bla. Com. 398. See COMES.

In Pleading (Fr. *conte*, a narrative). The plaintiff's statement of his cause of action.

This word, derived from the French *conte*, a narrative, is in our old law-books used synonymously with declaration; but practice has introduced the following distinction. When the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called, indifferently, a declaration or count; though the former is the more usual term. But when the suit embraces two or more causes of action (each of which, of course, requires a different statement), or when the plaintiff make two or more different statements of one and the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports, upon the face of it, to disclose a distinct right of action, unconnected with that stated in any of the other counts.

One object proposed in inserting two or more counts in one declaration when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring; but the more usual end proposed in inserting more than one count in such case is to accommodate the statement to the cause, as far as may be, to the possible state of the proof to be exhibited on trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action; so that, if one or more of several counts be not adapted to the evidence, some other of them may be so; Gould, Pl. c. 4, ss. 2, 3, 4; Steph. Pl. 266–269; *Doctrina Plac.* 178; 3 Com. Dig. 291; Dane, Abr. Index; Bouvier, Inst. Index. In real actions, the declaration is usually called a count. Steph. Pl. 29. See COMMON COUNTS.

COUNT AND COUNT-OUT. These words have a technical sense in a count of the house of commons by the speaker. May, Parl. Prac.

COUNTER (spelled, also, *Compter*). The name of two prisons formerly standing in London, but now demolished. They were the Poultry Counter and Wood Street Counter. Cowel; Whish. L. D.; Coke, 4th Inst. 248.

COUNTER AFFIDAVIT. An affidavit made in opposition to one already made. This is allowed in the preliminary examination of some cases.

COUNTER-BOND. A bond to idemnify. 2 Leon. 90.

COUNTER-CLAIM. A liberal practice introduced by the reformed codes of procedure in many of the United States, and comprehending RECOUPMENT and SET-OFF, *q. v.*, though broader than either.

The New York code thus defines it:—

The counter-claim must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:—

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action. N. Y. Code, 1877, § 501. See 21 N. Y. 191; 51 *id.* 327; 67 *id.* 48; 21 Hun, 240; 8 How. Pr. 122, 335; 12 *id.* 310; 35 Wis. 618; 82 N. C. 356; 66 Ind. 498; 25 Minn. 210.

COUNTER-LETTER. An agreement to recovery where property has been passed by absolute deed with the intention that it shall serve as security only. A defeasance by a separate instrument. 11 Pet. 351.

COUNTER-SECURITY. Security given to one who has become security for another, the condition of which is, that if the one who first became surety shall be damnified, the one who gives the counter-security will indemnify him.

COUNTERFEIT. In Criminal Law. To make something false in the semblance of that which is true. It always implies a fraudulent intent. It refers usually to imitations of coin or paper money. See Vin. Abr. *counterfeit;* R. M. Charlt. 151; 1 Ohio, 185. FORGERY.

COUNTERMAND. A change or recalling of orders previously given.

Express countermand takes place when contrary orders are given and a revocation of the prior orders is made.

Implied countermand takes place when a new order is given which is inconsistent with the former order.

When a command or order has been given, and property delivered, by which a right vests in a third person, the party giving the order cannot countermand it. For example, if a debtor should deliver to A a sum of money to be paid to B, his creditor, B has a vested right in the money, and, unless he abandon that right and refuse to take the money, the debtor cannot recover it from A. 1 Rolle, Abr. 32, pl. 13; Yelv. 164; Styles, 296. See 3 Co. 26 *b*; 2 Ventr. 298; 10 Mod. 432; Vin. Abr. *Countermand* (A, 1), *Bailment* (D); 9 East, 49; Bac. Abr. *Bailment* (D); Com. Dig. *Attorney* (B, 9), (C, 8); Dane, Abr. *Countermand.*

COUNTERPART. Formerly, each party to an indenture executed a separate deed: that part which was executed by the grantor was called the original, and the rest the counterparts. It is now usual for all the parties to execute every part; and this makes them all originals; 2 Bla. Com. 296.

In granting lots subject to a ground-rent reserved to the grantor, both parties execute the deeds, of which there are two copies:

although both are original, one of them is sometimes called the counterpart. See 12 Vin. Abr. 104; Dane, Abr. Index; 7 Com. Dig. 443; Merlin, *Rép. Double Ecrit.*

COUNTERPLEA. In Pleading. A plea to some matter incidental to the main object of the suit, and out of the direct line of pleadings. 2 Wms. Saund. 45 *h*. Thus, *counterplea of oyer* is the defendant's allegations why oyer of an instrument should not be granted. *Counterplea of aid prayer* is the demandant's allegation why the vouchee of the tenant in a real action, or a stranger who asks to come in to defend his right, should not be admitted. *Counterplea of voucher* is the allegation of the vouchee in avoidance of the warranty after admission to plead. Counterpleas are of rare occurrence. T. L.; *Doctrian Plac.* 300; Com. Dig. *Voucher* (B, 1, 2); Dane, Abr.

COUNTRY. A word often used in pleading and practice. Usually signifies a jury, or the inhabitants of a district from which a jury is to be summoned. 3 Bla. Com. 349; 4 *id.* 349; Steph. Pl. 73, 78, 230.

COUNTY. One of the civil divisions of a country for judicial and political purposes. 1 Bla. Com. 113. Etymologically, it denotes that portion of the country under the immediate government of a count. 1 Bla. Com. 116.

The United States are generally divided into counties. Counties are, in many of the states, divided into townships or towns. In the New England States, however, towns are the basis of all civil divisions, and the counties are rather to be considered as aggregates of towns, so far as their origin is concerned. In Pennsylvania, the state was originally divided into three counties by William Penn. See Proud's Hist. vol. 1, p. 234; vol. 2, p. 258.

In some states, a county is considered a corporation; 1 Ill. 115; in others, it is held a quasi corporation; 16 Mass. 87; 9 Me. 88; 8 Johns. 385; 3 Munf. 102. In regard to the division of counties, see 11 Mass. 399; 6 J. J. Marsh. 147; 4 Halst. 357; 5 Watts, 87; 9 Cow. 640; 89 Penn. 419; 8 Baxt. 74; *id.* 141; 100 U. S. 548; 33 Ark. 191; *id.* 497; 5 Heisk. 294. A county may be required by act of legislature to build a public work outside the county limits, where it is of special interest to the people of the county; 104 Mass. 236; 50 Md. 245. The terms "county" and "people of the county" are, or may be, used interchangeably; 58 Mo. 175.

In the English law, this word signifies the same as *shire*,—county being derived from the French, and *shire* from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided, for the better government thereof and the more easy administration of justice. There is no part of England that is not within some county; and the shire-reeve (*sheriff*) was the governor of the province, under the *comes*, earl, or count.

COUNTY COMMISSIONERS. Certain officers generally intrusted with the superintendence of the collection of the county taxes and the disbursements made for the county. They are invested by the local laws with various powers. In some of the states they are called supervisors.

COUNTY CORPORATE. A city or town, with more or less territory annexed, constituting a county by itself. 1 Bla. Com. 120. Something similar to this exists in this country in regard to Philadelphia, New York, and Boston. See 4 Mo. App. 347. They differ in no material points from other counties.

COUNTY COURT. In English Law. Tribunals of limited jurisdiction, originally established under the statute 9 & 10 Vict. c. 95.

They had at their institution jurisdiction of actions for the recovery of debts, damages, and demands, legacies, and balances of partnership accounts, where the sum sued for did not exceed twenty pounds. It has since been much extended, especially in cases where the parties give assent in writing. They are chiefly regulated by stat. 9 & 10 Vict. c. 95; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 19 & 20 Vict. c. 108; 21 & 22 Vict. c. 74. See 3 Bla. Com. 35.

Tribunals of limited jurisdiction in the county of Middlesex, established under the statute 22 Geo. II. c. 33.

These courts are held once a month at least in every hundred in the county of Middlesex, by the county clerk and a jury of twelve suitors, or freeholders, summoned for that purpose. They examine the parties under oath, and make such order in the case as they shall judge agreeable to conscience. 3 Steph. Com. 452; 3 Bla. Com. 83.

The county court was a court of great antiquity, and originally of much splendor and importance. It was a court of limited jurisdiction, incident to the jurisdiction of the sheriff, in which, however, the suitors were really the judges, while the sheriff was a ministerial officer. It had jurisdiction of personal actions for the recovery of small debts, and of many real actions prior to their abolition. By virtue of a *justicies*, it might entertain jurisdiction of personal actions to any amount. At this court all proclamations of laws, outlawries, etc., were made, and the elections of such officers as sheriffs, coroners, and others took place. In the time of Edward I. it was held by the earl and bishop, and was of great dignity. It was superseded by the courts of Request to a great degree; and these, in turn, gave way to the new county courts, as they are sometimes called distinctively.

In American Law. Courts in many of the states of the United States and in Canada, of widely varying powers. See the accounts of the various states and the article CANADA.

COUNTY PALATINE. A county possessing certain peculiar privileges.

The owners of such counties have kingly powers within their jurisdictions, as the pardoning crimes, issuing writs, etc. These counties have either passed into the hands of the crown, or have lost their peculiar privileges to a great degree. 1 Bla. Com. 117; 4 *id.* 431. The name is derived from *palatium* (palace), and was ap-

plied because the earls anciently had palaces and maintained regal state. Cowel; Spel.; 1 Bla. Com. 117. See COURTS OF THE COUNTIES PALATINE.

COUNTY SESSIONS. In England, the Court of General Quarter Sessions of the Peace held in every county once in every quarter of a year. Mozley & W. Law Dic.

COUPONS. Those parts of a commercial instrument which are to be *cut*, and which are evidence of something connected with the contract mentioned in the instrument. They are generally attached to certificates of loan, where the interest is payable at particular periods, and, when the interest is paid, they are cut off and delivered to the payor. In England, they are known as *warrants* or *dividend warrants*, and the securities to which they belong, debentures. 13 C. B. 372. In the United States they have been decided to be negotiable instruments, upon which suit may be brought though detached from the bond; 53 Ind. 191; 44 Penn. 63; 21 How. 529; 109 Mass. 88; 22 Gratt. 833; 14 Wall. 282; 20 Wall. 583; at least when negotiable on their face; 43 Me. 232; 49 *id.* 507; 23 Am. Rep. 315; 82 N. C. 382; 12 S. C. 200. Otherwise, in 1 Biss. 105, if the bond to which the coupons were attached was not negotiable; see 43 Me. 232; and otherwise if not payable to bearer or order; 66 N. Y. 14; see 26 Conn. 121. Dividend warrants of the Bank of England made payable to a particular person, but not containing words of transfer, were held not to be negotiable, notwithstanding they had been so by custom for sixty years; 9 Q. B. 396. A purchaser of overdue coupons takes only the title of his vendor; 18 Gratt. 750; 1 Hughes, 410. Negotiable coupons are entitled to days of grace; 66 N. Y. 14; Jones, Railroad Securities, § 326.

Interest on coupons may be recovered in a suit on the coupons; 44 Penn. 75; 3 McLean, 472; 92 U. S. 502; 96 *id.* 51; 57 N. H. 397; 65 N. C. 234; 41 Barb. 9. The *rate* of interest provided for in the bond continues on the coupon till it is merged in judgment; 96 U. S. 51; 112 Mass. 53; 2 Nev. 199; 25 Ohio St. 621; *contra*, 22 How. 118; 32 Md. 501; 10 R. I. 223. See Jones, Railroad Securities, § 336. A suit on the coupon is not barred by the Statute of Limitations unless a suit on the bond would be barred; 14 Wall. 282; otherwise, when the coupons have passed into the hands of a party who does not hold the bonds; 20 Wall. 583. As to practice in actions on coupons; see 9 Wall. 477.

See Jones, Railroad Securities; Clemens, Corporate Securities; Cavanaugh, Money Securities.

COUR DE CASSATION. In French Law. The supreme judicial tribunal and court of final resort, established 1790, under the title of *Tribunal de Cassation*, and received its present name 1802. It is composed of forty-nine counsellors and judges, including a first president and three presidents of chamber, an attorney-general and six advocates-general, one head registrar and four deputy registrars appointed by the head registrar, and a certain number of ushers. Jones, French Bar, 22; Guyot, *Rép. Univ.*

The jurisdiction of the court is only on error shown in the proceedings of the lower courts in matters of law, taking the facts as found by the lower courts.

COURSE. The direction of a line with reference to a meridian.

Where there are no monuments, the land must be bounded by the courses and distances mentioned in the patent or deed; 4 Wheat. 444; 3 Pet. 96; 3 Murph. 82; 2 H. & J. 267; 5 *id.* 254. When the lines are actually marked, they must be adhered to though they vary from the course mentioned in the deeds; 2 Over. 304; 7 Wheat. 7. See 3 Call, 239; 7 T. B. Monr. 333. See BOUNDARY.

COURSE OF TRADE. What is usually done in the management of trade or business.

Men are presumed to act for their own interest, and to pursue the way usually adopted by men generally: hence it is presumed in law that men in their actions will pursue the usual course of trade.

COURSE OF THE VOYAGE. By this term is understood the regular and customary track, if such there be, which a ship takes in going from one port to another, and the shortest way. Marsh. Ins. 185.

COURT (Fr. *cour*, Dutch, *koert*, a yard). **In Practice.** A body in the government to which the public administration of justice is delegated.

The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions; 20 Ala. 446; 20 Ark. 77.

The place where justice is judicially administered. Co. Litt. 58 *a*; 3 Bla. Com. 23, 25. See 45 Iowa, 501.

The judge or judges themselves, when duly convened.

The term is used in all the above senses, though but infrequently in the third sense given. The application of the term—which originally denoted the place of assembling—to denote the assemblage, strikingly resembles the similar application of the Latin term *curia* (if, indeed, it be not a mere translation), and is readily explained by the fact that the earlier courts were merely assemblages, in the court-yard of the baron or of the king himself, of those who were qualified and whose duty it was so to appear at stated times or upon summons. Traces of this usage and constitution of courts still remain in the courts baron, the various courts for the trial of impeachments in England and the United States, and in the control exercised by the parliament of England and the legislatures of the various states of the United States over the organization of courts of justice, as constituted in modern times. Indeed, the English parliament is still the *High Court of Parliament*, and in Massachusetts the united legislative bodies are entitled, as they (and the body to which they succeeded) have been from time immemorial, the *General Court*.

In England, however, and in those states of the

United States which existed as colonies prior to the revolution, most of these judicial functions were early transferred to bodies of a compacter organization, whose sole function was the public administration of justice. The power of impeachment of various high officers, however, is still retained by the legislative bodies both in England and the United States, and is, perhaps, the only judicial function which has ever been exercised by the legislative bodies in the newer states of the United States. These more compact bodies are the *courts*, as the term is used in its modern acceptance.

The one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called *the court*, as distinguished from the accessory and subordinate officers; 3 Ind. 239; 53 Mo. 173; see 19 Vt. 478. Courts of record are also provided with a recording officer, variously known as clerk, prothonotary, register, etc.; while in all courts there are counsellors, attorneys, or similar officers recognized as peculiarly suitable persons to represent the parties actually concerned in the causes, who are considered as officers of the court and assistants of the judges, together with a variety of ministerial officers, such as sheriffs, constables, bailiffs, tipstaves, criers, etc. For a consideration of the functions of the various members of a court, see the various appropriate titles, as JURY, SHERIFF, etc.

Courts are said to belong to one or more of the following classes, according to the nature and extent of their jurisdiction, their forms of proceeding, or the principles upon which they administer justice, viz.:—

Admiralty. See ADMIRALTY.

Appellate, which take cognizance of causes removed from another court by appeal or writ of error. See APPEAL; APPELLATE JURISDICTION; DIVISION OF OPINION.

Civil, which redress private wrongs. See JURISDICTION.

Criminal, which redress public wrongs, that is, crimes or misdemeanors.

Ecclesiastical. See ECCLESIASTICAL COURTS.

Of equity, which administer justice according to the principles of equity. See EQUITY; COURT OF EQUITY; COURT OF CHANCERY.

Of general jurisdiction, which have cognizance of and may determine causes various in their nature.

Inferior, which are subordinate to other courts; 18 Ala. 521; also, those of a very limited jurisdiction.

Of law, which administer justice according to the principles of the common law.

Of limited or special jurisdiction, which can take cognizance of a few specified matters only.

Local, which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough, or, in England, of a barony. See LOCAL COURTS.

Martial. See COURT-MARTIAL.

Not of record, those which are not courts of record.

Of original jurisdiction, which have jurisdiction of causes in the first instance. See JURISDICTION.

Of record. See COURT OF RECORD.

Superior, which are those of immediate jurisdiction between the inferior and supreme courts; also, those of controlling as distinguished from those of subordinate jurisdiction. 4 Bosw. 547.

Supreme, which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, though not the court of final resort.

See COURT OF RECORD.

COURT OF ADMIRALTY. See ADMIRALTY; COURTS OF THE UNITED STATES.

COURT OF ANCIENT DEMESNE. In English Law. A court of peculiar constitution, held by a bailiff appointed by the king, in which alone the tenants of the king's demesne could be impleaded. 2 Burr. 1046; 1 Spence, Eq. Jur. 100; 2 Bla. Com. 99; 1 Report Eng. Real Prop. Comm. 28, 29; 1 Steph. Com. 224; 3 & 4 W. IV., c. 74, §§ 4, 5, 6.

COURT OF APPEAL, HER MAJESTY'S. Established by the Supreme Court of Judicature Acts of 1873 and 1875. To it is transferred the jurisdiction of the lord chancellor and lords justices of the court of appeal in chancery, that of the court of exchequer chamber, also that exercised by the judicial committee of the privy council on appeal from the high court of admiralty or from any order in lunacy made by the lord chancellor, or any other person having jurisdiction in lunacy. No appeals can be brought from the court of appeal to the house of lords or the privy council. See JUDICATURE ACTS.

COURT OF APPEALS. In American Law. An appellate tribunal which, in Kentucky, Maryland, and New York, is the court of last resort. In Delaware and New Jersey, it is known as the court of errors and appeals; in Virginia and West Virginia, the supreme court of appeals; in Texas the court of appeals is inferior to the supreme court. For the judicial system of each state, see the articles on the several states.

COURT OF ARBITRATION OF THE CHAMBER OF COMMERCE OF NEW YORK. Organized in 1874, for the settlement of controversies of a mercantile nature in the city of New York. Where all the parties are regular members of the chamber of commerce, either may summon the opposite party before this court. Other parties may voluntarily submit to its decision such questions arising in the port of New York. An official arbitrator presides, but others may be named by the parties to sit with him, and counsel may be employed. The decision of this court is final, and is in the form of an award by the arbitrator. N. Y. Laws, 1874, c. 278, and 1875, c. 495.

COURT OF ARCHDEACON. The most inferior of the English ecclesiastical courts, from which an appeal generally lies to that of the bishop. 3 Bla. Com. 64; 3 Steph. Com. 305.

COURT OF ARCHES (L. Lat. *curia de arcubus*). **In English Ecclesiastical Law.** A court of appeal, and of original jurisdiction.

The most ancient consistory court belonging to the archbishop of Canterbury for the trial of spiritual causes, the judge of which is called the *dean of the arches*, because he anciently held his court in the church of St. Mary *le Bow* (*Sancta Maria de arcubus*, — literally, "St. Mary *of arches*"), so named from the style of its steeple, which is raised upon pillars built *archwise*, like so many bent bows. Termes de la Ley. It is now held, as are also the other spiritual courts, in the hall belonging to the College of Civilians, commonly called Doctors' Commons.

Its proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but, the office of dean of the arches having been for a long time united with that of the archbishop's principal official, the judge of the arches, in right of such added office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. 3 Bla. Com. 64; 3 Steph. Com. 306; Whart. Law Dic. *Arches Court*. Many suits are also brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the common law by the denomination of *letters of request*. 3 Steph. Com. 306; 2 Chitty, Gen. Pr. 496; 2 Add. Eccl. 406.

From the court of arches an appeal formerly lay to the pope, and afterwards, by statute 25 Hen. VIII. c. 19, to the king in chancery (that is, to a court of delegates appointed under the king's great seal), as supreme head of the English church, but now, by 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, to the judicial committee of the privy council; 3 Bla. Com. 65; 3 Steph. Com. 306.

A suit is commenced in the ecclesiastical court by citing the defendant to appear, and exhibiting a libel containing the complaint against him, to which he answers. Proofs are then adduced, and the judge pronounces decree upon hearing the arguments of advocates, which is then carried into effect.

Consult Burn, Eccl. Law; Reeve, Eng. Law; 3 Bla. Com. 65; 3 Steph. Com. 306.

COURTS OF ASSIZE AND NISI PRIUS. **In English Law.** Courts composed of two or more commissioners, called judges of assize (or of assize and *nisi prius*), who are twice in every year sent by the queen's special commission on *circuits* all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall; there being, however, as to London and Middlesex, this exception, that, instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose. in and after every term, before the chief or other judge of the superior court, at what are called the London and Westminster sittings.

These judges of assize came into use in the room of the ancient justices in eyre (*justiciarii in itinere*), who were regularly established, if not first appointed, by the Parliament of Northampton, A. D. 1176 (22 Hen. II.), with a delegated power from the king's great court, or *aula regis*, being looked upon as members thereof; though the present justices of assize and *nisi prius* are more immediately derived from the stat. Westm. 2, 13 Edw. I. c. 30, and consist principally of the judges of the superior courts of common law, being assigned by that statute out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By stat. 27 Edw. I. c. 4 (explained by 12 Edw. II. c. 3), assizes and inquests are allowed to be taken before any one justice of the court in which the plea is brought, associating with him one knight or other approved man of the county: by stat. 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law, or, otherwise, before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's sergeant sworn; and, finally, by 2 & 3 Vict. c. 22, all justices of assize may, on their respective circuits, try causes pending in the court of exchequer, without issuing (as it had till then been considered necessary to do) a separate commission from the exchequer for that purpose. 3 Steph. Com. 352; 3 Bla. Com. 57, 58.

There are eight circuits (formerly seven), viz.: the Home, Midland, Norfolk, Oxford, Northern, Western, North Wales, and South Wales. A general commission is issued twice a year to the judges mentioned (of the superior courts of common law at Westminster), two of whom are assigned to every circuit. The judges have four several commissions, viz.; of *the peace;* of *oyer and terminer;* of *gaol delivery;* and of *nisi prius*. There were formerly five, including the commission of assize; but the recent abolition of assizes and other real actions has thrown that commission out of force. The commission of *nisi prius* is directed to the judges, the clerks of assize, and others; and by it civil causes in which issue has been joined in any one of the superior courts are tried in circuit by a jury of twelve men of the county in which the venire is laid, and on return of the verdict to the court above—usually on the first day of the term following—the court gives judgment on the fifth day after, allowing the four intermediate days to either party, if dissatisfied with the verdict, to move for a new trial; 3 Steph. Com. 514, 515; 3 Bla. Com. 58, 59. Where courts of this kind exist in the United States, they are instituted by statutory provision. 4 W. & S. 404. See OYER AND TERMINER; GAOL DELIVERY; COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; NISI PRIUS; COMMISSION OF THE PEACE.

COURT OF ATTACHMENTS. The lowest of the three courts held in the forests. It has fallen into total disuse.

The highest court is called Justice in Eyre's

Seat; the middle, the Sweinmote; and the lowest, the Attachment. Sharswood, For. Laws, 90, 99; Wharton, Law Dic. *Attachment of the Forest.*

The Court of Attachments is to be held before the verderors of the forest once in every forty days, to inquire of all offenders against vert and venison, by receiving from the foresters or keepers their attachments or presentments *de viridi et venatione*, enrolling them, and certifying them under their seals to the court of justice-seat, or sweinmote; for this court can only inquire of offenders; it cannot convict them; 3 Bla. Com. 171; Carta de Foresta, 9 Hen. III. c. 8. But see FOREST COURTS.

COURT OF AUGMENTATION. A court established by 27 Hen. VIII. c. 27, for managing the revenues and possessions of all monasteries whose income was under two hundred pounds a year (which by an act of parliament of the same session had been given to the king), and for determining suits relating thereto.

It was called "The Court of the Augmentations of the Revenues of the King's Crown" (from the *augmentation* of the revenues of the crown derived from the suppression of the monasteries), and was a court of record, with one great seal and one privy seal,—the officers being a chancellor, who had the great seal, a treasurer, a king's attorney and solicitor, ten auditors, seventeen receivers, with clerk, usher, etc.

All dissolved monasteries under the above value, with some exceptions, were in survey of the court, the chancellor of which was directed to make a yearly report of their revenues to the king. The court was dissolved in the reign of queen Mary, but the Office of Augmentation remained long after; and the records of the court are now at the Public Record Office, in the keeping of the master of the rolls, stat. 1 & 2 Vict. c. 94, and may be searched on payment of a fee. Eng. Cyclopædia; Cowel.

COURT, BAIL. See BAIL COURT.

COURT OF BANKRUPTCY. A court of record, in England, with jurisdiction in bankruptcy, primary and appellate, and which is declared a court of law and equity for that purpose. The nature of its constitution may be learned from the early sections of the Bankrupt Law Consolidation Act, 1849. The judgments of this court may be examined, on appeal, by a vice-chancellor, and successively by the lord-chancellor and the house of lords, if he deem the question of sufficient difficulty or importance; 3 Bla. Com. 428. There is a court of bankruptcy in London, established by 1 & 2 Will. IV. c. 56, and 5 & 6 Will. IV. c. 29, s. 21; and courts of bankruptcy for different districts are established by 5 & 6 Vict. c. 122, which are branches of the London court; 2 Steph. Com. 199, 200; 3 *id.* 426. The Bankruptcy Act of 1869 constitutes two distinct jurisdictions: The London district, and the country district, comprising the rest of England. The former has all the powers of the superior courts of common law and equity, and the judge may reverse, vary, or affirm any order of a local bankruptcy court. Brown. Robson, Bkcy.

COURT BARON. A domestic court, incident to every manor, to be held by the steward within the manor, for redressing misdemeanors and nuisances therein, and for settling disputes among the tenants relating to property. It is not a court of record.

Customary court baron is one appertaining entirely to copyholders. See CUSTOMARY COURT BARON.

Freeholders' court baron is one held before the freeholders who owe suit and service to the manor. It is the court-baron proper.

These courts have now fallen into great disuse in England; and their jurisdiction is practically abolished by the County Courts Act, 30 and 31 Vict. c. 142, s. 28; 3 Steph. Com. 279–281. In the state of New York such courts were held while the state was a province. See charters in Bolton's Hist. of New Chester. The court has derived its name from the fact that it was the court of the baron or lord of the manor; 3 Bla. Com. 33, n.; see Fleta, lib. 2, c. 53; though it is explained by some as being the court of the freeholders, who were in some instances called barons; Co. Litt. 58 *a*.

COURT OF CHANCERY, or **CHANCERY.** A court formerly existing in England and still existing in several of the United States, which possesses an extensive equity jurisdiction.

The name is said by some to be derived from that of the chief judge, who is called a chancellor; others derive both names directly from the *cancelli* (bars) which in this court anciently separated the press of people from the officers. See 3 Bla. Com. 46, n.; CANCELLARIUS.

In American Law. A court of general equity jurisdiction.

The terms equity and chancery, court of equity and court of chancery, are constantly used as synonymous in the United States. It is presumed that this custom arises from the circumstance that the equity jurisdiction which is exercised by the courts of the various states is assimilated to that possessed by the English courts of chancery. Indeed, in some of the states it is made identical therewith by statute, so far as conformable to our institutions.

Separate courts of chancery or equity exist in a few of the states; in others, the courts of law sit also as courts of equity; in others, equitable relief is administered under the forms of the common law; and in others, the distinction between law and equity has been formally abolished or never existed. See the articles on the various states. The federal courts exercise an equity jurisdiction whether the state courts in the district are courts of equity or not; 2 McLean, 568; 15 Pet. 9; 11 How. 669; 13 *id.* 268, 519.

In English Law. The highest court of judicature next to parliament.

The superior court of chancery, called distinctively "The High Court of Chancery."

consisted of six separate tribunals, viz.: the court of the lord high chancellor of Great Britain; the court of the master of the rolls, or keeper of the records in chancery; the court of appeal in chancery, which title see; the three separate courts of the vice-chancellors.

The jurisdiction of this court was fourfold.

The common-law or ordinary jurisdiction. By virtue of this the lord-chancellor was a privy councillor and prolocutor of the house of lords. The writs for a new parliament issued from this department. The Petty Bag Office was in this jurisdiction. It was a common-law court of record, in which pleas of *scire facias* to repeal letters-patent were exhibited, and many other matters were determined, and whence all original writs issue. See 11 & 12 Vict. c. 94; 12 & 13 Vict. c. 109.

The statutory jurisdiction included the power which the lord-chancellor exercised under the *habeas corpus* act, and inquired into charitable uses, but did not include the equitable jurisdiction.

The specially delegated jurisdiction included the exclusive authority which the lord-chancellor and lords justices of appeal had over the persons and property of idiots and lunatics.

The equity or extraordinary jurisdiction was either *assistant* or auxiliary to the common law, including discovery for the promotion of substantial justice at the common law, preservation of testimony of persons not litigants relating to suits or questions at law, removal of improper impediments and prevention of unconscientious defences at common law, giving effect to and relieving from the consequences of common-law judgments; *concurrent* with the common law, including the remedial correction of fraud, the prevention of fraud by injunction, accident, mistake, account, dower, interpleader, the delivery up of documents and specific chattels, the specific performance of agreements; or *exclusive*, relating to trusts, infancy, the equitable rights of wives, legal and equitable mortgages, the assignment of choses in action, partition, the appointment of receivers, charities, or public trusts. Whart. Law Dic.

By the Supreme Court of Judicature Acts (36 & 37 Vict. c. 66, s. 3, and 38 & 39 Vict. c. 77, *q. v.*), this court is merged in the supreme court of judicature, its jurisdiction being transferred to the chancery division of the high court of justice, and the jurisdiction exercised by the lord chancellor and lords justices of the court of appeal in chancery to her majesty's court of appeal. See JUDICATURE ACTS.

The inferior courts of chancery are the equity courts of the Palatine Counties, the courts of the Two Universities, the lord-mayor's courts in the city of London, and the court of chancery in the Isle of Man. See 18 & 19 Vict. c. 48, and the titles of these various courts. Consult Story, Eq. Jur.; Dan. Ch. Pr.; Spence, Eq. Jur.; COURTS OF EQUITY.

COURT OF CHIVALRY. In English Law. An ancient military court, possessing both civil and criminal jurisdiction touching matters of arms and deeds of war.

As a court of civil jurisdiction, it was held by the lord high constable of England while that office was filled, and the earl-marshal, jointly, and subsequently to the attainder of Stafford, duke of Buckingham, in the time of Henry VIII., by the earl-marshal alone. It had cognizance, by statute 13 Ric. II. c. 2, "of contracts and other matters touching deeds of arms and war, as well out of the realm as within it." This jurisdiction was of importance while the English kings held territories in France.

As a court of criminal jurisdiction, it could be held only by the lord high constable and earl-marshal jointly. It had jurisdiction over "pleas of life and member arising in matters of arms and deeds of war, as well out of the realm as within it."

It was not a court of record, could neither fine nor imprison, 7 Mod. 137, and has fallen entirely into disuse. 3 Bla. Com. 68; 4 *id.* 268.

COURTS CHRISTIAN. Ecclesiastical courts, which see.

COURTS OF THE CINQUE PORTS. In English Law. Courts of limited local jurisdiction, formerly held before the mayor and jurats (aldermen) of the Cinque Ports.

A writ of error lay to the lord-warden in his court at Shepway, and from this court to the queen's bench. By the 18 & 19 Vict. c. 48, and 20 & 21 Vict. c. 1, the jurisdiction and authority of the lord-warden of the Cinque Ports and constable of Dover Castle, in or in relation to the administration of justice in actions, suits, or other civil proceedings, at law or in equity, are abolished; but a peculiar maritime jurisdiction is still retained; 32 and 33 Vict. c. 53; 2 Steph. Comm. 499, n.; 3 Bla. Com. 79; 3 Steph. Com. 347, n. See CINQUE PORTS.

COURT OF CLAIMS. See COURTS OF THE UNITED STATES.

COURT OF THE CLERK OF THE MARKET. In English Law. A tribunal incident to every fair and market in the kingdom, to punish misdemeanors therein.

This is the most inferior court of criminal jurisdiction in the kingdom. The object of its jurisdiction is principally the recognizance of weights and measures, to try whether they are according to the true standard thereof, which standard was anciently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly; and hence this officer, though usually a layman, is called the *clerk* of the market.

The jurisdiction over weights and measures formerly exercised by the clerk of the market has been taken from him by stat. 5 & 6 Will. IV. c. 63; 9 M. & W. 747; 4 Steph. Com. 323.

COURT OF COMMISSIONERS OF SEWERS. See COMMISSIONERS OF SEWERS.

COURT OF COMMON PLEAS. In American Law. A court of original and general jurisdiction for the trial of issues of fact and law according to the principles of the common law.

Courts of this name still exist in some of the states of the United States, and frequently have a criminal as well as civil jurisdiction. They are, in general, courts of record, being expressly made so by statute in Pennsylvania, 14 April, 1834, § 18; Purd. Dig. 222. In Pennsylvania they exercise an equity jurisdiction also, as well as that at common law. Courts of substantially similar powers to those indicated in the definition exist in all the states, under various names; and for peculiarities in their constitution reference is made to the articles on the states in regard to which the question may arise.

In English Law. One of the three superior courts of common law at Westminster.

This court, which is sometimes called, also, Bancus Communis, Bancus, and Common Bench, is a branch of the *aula regis*, and was at its institution ambulatory, following the household of the king. In the eleventh clause of Magna Charta, it is provided that it shall be held at some fixed place, which is Westminster. The establishment of this court at Westminster, and the consequent construction of the *Inns of Court* and gathering together of the common-law lawyers, enabled the law itself to withstand the attacks of the canonists and civilians. It derived its name from the fact that the causes of *common people* were heard there. It had exclusive jurisdiction of real actions as long as those actions were in use, and had also an extensive and, for a long time, exclusive jurisdiction of all actions between subjects. This latter jurisdiction, however, was gradually encroached upon by the king's bench and exchequer, with which it afterwards had a concurrent jurisdiction in many matters. Formerly none but serjeants at law were admitted to practice before this court *in banc*, 6 Bingh. N. C. 235; but, by statutes 6 & 7 Vict. c. 18, § 61, 9 & 10 Vict. c. 54, all barristers at law have the right of "practice, pleading, and audience."

It consisted of one chief and four puisne or associate justices.

It had a civil, common-law jurisdiction, concurrent with the king's bench and exchequer, of personal actions and actions of ejectment, and a peculiar or exclusive jurisdiction of real actions, actions under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, the registration of judgments, annuities, etc., 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 Vict. c. 15; respecting fees for conveyances under 3 & 4 Will. IV. c. 74; the examination of married women concerning their conveyances, 11 & 12 Vict. c. 70; 17 & 18 Vict. c. 75; 19 & 20 Vict. c. 108, § 73; and of appeals from the revising barristers' court, 6 & 7 Vict. c. 18. Whart. Law Dic.

Appeals formerly lay from this court to the king's bench; and by statutes 11 Geo. IV., and 1 Will. IV. c. 70, appeals for errors in law were afterwards taken to the judges of the king's bench and barons of exchequer in the exchequer chambers, from whose judgment an appeal lay only to the house of lords; 3 Bla. Com. 40.

The Judicature Act of 1873 (36 & 37 Vict. c. 66, § 16) transfers the jurisdiction of this court to the Common Pleas division of the High Court of Justice; 3 Steph. Com. 353; and it is to be exercised by five of the judges of that division at least, whereof the Lord Chief Justice of England, or the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron of the Exchequer, shall be one; *ibid.* See JUDICATURE ACTS.

COURTS OF CONSCIENCE. See COURTS OF REQUESTS.

COURT FOR CONSIDERATION OF CROWN CASES RESERVED. A court established by stat. 11 & 12 Vict. c. 78, composed of such of the judges of the superior courts of Westminster as were able to attend, for the consideration of questions of law reserved by any judge in a court of oyer and terminer, gaol delivery, or quarter sessions, before which a prisoner had been found guilty by verdict. Such question is stated in the form of a special case; Moz. & W. Dic.; 4 Steph. Com. 442.

COURT, CONSISTORY. See CONSISTORY COURT.

COURT OF CONVOCATION. In English Ecclesiastical Law. A convocation or ecclesiastical synod, which is in the nature of an ecclesiastical parliament.

There is one for each province. They are composed respectively of the archbishop, all the bishops, deans, and archdeacons of their province, with one proctor, or representative, from each chapter, and, in the province of Canterbury, two proctors for the beneficed parochial clergy in each diocese, while in the province of York there are two proctors for each archdeaconry. In York the convocation consists of only one house; but in Canterbury there are two houses, of which the archbishop and bishops form the upper house, and the lower consists of the remaining members of the convocation. In this house a prolocutor, performing the duty of president, is elected. These assemblies meet at the time appointed in the queen's writ. The convocation has long been summoned *pro formâ* only, but is still, in fact, summoned before the meeting of every new parliament, and adjourns immediately afterwards, without proceeding to the dispatch of any business.

The purpose of the convocation is stated to be the enactment of canon law, subject to the license and authority of the sovereign, and consulting on ecclesiastical matters.

In their judicial capacity, their jurisdiction extends to matters of heresy, schisms, and other mere spiritual or ecclesiastical causes,—an appeal lying from their judicial proceedings to the queen in council, by stat. 2 & 3 Will. IV. c. 92.

Cowel; Bac. Abr. *Ecclesiastical Courts*, A, 1; 1 Bla. Com. 279; 2 Steph. Com. 525, 668; 2 Burn, Eccl. Law, 18 *et seq.*

COURT OF THE CORONER. In English Law. A court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end; 4 Steph. Com. 323; 4 Bla. Com. 274. See CORONER.

COURT FOR THE CORRECTION OF ERRORS. See SOUTH CAROLINA.

COURTS OF THE COUNTIES PALATINE. In English Law. A species of private court which formerly appertained to the counties palatine of Lancaster and Durham.

They were local courts, which had exclusive jurisdiction in law and equity of all cases arising within the limits of the respective counties. The judges who held these courts sat by special commission from the owners of the several franchises and under their seal, and all process was taken in the name of the owner of the franchise, though subsequently to the 27 Hen. VIII. c. 24 it ran in the king's name. See COUNTY PALATINE.

The Judicature Act of 1873 transfers the jurisdiction of the court of common pleas at Lancaster and the court of pleas at Durham to the High Court of Justice. See JUDICATURE ACTS. But the chancery court at Lancaster is expressly retained by § 95 of the act; 1 Steph. Com. 129; 3 *id.* 348.

COURT OF DELEGATES. In English Law. A court of appeal in ecclesiastical and admiralty suits, formerly the great court of appeal in ecclesiastical causes, now abolished by 2 & 3 Will. IV., c. 92, and its functions transferred to the Judicial Committee of the Privy Council. Cowel; 3 Bla. Com. 66, 67; 3 Steph. Com. 307, 308.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. In English Law. A court which had the jurisdiction formerly exercised by the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and all suits, causes, and matters matrimonial.

It consisted of the lord chancellor and the justices of the queen's bench, the common pleas, the exchequer, and the judge of the court of probate, who was entitled judge ordinary.

The judge ordinary exercised all the powers of the court, except petitions for dissolving or annulling marriages and applications for new trials of matters of fact, bills of exception, special verdict and special cases, for hearing which excepted cases he must be joined by two of the other judges. Provision was made for his absence by authorizing the lord chancellor to appoint one of certain judicial persons to act in such absence. Juries were summoned to try matters of fact, and such trials were conducted in the same manner as jury trials at common law. See stat. 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61. Now merged in the High Court of Justice by § 16 of the Judicature Act of 1873, *q. v.*

COURT OF THE DUCHY OF LANCASTER. In English Law. A court of special jurisdiction, which has jurisdiction of all matters of equity relating to lands holden of the king in right of the duchy of Lancaster.

It is held by the chancellor or his deputy, is a court of equity jurisdiction and not of record. It is to be distinguished from the court of the county palatine of Lancaster. 3 Bla. Com. 78. See COURTS OF THE COUNTIES PALATINE.

COURT OF EQUITY. A court which administers justice according to the principles of equity.

As to the constitution and jurisdiction of such courts, see COURTS OF CHANCERY, and the articles upon the various states.

Such courts are not, strictly speaking, courts of record. Their decrees touch the person only; 3 Caines, 36; but are conclusive between the parties; 8 Conn. 268; 1 Stock. 302; 6 Wheat. 109. See 2 Bibb, 149. And as to the personalty, their decrees are equal to a judgment; 2 Madd. 355; 2 Salk. 507; 1 Vern. 214; 3 Caines, 35; and have preference according to priority; 3 P. Wms. 401, n.; Cas. *temp.* Talb. 217; 4 Brown, P. C. 287; 4 Johns. Ch. 638. They are admissible in evidence between the parties; 2 Leigh, 474; 13 Miss. 783; 1 Fla. 409; 10 Humphr. 610; and see 3 Litt. 248; 8 B. Monr. 493; 5 Ala. 254; 2 Gill, 21; 12 Mo. 112; 2 Ohio, 551; 9 Rich. 454; when properly authenticated; 2 A. K. Marsh. 290; and come within the provisions of the constitution for authentication of judicial records of the various states for use as evidence in other states; Pet. C. C. 352.

An action may be brought at law on a decree of a foreign court of chancery for an ascertained sum; 1 Campb. 253; Hempst. 197; but not for an unascertained sum; 3 Caines, 37, n.; but *nil debet* or *nul tiel record* is not to be pleaded to such an action; 9 S. & R. 258.

COURT OF ERROR. An expression applied especially to the court of exchequer chamber and the house of lords, as taking cognizance of *error* brought; Moz. & W. Dic.; 3 Steph. Com. 333. It is applied in some of the United States to the court of last resort in the state.

COURT OF EXCHEQUER. In English Law. A superior court of record, administering justice in questions of law and revenue.

It was the lowest in rank of the three superior common-law courts of record, and had jurisdiction originally only of cases of injury to the revenue by withholding or non-payment. The privilege of suing and being sued in this court in

personal actions was extended to the king's accountants, and then, by a fiction that the plaintiff was a debtor of the king, to all personal actions. It had formerly an equity jurisdiction, and there was then an equity court; but, by statute 5 Vict. c. 5, this jurisdiction was transferred to the court of chancery.

It consisted of one chief and four puisne judges or barons.

As a court of revenue, its proceedings were regulated by 22 & 23 Vict. c. 1, § 9.

As a court of common law, it administered redress between subject and subject in all actions whatever, except real actions.

The appellate jurisdiction from this court was to the judges of the king's bench and common pleas sitting as the court of exchequer chamber, and from this latter court to the house of lords; 3 Steph. Com. 338–340; 3 Bla. Com. 44–46. The business of this court is transferred by the Judicature Act of 1873 to the exchequer division of the high court of justice. See JUDICATURE ACTS.

In Scotch Law. A court which formerly had jurisdiction of matters of revenue, and a limited jurisdiction over cases between the crown and its vassals where no questions of title were involved.

This court was established by the statute 6 Anne, c. 26, and its processes resembled those in the English court of exchequer. It is now merged in the court of sessions; but the name is still applied to this branch of the latter court, which is held by two of the judges acting in rotation. Pat. Com. 1055, n. The proceedings are regulated by stat. 19 & 20 Vict. c. 56.

COURT OF EXCHEQUER CHAMBER. In English Law. A court for the correction and prevention of errors of law in the three superior common-law courts of the kingdom.

A court of exchequer chamber was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common-law side of the exchequer court. It consisted of the lord chancellor, lord treasurer, and the justices of the king's bench and common pleas. A second court of exchequer chamber was instituted by statute 27 Eliz. c. 8, consisting of the justices of the common pleas and the exchequer, which had jurisdiction in error of cases commenced in the king's bench. By statutes 11 Geo. IV. and 1 Will. IV. c. 70, these courts were abolished and the court of exchequer chamber substituted in their place. It is now merged in the Court of Appeal, under the Judicature Acts, *q. v.*

As a court of debate, it was composed of the judges of the three superior courts of law, to whom is sometimes added the lord chancellor. To this court questions of unusual difficulty or moment were referred before judgment from either of the three courts.

As a court of appeals, it consisted of the judges of two of the three superior courts of law (common bench, king's bench, and exchequer) sitting to decide writs of error from the other two courts. 3 Bla. Com. 56, 57; 3 Steph. Com. 333, 356.

From the decisions of this court a writ of error lay to the house of lords; but no such appeal lies from the court of appeal under the new act.

COURT OF FACULTIES. In Ecclesiastical Law. A tribunal, in England, belonging to the archbishop.

It does not hold pleas in any suits, but creates rights to pews, monuments, and other mortuary matters. It has also various other powers under 25 Hen. VIII. c. 21, in granting licenses, faculties, dispensations, etc., of different descriptions: as, a license to marry, a faculty to erect an organ in a parish church, to level a church-yard, to remove bodies previously buried; and it may also grant dispensations to eat flesh on days prohibited, or to ordain a deacon under age, and the like. The archbishop's office in this tribunal is called *magister ad jacultates;* Co. 4th Inst. 337; 2 Chitty, Gen. Pr. 507.

COURT OF GENERAL QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction. See NEW JERSEY.

In English Law. A court of criminal jurisdiction, in England, held in each county once in every quarter of a year, but in the county of Middlesex, twice a month; 4 Steph. Com. 317–320.

It is held before two or more justices of the peace, one of whom was a justice of the *quorum*.

The stated times of holding sessions are fixed by stat. 11 Geo. IV. and 1 Will. IV. c. 70, § 35. When held at other times than quarterly, the sessions are called "general sessions of the peace."

As to the jurisdiction of the various sessions, see 5 & 6 Vict. c. 38; 7 & 8 Vict. c. 71; 9 & 10 Vict. c. 25; 4 Bla. Com. 271.

COURT OF GREAT SESSIONS IN WALES. A court formerly held in Wales; abolished by 11 Geo. IV. and 1 Will. IV. c. 70, and the Welsh judicature incorporated with that of England. 3 Bla. Com. 77; 3 Steph. Com. 317, n.

COURT OF HIGH COMMISSION. See HIGH COMMISSION COURT.

COURT-HOUSE. The building occupied for the purposes of a court of record. The term may be used of a place temporarily occupied for the sessions of a court, though not the regular court-house; 55 Mo. 181; 59 Mo. 52; 71 Ill. 350.

COURT, HUNDRED. See HUNDRED COURT.

COURT OF HUSTINGS. In English Law. The county court in the city of London.

It is held nominally before the lord mayor, recorder, and aldermen; but the recorder is practically the sole judge. It has an appellate jurisdiction of causes in the sheriff's court of London. A writ of error lies from the decisions of this court to certain commissioners (usually five of the judges of the superior

courts of law), from whose judgment a writ of error lies to the house of lords. No merely personal actions can be brought in this court. See 3 Bla. Com. 80, n.; 3 Steph. Com. 293, n.; Madox, Hist. Exch. c. 20; Co. 2d Inst. 327; Calth. 131. Since the abolition of all real and mixed actions except ejectment, the jurisdiction of this court has fallen into comparative desuetude. Pulling on Cust. Lond.; Moz. & W. Dict.

In American Law. A local court in some parts of the state of Virginia; 6 Gratt. 696.

COURT FOR THE TRIAL OF IMPEACHMENTS. A tribunal for determining the guilt or innocence of any person properly impeached. In England, the house of lords, and in this country, generally, the more select branch of the legislative assembly, constitutes a court for the trial of impeachments. A peer could always be impeached for any crime, and although Blackstone lays it down that a commoner cannot be impeached for a capital offence, but only for a high misdemeanor, the opinion seems to have prevailed that he could be impeached for high treason; 4 Bla. Com. 260; 4 Steph. Com. 299; May, Parl. Prac. c. 23. See IMPEACHMENT, and also the articles on the various states.

COURT FOR THE RELIEF OF INSOLVENT DEBTORS IN ENGLAND. In English Law. A local court which has its sittings in London only, which receives the petitions of insolvent debtors and decides upon the question of granting a discharge.

It is held by the commissioners of bankruptcy; and its decisions, if in favor of a discharge, are not reversible by any other tribunal. See 3 Steph. Com. 426; 4 *id.* 287, 288.

This court was abolished by the Bankruptcy Act of 1861, which was repealed in 1869, and all the former powers of the court were vested in the court of bankruptcy in London, which was merged in the high court of justice by the Judicature Act of 1873, § 16. 3 Steph. Com. 346; 32 & 33 Vict. c. 83.

COURT OF INQUIRY. In English Law. A court sometimes appointed by the crown to ascertain the propriety of resorting to ulterior proceedings against a party charged before a court-martial. See 2 Steph. Com. 590, note (z); 1 Coleridge, Bla. Com. 418, n.; 2 Brod. & B. 130. Also a court for hearing the complaints of private soldiers. Moz. & W. Dic.; Simmons on Cts. Mart. § 341.

In American Law. A court constituted by authority of the articles of war, invested with the power to examine into the nature of any transaction, accusation, or imputation against any officer or soldier. The said court shall consist of one or more officers, not exceeding three, and a judge-advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the performance of their duty. It exists also in the navy; Rev. Stat. §§ 1342, 1624.

COURT OF JUSTICE SEAT. In English Law. The principal of the forest courts.

It was held before the chief justice in eyre, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, privileges, and all pleas and causes whatsoever, therein arising. It might also try presentments in the inferior courts of the forests, and give judgment upon conviction of the sweinmote. After presentment made or indictment found, the chief justice might issue his warrant to the officers of the forest to apprehend the offenders. It might be held every third year; and forty days' notice was to be given of its sitting.

It was a court of record, and might fine and imprison for offences within the forest. A writ of error lay from it to the court of queen's bench to rectify and redress any maladministration of justice; or the chief justice in eyre might adjourn any matter of law into that court.

These justices in eyre were instituted by King Henry II., in 1184.

These courts were formerly very regularly held; but the last court of justice seat of any note was held in the reign of Charles I., before the earl of Holland. After the restoration another was held, *pro formâ* only, before the earl of Oxford. But since the era of the revolution of 1688 the forest-laws have fallen into total disuse; 3 Steph. Com. 439–441; 3 Bla. Com. 71–73; Co. 4th Inst. 291.

COURT OF JUSTICIARY. In Scotch Law. A court of general criminal and limited civil jurisdiction.

It consists of the lord justice general, the lord justice clerk, and five other members of the court of sessions. The kingdom is divided into three circuits, in each of which two sessions, of not less than three days each, are to be held annually. A term may be held by any two of the justices, or by the lord justice general alone, or, in Glasgow, by a simple justice; except in Edinburgh, where three justices constitute a quorum, and four generally sit in important cases.

Its criminal jurisdiction extends to all crimes committed in any part of the kingdom; and it has the power of reviewing the sentences of all inferior criminal courts, unless excluded by statute. Alison, Pr. 25.

Its civil jurisdiction on circuits is appellate and final in cases involving not more than twelve pounds sterling. See Paterson, Comp. § 940, n. *et seq.*; Bell, Dict.; Alison, Pr. 25; 20 Geo. II. c. 43; 23 Geo. III. c. 45; 30 Geo. III. c. 17; 1 Will. IV. c. 69, § 19; 11 & 12 Vict. c. 79, § 8. For amendments to the procedure of this court see 31 & 32 Vict. c. 95.

COURT OF KING'S BENCH. In English Law. The supreme court of common law in the kingdom, now merged in the

High Court of Justice under the Judicature Act of 1873, § 16. See JUDICATURE ACTS.

It was one of the successors of the *aula regis*, and received its name, it is said, because the king formerly sat in it in person, the style of the court being *coram rege ipso* (before the king himself). During the reign of a queen it was called the Queen's Bench, and during Cromwell's protectorate it was called the Upper Bench. Its jurisdiction was originally confined to the correction of crimes and misdemeanors which amounted to a breach of the peace, including those trespasses which were committed with force (*vi et armis*), and in the commission of which there was, therefore, a breach of the peace. By aid of a fiction of the law, the number of actions which might be alleged to be so committed was gradually increased, until the jurisdiction extended to all actions of the case, of debt upon statutes or where fraud was alleged, and, finally, included all personal actions whatever, and the action of ejectment. See ASSUMPSIT; ARREST; ATTACHMENT. It was, from its constitution, ambulatory and liable to follow the king's person, all process in this court being returnable "*ubicunque fuerimus in Anglia*" (wherever in England we the sovereign may be), but has *for some centuries* been held at Westminster.

It consisted of a lord chief justice and four puisne or associate justices, who were, by virtue of their office, conservators of the peace and supreme coroners of the land.

The *civil* jurisdiction of the court is either *formal* or *plenary*, including personal actions and the mixed action of ejectment; *summary*, applying to annuities and mortgages, 15 & 16 Vict. cc. 55, 76, 219, 220, arbitrations and awards, cases under the Habeas Corpus Act, 31 Car. II. c. 2; 56 Geo. III. c. 100, cases under the Interpleader Act, 1 & 2 Will. IV. c. 58, officers of the court, warrants of attorney, cognovits, and judges' orders for judgment; *auxiliary*, including answering a special case, enforcing judgments of inferior courts of record, prerogative, mandamus to compel inferior courts or officers to act, 17 & 18 Vict. c. 125, §§ 75–77, prohibition, quo warranto, trying an issue in fact from a court of equity or a feigned issue; or *appellate*, including appeals from decisions of justices of the peace giving possession of deserted premises to landlords, 11 Geo. II. c. 19, §§ 16, 17, writs of false judgment from inferior courts not of record, but proceeding according to the course of the common law, appeals by way of a case from the summary jurisdiction of justices of the peace on questions of law, 20 & 21 Vict. c. 43; Order of Court of Novr. 25, 1857. See Whart. Law Dic.

Its *criminal* jurisdiction extends to all crimes and misdemeanors whatever of a public nature, it being considered the *custos morum* of the realm. Its jurisdiction is so universal that an act of parliament appointing that all crimes of a certain denomination shall be tried before certain judges does not exclude the jurisdiction of this court, without negative words. It may also proceed on indictments removed into that court out of the inferior courts by certiorari.

COURT LANDS. See DEMESNE.

COURT LEET. In English Law. A court of record for a particular hundred, lordship, or manor, holden therein before the steward of the leet, for the punishment of petty offences and the preservation of the peace. Kitchin, Courts Leet.

These courts were established as substitutes for the sheriff's tourn in those districts which were not readily accessible to the sheriff on the tourn. The privilege of holding them is a franchise subsisting in the lord of the manor by prescription or charter, and may be lost by disuse. The court leet took cognizance of a wide variety of crimes, ranging from the very smallest misdemeanors to, but excluding, treason. For some of these offences of a lower order, punishment by fines, amercements, or other means might be inflicted. For the higher crimes, they either found indictments which were to be tried by the higher courts, or made presentment of the case to such higher tribunals. They also took *view of frankpledge*. Among other duties for the keeping of the peace, the court assisted in the election of, or, in some cases, elected certain municipal officers in the borough to which the leet was appended.

This court has fallen almost totally into disuse, but still exists in some parts of England. In some boroughs it still elects, and in others assists in the election of, the chief municipal officers of the borough. Its duties are mainly, however, those of the trial of the smaller offences or misdemeanors, and presentment of the graver offences. These presentments may be removed by certiorari to the king's bench and an issue there joined; 4 Bla. Com. 273; Greenw. County Courts, 308 *et seq.*; Kitchin, Courts Leet; Powell, Courts Leet; 1 Reeve, Hist. Eng. Law, 7.

COURT OF THE LORD HIGH STEWARD. In English Law. A court instituted for the trial of peers or peeresses indicted for treason, felony, or misprision of either.

This court can be held only during a recess of parliament, since the trial of a peer for either of the above offences can take place, during a session of that body, only before the High Court of Parliament. It consists of a lord high steward (appointed in modern times *pro hac vice* merely) and as many of the temporal lords as may desire to take the proper oath and act. And all the peers qualified to sit and vote in parliament are to be summoned at least twenty days before the trial; Stat. 7 Will. III. c. 3.

The lord high steward, in this court, decides upon matters of law, and the lords triers decide upon the questions of fact.

The course of proceedings is to obtain jurisdiction of the cause by a writ of certiorari removing the indictment from the queen's bench or court of oyer and terminer where it was found, and then to go forward with the trial before the court composed as above stated. The guilt or innocence of the peer is determined by a vote of the court, and a majority suffices to convict; but the number voting for conviction must not be less than twelve. The manner of proceeding is much the same as in

trials by jury; but no special verdict can be rendered.

A peer indicted for either of the above offences may plead a pardon in the queen's bench, but can make no other plea there. If indicted for any less offence, he must be tried by a jury before the ordinary courts of justice; 4 Bla. Com. 261–265. See HIGH COURT OF PARLIAMENT.

COURT OF THE LORD HIGH STEWARD OF THE UNIVERSITIES. **In English Law.** A court constituted for the trial of scholars or privileged persons connected with the university at Oxford or Cambridge who are indicted for treason, felony, or mayhem.

The court consists of the lord high steward, or his deputy nominated by the chancellor of the university and approved of by the lord high chancellor of England. The steward issues a precept to the sheriff, who returns a panel of eighteen freeholders, and another to the university bedels, who return a panel of eighteen matriculated laymen. From these panels a jury *de medietate* is selected, before whom the cause is tried. An indictment must first have been found by a grand jury, and cognizance claimed thereof at the first day. 3 Bla. Com. 83; 4 *id.* 277; 1 Steph. Com. 67; 3 *id.* 299; 4 *id.* 325.

COURT OF THE STEWARD OF THE KING'S HOUSEHOLD. **In English Law.** A court which had jurisdiction of all cases of treason, misprision of treason, murder, manslaughter, bloodshed, and other malicious strikings whereby blood is shed, occurring in or within the limits of any of the palaces or houses of the king, or any other house where the royal person is abiding.

It was created by statute 33 Hen. VIII. c. 12, but long since fell into disuse. 4 Bla. Com. 276, 277, and notes.

COURT OF MAGISTRATES AND FREEHOLDERS. **In American Law.** The name of a court in South Carolina for the trial of slaves and free persons of color for criminal offences. Now abolished.

COURT OF THE MARSHALSEA. **In English Law.** A court which had jurisdiction of causes to which the domestic servants were parties.

It was held by the steward of the king's household, as judge, and the marshal was the ministerial officer, and held pleas of trespasses committed within twelve miles of the sovereign's residence (called the verge of the court), where one of the parties was a servant of the king's household, and of all debts, contracts, and covenants, where both parties were servants as above. Where one of the parties only was of the king's household, a jury of the country was summoned; in the other case, the inquest was composed of men of the household only. This court was merged, in the time of Charles I., in the Palace Court, and abolished by 12 & 13 Vict. c. 101, § 13; 3 Steph. Com. 317, n. See PALACE COURT.

COURT-MARTIAL. A military or naval tribunal, which has jurisdiction of offences against the law of the service, military or naval, in which the offender is engaged.

The original tribunal, for which courts-martial are a partial substitute, was the Court of Chivalry, which title see. These courts exist and have their jurisdiction by virtue of the military law, the court being constituted and empowered to act in each instance by authority from a commanding officer. The general principles applicable to courts-martial in the army and navy are essentially the same; and for consideration of the exact distinctions between them reference must be had to the works of writers upon these subjects. Courts-martial for the regulation of the militia are held in the various states under local statutes, which resemble in their main features those provided for in the army of the United States; and when in actual service the militia, like the regular troops, are subject to courts-martial, composed, however, of militia officers.

As to their constitution and jurisdiction, these courts may belong to one of the following classes:—

General, which have jurisdiction over every species of offence of which courts-martial have jurisdiction. They are to be composed in the United States of not less than five nor more than thirteen commissioned officers of suitable rank, according to the exigencies of the service (R. S. p. 237, art. 75), and in England of not less than thirteen commissioned officers, except in special cases, and usually do consist of more than that number.

Regimental, which have jurisdiction of offences not capital, occurring in a regiment or corps. They consist in the United States of three commissioned officers; and are appointed by the commanding officer. In England they consist of not less than five commissioned officers, when that number can be assembled without detriment to the service, and of not less than three in any event. The jurisdiction of this class of courts-martial extends only to offences less than capital committed by those below the rank of commissioned officers, and their decision is subject to revision by the commanding officer of the division, regiment, or detachment, by the officer who appointed them, or by certain superior officers.

Garrison, which have jurisdiction of some offences not capital, occurring in a garrison, fort, or barracks. They are of the same constitution as to number and qualifications of members as regimental courts-martial. Their limits of jurisdiction in degree are the same, and their decisions are in a similar manner subject to revision.

The Rev. Stat. § 1342, p. 237, provide:—

Art. 72. Any general officer, commanding the army of the United States, a separate army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the president, and its proceedings and sentence shall

be sent directly to the secretary of war, by whom they shall be laid before the president for his approval or orders in the case.

Art. 73. In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.

Art. 74. Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

By § 1624 it is provided:—

Art. 26. Summary courts-martial may be ordered upon petty officers and persons of inferior ratings by the commander of any vessel, or by the commandant of any navy-yard, naval station, or marine barracks to which they belong, for the trial of offences which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict, but not sufficient to require trial by a general court-martial.

Art. 27. A summary court-martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder.

Art. 38. General courts-martial may be convened by the president, the secretary of the navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the president.

Art. 39. A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside, and the others shall take place according to their rank.

The decision of the commanding officer as to the number that can be convened without injury to the service is conclusive; 12 Wheat. 19.

The jurisdiction of such courts is limited to offences against the military law (which title see) committed by individuals in the service; 12 Johns. 257; see De Hart, Courts-Mart. 28; 3 Wheat. 212; 3 Am. Jur. 281; which latter term includes sutlers, retainers to the camp, and persons serving with the army in the field; 60th Art. of War; De Hart, Courts-Mart. 24, 25. See V. Kennedy, Courts-Mart. 3. But while a district is under martial law by proclamation of the executive, as for rebellion, they may take jurisdiction of offences which are cognizable by the civil courts only in time of peace; 11 Op. Att.-Gen. 137; V. Kennedy, Courts-Mart. 14. This rule is said by American writers to apply where the army passes into a district where there are no civil courts in existence. Benèt, Mil. Law, 15.

The act of March 3, 1863, did not make the jurisdiction of military tribunals exclusive of that of the state courts in the *loyal* states; but otherwise in the rebellious states when in the military occupation of the United States; 97 U. S. 509.

Military commissions organized during the late civil war, in a state not invaded and not engaged in rebellion, in which the federal courts were open and not obstructed in the exercise of their judicial functions, had no jurisdiction to convict, for a criminal offence, a citizen, who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service; and congress could not invest them with any such power; *Ex parte* Milligan, 4 Wall. 2. Cases arising in the land and naval forces, or in the militia in time of war or public danger, are excepted from the right of trial by jury; *ibid.*

In regard to the jurisdiction of naval courts-martial over civil crimes committed at sea, see 1 Term, 548; 3 Wheat. 212; 10 *id.* 159; 1 N. Y. Leg. Obs. 371; 7 Hill, 95; 1 Kent, 341, n. Naval courts-martial in England are now governed by the Naval Discipline Act of 1866; 2 Steph. Com. 589–598.

The court must appear from its record to have acted within its jurisdiction; 3 S. & R. 590; 1 Rawle, 143; 11 Pick. 442; 19 Johns. 7; 25 Me. 168; 1 M'Mull. 69; 13 How. 134. A want of jurisdiction either of the person, 1 Brock. 324, or of the offence, will render the members of the court and officers executing its sentence trespassers; 3 Cra. 331. See MILITARY LAW; MARTIAL LAW. So, too, the members are liable to a civil action if they admit or reject evidence contrary to the rules of the common law; 2 Kent, 10; V. Kennedy, Courts-Mart. 13; or award excessive or illegal punishment; V. Kennedy, Courts-Mart. 13.

The decisions of general courts-martial are subject to revision by the commanding officer, the officer ordering the court, or by the president or sovereign, as the case may be; 11 Johns. 150. No sentence extending to the loss of life or to the dismissal of a commissioned or warrant officer shall be carried into effect until confirmed by the president; R. S. § 1624, art. 53. Consult Benèt; De Hart, and also Adye; Defalon; Hough; J. Kennedy; V. Kennedy; M'Arthur; Macnaghten; Macomb; Simmons; Tytler; Courts-Martial; Opinions Att. Gen. *passim.*

COURT OF NISI PRIUS. In American Law. A court of original civil jurisdiction in the city and county of Philadelphia, held by one of the judges of the supreme court of the state. Abolished by the constitution of 1874; art. 5, § 1. See NISI PRIUS; COURTS OF ASSIZE AND NISI PRIUS.

COURT OF ORDINARY. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management of decedents' estates.

Such a court exists in Georgia and formerly existed in New Jersey, South Carolina, and Texas, but has been replaced by the court of probate or district court, *q. v.* See 2 Kent, 409; ORDINARY.

COURT OF ORPHANS. In English Law. The court of the lord mayor and aldermen of London, which has the care of those orphans whose parent died in London and was free of the city.

By the custom of London this court is entitled to the possession of the person, lands, and chattels of every infant whose parent was free of the city at the time of his death and who died in the city. The executor or administrator of such deceased parent is obliged to exhibit inventories of the estate of the deceased, and give security to the chamberlain for the orphan's part or share. It is now said to be fallen into disuse. 2 Stephen, Com. 313; Pull. Cust. Lond. 196, *Orphans' Court.*

COURT OF OYER AND TERMINER. In American Law. The name of courts of criminal jurisdiction in several of the states of the American Union, as in New Jersey, New York, and Pennsylvania.

COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY. In English Law. Tribunals for the examination and trial of criminals.

They are held before commissioners selected by the queen, among whom are usually two justices of the superior courts at Westminster, twice in every year in all the counties of England except the four northern, where they are held once only, and Middlesex and parts of other counties, over which the central criminal court has jurisdiction.

Under the commission of *oyer and terminer* the justices try indictments previously found at the same assizes for treason, felony, or misdemeanors. Under the commission of *general gaol delivery* they may try and deliver every prisoner who is in gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted or for whatsoever crime committed. These commissions are joined with those of *assize* and *nisi prius* and the commission *of the peace.* 3 Steph. Com. 352. See COURTS OF ASSIZE AND NISI PRIUS.

In American Law. Courts of criminal jurisdiction in the state of Pennsylvania.

They are held at the same time with the court of quarter sessions, as a general rule, and by the same judges. See Brightly's Purdon, Dig. Penn. Laws, pp. 26, 382, 1201.

COURT OF OYER AND TERMINER, GENERAL JAIL DELIVERY, AND COURT OF QUARTER SESSIONS OF THE PEACE, IN AND FOR THE CITY AND COUNTY OF PHILADELPHIA. In American Law. A court of record of general criminal jurisdiction in and for the city and county of Philadelphia, in the state of Pennsylvania.

COURT OF PALACE AT WESTMINSTER. This court had jurisdiction of personal actions arising within twelve miles of the palace at Whitehall. Abolished by 12 & 13 Vict. c. 101; 3 Steph. Com. 317, n.

COURT OF PECULIARS. In English Law. A branch of the court of arches, to which it is annexed.

It has jurisdiction of all ecclesiastical causes arising in the peculiars of Canterbury or other dioceses which are exempt from the ordinary's jurisdiction and subject to that of the metropolitan only. The court of arches has an appellate jurisdiction of causes tried in this court. 3 Bla. Com. 65; 3 Steph. Com. 306. See PECULIARS.

COURT OF PIEPOUDRE (Fr. *pied*, foot, and *poudre*, dust, or *puldreaux*, old French pedlar). **In English Law.** A court of special jurisdiction incident to every fair or market.

The word *piepoudre*, spelled also *piedpoudre* and *pypowder*, has been considered as signifying dusty feet, pointing to the general condition of the feet of the suitors therein; Cowel; Blount; or as indicating the rapidity with which justice is administered, as rapidly as dust can fall from the foot; Co. 4th Inst. 472; or pedlar's feet, as being the court of such chapmen or petty traders as resorted to fairs. It was not confined to fairs or markets, but might exist, by custom, in cities, boroughs, or vills for the collection of debts and the like; Cro. Jac. 313; Cro. Car. 46; 2 Salk. 604. It was held before the steward of him who was entitled to the tolls from the market. It has fallen into disuse.

The *civil* jurisdiction extended to all matters of contract arising within the precinct of the fair or market during the continuance of the particular fair or market at which the court was held, the plaintiff being obliged to make oath as to the time and place.

The *criminal* jurisdiction embraced all offences committed at the particular fair or market at which the court was held. An appeal lay to the courts at Westminster. See Barrington, Stat. 337; 3 Bla. Com. 32; 3 Steph. Com. 317, n.; Skene, *de verb. sig. Pede pulverosus;* Bracton, 334.

COURT OF POLICIES OF INSURANCE. A court of special jurisdiction which took cognizance of cases involving claims made by those insured upon policies in the city of London.

It was organized by a commission issued yearly by the lord chancellor, by virtue of 43 Eliz. c. 12, and 13 & 14 Car. II. c. 23, to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common-law lawyers, and eight merchants, empowering any three of them (one being a civilian or barrister) to determine in a summary way all causes concerning policies in the city of London. The jurisdiction was confined to actions brought by assured persons upon policies of insurance on merchandise; and an ap-

peal lay by way of a bill to the court of chancery. The court has been long disused, and was formally abolished by stat. 26 & 27 Vict. c. 125. 3 Bla. Com. 74; 3 Steph. Com. 317, n.; Crabb, Hist. Eng. Law, 503.

COURT PREROGATIVE. See PREROGATIVE COURT.

COURT OF PROBATE. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law. In some states, this court has also a limited jurisdiction in civil and criminal actions. For the states in which such courts exist, and the limits of their jurisdiction, see the articles on the various states.

In English Law. A court in England, established under the Probate Act of 1857, having exclusive jurisdiction of testamentary causes or proceedings relating to the validity of wills and the succession to the property of persons deceased intestate. 2 Steph. Com. 192; 3 *id.* 346. See stat. 20 & 21 Vict. c. 77; 21 & 22 Vict. c. 95. This court is now merged in the High Court of Justice under the Judicature Act of 1873. See JUDICATURE ACTS.

COURT OF QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction in the state of Pennsylvania.

There is one such court in each county of the state. Its sessions are, in general, held at the same time and by the same judges as the *court of oyer and terminer and general jail delivery.* See Brightly's Purdon, Dig. pp. 26, 383, § 35, 1198, § 1.

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RECORD. A judicial organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law.

A court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony; 3 Bla. Com. 24.

A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil causes above forty shillings, and proceeding according to the course of the common law; 37 Me. 29.

All courts are either *of record* or *not of record.* The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record; Co. Litt. 117 *b*, 260 *a*; 1 Salk. 144; 12 Mod. 388; 2 Wms. Saund. 101 *a*; Viner, Abr. *Courts*; and it is said that the erection of a new tribunal with this power renders it by that very fact a court of record; 1 Salk. 200; 12 Mod. 388; 1 Woodd. Lect. 98; 3 Bla. Com. 24, 25; but every court of record does not possess this power; 1 Sid. 145; 3 Sharsw. Bla. Com. 25, n. The mere fact that a permanent record is kept does not, in modern law, stamp the character of the court; since many courts, as probate courts and others of limited or special jurisdiction, are obliged to keep records and yet are held to be courts not of record. See 11 Mass. 510; 22 Pick. 430; 1 Cow. 212; 3 Wend. 268; 10 Penn. 158; 5 Ohio, 545; 7 Ala. 351; 25 *id.* 540. The definition first given above is taken from the opinion of *Shaw*, C. J., in 8 Metc. 171, with an additional element not required in that case for purposes of distinction, and is believed to contain all the distinctive qualities which can be said to belong to all courts technically of record at modern law.

Courts may be at the same time of record for some purposes and not of record for others; 23 Wend. 376; 6 Hill, 590; 8 Metc. 168; 12 *id.* 11.

Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; but such rules must not contravene the law of the land; 1 Pet. 604; 3 S. & R. 253; 8 *id.* 336; 2 Mo. 98. They can be deprived of their jurisdiction by express terms of denial only; 3 Yeates, 479; 9 S. & R. 298; 2 Burr. 1042; 1 W. Bla. 285. Actions upon the judgments of such courts may, under the statutes of limitations of some of the states of the United States, be brought after the lapse of the period of limitation for actions on simple contracts; and this provision has given rise to several determinations of what are and what are not courts of record. See 22 Pick. 430; 6 Gray, 515; 6 Hill, 590; 1 Cow. 212; 25 Ala. N. S. 540; 37 Me. 29.

Under the naturalization act of the United States, "every court of record in a state having common-law jurisdiction and a seal and a clerk or prothonotary" has certain specified powers. As to what the requirements are to constitute a court of record under this act, see 8 Pick. 168; 23 Wend. 375.

A writ of error lies to correct erroneous proceedings in a court of record; 3 Bla. Com. 407; 18 Pick. 417; but will not lie unless the court be one, technically, of record; 11 Mass. 510. See WRIT OF ERROR.

COURT OF REGARD. In English Law. One of the forest courts, in England, held every third year, for the lawing or expeditation of dogs, to prevent them from running after deer. It is now obsolete. 3 Steph. Com. 440; 3 Bla. Com. 71, 72.

COURTS OF REQUESTS (called otherwise *courts of conscience*). **In English Law.** Courts of special jurisdiction, constituted by act of parliament in the city of London and other towns, for the recovery of small debts

They were courts *not of record*, and proceeded in a summary way to examine upon oath the parties and other witnesses, without the aid of a jury, and made such order as is consonant to equity and good conscience.

They had jurisdiction of causes of debt generally to the amount of forty shillings, but in many instances to the amount of five pounds sterling.

The courts of requests in London consisted

of two aldermen and four common councilmen, and was formerly a court of considerable importance, but was abolished, as well as all other courts of request, by the Small Debts Act, 9 & 10 Vict. c. 95, and the order in council of May 9, 1847, and their jurisdiction transferred to the county courts.

The court of requests before the king in person was virtually abolished by 16 Car. I. c. 10. See 3 Steph. Com. 449, and note (j); Bacon, Abr. *Courts in London;* COUNTY COURTS.

COURT ROLLS. The rolls of a manor, containing all acts relating thereto. While belonging to the lord of the manor, they are not in the nature of public books for the benefit of the tenant. Scriven on Copyholds. See COPYHOLD.

COURT OF SESSION. In Scotch Law. The supreme court of civil jurisdiction in Scotland.

The full title of the court is *council and session.* It was first established in 1425. In 1469 its jurisdiction was transferred to the king's council, which in 1503 was ordered to sit in Edinburgh. In 1532 the jurisdiction of both courts and the joint title were transferred to the present court. The regular number of judges was fifteen; but an additional number of justices might be appointed by the crown to an unlimited extent. This privilege was renounced by 10 Geo. I. c. 19.

It consists of thirteen judges, formerly of fifteen, and is divided into an inner and an outer house.

The inner house is composed of two branches or chambers, of co-ordinate jurisdiction, each consisting of four judges, and called respectively the first division and the second division. The first division is presided over by the lord president or lord justice general, the second by the lord justice clerk. The outer house is composed of five separate courts, each presided over by a single judge, called a lord ordinary.

All causes commence before a lord ordinary, in general; and the party may select the one before whom he will bring his action, subject to a removal by the lord president in case of too great an accumulation before any one or more lords ordinary. See Bell, Dict.; Paterson, Comp. § 1055, n. *et seq.*

COURT OF SESSIONS. In American Law. A court of criminal jurisdiction existing in some of the states of the United States. Courts of this name exist in New York, and, perhaps, other states. In the county of New York, two courts of sessions are held, one of special and one of general sessions, an appeal lying from the former to the latter. In the other counties of the state there is only the court of special sessions, which is held at the same time as the county courts.

COURT OF SHERIFF'S TOURN. See SHERIFF'S TOURN.

COURT OF STANNERIES. See STANNARY COURTS.

COURT OF STAR-CHAMBER. In English Law. A court which was formerly held by divers lords, spiritual and temporal, who were members of the privy council, together with two judges of the courts of common law.

It was of very ancient origin, was new-modelled by the 3 Hen. VII. c. 1 and 21 Hen. VIII. c. 20, and was finally abolished, after having become very odious to the people, by the 16 Car. I. c. 10. The name *star-chamber* is of uncertain origin. It has been thought to be from the Saxon *steoran*, to govern, alluding to the jurisdiction of the court over the crime of cosenage; and has been thought to have been given because the hall in which the court was held was full of windows, Lambard, Eiren. 148; or because the roof was originally studded with gilded stars, Coke, 4th Inst. 66; or, according to Blackstone, because the Jewish covenants (called starrs or stars, and which, by a statute of Richard I., were to be enrolled in three places, one of which was near the exchequer) were originally kept there, 4 Bla. Com. 266, n. The derivation of Blackstone receives confirmation from the fact that this location (near the exchequer) is assigned to the *star-chamber* the first time it is mentioned. The word *star* acquired at some time the recognized signification of inventory or schedule. Stat. Acad. Cont. 32; 4 Sharsw. Bla. Com. 266, n.

The legal jurisdiction of this court extended originally to riots, perjuries, misbehavior of sheriffs, and other notorious misdemeanors. It acted without the assistance of a jury. See Hudson, *Court of Star Chamber* (printed at the beginning of the second volume of the *Collectanea Juridica*); 4 Bla. Com. 266, and notes; 4 Steph. Com. 308–310; 12 Amer. Law Rev. 21.

COURT OF THE STEWARD AND MARSHAL. See COURT OF MARSHALSEA.

COURT, SUPREME. See SUPREME COURT.

COURT OF SWEINMOTE (spelled, also, *Swainmote, Swain-gemote;* Saxon, *swang*, an attendant, a freeholder, and *mote* or *gemote*, a meeting).

In English Law. One of the forest courts, now obsolete, held before the verderors, as judges, by the steward, thrice in every year,—the sweins or freeholders within the forest composing the jury.

This court had jurisdiction to inquire into grievances and oppressions committed by the officers of the forest, and also to receive and try presentments certified from the court of attachments, certifying the cause, in turn, under the seals of the jury, in case of conviction, to the court of justice seat for the rendition of judgment. Cowel; 3 Bla. Com. 71, 72; 3 Steph. Com. 317, n.

COURTS OF THE UNITED STATES.

1. Except in the case of the senate as a court to try impeachments, and the mode prescribed for the appointment of the judges, the judicial system of the United States has been constructed under the authority derived primarily from the following provisions of the federal constitution and the amendments thereto, viz.:—

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

The judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as congress may by law have directed. Const. art. 3, sects. 1, 2.

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. Amendments, art. 11.

2. As the government of the United States possesses many of the attributes of sovereignty, while the state governments possess others, it results that the citizens are obliged to accommodate themselves to different judiciary systems. These two sets of courts frequently occupy the same house at the same time, and their judgments or decrees operate upon the same community and upon the same mass of property. It is evident, therefore, that without great care, both in legislation and the administration of the law, there would be danger of clashing between these two classes of independent tribunals.

3. As respects criminal proceedings, each court generally confines itself to the administration of the laws of the government which created it. In civil cases, however, as the constitution of the United States has conferred jurisdiction upon the federal courts in cases, for example, where a citizen of one state sues a citizen of another state, it is manifest that the court which tries such a case must administer the laws of the state in which the action is brought, subject to the constitution of the United States in cases which conflict with its provisions.

4. In the organization of the federal system of courts, there were two objects to be accomplished. The first was to prevent a clashing between the state and United States courts, by imposing restrictions upon the United States courts. The second was to carry out the mandates of the constitution, by clothing the latter with all the powers necessary to execute its provisions. This organization was commenced by the act of 1789, familiarly known as the Judiciary Act; 1 Stat. at Large, 921.

5. To accomplish the first object, it was accordingly enacted by the fourteenth section that writs of *habeas corpus* should in no case extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or it was necessary that they should be brought into court to testify. Other cases where this writ is allowed are: where the prisoner is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, etc., or exemption claimed under the commission, order, or sanction of any foreign state, etc., the validity of which depends upon the law of nations; R. S. § 753.

This important restriction was intended to leave to the state authorities the absolute and exclusive administration of the state laws in all cases of imprisonment; and no instance has ever occurred in which this act has been disregarded. On the contrary, its observance has been emphatically enjoined and enforced; 21 How. 523, 524. See 4 Dill. 323; 24 Am. L. Reg. 522. See *infra*.

6. By the thirty-fourth section of the same act (R. S. § 721), it was enacted that the laws of the several states, except where the constitution, treaties, or statutes of the United States should otherwise require or provide, were to be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they applied. This provision has received examination and interpretation in the following, among the many cases: 7 How. 40; 8 *id.* 169: 14 *id.* 504; 17 *id.* 476; 18 *id.* 502, 507; 20 *id.* 393, 584; 18 Wall. 71; 17 *id.* 44; 98 U. S. 176, 242, 470; 3 Wash. C. C. 313; see Bump, Fed. Proc. 412 *et seq.*

And while the United States courts follow the interpretation given to the laws of the state by their highest tribunals, yet in case of conflicting decisions, or in the absence of decisions at the time of consideration by the United States courts, the rule is, of course, modified; 5 How. 139; 18 *id.* 599. Ordinarily, they will follow the latest settled decisions; 1 Dill. 555; 6 Pet. 291; 2 Black, 599. But a change of decision by a state court in regard to the construction of a statute will not

be allowed to affect rights acquired under the former decision: 101 U. S. 677; otherwise, when no rights have been acquired under the former decision; 100 U. S. 47. The federal courts will not follow the decision of an inferior court; 2 Woods, 395.

7. The decisions of state courts upon questions of general commercial law are held not to be binding upon the United States courts; 18 How. 520; see COMMERCIAL LAW; 16 Pet. 1; 2 Fed. Rep. 285, 843; 4 Biss. 473; 100 U. S. 239. Nor are they binding upon questions of the general principles of equity jurisprudence; 13 How. 271; 12 *id.* 361. This section does not apply to criminal cases; 12 How. 361. It embraces the state rules of evidence in civil cases at common law; 1 Black, 427; 18 Wall. 436; 98 U. S. 1; but not in equity cases; 3 Blatch. 11. The word "laws" does not include the decisions of the local tribunals, for these are only evidence of what the laws are; 16 Pet. 1. The decisions of the state courts upon questions of a general nature which are not based upon a local statute, are not within this section; 100 U. S. 213. If a contract when made is valid under the laws of the state as then interpreted by the courts of the state, subsequent decisions putting a different interpretation upon such laws are not binding on the federal courts as to that contract; 1 Wall. 175; 16 *id.* 678. And where contracts are based upon laws then believed to be constitutional, there being at the time no adjudication on such laws in the state courts declaring them invalid, the federal courts will not follow subsequent decisions of state courts thereon, but will construe such statute for themselves; 19 Wall. 66.

8. In clothing the United States courts with sufficient authority to carry out the mandates of the constitution, their powers are made in certain cases to transcend those of the state courts; various provisions exist for the removal of causes from the state to the federal courts. See REMOVAL OF CAUSES.

9. By § 709 of the Rev. Stat. it is enacted, "That a final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States. The supreme court may reverse, modify, or affirm the judgment or decree of such state court, and may at their discretion award execution or remand the case to the court from which it was removed by the writ." Cases on a writ of error to revise the judgment of a state court in a criminal case have precedence on the supreme court docket of all cases except those in which the United States is a party, and those which the court may deem to be of public importance. Rev. Stat. § 710.

10. The rules adopted from time to time as necessary to give to the supreme court jurisdiction under this section are summed up by Mr. Justice Daniel, in delivering the opinion of the court in Smith *v.* Hunter. They are as follows:—

That, to give jurisdiction, it must appear on the *record itself* that the case is one embraced by the section: first, either by express averment or by necessary intendment in the pleadings in the case; secondly, by directions given by the court and stated in the exceptions; or, thirdly, when the proceedings are according to the laws of Louisiana, by the statements of the facts and of the decision as is usually made in such cases by the court; fourthly, it must be entered on the record of the proceedings of the appellate court, in cases where the record shows that such a point may have arisen and may have been decided, that it was in fact raised and decided, and this entry must appear to have been made by order of the court or the presiding judge and certified by the clerk as part of the record in the state court; or, fifthly, in proceedings in equity it may be stated in the body of the final decree of the state court; or, sixthly, it must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree without deciding it; 7 How. 744.

It is no objection to the appellate jurisdiction under this section that one party is a state and the other a citizen of that state; 6 Wheat. 264. A writ of error is the foundation of this jurisdiction; 9 Wall. 779; no appeal can be taken from the state court; 22 How. 192; it applies as well to criminal as to civil suits; 7 Wall. 321; the judgment must be final; 91 U. S. 1, 487; 94 *id.* 514; 93 *id.* 320, 108. The writ of error issues to the highest court in which a decision of the cause can be had, though it be not the highest court of the state; 9 Wall. 659; 93 U. S. 274; 94 Mass. 201; if the record remains in the inferior court, the writ of error will issue to that court instead of to the appellate court; if the first writ of error does not succeed in reaching the record, a second will issue; 91 U. S. 143. The record must show that a federal question was in fact decided, or that its decision was necessarily involved in the case; 91 U. S. 578, 594; 96 U. S. 432; the question need not have been raised in the subordinate court; 99 U. S. 291; the federal question must have been controlling in the cause; 98 U. S. 140. It need not appear that the state court erred in its judgment; it is enough if a federal question was in the case, as the ground of decision, and that the decision was adverse to the party claiming under the statute, etc.; 8 Wall. 44. No writ of error lies where the decision is in favor of the right, privilege, etc.; 4 Wall. 603; nor where a case is decided on general principles of commercial law; 98 U. S. 332. An allowance of the writ by a judge of the state or supreme court must first be obtained; 9 Wall. 779.

11. But, independently of their relation to the jurisdiction of the several states, the courts of the United States are necessarily clothed with powers as the organized branch of the government of the United States established for the purpose of executing the constitution and laws of the general government as a distinct sovereignty.

The several courts embraced in the judicial system of the United States will be separately considered, and in the following order:—

12. The Senate of the United States as a court to try impeachments.

The Supreme Court.
The Circuit Court.
The District Court.
The Territorial Courts.

The Supreme Court of the District of Columbia.
The Court of Claims.

The Senate of the United States as a Court to try Impeachments.

13. The constitution provides that the senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law. Const. art. 1, sect. 3. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Const. art. 2, sec. 4.

14. The organization of this extraordinary court, therefore, differs according as the officer impeached is or is not the president of the United States to try. For the trial of an impeachment of the president the presence of the chief justice and a sufficient number of senators to form a quorum is required. For the trial of all other impeachments it is sufficient if a quorum is present. A concurrence of two-thirds of the members present is necessary to conviction.

15. The constitution defines treason, art. 3, sect. 3; but recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are. Story, Const. § 795.

16. This is an extraordinary court, and its sittings are of rare occurrence. It is mentioned in the constitution under the head of the legislative and not the judicial, power, and is not usually intended when speaking of the judicial tribunals of the country, which comprehend rather the ordinary courts of law, equity, etc.; and it would be out of place to treat at large of this tribunal here. For instances in which it has been convened, see the impeachments of Judge Chase, in 1804, Judge Peck, in 1831, Judge Humphreys, in 1862, and President Johnson, in 1866. See article by Mr. Dwight in 6 Am. L. Reg. 257, and by Judge Lawrence in *id.* 641; IMPEACHMENT.

The Supreme Court.

17. The constitution of the United States provides that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish.

Organization. The judges of the supreme court are appointed by the president, by and with the consent of the senate. Const. art. 2, sect. 2. They hold their office during good behavior, and receive for their services a compensation which is not to be diminished during their continuance in office. Const. art. 3, sect. 1. They consist of a chief justice and eight associate justices, any six of whom constitute a quorum; R. S. § 673. The associate justices have precedence according to the dates of their commissions, or where two or more of their commissions bear the same date, according to their ages; R. S. § 674. If the chief justiceship is vacant, etc., the duties of the office are performed by the justice first in precedence; R. S. § 675. The salary of the chief justice is ten thousand five hundred dollars, and that of the associate justices ten thousand dollars each; R. S. § 676.

The court holds one term, annually, at Washington, commencing on the second Monday of October, and such special terms as it may find necessary for its business; R. S. § 684. If a quorum do not attend on that day, the judges who do attend may adjourn the court from day to day for twenty days after the time appointed for the commencement of the session, unless a quorum shall sooner attend; and the business shall not be continued over till the next session of the court, until the expiration of the said twenty days. If, after the judges shall have assembled, on any day less than a quorum shall assemble, the judge or judges so assembling shall have authority to adjourn the said court from day to day until a quorum shall attend, or may adjourn the same without day; R. S. § 685.

The court has power to appoint a clerk, a marshal, and a reporter of its decisions; R. S. § 677.

18. *The Jurisdiction* of the supreme court is either original or appellate, civil or criminal. The constitution establishes the supreme court and defines its jurisdiction. It enumerates the cases in which its jurisdiction is original and exclusive, and defines that which is appellate. See 11 Wheat. 467. The provisions of the constitution that relate to the original jurisdiction of the supreme court are contained in the articles of the constitution already cited.

By the act of September 24, 1789, sect. 13, the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. It shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party; R.

S. § 687. The court has no jurisdiction except that given it by the constitution or law; 4 Cra. 93.

19. Many cases have occurred of controversies between states, amongst which may be mentioned that of Rhode Island *v.* Massachusetts, 4 How. 591, in which the attorney-general of the United States was authorized by act of congress, 11 Stat. at Large, 382, to intervene; Missouri *v.* Iowa, 7 How. 660, and 10 How. 1; Alabama *v.* Georgia, 23 How. 505; Florida *v.* Georgia, 17 How. 478; and Missouri *v.* Kentucky. The state of Pennsylvania filed a bill against the Wheeling & Belmont Bridge Company, for the history of which see 18 How. 421.

To give jurisdiction a state must be a party on the record; 9 Wheat. 904; or substantially a party; 3 Dall. 411; it must have a direct interest in the controversy; 13 How. 518. A state may bring an original action against a citizen of another state, but not against one of its own; 10 Wall. 553. A question of boundary between states is within its original jurisdiction; 7 How. 660; 17 *id.* 478; 23 *id.* 505; 15 Pet. 233.

The court has no jurisdiction over questions of a political and not judicial nature; 6 Wall. 50; a state cannot maintain a bill to enjoin the president in his official duties; 4 Wall. 475. It has no original jurisdiction over suits brought by any other political communities than states; 7 Wall. 700. An Indian tribe cannot institute original proceedings in it; 5 Pet. 1. Service on the governor and attorney-general of a state is sufficient; 3 Dall. 320. The bill should be filed by the governor on behalf of the state; 24 How. 66. When a state is a party the practice in chancery is adopted; 17 How. 478. In cases of boundary a bill and cross-bill is the appropriate mode of procedure; 7 How. 660. Leave of the court to file a bill must first be obtained; 4 Wall. 497; Phil. Pr. 21; 17 How. 478.

As to whether a state can be compelled to pay its debts by proceedings in the supreme court instituted by another state on behalf of its citizens, see a discussion in 12 Am. L. Rev. 625.

In consequence of the decision in the case of Chisholm *v.* Georgia, where it was held that assumpsit might be maintained against a state by a citizen of another state, the eleventh article of the amendments of the constitution was adopted. This article is retrospective, and not only prevents the bringing of new suits, but deprived the court of jurisdiction of all suits depending at the time, wherever a state was sued by the citizens of another state, or by citizens or subjects of a foreign state; 3 Dall. 378.

The supreme court has power to issue writs of prohibition in the district courts when proceeding as courts of admiralty; and writs of mandamus in cases warranted by the principles of law to any inferior federal courts, or to persons holding office under the authority of the U. S., where a state, or an ambassador or other public minister, or a consul, or vice-consul is a party; R. S. § 688. This does not apply to bankruptcy; 3 How. 292.

20. The supreme court has also the power to issue writs of *habeas corpus;* R. S. § 751; *scire facias,* and all other writs not especially provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law; R. S. § 716; and the justices have, individually, the power to grant writs of *habeas corpus,* of *ne exeat,* and of injunction; R. S. §§ 717, 719, 752. It has also the ordinary powers exercised by courts in their conduct of their business.

In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. With the exception of cases in which original jurisdiction is given to this court, there are none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution.

21. Congress cannot vest in the supreme court original jurisdiction in a case in which the constitution has clearly not given that court original jurisdiction; and affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases, as otherwise the clause would be inoperative and useless; 1 Cra. 137. See 5 Pet. 1, 284; 12 *id.* 657; 6 Wheat. 264; 9 *id.* 738.

22. The supreme court *exercises appellate jurisdiction* as follows: By writ of error from the final judgment of the circuit courts, of the district courts exercising the powers of circuit courts in civil actions brought there by original process, or removed there from any of the courts of the several states, and in all final judgments of any circuit court in civil actions brought from the district court, where the matter in dispute, exclusive of costs, exceeds $5000; R. S. § 691. Upon appeal from decrees of the circuit court in cases of equity and admiralty, where the sum in controversy, exclusive of costs, exceeds $5000; R. S. § 692 (as amended by the act of February 16, 1875). As to the review of admiralty cases, see the act of February 16, 1875, and § 32, *infra.*

Upon appeals or writ of error upon a certificate of differences of opinion between the judges of the circuit court; R. S. § 693. Upon appeals from final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds $2000; and exclusive of the value of the matter in dispute, on the certificate of the judge that the adjudication involves a question of general importance; R. S. § 695; and under similar circumstances in prize cases from the circuit court; R. S. § 696; and upon a certificate of a difference of opinion in the circuit court in

criminal cases; R. S. § 697. Without regard to the sum in dispute, in patent and copyright cases; or cases brought by the United States for the enforcement of any revenue law; and all cases brought on account of the deprivation of any right, privilege, or immunity secured by the constitution, or any privilege of a citizen of the United States; in actions against officers of the revenue, or brought to recover money exacted by a revenue officer and paid into the treasury; in all cases occurring under R. S. § 1980, title "Civil Right"; R. S. § 699. In cases from the supreme courts of any territory (except Washington, where the amount is $2000) when the sum in controversy, exclusive of costs, exceeds $1000; R. S. § 702. In cases in the supreme court of the District of Columbia, involving over $2500, exclusive of costs; R. S. Suppl. 419. In cases under the last section upon special allowance of a supreme court judge, if he is of opinion that the case involves questions of law of extensive operation, and over $100 is involved; R. S. § 706. In all cases in the court of claims when the decision is adverse to the U. S. and on behalf of the plaintiff, where the case involves over $3000, or his claim is forfeited under R. S. § 1089; R. S. § 707. In cases in the highest courts of a state in which a decision could be had, etc., as set forth *supra*, § 9. In capital cases and cases of bigamy or polygamy from Utah Territory; R. S. Suppl. p. 108. In cases of an order of the circuit court dismissing or remanding a cause to the state court, under the act of March 3, 1875, ch. 137.

By the act of March 1, 1875, ch. 114, 18 Stat. at L. 337, the supreme court has jurisdiction to review all cases arising under the act (to protect all citizens in their civil and legal rights) in the federal courts, without regard to the sum in controversy.

As to the exercise of the appellate jurisdiction in cases in the territorial courts, see R. S. Suppl. p. 13.

The words "matters in dispute," in the act of congress which is to regulate the jurisdiction of the supreme court, seem appropriated to civil causes; 3 Cra. 159. As to the manner of ascertaining the matter in dispute, see 4 Cra. 216, 316; 5 *id.* 13; 3 Dall. 365; 4 *id.* 22; 2 Pet. 243; 3 *id.* 33; 7 *id.* 634.

23. The *criminal* jurisdiction of the supreme court is derived from the constitution and the act of September 24, 1789, sect. 13, which gives the supreme court exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistenly with the law of nations. But the act of April 30, 1790, sections 25 and 26, declares void any writ or process whereby the person of any ambassador, or other public minister, their domestics or domestic servants, may be arrested or imprisoned; R. S. § 4063.

The Circuit Courts.

24. *Organization.* The circuit courts are the principal inferior courts established by congress. There are nine circuits, in each of which a circuit court is held. The United States are first divided into districts (see "District Courts"), and the nine circuits are composed respectively (R. S. § 604) of the following districts, to wit:—

The first circuit, of the districts of Maine, New Hampshire, Massachusetts, and Rhode Island.

The second circuit, Vermont, Connecticut, and New York.

The third circuit, Pennsylvania, New Jersey, and Delaware.

The fourth circuit, Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

The fifth circuit, Georgia, Alabama, Mississippi, Florida, Louisiana, and Texas. (Act of June 11, 1879.)

The sixth circuit, Ohio, Michigan, Kentucky, and Tennessee.

The seventh circuit, Indiana, Illinois, and Wisconsin.

The eighth circuit, Nebraska, Minnesota, Iowa, Missouri, Kansas, and Arkansas (and Colorado, by act of June 26, 1876).

The ninth circuit, California, Oregon, and Nevada.

25. In the early history of the government it was intended that one or more of these courts should be held annually in every state, at which should be present one of the justices of the supreme court. But the increase of the number of states and the remoteness of some of them from any of the justices sometimes rendered this impossible, and there were in 1860 seven states in which no justice of the supreme court held court,—viz.: Florida, Texas, Iowa, Wisconsin, California, Minnesota, and Oregon. This evil has been remedied by the acts of July 15, 1862, and March 3, 1863.

26. One of the justices of the supreme court of the United States, called the circuit justice, a circuit judge for each circuit having the same powers therein as the circuit justice, and the district judge of the district where the circuit is holden, compose the circuit court. Circuit courts may be held by the circuit justice, or the circuit judge, or the district judge of the district, or any two of them. Cases may be tried by each of the judges holding a circuit court, sitting apart. The circuit justice is required to attend at least one term of the circuit court in the district during every two years. By § 608 of R. S., circuit courts are established as follows: One for the three districts of Alabama; one for the eastern district of Arkansas; one for the eastern district of Mississippi, and one for each district in the states not named in the section.

27. By R. S. Suppl. p. 87, a circuit court for

the middle district of Alabama, and one for the northern district thereof are provided for.

A district judge sitting in a circuit court may not vote in case of an appeal, etc., from his own decision, except by consent of parties. When the district judge holds a circuit court with either of the other judges, the judgment, etc., shall be rendered in conformity with the opinion of the presiding judge; R. S. § 614.

In case all the judges are disqualified by interest, etc., from hearing any case, the papers are to be certified to the most convenient circuit; R. S. § 615. Whenever a circuit justice deems it advisable on account of disability, absence, interest, or the accumulation of business, or other cause, the judge of any other circuit court may be requested to hold the court; R. S. § 617. The power thus conferred is permissive and discretionary; the judge so requested may refuse the request; 7 Wall. 175. Each circuit court may appoint so many discreet persons as it may deem necessary to be commissioners of the circuit court; R. S. § 627. These officers are not officers of the court; 3 Blatch. 166. No marshal or deputy marshal may be appointed a commissioner; R. S. § 628.

28. The judges of the supreme court are not appointed as circuit-court judges, or, in other words, have no distinct commission for that purpose; but practice and acquiescence under it for many years were held to afford an irresistible argument against this objection to their authority to act, when made in the year 1803, and to have fixed the construction of the judicial system. The court deemed the contemporary exposition to be of the most forcible nature, and considered the question at rest, and not to be disturbed then; 1 Cra. 308. If a vacancy exist by the death of the justice of the supreme court to whom the district was allotted, the district judge may, under the act of congress, discharge the official duties (4 Cra. 428. See the fifth section of the act of April 29, 1802), except that he cannot sit upon a writ of error from a decision in the district court; 5 Wheat. 434.

29. It is enacted by R. S. § 619, that all the circuit courts shall have the appointment of their own clerks; and, in case of disagreement between the judges, the appointment shall be made by the associate justice of the United States alloted to the circuit. One or more deputies to such clerk may be appointed by the court, on the application of the clerk, and removed at the pleasure of the judges making the appointment; R. S. § 624.

Of the Jurisdiction of the Circuit Courts.

30. The jurisdiction of the circuit courts is either civil or criminal.

Civil Jurisdiction.

The civil jurisdiction is either at law or in equity. Their civil jurisdiction at law is—1st, Original; 2d, By removal of actions from the state courts; 3d, By writ of mandamus; 4th, By appeal.

Original Jurisdiction.

By R. S. § 629, their original jurisdiction is defined as follows:—

First. Of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the state where it is brought and a citizen of another state: Provided, that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

Second. Of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners.

Third. Of all suits at common law where the United States, or any officer thereof suing under the authority of any act of congress, are plaintiffs.

Fourth. Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under postal laws.

Fifth. Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels.

Sixth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, title "Insurrection."

Seventh. Of all suits arising under any law relating to the slave trade.

Eighth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States.

Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

Eleventh. Of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "The National Banks," to enjoin the comptroller of the currency, or any

receiver acting under his direction, as provided by said title.

Twelfth. Of all suits by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States for the protection or collection of any of the revenues thereof, or to enforce the right of the citizens of the United States to vote in the several states.

Thirteenth. Of all suits to recover possession of any office, except that of elector of president or vice-president, representative or delegate in congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by the reason of the denial of the right guaranteed by the constitution of the United States, and secured by any law to enforce the right of the citizens of the United States to vote in all states.

Fourteenth. Of all proceedings by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of congress or of a state legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the constitution of the United States.

Fifteenth. Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several states.

Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Seventeenth. Of all suits authorized by law to be brought by any person on account of injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, title "Civil Rights."

Eighteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, are about to be done, and having power to prevent or aid in preventing the same, neglects to do so, to recover damages for any such wrongful act.

Nineteenth. Of all suits and proceedings arising under section fifty-three hundred and forty-four, title "Crimes," for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed.

Twentieth. Exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offences cognizable therein.

The circuit court has no jurisdiction except such as the statutes confer; 19 How. 393; 1 Deady, 300; 2 Dill. 406. The jurisdiction of the circuit courts in equity is coextensive with that of English courts of equity; it is not controlled by the jurisprudence of the state in which the circuit court is held; 2 Story, 555; 13 How. 518; 7 Wall. 425. The circuit court has no jurisdiction over a suit between aliens; one party must be a citizen of the state; 5 Cra. 303; 3 Blatch. 244. Under this section the division of a state into two or more districts does not affect the jurisdiction of the circuit court on account of citizenship. The residence of a party in a different district of a state from that in which the suit is brought does not exempt him from the jurisdiction of the court; if he is found in the district where he is sued, he is not within the prohibition of this section; 11 Pet. 25. A citizen of the United States who resides permanently in a state is a citizen of that state; 1 Pet. 476. A citizen of the District of Columbia (6 Wall. 280), or of a territory (1 Wheat. 91), cannot sue in the circuit court, in cases where the jurisdiction depends upon citizenship. Nor can a suit be maintained when neither party is a citizen of the state where the suit is brought; 2 Pet. 556; 5 Blatch. 502. A corporation created by a state and doing business in the state, is deemed to be a citizen of that state; 18 How. 404; 2 Woods, 479; 13 Wall. 270; but see 14 Pet. 60; 6 Wheat. 450. If there are several plaintiffs or several defendants, each must be competent to sue or be sued, in order to maintain the jurisdiction; 11 Wall. 172; a colorable assignment for the purpose of bringing suit, will not confer jurisdiction; 6 Wall. 280. The pleadings must show the facts, as to citizenship, necessary to maintain the jurisdiction; 13 Wall. 602.

31. *The matter in dispute.* In actions to recover damages for torts, the sum laid in the declaration is the criterion as to the matter in dispute; 3 Dall. 358. In an action of covenant on an instrument under seal, containing a penalty less than five hundred dollars, the court has jurisdiction if the declaration demand more than five hundred dollars; 1 Wash. C. C. 1. In ejectment, the value of the land should appear in the declaration; 4 Wash. C. C. 624; 8 Cra. 220; 1 Pet. C. C. 73; but though the jury do not find the value of the land in dispute, yet if evidence be given on the trial that the value exceeds five hundred dollars, it is sufficient to fix the jurisdiction; or the court may ascer-

tain its value by affidavits; 1 Pet. C. C. 73. The amount stated in the declaration and not the amount stated in the prayer for judgment at its close is the test; 4 Dill. 239; where there are separate counts for separate causes of action, the "matter in dispute" is the aggregate of the sums claimed in all the counts; 2 Dill. 213.

If the matter in dispute arise out of a local injury, for which a local action must be brought, in order to give the circuit court jurisdiction it must be brought in the district where the lands lie; 15 How. 233; 2 Black, 485.

32. The act of March 3, 1875, 18 Stat. at L. 470, provides that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought by either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in case of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

By act of February 16, 1875, ch. 77, 18 Stat. at L. 315, it is provided that the circuit courts, in deciding admiralty causes, shall find the facts and the conclusions of law and state them separately. In finding the facts the court may by consent impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issue of fact in the cause, as in cases of common law. The finding of the jury unless set aside shall stand as the finding of the court. The review of the judgment, etc., in the supreme court, upon appeal, is limited to the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. The court in patent causes in equity may, under general rules of the supreme court, submit to a similar jury such questions of fact as the court may deem expedient, the finding of the jury to be treated as in cases of issues sent from chancery to a court of law. See 98 U. S. 440; 102 *id.* 218; 101 *id.* 6, 247.

The court has jurisdiction in matters of bankruptcy, as provided by law; R. S. § 630.

Removal of Actions from the State Courts.

For the acts, practice, and decisions on this subject, see REMOVAL OF ACTIONS.

Appellate Jurisdiction.

33. The appellate jurisdiction is exercised by means of—1. Writs of error; 2. Appeals from the district courts in admiralty and maritime jurisdiction; 3. Certiorari; 4. Procedendo.

34. This court has jurisdiction to issue writs of error to the district court, on judgments of that court in civil cases at common law.

By Rev. Stat. § 631, it is provided that from all final decrees of a district court of equity or admiralty and maritime jurisdiction except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to receive, hear, and determine such appeal.

A writ of error is not the appropriate process to remove a record into the circuit court under this section; 1 Gall. 227. No appeal can be taken except when the decree is final; 19 How. 199. The only appeal known in admiralty practice is in open court; but the district court may make rules upon the subject; 3 Wall. Jr. 58. See 3 Sumn. 495; 3 Mas. 443. Appeals must be taken to the next term of the circuit court after judgment entered; 2 Curt. C. C. 236; 1 Woods, 14. An appeal in admiralty supersedes the decree in the district court; the cause is practically tried anew, with other pleadings and testimony, if necessary. The judgment of the court is as if it had never been made; 19 Wall. 73. The funds in controversy must be transmitted to the circuit court with the papers; 20 Wall. 201. When a vessel has been released on stipulation, in case of an appeal a decree may be entered against the stipulators in the circuit court; 96 U. S. 461. The circuit court will usually not disturb the finding of facts made by the district court; 1 Holmes, 85; 10 Blatch. 456. The circuit court must execute its own decree; it cannot send it to the district court to be executed; 21 How. 386.

Final judgments of district courts in civil actions, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court holden in the same district, upon a writ of error; Rev. Stat. § 633.

No judgment, decree, or order of a district court shall be reviewed by a circuit court, on writ of error or appeal, unless the writ of error is sued out, or the appeal is taken, within one year after the entry of such judgment, decree, or order: Provided, that where a party entitled to prosecute a writ of error or to take an appeal is an infant, or *non compos mentis*, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within one year after the entry of the judgment, decree, or order, exclusive of the term of such disability; R. S. § 635.

The decrees herein referred to are decrees other than those in equity and admiralty; 9 Chi. L. News, 321.

A circuit court may affirm, modify, or reverse any judgment, decree, or order of a district court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the district court, as the justice of the case may require; R. S. § 636.

35. When any cause, civil or criminal, of whatever nature, is removed into a circuit court, as provided by law, from a district court wherein the same is cognizable, on account of the disability of the judge of such district court, or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or concerned with either party to such cause, as to render it improper, in his opinion, for him to sit on the trial thereof, such circuit court shall have the same cognizance of such cause, and in like manner, as the said district court might have, or as said circuit court might have if the same had been originally and lawfully commenced therein; and shall proceed to hear and determine the same accordingly; R. S. § 637.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, or issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a circuit court may upon reasonable notice to the parties make and direct and award at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings whenever the same are not grantable of course, according to the rules and practice of the court; R. S. § 638.

The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section; R. S. § 648. See, also, R. S. Suppl. p. 175; 100 U. S. 208.

A reference cannot be made to a referee without the consent of both parties; 15 Blatch. 402; 2 Paine, 578; a circuit court cannot order a peremptory nonsuit; 14 How. 218; 23 *id.* 172.

Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorney of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury; R. S. § 649.

In the absence of an agreement, the court cannot try an issue of fact without a jury; 19 Wall. 81; in order to obtain a review of the case in the supreme court, the parties must file their written stipulation under this section; 12 Wall. 275. The court may make a special or a general finding; 9 Wall. 125; the finding is conclusive as to the facts so found; 101 U. S. 569.

36. Whenever in any civil suit or proceeding in a circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being; R. S. § 650.

Whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party or of their counsel, be stated under the direction of the judges and certified under the seal of the court to the supreme court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment; R. S. § 651.

The certificate must state the point on which the judges differ; 7 How. 646.

When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record; R. S. § 652.

If neither of the judges of a circuit court is present to open any session, the marshal may adjourn the court from day to day until a judge is present: Provided, that if neither of them attends before the close of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court to the next regular term; R. S. § 671.

If neither of the judges of a circuit court be present to open and adjourn any regular or adjourned or special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term; R. S. § 672.

37. By the act of March 3, 1879, 20 Stat. at L. 354, it is provided as follows:—

Sec. 1. The circuit court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court where the sentence is imprisonment or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars; and in such case a respondent feeling himself aggrieved by a decision of a district court, may except to the opinion of the court, and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be a part of the record of the case.

Sec. 2. Within one year next after the end of the term, etc., and not after, the respondent may petition for a writ of error from the judgment of the district court in the cases named in the preceding section, which petition shall be presented to the circuit judge or circuit justice in term or vacation, who, on consideration of the importance, etc., of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of such writ shall not so operate without such order.

The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same shall be prosecuted to effect, and that the respondent shall abide the judgment of the circuit court thereon.

And if the writ shall be allowed to operate as a stay of proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent at the term of the circuit court to which such writ of error shall be returnable, and that he will not depart without leave of court.

Sec. 3. Such writ of error so allowed shall be returnable to the next regular term of the circuit court for the district, and shall be served on the district attorney of the United States for such district.

The circuit court may advance all such writs of error on its docket in order that speedy justice may be done. And in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon; but if such judgment shall be reversed, the circuit court may proceed with the trial of such cause *de novo*, or remand the same to the district court for further proceedings.

Organization of the District Courts.

38. District judges are appointed one for each district, except in some cases specially provided for, and are required to reside in their respective districts; R. S. § 551. The judges have authority to appoint clerks for their respective districts; R. S. § 555; see 13 Pet. 230; and one or more deputies on the application of the clerk; § 558. The deputies may do any act which the clerk may do; 1 Woods, 209; 20 Wall. 92. The records of the court are to be kept at the place where the court is held; § 562.

Jurisdiction of the District Courts.

39. Under R. S. § 563, the district courts have jurisdiction as follows:—

First. Of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, title "*Crimes.*"

Second. Of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.

Third. Of all suits for penalties and forfeitures incurred under any law of the United States.

Fourth. Of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue.

Fifth. Of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest.

Sixth. Of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety, title "*Debts Due by or to the United States:*" And such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.

Seventh. Of all causes of action arising under the postal laws of the United States.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.

Ninth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, title "*Insurrection.*"

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty-five, title, "*Civil Rights.*"

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

Thirteenth. Of all suits to recover possession of any office, except that of elector of president or vice-president, representative or delegate in congress, or member of the state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the constitution of the United States, and secured by the law, to enforce the right of citizens of the United States to vote in all the states.

Fourteenth. Of all proceedings by writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of congress, or of a state legislature, contrary to the provisions of the third section of the fourteenth article of the amendment of the constitution of the United States.

Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held.

Sixteenth. Of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States.

Seventeenth. Of all suits against consuls or vice-consuls, except for offences above the description aforesaid.

Eighteenth. The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy. (This is now repealed, except as to pending cases.)

40. The district court has no other jurisdiction than that conferred upon it by congress, but it is not an inferior court, though of limited jurisdiction; 1 Hempst. 304; 55 Ind. 52; it is a court of record; 3 W. & S. 166.

1. The district court of a district has no jurisdiction to try a prisoner for a crime committed in another district; 4 Cra. 75.

4. All officers holding office under an act of congress, and appointed as required by the constitution, are included; 2 Ben. 303; including the postmaster-general; 12 Wheat. 136; and a receiver of a national bank; 8 Ben. 357.

8. Exclusive original jurisdiction of all civil causes in admiralty and maritime matters is vested in the district courts; 3 Dall. 16. As to the extent of the admiralty jurisdiction, see ADMIRALTY.

Jurisdiction *in rem* is exclusive in the district courts, but the suit may be instituted in the district where the *res* is found, irrespective of where the injury for which satisfaction is sought occurred; 3 Cliff. 456. Where a lien exists by the maritime law of a foreign nation, our admiralty has jurisdiction to enforce it here, by comity, even though all the parties are foreigners; 9 Wall. 435.

15. National banks may sue in the district court; 8 Wall. 498; and may be sued by a citizen of the state in which it is established, or of any other state; 11 Blatch. 101.

17. An alien may sue the consul of his own nation in the district court to recover illegal fees; 1 Low. 77.

18. The district court has no powers as a bankrupt court, except those conferred upon it by statute; 38 How. Pr. 341. It has jurisdiction of two kinds: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy, initiated by the petition and ending in the distribution of the assets and the discharge or refusal to discharge the bankrupt; secondly, jurisdiction as an ordinary court, at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him; 91 U. S. 516. An assignee in bankruptcy may sue in any district; 94 U. S. 558.

41. Proceedings on seizure for forfeiture of any vessel or cargo entering any port of entry which has been closed by the president in pursuance of the law, or of goods and chattels coming from a state or section declared by proclamation of the president to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such state or section, or of any vessel belonging, in whole or any part, to any inhabitant of such state or section, may be prosecuted in any district court into which the property so seized may be taken, and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district; R. S. § 564.

Any district court may, notwithstanding an appeal to the supreme court, in any prize cause, make and execute all necessary orders for the custody and disposal of the prize property, and, in case of an appeal from a decree of condemnation, may proceed to make a decree of distribution, so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein; R. S. § 565.

The trial of issues of fact in district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. In cases of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes the trial of issues of fact shall be by jury when either party requires it; R. S. § 566.

42. When any territory is admitted as a state, and a district court is established therein, all the records of the proceedings in the several cases pending in the court of appeal of said territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the supreme court, shall be transferred to and deposited in the district court for the said state; R. S. § 567. Upon the admission of a state, all cases of a federal character pending in the supreme court, etc., of the territory, are to be transferred into the federal courts; 8 Wall. 342.

The court may compel the delivery of the records by attachment; § 568. When any territory is admitted as a state, the district court has cognizance of all cases pending and undetermined in the superior court of such territory, from the judgments or decrees to be rendered in which writs of error or appeals lie to the supreme court; § 569. If the case pending was not of a federal character, this section does not cover it; 10 How. 72.

By § 572, the times of holding the sessions of the various district courts is provided for; and by § 573 it is provided that no action, etc., shall abate by reason of any act changing the time of holding any district court, but the action shall be deemed returnable to, pending in, and triable at the terms established next after the return day thereof.

The district courts, as courts of admiralty and as courts of equity, so far as equity jurisdiction has been conferred upon them, shall be deemed always open, for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and all other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court; R. S. § 574.

43. By law, the district judge alone composes the court. He is a court wherever and whenever he pleases. No notice to parties is required; no previous order is necessary. The various *ex parte* orders which admiralty proceedings require, renders this informal mode of acting essential to justice and expedition. The judge will take care that neither party be injured by the orders which he makes *ex parte*, and where they are of course, it is convenient that they should be made without the formality of summoning the parties to attend. It does not seem to be a violent construction of such an act, to consider the judge as constituting a court whenever he proceeds on judicial business; such seems to have been the practice in this and in other districts of the United States; 1 Brock. 382.

By § 578, it is provided that district courts shall hold monthly adjournments of their regular terms, for the trial of criminal cases, when their business requires it to be done.

A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge, and any business may be transacted at such special term which might be transacted at a regular term; R. S. § 581.

If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct; R. S. 583.

44. Provision is made by § 587, in case of the disability of the district judge, for an order of the circuit judge or justice to the clerk, upon the request of the district attorney or marshal, to certify into the next circuit court to be held in the district, all suits and processes, civil and criminal; such order is to be duly published in one newspaper, published in the district, for thirty days, before the commencement of the session. This provision looks to the disbility of the district judge, not to a vacancy by death; 1 Gall. 338. Pending the disability, all causes are to be certified in the same way; and, upon the removal of the disability, the causes are to be remanded; § 588. So if the district judge dies, undetermined cases are to be remanded; 1 Gall. 338.

During the disability, the circuit judge, and, in his absence, the circuit justice, exercises all the powers of a district judge; § 589; see 97 U. S. 146.

In case of the disability of a district judge to hold any stated or appointed term of the district court or the circuit court, the circuit judge or, in his absence, the circuit justice may designate the judge of some other district in the circuit to hold such district court; § 591.

Provision is made, in case of the accumulation of business in any district court, for the holding of a district court in such district by the district judge of some other district in the circuit, upon the designation of the circuit judge or, in his absence, the circuit justice, or in some cases of the chief justice; §§ 592, 593, 594, 595.

Any circuit judge, whenever the public interests so require, may designate any district judge in his circuit to hold a district or circuit court, in the place or in the aid of any other district judge in the circuit; such district judge to act without additional salary; § 596; except in the cases of district judges holding court in the southern district of New York; § 597.

Whenever a district judge is interested in any suit, or has been of counsel therein, or is related to the parties, etc., he shall, upon the application of either party, order the proceedings to be certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court for the state; and if there be no circuit court in the state, to the next convenient circuit court in an adjoining state; § 601.

In cases of vacancy all processes, etc., are to be continued to the next stated term after the qualification of a successor; § 602; except that in states having two or more districts, the judge of the other or either of the other districts may hold the district court, or the circuit in case of the absence or sickness of the other judges thereof; § 603.

Provisions Common to more than one Court or Judge.

45. The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.

First. Of all crimes and offences cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty or maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.

Fifth. Of all cases arising under the patent right or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens; R. S. § 711.

State courts have concurrent jurisdiction by and against national banks; 7 Biss. 449; 49 Vt. 1; a citizen of the United States may sue in a state court a citizen of another state; 27 La. An. 229; so in the case of an action by an alien against a citizen of a state; 29 Ark. 637.

A state court has no jurisdiction in cases of offences against the laws of the United States, see 53 Penn. 112; 4 Blackf. 146; it includes perjury committed before a U. S. commissioner; 55 Ga. 192; 2 Woods, 428. The federal courts have no jurisdiction over crimes except that conferred by acts of congress; 4 Sawy. 629; 2 Dall. 384.

The exclusive federal jurisdiction of suits for penalties, etc., contemplates those penalties of a public nature which may be sued for by the United States; 47 Md. 217. Suit may be brought in a state court by a party aggrieved to recover a penalty, although imposed by an act of congress; *ibid.;* but see *contra*, 74 Ill. 217.

A collector is liable in a state court at the suit of an informer entitled to a share in the proceeds of the condemnation of a vessel for smuggling, where the proceeds have been paid to the collector; 95 Mass. 301.

A state court has no jurisdiction over proceedings for an infringement of letters patent; 7 Johns. 144; nor in an action of assumpsit upon a *quantum valebat* to recover for the use of a patented device; 66 N. Y. 459; but a state court has jurisdiction to recover damages for fraud in the sale of letters patent, even though the question of the validity of the patent be involved incidentally; 103 Mass. 501; 24 Iowa, 231; 15 Mich. 265; but see 40 Me. 430.

State courts have jurisdiction to adjudicate upon the common law rights of authors in their literary productions; 47 N. Y. 532.

An assignee in bankruptcy may sue in a state court to collect the assets of the bankrupt; 119 Mass. 429; 3 Neb. 437; 72 N. Y. 159; 3 Fed. Rep. 83; but this must be done under the direction of the district court; 8 N. Y. 254. He can be sued in a state court; 69 N. C. 464.

A state may sue a citizen of another state in a state court; 2 Hill, N. Y. 159, per Bronson, J.

46. By the act of March 1, 1875, § 3, it is provided: "That the district and circuit courts of the United States shall have, exclusively of the courts of the several states, cognizance of all crimes and offences against and violations of the provisions of this act [an act to protect all citizens in their civil and legal rights]; and actions for the penalty given by the preceding section may be prosecuted in

the territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party."

The supreme court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law; R. S. § 716.

By this section, congress only intended the power to issue such other writs in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued; 3 Cliff. 28. This power embraces writs sanctioned by the usages of the common law, and also writs of execution in use in the state courts other than such as were conformable to the usage of common law; 10 Wheat. 51.

A mandamus cannot be granted when not necessary to the exercise of jurisdiction; 15 Wall. 427.

A writ of *certiorari* is included in this provision; 5 Blatch. 303; but only when it can be issued *in aid* of a jurisdiction obtained over the subject of the suit in which it is issued; 3 Blatch. 166.

A writ of *supersedeas* comes within the meaning of the section; 94 U. S. 672; also, a writ of injunction; of subpœna, and attachments for witnesses; 4 Cra. C. C. 372; also, a writ of assistance; 21 Wall. 289; a writ of inhibition; 3 Dall. 54. A writ of error *coram nobis* does not lie in the circuit court in a criminal case, either from its own judgment or the judgment of the district court; 3 Cliff. 28.

Writs of *ne exeat* may be granted by any justice of the supreme court in cases where they might be granted by the supreme court, and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States; R. S. § 717.

Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion, and such order may be granted with or without security in the discretion of the court or judge; R. S. § 718.

The national courts cannot order temporary injunctions except on reasonable notice; 4 Biss. 78; 4 Dall. 1. But since the act of June 22, 1874, reasonable previous notice of a motion for a preliminary injunction is not required; 1 Hughes, 607.

By § 719, a single supreme or a circuit court judge may grant an injunction; but a supreme court judge can hear cases only in his circuit, except by written consent of parties, and when it cannot be heard by the appropriate circuit or district judge. No district judge may issue an injunction in any case where a party has had reasonable time to apply to the circuit court for the writ; and the injunction so issued shall continue no longer than to the circuit court next ensuing.

As to the allowance of the writ by a supreme court justice out of his circuit, see 4 Dill. 600; 2 Woods, 621. As to a district court issuing the writ, see 3 Fed. Rep. 509. As to the writ ceasing to be of force at the next ensuing circuit court, see 12 Wheat. 561.

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy; R. S. § 720.

This section is a positive inhibition against issuing any writ or any process whatever intended to stay proceedings in a state court; 6 Blatch. 362. An injunction cannot issue from a federal to a state court, except in bankruptcy; 91 U. S. 254; it may issue in cases of bankruptcy; 98 U. S. 240.

47. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title and of title "Civil Rights," and of title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies, and punish offences against law, the common law as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty; R. S. § 722.

Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law; R. S. § 723.

This section makes no change in the rule of equity which refuses a remedy when an adequate remedy exists at law; 2 Black, 545.

By § 724, in the trial of actions at law, the courts may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issues, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit, and if a defendant fails to comply with such order the court may,

on motion, give judgment against him by default.

An order to produce will be granted only in cases where a relief would be granted in equity by a bill of discovery; 2 Blatch. 301. A preliminary motion and notice are required; 20 How. 194; an *ex parte* affidavit in support of the motion is sufficient; Gilp. 306. The order may be made with leave to show cause at the trial; 3 Cliff. 201; but see 2 Cra. C. C. 427. See 2 Blatch. 23. The rule does not apply to a *subpœna duces tecum* to compel a witness to produce papers in his possession; 3 Dill. 566.

The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment at the discretion of the court contempt of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts; R. S. § 725.

Whether this section can limit the powers of the supreme court may be doubtful, as that court derives its powers from the constitution; 19 Wall. 506.

All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law; R. S. § 726. See 1 W. & M. 368.

The district and circuit courts, and the commissioners of the circuit courts, shall have power to carry into effect, according to the true intent and meaning thereof, the award, or arbitration, or decree of any consul, vice-consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice-consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge; application for the exercise of such power being first made to such court or commissioner by petition of such consul, vice-consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto, by imprisonment in the jail or other place of confinement in the proper district, etc., until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice-consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul, or commercial agent: Provided, however, that the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice-consul, or commercial agent requiring such imprisonment; R. S. § 728.

The trial of offences punishable with death shall be had in the county where the offence was committed, where that can be done without great inconvenience; R. S. § 729.

As to whether this section applies to crimes committed in a place within the exclusive jurisdiction of the United States, see 2 Mas. 91.

48. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought; R. S. § 730. These are offences belonging naturally and properly to the maritime jurisdiction of the Union; Hemp. 446; a person is triable in the southern district of New York, who on a vessel owned by citizens of the United States has committed the offence on the high seas specified, has, on the arrival of the vessel at the quarantine in the eastern district, been delivered to the state authorities, and by them carried into the southern district and there delivered to the United States authorities to whom a warrant to apprehend him was first issued; 19 Wall. 486.

Where any offence against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein; R. S. § 731. The phrase "judicial circuit" is used in the Rev. Stat. of 1878. See a discussion of this section in relation to United States *v.* Guiteau in appendix to Am. L. Rev. published in 1881. The section does not permit the indictment in the District of Columbia of one who wrote a libel in Washington and sent it to Michigan for publication; 3 Dill. 116.

All pecuniary penalties and forfeitures may be recovered in the district where they accrue or where the offender may be found; R. S. § 732; and internal revenue taxes may be recovered in the district where the liability occurs or where the delinquent resides; § 733.

Proceedings on seizures made on the high seas may be prosecuted in any district into which the property is brought; § 734; 1 Mas. 360; 9 Cra. 289; 2 Wall. 383.

Proceedings for the condemnation of any property captured whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its having been purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding or abetting, etc., any insurrection against the United States, or knowingly so used by the owner thereof, may be prosecuted in any district where the same may be seized,

or into which it may be taken and proceedings first instituted; R. S. § 735.

When there are several defendants in any suit in law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit was brought and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit; R. S. § 737.

Where four persons made a contract with a citizen of Ohio, and three of the four were citizens of Indiana, and suit was brought in the circuit court in Indiana, the non-joinder of the fourth was not ground for abatement; 21 How. 489.

If a party is a necessary party in equity, no decree can be made in his absence; 2 Woods, 1.

49. By § 738 provision is made for service on absent defendants in suits in equity to enforce liens or claims against property within the district, by service of an order to appear, etc., if practicable, if not by advertising.

Proceedings under the act are proper, although suit was begun before the act was passed; 99 U. S. 567. Personal service under this act should be secured whenever practicable, and resort had to constructive service by publication, only when the better mode is not practicable within a reasonable time and by the exercise of reasonable diligence; 2 Dill. 498.

Shares of stock of a corporation of the district in which suit is brought, owned by a non-resident, are not "personal property within the district," and, therefore, service cannot be made in such a case by publication; 2 Woods, 145.

Except as provided for in §§ 738, 740, 741, and 742, no civil suit shall be brought in the circuit or district courts against any inhabitant of the United States, by any original process, in any other district than that in which he is an inhabitant or in which he was found at the time of serving the writ; and no person can be arrested in one district for trial in another district in a circuit or district court; R. S. § 739. The exceptions are (§ 740) that in a state containing more than one district, defendants living in different districts may be sued in either, in suits not of a local nature. In suits of a local nature (§ 741) where the defendant resides in another district of the same state, the plaintiff may have original and final process directed to the marshal of the district in which he resides. By § 742, in law or equity, when the land or other subject matter of a fixed character lies partly in one district and partly in another in the same state, suit may be brought in either district.

If a defendant is served with process in a district, the court has jurisdiction although he lives in another district; 2 Cliff. 304; but in 5 Biss. 159, it is said that a federal court cannot acquire jurisdiction by service of process on a party who is only temporarily in the district. Service upon a defendant who is brought into the jurisdiction by fraud does not give jurisdiction; 2 Cliff. 304; 4 Fed. Rep. 17; nor does service upon one who has come into the district merely to attend a trial in a case in which he is a party; 5 Biss. 64. The phrase "civil suit" does not include causes of admiralty jurisdiction; 18 Wall. 272. Service of process on an officer of a corporation outside of the state under which the corporation is incorporated, does not confer jurisdiction over the corporation; 15 How. 233; except when the corporation consents that process may be served upon its agent in another state; 96 U. S. 369.

In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein; R. S. § 747. The attorney, when retained, has the exclusive control of the management and conduct of the cause; 2 Sawy. 341.

50. The supreme, circuit, and district courts have power to issue writs of habeas corpus; R. S. § 751.

The term used in the act is a generic term, and includes every species of the writ of habeas corpus; *per* Marshall, Ch. J., in 4 Cra. 95; and the extent of the jurisdiction is only such as is conferred by statute; *ibid.*

"The appellate jurisdiction of the supreme court, exercisable by the writ of habeas corpus, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not.

The jurisdiction of this court by habeas corpus, when not restrained by some special law, extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act.

But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error; and, of course, cannot be reviewed at all if no writ of error lies.

When personal liberty is concerned, the judgment of an inferior court affecting it is

not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ;" *Ex parte* Siebold, 100 U. S. 371. See, generally, 100 U. S. 339; 4 Wall. 2; 18 *id.* 163; 1 *id.* 243; 8 *id.* 85. A justice of the supreme court may issue the writ in any part of the United States; 100 U. S. 399.

The several judges, within their respective districts, have power to issue such writs; § 752; but the writ shall in no case extend to a prisoner in jail, unless where he is in custody under, or by color of, the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed, under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify; R. S. § 753.

From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus, or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:—

First. In the case of any person alleged to be restrained of his liberty in violation of the constitution, or of any law or treaty of the United States.

Second. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any state, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof; R. S. § 763.

From the final decision of such circuit court, an appeal may be taken to the supreme court, in the cases described in the last clause of the preceding section; R. S. § 764. See 3 Cliff. 440.

The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings as may be subscribed by the supreme court, or, in default thereof, by the court or judge hearing the cause; R. S. § 765.

The Territorial Courts.

51. In the territorial governments of New Mexico, Utah, Washington, Dakota, Idaho, Montana, and Wyoming, the judicial power is vested in a supreme court, consisting of a chief justice and two associate justices, who hold their offices for a term of four years, district courts, probate courts, and justices of the peace. In Arizona, the judicial power is vested in a supreme court and such inferior courts as the legislative council may by law provide. These territorial courts are not constitutional courts, that is, courts upon which judicial power is conferred by the constitution of the United States; but their powers and duties are conferred upon them by the acts of congress which created them. It is not necessary to specify these. The chief judge and associate justices hold one term annually of the supreme court, and each territory is divided into three districts, in which each one of the judges holds a district court. By a law passed in 1858, 4 Stat. at Large, 366, the judges of the supreme court of each territory are authorized to hold courts within their respective districts in the counties wherein, by the laws of said territories, courts have been or may be established, for the purpose of hearing and determining all matters and causes except those in which the United States is a party. The expenses thereof are to be paid by the territory or by the counties in which the courts are held. In all the territories but one there is an appeal to the supreme court of the United States where the value in dispute exceeds one thousand dollars. In Washington, this limit is extended to two thousand dollars, but an appeal or writ of error is allowed in all cases where the constitution of the United States, or acts of congress, or a treaty of the United States is brought in question.

Supreme Court of the District of Columbia.

52. The supreme court of the District of Columbia was established by act of congress, approved March 3, 1863. The same act abolished the former circuit court, district court, and criminal court of the district. The supreme court consists of six justices (one of whom is designated the chief justice), appointed by the president of the United States, etc., who hold their offices during good behavior.

It has the same jurisdiction as circuit and district courts, and any judge may exercise the jurisdiction of a circuit or district court. It has jurisdiction of patent, copyright, divorce, and bankruptcy cases. Actions can be brought only against inhabitants of the district, or persons found therein. It has common law and chancery jurisdiction, according to the laws of Maryland on May 3, 1802. In cases within the jurisdiction of a justice of the peace,

it has original jurisdiction only over cases involving more than fifty dollars. It has appellate jurisdiction from the police court, and from justices of the peace, and from the decisions of the commissioner of patents.

Any one of the justices may hold a criminal court for the trial of all crimes and offences arising within the district; R. S. Supp. p. 279; 102 U. S. 378. Two of the justices, sitting at general term, shall constitute a quorum for the transaction of business; the general term may order two terms of the circuit court to be held at the same time whenever, in their judgment, the business therein shall require it, designating the justices by whom such terms shall be held; R. S. Supp. p. 419. Any final judgment, order, or decree of the court, involving over $2500 in value, may be re-examined and reversed or affirmed in the supreme court of the United States, on writ of error or appeal. In special cases involving a less amount, and questions of law of general importance, the case may be removed to the supreme court upon special allowance.

Court of Claims.

53. This court, as originally created by statute of February 24, 1855, 10 Stat. at Large, 12, consisted of three judges; it now consists of a chief justice and four judges, who are appointed by the president, by and with the advice and consent of the senate, and hold office during good behavior; its sessions are held annually at Washington, beginning on the first Monday in December. Members of either house of congress are forbidden to practise in this court; R. S. §§ 1049–1058. A quorum consists of three judges, but the concurrence of three judges is necessary to any judgment; Act of June 23, 1874. Its jurisdiction extends throughout the United States; 1 Ct. Cl. 383.

"Before the establishment of the court of claims, claimants could only be heard by congress. That court was established in 1855 for the triple purpose of relieving congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to congress.

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for congress, it was authorized to render final judgment, subject to appeal to this court, and to an estimate of the secretary of the treasury of the amount required to pay each claimant. This court being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, congress repealed that provision. Since then the court of claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

The court of claims is thus constituted one of those inferior courts which congress authorizes, and has jurisdiction of contracts between the government and the citizens, from which appeal regularly lies to this court;" *per* Chase, C. J., 13 Wall. p. 136.

Its jurisdiction, by R. S. § 1059, extends to:—

First. All claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, and all claims which may be referred to it by either house of congress.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the United States against any person making claim against the government in said court.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, chapter 120, entitled An act to provide for the collection of abandoned property and for the prevention of frauds in the insurrectionary districts within the United States, or by the act of July 2, 1864, chapter 225, being an act in addition thereto: Provided, that the remedy given in cases of seizure under the said acts, by preferring claim in the court of claims, shall be exclusive, precluding the owner of any property taken by agents of the treasury department as abandoned or captured property in virtue or under color of said acts from suit at common law, or any other mode of redress whatever, before any court other than said court of claims. Provided, also, that the jurisdiction of the court of claims shall not extend to any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion.

In the court of claims, the government is liable for refusing to receive and pay for what it has agreed to receive and purchase; it is not liable on implied assumpsit for the torts of its officers, committed while in the service, and apparently for its benefit; 8 Wall. 269. The United States cannot be sued there upon equitable considerations only; the holder of a military bounty land warrant cannot recover

compensation for the wrongful appropriation to others of the land ceded for his benefit; 9 Wall. 156.

To constitute an implied contract with the United States for the payment of money upon which an action will lie in the court of claims, there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. No such implied contract with the United States arises with respect to moneys received into the treasury as the proceeds of property forfeited and sold under that act; 95 U. S. 149.

The court has no jurisdiction of a case of marine tort; 2 Ct. Cl. 210; nor of an action to recover damages for illegal arrest and imprisonment; 1 Ct. Cl. 316.

No suit can be maintained against the United States under the Abandoned and Captured Property Act, if the property was neither captured, seized, nor sold, and the proceeds not paid into the treasury; 91 U. S. 577. Under this act, a pardoned rebel could recover in the court of claims, if he brought suit within two years; 13 Wall. 144; but a person who did give aid and comfort to the rebellion, and who has not been pardoned until two years after the suppression of the rebellion, cannot obtain the benefit of the act; 22 Wall. 81.

Where a trust fund has been perverted by the fraud of an agent of the government, and gone into the hands of the United States, the owner of the fund may follow it and recover in the court of claims; in such a case, its sovereignty is in no wise involved; 96 U. S. 30.

It is said by Nott, J., in 6 Ct. Cl. 192, that it is a fact judicially established that the government of the United States holds itself, of nearly all governments, the least amenable to the law. See that case for a full discussion of the rights of aliens of various nationalities to sue in the court of claims.

Suits in this court are not suits at common law, and the provision in the constitution which preserves the right of trial by jury does not extend to such suits; the right to sue the government is a grant, and one of the conditions of the grant is that the government may set up and recover on counter-claims against the suitor; 12 Ct. Cl. 312.

All petitions and bills praying or providing for the payment of private claims against the government are, unless otherwise ordered, to be transmitted to the court of claims; § 1060.

By § 1061, in case of a set-off on behalf of the United States the court shall determine the whole case and may enter a judgment on the set-off against the claimant. See 12 Ct. Cl. 312.

A demand by the United States of the proceeds of Indian trust bonds unlawfully converted to their own use by persons who had illegally procured and sold them, and become insolvent, is a proper subject of set-off; 17 Wall. 207.

Wherever any claim is made against any executive department of the government, involving disputed facts or controverted questions of law, where the amount in controversy exceeds $3000, or where the decision will affect a class of cases, or furnish a precedent, etc., without regard to the amount involved, or where any authority, right, privilege, or exemption is claimed or denied under the constitution, the head of the department may cause the claim with all the documents, etc., to be sent to this court, there to be proceeded in as if begun by the voluntary action of the claimant; provided it be one of a class of cases in which the court would have jurisdiction of the voluntary suit of the claimant; R. S. § 1063. See 12 Ct. Cl. 319, 470; 8 *id.* 326.

Claims not pending on December 1, 1862, growing out of any treaty stipulation with foreign nations or Indian tribes, are not within the jurisdiction of the court; R. S. § 1066. See 17 Wall. 439.

Aliens who are subjects of governments which afford citizens of the United States the right to prosecute claims against such governments in its courts, have the privilege of suing the United States, if their claims are otherwise within its ordinary jurisdiction; R. S. § 1068.

Great Britain accords such rights to American citizens, and her subjects may, therefore, bring suit under this provision; 11 Wall. 178; a citizen of Italy may maintain such a suit; 9 Ct. Cl. 254. See, also, 6 *id.* 171.

The limitation of suits is six years after the claim accrues, with allowance of certain disabilities of coverture, etc.; R. S. § 1069. By § 1079 no claimant, nor any person through whom he claims title, nor any person interested in the claim, is allowed to be a witness. This act merely restores in this court the common law rule of exclusion of interested parties; therefore a party is competent to prove the contents of a package of money taken from his official safe by robbers; 96 U. S. 37. At the instance of the solicitor of the United States, any claimant may be required to testify; § 1080.

For an exhaustive article on war claims, see 13 Am. L. Reg. N. S. 265 *et seq.* The common law federal jurisdiction over crimes is treated of 6 *id.* 128.

Commissioners of the United States.

54. See UNITED STATES COMMISSIONERS.

See, generally, on the subject of this title, Bump; Field & Miller; Federal Procedure; Phillips, Practice; article in appendix to 3 Hughes.

COURTS OF THE TWO UNIVERSITIES. In English Law. See CHANCELLORS' COURTS OF THE TWO UNIVERSITIES.

COURT OF WARDS AND LIVERIES. In English Law. A court of re-

cord in England, which had the supervision and regulation of inquiries concerning the profits which arose to the crown from the fruits of tenure, and to grant to heirs the delivery of their lands from the possession of their guardians.

The Court of the King's Wards was instituted by stat. 32 Hen. VIII. c. 46, to take the place of the ancient *inquisitio post mortem*, and the jurisdiction of the restoration of lands to heirs on their becoming of age (livery) was added by statute 33 Hen. VIII. c. 22, when it became the Court of Wards and Liveries. It was abolished by statute 12 Car. II. c. 24.

The jurisdiction extended to the superintendence of lunatics and idiots in the king's custody, granting licenses to the king's widows to marry, and imposing fines for marrying without license; 4 Reeve, Hist. Eng. Law, 259; Crabb, Hist. Eng. Law, 468; 1 Steph. Com. 183, 192; 4 *id.* 40; 2 Bla. Com. 68, 77; 3 *id.* 258.

COURTESY. See CURTESY.

COUSIN. The son or daughter of the brother or sister of one's father or mother.

The issue, respectively, of two brothers or two sisters, or of a brother and a sister.

Those who descend from the brother or sister of the father of the person spoken of are called paternal cousins; maternal cousins are those who are descended from the brothers or sisters of the mother. See 2 Brown, Ch. 125; 1 Sim. & S. 301; 3 Russ. 140; 9 Sim. 386, 457. The word is still applied in Devonshire to a nephew. 1 Ves. Jr. 73.

COUSINAGE. See COSINAGE.

COUSTUM (Fr.). Custom; duty; toll. 1 Bla. Com. 314.

COUSTUMIER (Fr.). A collection of customs and usages in the old Norman law. See the Grand Coutumier de Normandie.

COUTHUTLAUGH. He that willingly receives an outlaw and cherishes or conceals him. In ancient times he was subject to the same punishment as the outlaw. Blount.

COVENABLE (L. Fr.). Convenient; suitable. Anciently written *convenable*.

COVENANT (Lat. *convenire*, to come together; *conventio*, a coming together. It is equivalent to the *factum conventum* of the civil law.)

In Contracts. An agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not, exist. It differs from an express assumpsit in that it must be by deed.

Affirmative covenants are those in which the covenantor declares that something has been already done, or shall be done in the future. Such covenants do not operate to deprive covenantees of rights enjoyed independently of the covenants; Dy. 19 *b*; 1 Leon. 251.

Covenants against incumbrances. See COVENANT AGAINST INCUMBRANCES.

Alternative covenants are disjunctive covenants.

Auxiliary covenants are those which do not relate directly to the principal matter of contract between the parties, but to something connected with it. Those the scope of whose operation is in *aid* or *support* of the principal covenant. If the principal covenant is void, the auxiliary is discharged; Anstr. 256; Prec. Chanc. 475.

Collateral covenants are those which are entered into in connection with the grant of something, but which do not relate immediately to the thing granted: as, to pay a sum of money in gross, that the lessor shall distrain for rent on some other land than that which is demised, to build a house on the land of some third person, or the like; Platt, Cov. 69; Shepp. Touchst. 161; 4 Burr. 2439; 3 Term, 393; 2 J. B. Moore, 164; 5 B. & Ald. 7; 2 Wils. 27; 1 Ves. 56.

Concurrent covenants are those which are to be performed at the same time. When one party is ready and offers to perform his part, and the other refuses or neglects to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act; Platt, Cov. 71; 2 Selw. N. P. 443; Dougl. 698; 18 E. L. & Eq. 81; 4 Wash. C. C. 714; 16 Mo. 450.

Declaratory covenants are those which serve to limit or direct uses; 1 Sid. 27; 1 Hob. 224.

Dependent covenants are those in which the obligation to perform one is made to depend upon the performance of the other. Covenants may be so connected that the right to insist upon the performance of one of them depends upon a prior performance on the part of the party seeking enforcement; Platt, Cov. 71; 2 Selw. N. P. 443; Steph. N. P. 1071; 1 C. B. N. S. 646; 6 Cow. 296; 2 Johns. 209; 2 W. & S. 227; 8 S. & R. 268; 4 Conn. 3; 24 *id.* 624; 11 Vt. 549; 17 Me. 232; 3 Ark. 581; 1 Blackf. 175; 6 Ala. 60; 3 Ala. N. S. 330. To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded, rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant; 1 Wms. Saund. 320, n.; 7 Term, 130; 8 *id.* 366; Willes, 157; 5 B. & P. 223; 36 E. L. & Eq. 358; 4 Wash. C. C. 714; 4 Rawle, 26; 2 W. & S. 227; 4 *id.* 527; 2 Johns. 145; 5 Wend. 496; 5 N. Y. 247; 1 Root, 170; 4 Rand. 352. See note to Cutter *v.* Powell, Smith Lead. Cas.

Disjunctive covenants. Those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be; Platt, Cov. 21; 1 Du. N. Y. 209.

Executory covenants are those whose performance is to be future; Shepp. Touchst. 161.

Express covenants are those which are created by the express words of the parties to the deed declaratory of their intention; Platt, Cov. 25. The formal word covenant is not indispensably requisite for the creation of an express covenant; 2 Mod. 268; 3 Kebl. 848; 3 Ex. 237; 5 Q. B. 683; 1 Bingh. 433; 8 J. B. Moore, 546; 12 East, 182, n.; 16 *id.* 352; 1 Bibb, 379; 2 *id.* 614; 3 Johns. 44; 5 Cow. 170; 4 Conn. 508; 1 Harr. Del. 233. The words "I oblige," "agree," 1 Ves. 516; 2 Mod. 266, "I bind myself," Hardr. 178; 3 Leon. 119, have been held to be words of covenant, as are the words of a bond; 1 Ch. Cas. 194. Any words showing the intent of the parties to do or not to do a certain thing, raise an express covenant; 13 N. H. 513. But words importing merely an order or direction that other persons should pay a sum of money, are not a covenant; 6 J. B. Moore, 202, n. (*a*).

Covenants for further assurance. See COVENANT FOR FURTHER ASSURANCE.

Covenants for quiet enjoyment. See COVENANT FOR QUIET ENJOYMENT.

Covenants for title are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title which the grantor and covenantor professes to convey.

Those in common use in England are four in number—of *right to convey*, for *quiet enjoyment*, against *incumbrances*, and for *further assurance*—and are held to run with the land; the covenant for *seisin* has not been generally in use in modern conveyances in England; Rawle, Cov. 24 *et seq.* In the United States there is, in addition, a covenant of *warranty*, which is more commonly used than any of the others. In the United States what are "often called 'full covenants' are the covenants for seisin, for right to convey, against incumbrances, for quiet enjoyment, sometimes for further assurance, and, almost always, of warranty—this last often taking the place of the covenant for quiet enjoyment;" Rawle, Cov. 27. The covenants of seisin, for right to convey, and against incumbrances, are generally held to be *in præsenti*; if broken at all, they are broken as soon as made; Rawle, Cov. 318; 4 Kent, 471; 6 Cush. 128. See 36 Me. 170; and see the various titles below for a fuller statement of the law relative to the different covenants for title.

Implied covenants or *covenants in law* are those which arise by intendment and construction of law from the use of certain words having a known legal operation in the creation of an estate, so that after they have had their primary operation in the creation of the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor, to protect and preserve the estate so by these words already created; 1 C. B. 429; Bacon, Abr. *Covenant*, B; Rawle, Cov. 470, n. In Co. Litt. 139 *b*, it is said that "of covenants there be two kinds: a covenant personal and a covenant real; a covenant in deed and a covenant in law." In a conveyance of lands in fee, the words "grant," bargain, and sell, imply certain covenants; see 4 Kent, 473; and the word "give" implies a covenant of warranty during the life of the feoffor; 10 Cush. 134; 4 Gray, 468; 2 Caines, 193; 9 N. H. 222; 7 Ohio, pt. 2, 63; (but this covenant and that implied from the word "grant" are abolished in England by 8 & 9 Vict. c. 106, § 14;) and in a lease the use of the words "grant and demise;" Co. Litt. 384; 4 Wend. 502; 8 Cow. 36; "grant;" Freem. 367; Cro. Eliz. 214; 4 Taunt. 609; 1 P. & D. 360; "demise;" 4 Co. 80; 10 Mod. 162; Hob. 12; 9 N. H. 222; 15 N. Y. 327; "demisement;" 1 Show. 79; 1 Salk. 137; raises an implied covenant on the part of the lessor, as do "yielding and paying;" 9 Vt. 151; on the part of the lessee. In regard to the covenants arising to each grantee by implication on sale of an estate with conditions, in parcels to several grantees, see 23 Barb. 153.

Covenants in deed. Express covenants.

Covenants in gross. Such as do not run with the land.

Covenants in law. Implied covenants.

Illegal covenants are those which are expressly or impliedly forbidden by law. Covenants are absolutely void when entered into in violation of the express provisions of statutes; 5 H. & J. 193; 5 N. H. 96; 6 *id.* 225; 1 Binn. 118; 6 *id.* 321; 4 S. & R. 159; 4 Halst. 252; or if they are of an immoral nature; 3 Burr. 1568; 1 Esp. 13; 1 B. & P. 340; 3 T. B. Monr. 35; against public policy; 4 Mass. 370; 5 *id.* 385; 7 Me. 113; 5 Halst. 87; 3 Day, 145; 7 Watts, 152; 5 W. & S. 315; 6 Miss. 769; 2 McLean, 464; 4 Wash. C. C. 297; 11 Wheat. 258; in general restraint of trade; 21 Wend. 166; 7 Cow. 307; 6 Pick. 206; 19 *id.* 51; or fraudulent between the parties; 4 S. & R. 483; 7 W. & S. 111; 5 Mass. 16; or third persons; 3 Day, 450; 14 S. & R. 214; 3 Caines, 213; 2 Johns. 286; 12 *id.* 306; 15 Pick. 49.

Independent covenants are those the necessity of whose performance is determined entirely by the requirements of the covenant itself, without regard to other covenants between the parties relative to the same subject-matter or transactions or series of transactions.

Covenants are generally construed to be independent; Platt, Cov. 71; 2 Johns. 145; 10 *id.* 204; 21 Pick. 438; 1 Ld. Raym. 666; 3 Bingh. N. S. 355; unless the undertaking on one side is *in terms* a condition to the stipulation of the other, and then only consistently with the intention of the parties; 3 Maule & S. 308; 10 East, 295, 530; or unless dependency results from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance; Willes, 496; or unless the non-performance on one side goes to the entire substance of the contract, and to the whole consideration; 1 Seld.

247. If once independent, they remain so; 19 Barb. 416.

Inherent covenants are those which relate directly to the land itself, or matter granted; Shepp. Touchst. 161. Distinguished from collateral covenants.

If real, they run with the land; Platt, Cov. 66.

Intransitive covenants are those the duty of performing which is limited to the covenantee himself, and does not pass over to his representative.

Joint covenants are those by which several parties agree to do or perform a thing together, or in which several persons have a joint interest as covenantees; 26 Barb. 63; 16 How. 580; 1 Gray, 376; 10 B. Monr. 291. They may be in the negative; 35 Me. 260.

Negative covenants are those in which the party obliges himself *not* to do or perform some act. Courts are unwilling to construe a negative covenant a condition precedent, inasmuch as it cannot be said to be performed till a breach becomes impossible; 2 Wms. Saund. 156; 1 Mod. 64; 2 Kebl. 674; 1 Sid. 87.

Obligatory covenants are those which are binding on the party himself; 1 Sid. 27; 1 Kebl. 337. They are distinguished from declaratory covenants.

Covenants of right to convey. See COVENANT OF RIGHT TO CONVEY.

Covenants of seisin. See COVENANT OF SEISIN.

Covenants of warranty. See COVENANT OF WARRANTY.

Personal covenants. See PERSONAL COVENANT.

Principal covenants. Those which relate directly to the principal matter of the contract entered into between the parties. They are distinguished from auxiliary.

Real covenants. Those by which a single covenantor undertakes the performance of the covenant. It frequently happens that each one of several covenantors binds himself to perform singly the whole undertaking. The words commonly used for this purpose are "severally," "each of us." Still more commonly the undertaking is both joint and several.

It is the nature of the interest, and not the form of the covenant, which determines its character in this respect; 16 How. 580; 1 Gray, 376.

Covenants to stand seised, etc. See COVENANT TO STAND SEISED TO USES.

Transitive covenants are those personal covenants the duty of performing which passes over to the representatives of the covenantor.

Covenants are subject to the same rules as other contracts in regard to the qualifications of *parties*, the *assent* required, and the nature of the *purpose* for which the contract is entered into. See PARTIES; CONTRACTS.

No peculiar words are needed to raise an express covenant; 12 Ired. 145; 1 C. & M. 657; 5 Q. B. 683; 3 Ex. 237, *per* Parke, B.; and by statute in Alabama, Delaware, Illinois, Indiana, Mississippi, Missouri, and Pennsylvania, the words *grant, bargain*, and *sell*, in conveyances in fee, unless specially restricted, amount to covenants that the grantor was seised in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment against his acts; 6 Kent, 473; 2 Binn. 95; 23 Mo. 151, 174; 17 Ala. N. S. 198; 1 Sm. & M. 611; 19 Ill. 235; but do not imply any warranty of title in Alabama and North Carolina; 4 Kent, 474; 1 Murph. 343, 348; 2 Ala. N. S. 535.

Describing lands in a deed as bounded on a street of a certain description raises a covenant that the street shall be of that description; 7 Gray, 563; and that the purchaser shall have the use thereof; 5 Md. 314; 23 N. H. 261; which binds subsequent purchasers from the grantor; 7 Gray, 83.

In New York, no covenants can be implied in any conveyance of real estate; 4 Kent, 469; but this provision does not extend to leases for years; 11 Paige, 566; 42 N. Y. 174; Rawle, Cov. 463, n. In some cases where the covenants relate to lands, the rights and liabilities of the covenantor, or covenantee, or both, pass to the assignee of the thing to which the covenant relates. In such cases the covenant is said to run with the land. If rights pass, the *benefit* is said to run; if liabilities, the *burden*. Only real covenants run with the land, and these only when the covenant has entered into the consideration for which the land, or some interest therein to which the covenant is annexed, passed between the covenantor and the covenantee; 2 Sugd. Vend. 468, 484; 3 Wils. 29; 2 M. & K. 535; 19 Pick. 449, 464; 24 Barb. 366; 45 Me. 474; and die with the estate to which they are annexed; 3 Jones, No. C. 12; 13 Ired. 193; but an estoppel to deny passage of title is said to be sufficient; 3 Metc. Mass. 124; and the passage of mere possession, or defeasible estate without possession, enables the covenant to run; 23 Mo. 151, 174.

It is said by some authorities that the benefit of a covenant to do acts upon land of the covenantee, made with the "covenantee and his assigns," will run with the land though no estate passed between the covenantor and covenantee; Rawle, Cov. 335; Year B. 42 Edw. III. 13; 3 Denio, 301; 8 Gratt. 403; but the weight of authority is otherwise; 2 Sugd. Vend. 468; Platt, Cov. 461. Covenants concerning title generally run with the land; 3 N. J. 260; except those that are broken before the land passed; 4 Kent, 473; 30 Vt. 692; COVENANTS OF SEISIN, etc. "*Until breach*, covenants for title, without distinction between them, run with the land to heirs and assigns. But while this is well settled, a strong current of American authority has set in favor of the position that the covenants for seisin, for right to convey, and, perhaps, against incumbrances, are what are called covenants *in præsenti*,—if broken at all, their breach occurs at the moment of their

creation. * * * * These covenants, it is held, are then turned into a mere right of action, which is not assignable at law and can neither pass to an heir, a devisee, or a subsequent purchaser. A distinction is considered, by this class of cases, to exist, in this respect, between the covenants first named, and those for quiet enjoyment, of warranty, and for further assurance, which are held to be prospective in their character;" Rawle, Cov. 318; see also 2 Johns. 1.

Covenants in leases, by virtue of the statute 32 Hen. VIII. c. 34, which has been re-enacted in most of the states, are assignable as respects assignees of the reversion and of the lease. The lessee continues liable on express covenants after an assignment by him, but not on implied ones; 4 Term, 98; but he is liable to the assignee of the lessor on implied covenants, at common law; Platt, Cov. 532; 2 Sugd. Vend. 466; Burton, R. P. § 855.

In case of the assignment of lands in parcels, the assignees may recover *pro rata*, and the original covenantee may recover according to his share of the original estate remaining; 2 Sugd. Vend. 508; Rawle, Cov. 341; 36 Me. 170; 27 Penn. 288; 3 Metc. Mass. 87; 8 Gratt. 407; 9 B. Monr. 58. But covenants are not, in general, apportionable; 27 Penn. 288.

See Spencer's case, 1 Sm. Lead. Cas. 206.

In Practice. A form of action which lies to recover damages for breach of a contract under seal. It is one of the *brevia formata* of the register, is sometimes a concurrent remedy with *debt*, though never with *assumpsit*, and is the only proper remedy where the damages are unliquidated in nature and the contract is under seal; Fitzh. N. B. 340; Chitty, Pl. 112, 113; Steph. N. P. 1058.

The action lies, generally, where the covenantor does some act contrary to his agreement, fails to do or perform that which he has undertaken; 4 Dane, Abr. 115; or does that which disables him from performance; Cro. Eliz. 449; 15 Q. B. 88; 11 Mass. 302; 23 Pick. 455.

To take advantage of an oral agreement modifying the original covenant in an essential point, the covenant must be abandoned and assumpsit brought; 27 Penn. 429; 24 Vt. 347.

The venue is local when the action is founded on privity of estate; 2 Steph. N. P. 1148; 1 Wms. Saund. 241 *b*, n.; and transitory when it is founded upon privity of contract. As between original parties to the covenant, the action is transitory; and, by the statute 32 Hen. VIII. c. 34, an action of covenant by an assignee of the reversion against a lessor, or by a lessee against the assignee of the reversion, is also transitory; 1 Chitty, Pl. 274, 275.

The declaration must, at common law, aver a contract under seal; 2 Ld. Raym. 1536; and either make profert thereof or excuse the omission; 3 Term, 151; at least of such part as is broken; 4 Dall. 436; 4 Rich. 196; and a breach or breaches; 15 Ala. 201; 5 Ark. 263; 4 Dana, 381; 6 Miss. 229; which may be by negativing the words of the covenant in actions upon covenants of seisin and right to convey; Rawle, Cov. 82; or according to the legal effect; but must set forth the incumbrance in case of a covenant against incumbrances; Rawle, Cov. 114; and must allege an eviction in case of covenants of warranty; Rawle, Cov. 228. No consideration need be averred or shown, as it is implied from the seal; but performance of an act which constitutes a condition precedent to the defendant's covenant, if there be any such, must be averred; 1 Chitty, Pl. 116; 2 Greenl. Ev. § 235; 26 Ala. N. S. 748. The damages laid must be large enough to cover the real amount sought to be recovered; 3 S. & R. 364, 567; 9 *id.* 45.

There is no plea of general issue in this action. Under *non est factum*, the defendant may show any facts contradicting the making of the deed; 1 Seld. 422; 1 Mich. 438; as, personal incapacity; 2 Campb. 272; 3 *id.* 126; that the deed was fraudulent; Lofft, 457; was not delivered; 4 Esp. 255; or was not executed by all the parties; 6 Maule & S. 341.

Non infregit conventionem and *nil debet* have both been held insufficient; Comyns, Dig. *Pleader*, 2 V, 4. As to the effect of covenant performed, see COVENANT PERFORMED.

In respect to the damages to be recovered, see DAMAGES.

The judgment is that the plaintiff recover a named sum for the damages which he has sustained by reason of the breach or breaches of covenant, together with costs.

COVENANT TO CONVEY. A covenant by which the covenantor undertakes to convey to the covenantee the estate described in the covenant, under certain circumstances.

This form of conditional alienation of lands is in frequent use in several of the United States; 14 Penn. 308; 19 Barb. 639; 4 Md. 498; 11 Ill. 194; 19 Ohio, 347. Substantially the same effect is secured as by a conveyance and a mortgage back for the purchase-money, with this important difference, however, that the title of course remains in the covenantor till he actually executes the conveyance.

The remedy for breach may be by action on the covenant; 29 Penn. 264; but the better remedy is said to be in equity for specific performance; 1 Grant, Pa. 230.

It is satisfied only by a perfect conveyance of the kind bargained for; 19 Barb. 639; otherwise where an imperfect conveyance has been accepted; 4 Md. 498.

COVENANT FOR FURTHER ASSURANCE. One by which the covenantor undertakes to do such reasonable acts in addition to those already performed as may be necessary for the completion of the transfer made, or intended to be made, at the requirement of the covenantee. It relates both to the title of the vendor and to the instrument of conveyance to the vendee, and operates as

well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter; Platt, Cov. 341.

The covenant is of frequent occurrence in English conveyances; but its use in the United States seems to be limited to some of the middle states; 2 Washb. R. P. 648; 10 Me. 91; 4 Mass. 627; 10 Cush. 134.

The covenantor, in execution of his covenant, is not required to do unnecessary acts; Yelv. 44; 9 Price, 43. He must in equity grant a subsequently acquired title; 2 Ch. Cas. 212; 1 Eq. Cas. Abr. 26; 2 Vern. 111; 2 P. Wms. 630; must levy a fine; Yelv. 44; 16 Ves. 366; 5 Taunt. 427; 4 Maule & S. 188; must remove a judgment or other incumbrance; 5 Taunt. 427; but a mortgagor with such covenant need not release his equity; 1 Ld. Raym. 36. It may be enforced by a bill in equity for specific performance, or an action at law to recover damages for the breach; 2 Co. 3 *a*; 6 Jenk. Cas. 24; Platt, Cov. 353; Rawle, Cov. 652; 2 Washb. R. P. 666.

COVENANT AGAINST INCUMBRANCES. One which has for its object security against those rights to, or interests in, the land granted which may subsist in third persons to the diminution of the value of the estate, though consistently with the passing of the fee by the deed of conveyance. For what constitutes an incumbrance, see INCUMBRANCE.

The mere existence of an incumbrance constitutes a breach of this covenant; 2 Washb. R. P. 658; 20 Ala. 137, 156; without regard to the knowledge of the grantee; 2 Greenl. Ev. § 242; 27 Vt. 739; 8 Ind. 171; 10 *id.* 424.

Such covenants, being *in præsenti*, do not run with the land, in the United States; Rawle, Cov. 89; 20 N. H. 369; 5 Wisc. 17; though it is held otherwise in 10 Ohio, 317; 13 Johns. 105.

Yet the incumbrance may be of such a character that its enforcement may constitute a breach of the covenant of warranty: as in case of a mortgage; 4 Mass. 349; 17 *id.* 586; 8 Pick. 547; 22 *id.* 494.

The measure of damages is the amount of injury actually sustained; 7 Johns. 358; 16 *id.* 254; 5 Me. 94; 34 *id.* 422; 12 Mass. 304; 3 Cush. 201; 20 N. H. 369; 25 *id.* 229.

The covenantee may extinguish the incumbrance and recover therefor, at his election, in the absence of agreement; 4 Ind. 533; 19 Mo. 480; 25 N. H. 229. See COVENANT; REAL COVENANT.

COVENANT OF NON-CLAIM. A covenant sometimes employed, particularly in the New England States, and in deeds of extinguishment of ground rents in Pennsylvania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed; Rawle, Cov. 29. It is substantially the same as the covenant of warranty, *q. v.*; *ibid.* 216.

COVENANT NOT TO SUE. One entered into by a party who has a cause of action at the time of making it, by which he agrees not to sue the party liable to such action.

A *perpetual* covenant not to sue is one by which the covenantor agrees not to sue the covenantee at any time. Such a covenant operates as a release to the covenantee, and may be pleaded as such; Cro. Eliz. 623; 1 Term, 446; 8 *id.* 486; 2 Salk. 375; 3 *id.* 298; 12 Mod. 415; 7 Mass. 153; 16 *id.* 24; 17 *id.* 623; 3 Ind. 473; 34 L. J. Q. B. 25. And see 11 S. & R. 149.

A covenant of this kind with one of several jointly and severally bound will not protect the others so bound; 12 Mod. 551; 8 Term, 168; 6 Munf. 6; 1 Conn. 139; 4 Me. 421; 2 Dana, 107; 17 Mass. 623. It is equivalent to a release with a reserve of remedies, and hence is properly used in composition deeds in preference to a release, which discharges all sureties and co-debtors; 3 B. & C. 361.

A covenant by one of several partners not to sue cannot be set up as a release in an action by all; 3 P. & D. 149.

A *limited* covenant not to sue, by which the covenantor agrees not to sue for a limited time, does not operate a release; and a breach must be taken advantage of by action; Carth. 63; 1 Show. 46; 2 Salk. 573; 11 Q. B. 852; 6 Wend. 471; 5 Cal. 501. See 29 Ala. N. S. 322, as to requisite consideration.

See Leake, Contr. 928 *et seq.*

COVENANT FOR QUIET ENJOYMENT. An assurance against the consequences of a defective title, and of any disturbances thereupon; Platt, Cov. 312; 11 East, 641; Rawle, Cov. 125. By it, when general in its terms, the covenantor stipulates at all events; 11 East, 642; 1 Mod. 101; to indemnify the covenantee against all acts committed by virtue of a paramount title; Platt, Cov. 313; 1 Lev. 83; 8 *id.* 305; Hob. 34; 4 Co. 80 *b*; Cro. Car. 5; 3 Term, 584; 6 *id.* 66; 3 Du. N. Y. 464; 2 Jones, No. C. 203; Busb. 384; 3 N. J. 260; not including the acts of a mob; 19 Miss. 87; 2 Strobh. 366; nor a mere trespass by the lessor; 10 N. Y. 151.

But this rule may be varied by the terms of the covenant; as where it is against acts of a particular person; Cro. Eliz. 212; 5 Maule & S. 374; 1 B. & C. 29; 2 Ventr. 61; or those "claiming or pretending to claim;" 10 Mod. 383; 1 Ventr. 175; or molestation by any person. See 21 Miss. 87.

It has practically superseded the ancient doctrine of warranty as a guaranty of title, in English conveyances; 2 Washb. R. P. 661; but the latter is more common in conveyances in America; Rawle, Cov. 125.

It occurs most frequently in leases; 1 Washb. R. P. 325; Rawle, Cov. 125; and is usually the only covenant used in such

cases; it is there held to be raised by the words grant, demise, lease, yielding and paying, give, etc.; 1 P. & D. 360; 9 N. H. 222; 15 N. Y. 327; 6 Bingh. 656; 4 Kent, 474, n.; and exists impliedly in a parol lease; 20 E. L. & Eq. 374; 3 N. J. 260; see 1 Du. N. Y. 176. It is usual in ground-rent deeds in Pennsylvania; Rawle, Cov. 125.

COVENANT OF RIGHT TO CONVEY. An assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey.

In modern English conveyancing, this covenant has taken the place of the covenant of seisin; 2 Washb. R. P. 648, 651. It is said to be the same as a covenant of seisin; 10 Me. 91; 4 Mass. 627; 10 Cush. 134; but is not necessarily so, as it includes the capacity of the grantor; T. Jones, 195; 2 Bulstr. 12; Cro. Jac. 358.

The breach takes place on execution of the deed, if at all; Freem. 41; 5 Halst. 20; and the covenantee need not wait for a disturbance to bring suit; 5 Taunt. 426; but a second recovery of damages cannot be had for the same breach; Platt, Cov. 310; 1 Maule & S. 365; 4 *id.* 53.

COVENANT OF SEISIN. An assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey; Platt, Cov. 306. It has given place in English conveyancing to the covenant of right to convey, but is in use in several states of the United States; 2 Washb. R. P. 648.

In England; 1 Maule & S. 355; 4 *id.* 53; Walker, Am. Law, 382; and in several states of the United States by decisions; 5 Blackf. 232; 17 Ohio, 52; 22 Wis. 495; 32 Iowa, 317; 40 Mo. 512; or by statute; 2 Washb. R. P. 650; this covenant runs with the land, and may be sued on for breach by an assignee; in others it is held that a mere covenant of *lawful seisin* does not run with the land, but is broken, if at all, at the moment of executing the deed; Rawle, Cov. 320; 4 Mass. 408, 439, 627; 10 Cush. 134; 2 Barb. 303; 2 Me. 269; 10 *id.* 95; 2 Dev. 30; 8 Gratt. 396; 5 Sneed, 119; 7 Ind. 673; 27 Ill. 482; 37 Cal. 188; 23 Ark. 590.

A covenant for *indefeasible seisin* is everywhere held to run with the land; 2 Vt. 328; 2 Dev. 30; 4 Dall. 439; 5 Sneed, 123; 14 Johns. 248; 14 Pick. 128; 10 Mo. 467; and to apply to all titles adverse to the grantor's; 2 Washb. R. P. 656.

A covenant of *seisin* or *lawful seisin*, in England and several of the states, is satisfied only by an indefeasible seisin; Rawle, Cov. 56, 63; 7 C. B. 310; 22 Vt. 106; 15 N. H. 176; 6 Conn. 374; 23 *id.* 349; while in other states possession under a claim of right is sufficient; 3 Vt. 403–407; 10 Cush. 134; 4 Mass. 408; 51 Me. 567; 26 Mo. 92; 3 Ohio, 220, 525.

A covenant of seisin, of whatever form, is broken at the time of the execution of the deed if the grantor has no possession either by himself or another; and no rights can pass to the assignee of the grantee; 2 Johns. 1; 2 Vt. 327; 5 Conn. 497; 14 Pick. 170; 1 Metc. Mass. 450; 17 Ohio, 60; 8 Gratt. 397; 4 Cra. 430; 36 Me. 170; 24 Ala. N. S. 189; 4 Kent, 471; 2 Washb. R. P. 656.

The existence of an outstanding life-estate; 22 Vt. 106; a material deficiency in the amount of land; 1 Bay, 256; see 24 Miss. 597; non-existence of the land described; 16 Pick. 68; 4 Cush. 212; the existence of fences or other fixtures on the premises belonging to other persons, who have a right to remove them; 1 N. Y. 564; 7 Penn. 122; 30 Vt. 752; 19 Iowa, 427; or of a paramount right in another to divert a natural spring; 38 Vt. 471; or to prevent the grantee from damming water to a certain height when that right is reserved to him by his deed; 20 Wis. 293; 29 Ind. 96; concurrent seisin of another as tenant in common; 12 Me. 389; 43 Me. 567; adverse possession of a part by a stranger; 7 Johns. 376; constitute a breach of this covenant. But the existence of such easements or incumbrances as do not affect the seisin of the purchaser does not constitute a breach of the covenant; Rawle, Cov. 79. For instance, the existence of a highway over a part of the land; 15 Johns. 483; 16 Ind. 340; or of a judgment, mortgage, or right of dower; Rawle, Cov. 80. But see 6 Cush. 124.

In the execution of a power, a covenant that the power is subsisting and not revoked is substituted; Platt, Cov. 309.

COVENANT TO STAND SEISED TO USES. A covenant by means of which under the statute of uses a conveyance of an estate may be effected; Burton, R. P. §§ 136, 145.

Such a covenant cannot furnish the ground for an action of covenant broken, and in this respect resembles the ancient real covenants.

The consideration for such a covenant must be relationship either by blood or marriage; 2 Washb. R. P. 129, 130. See 2 Seld. 342.

As a mode of conveyance it has fallen into disuse; though the doctrine is often resorted to by courts in order to give effect to the intention of the parties who have undertaken to convey lands by deeds which are insufficient for the purpose under the rules required in other forms of conveyance; 2 Washb. R. P. 155, 156; 2 Sand. Uses, 79, 83; 4 Mass. 136; 18 Pick. 397; 22 *id.* 376; 5 Me. 232; 11 Johns 351; 20 *id.* 85; 5 Yerg. 249.

COVENANT OF WARRANTY. An assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title; 2 Jones, No. C. 203; 3 Du. N. Y. 464.

It is not in use in English conveyances, but is in general use in the United States; 2 Washb. R. P. 659; and in several states is the *only* covenant in general use; Rawle, Cov. 205; 4 Ga. 593; 8 Gratt. 353; 6 Ala. 60.

The form in common use is as follows:—"And I the said [grantor], for myself, my heirs, executors, and administrators, do covenant with the said [grantee], his heirs and assigns, that I will, and my heirs, executors, and administrators shall, *warrant* and *defend* the same to the said [grantee], his heirs and assigns forever, against the lawful claims and demands of all persons [or, of all persons claiming by, through, or under me, but against none other]," [or other special covenant, as the case may be]. When *general*, it applies to lawful adverse claims of all persons whatever; when *special*, it applies only to certain persons or claims to which its operation is limited or restricted; 2 Washb. R. P. 665.

This limitation may arise from the nature of the subject-matter of the grant; 8 Pick. 547; 19 *id.* 341; 5 Ohio, 190; 9 Cow. 271.

Such covenants give the covenantee and grantee the benefit of subsequently acquired titles; 11 Johns. 91; 13 *id.* 316; 14 *id.* 193; 9 Cow. 271; 6 Watts, 60; 9 Cra. 43; 13 N. H. 389; 1 Ohio, 190; 3 id. 107; 3 Pick. 52; 13 *id.* 116; 24 *id.* 324; 3 Metc. Mass. 121; 13 Me. 281; 20 *id.* 260; to the extent of their terms; 12 Vt. 39; 3 Metc. Mass. 121; 9 Cow. 271; 34 Me. 483; but not if an interest actually passes at the time of making the conveyance upon which the covenant may operate; 3 McLean, 56; 9 Cow. 271; 12 Pick. 47; 5 Gratt. 157; in case of terms for years, as well as conveyances of greater estates; Burton, R. P. § 850; Williams, R. P. 229; 2 Washb. R. P. 478; 4 Kent, 261, n.; Cro. Car. 109; 1 Ld. Raym. 729; 4 Wend. 502; 1 Johns. Cas. 90; as against the grantor and those claiming under him; 2 Washb. R. P. 479, 480; including purchasers for value; 14 Pick. 224; 24 *id.* 324; 5 N. H. 533; 13 *id.* 389; 5 Me. 231; 12 Johns. 201; 13 *id.* 316; 9 Cra. 53; but see 4 Wend. 619; 18 Ga. 192. And this principle does not operate to prevent the grantee's action for breach of the covenant, if evicted by such title; 1 Gray, 195; 25 Vt. 635; 12 Me. 499. See 33 Me. 346.

In case of a *release* of right and title, covenants limited to those claiming under the grantor do not prevent the assertion of a subsequently acquired title; 26 N. H. 401; 4 Wend. 300; 6 Cush. 34; 5 Gray, 328; 11 Ohio, 475; 14 Me. 351; 29 *id.* 183; 43 *id.* 432; 14 Cal. 472.

It is a real covenant, and runs with the estate in respect to which it is made into the hands of whoever becomes the owner; 2 Washb. R. P. 659; 4 Sneed, 52; against the covenantor and his personal representatives; 27 Penn. 288; 3 Zabr. 260; to the extent of assets received, and cannot be severed therefrom; 13 Ired. 193.

The action for breach should be brought by the owner of the land and, as such, assignee of the covenant at the time it is broken; 4 Johns. 89; 19 Wend. 334; 2 Mass. 455; 7 *id.* 444; 3 Cush. 219; 10 Me. 81; 5 T. B. Monr. 357; 12 N. H. 413; but may be by the original covenantee, if he has satisfied the owner; 5 Cow. 137; 10 Wend. 184; 2 Metc. Mass. 618; 3 Cush. 222; 5 T. B. Monr. 357; 1 Conn. 244; 1 Dev. & B. 94; 10 Ga. 311; 26 Vt. 279.

To constitute a breach there must be an eviction by paramount title; Rawle, Cov. 144; 6 Barb. 165; 5 Harr. Del. 162; 11 Rich. 80; 13 La. An. 390, 499; 5 Cal. 262; 4 Ind. 174; 6 Ohio St. 525; 26 Mo. 92; 17 Ill. 185; 36 Me. 455; 14 Ark. 309; which may be constructive; 12 Me. 499; 17 Ill. 185; and it is sufficient if the tenant yields to the true owner, or if, the premises being vacant, such owner takes possession; 5 Hill, 599; 4 Mass. 349; 8 Ill. 162; 5 Ired. 393. See 4 Halst. 139.

Exercise of the right of eminent domain does not render the covenantee liable; 31 Penn. 37.

When the covenantee is threatened with eviction, it is usual and proper for him to give notice to the covenantor to appear and defend the suit. If it appears on the record that the covenantor received the notice or if he defends the suit, recovery therein will be conclusive against him in an action by the covenantee; otherwise the question of notice will go to the jury on the facts. If no notice was given, the record of the adverse suit is not even *primâ facie* evidence that the adverse title was paramount. Notice of the adverse suit is not indispensable to a recovery against the covenantor; Rawle, Cov. 232.

The measure of damages in England, Arkansas, California, Georgia, Indiana, Iowa, Kentucky, Maryland, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin, and in the United States courts, is the consideration money at the time of conveyance, and the interest; Rawle, Cov. 242; 8 Taunt. 715; 6 Wheat. 118; 25 N. H. 229; 3 Chandl. 295; 27 Penn. 288; 11 Ohio St. 82; 5 Ga. 285; 23 Mo. 166, 437; 31 Iowa, 137; 39 Cal. 360. In Connecticut, Maine, Massachusetts, and Vermont it is the value at the time of the eviction; 14 Conn. 245; 12 Vt. 387; 27 Me. 525; 3 Mass. 523. See 1 Sm. Lead. Cas. 206.

COVENANTS PERFORMED. In Pleading. A plea to an action of covenant, allowed in the state of Pennsylvania, whereby the defendant, upon informal notice to the plaintiff, may give any thing in evidence which he might have pleaded; 4 Dall. 439; 2 Yeates, 107; 15 S. & R. 105. And this evidence, it seems, may be given in the circuit court without notice, unless called for; 2 Wash. C. C. 456.

COVENANTEE. One in whose favor a covenant is made. Shepp. Touch. 150.

COVENANTOR. One who becomes bound to perform a covenant.

COVENTRY ACT. The common name for the statute 22 & 23 Car. II. c. 1,—it having been enacted in consequence of an assault

on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament.

By this statute it is enacted that if any person shall, of malice aforethought, and by lying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. The act was repealed in England by the 9 Geo. IV. c. 31. The provision now in force on this subject is the 24 & 25 Vict. c. 100, § 18; 4 Steph. Com. 80, n.

COVERT BARON. A wife. So called from being under the protection of her husband, baron, or lord. 1 Bla. Com. 442.

COVERTURE. The condition or state of a married woman.

During coverture the civil existence of the wife is, for many purposes, merged in that of her husband. 2 Steph. Com. 263–272. See ABATEMENT; PARTIES.

COVIN. A secret contrivance between two or more persons to defraud and prejudice another of his rights; Co. Litt. 357 *b*; Comyns, Dig. *Covin*, A; 1 Viner, Abr. 473; 28 Conn. 166. See COLLUSION; FRAUD.

COW. In a penal statute which mentions both cows and heifers, it was held that by the term cow must be understood one that had had a calf; 2 East, Pl. Cr. 616; 1 Leach, 105.

COWARDICE. Pusillanimity; fear; misbehavior through fear in relation to some duty to be performed before an enemy. O'Brien, Court M. 142.

By both the army and navy regulations of the United States this is an offence punishable in officers or privates with death, or such other punishment as may be inflicted by a court-martial; R. S. §§ 1342, 1624.

CRANAGE. A toll paid for drawing merchandise out of vessels to the wharf: so called because the instrument used for the purpose is called a crane; 8 Co. 46.

CRASTINUM, CRASTINO (Lat. tomorrow). On the day after. The return day of writs is made the second day of the term, the first day being some saint's day, which gives its name to the term. In the law Latin, *crastino* (the morning, the day after) would then denote the return day. 2 Reeve, Hist. Eng. Law, 56. 57. In the United States the return day is the first day of the term.

CRAVE. To ask; to demand.

The word is frequently used in pleading: as, to crave oyer of a bond on which the suit is brought; and in the settlement of accounts the accountant-general craves a credit or an allowance. 1 Chitty, Pr. 520. See OYER.

CRAVEN. A word denoting defeat, and begging the mercy of the conqueror.

It was used (when used) by the vanquished party in trial by battle. Victory was obtained by the death of one of the combatants, or if either champion proved *recreant*,—that is, yielded, and pronounced the horrible word "*craven*." Such a person became infamous, and was thenceforth unfit to be believed on oath. 3 Bla. Com. 340. See WAGER OF BATTLE.

CREANCE. In French Law. A claim; a debt; also belief, credit, faith. 1 Bouvier, Inst. n. 1040, note.

CREANSOR. A creditor. Cowel.

CREATE. To create a charter is to make an entirely new one, and differs from renewing, extending, or continuing an old one; 21 Penn. 188; 1 Gilm. 672; 16 Barb. 188.

CREDENTIALS. In International Law. The instruments which authorize and establish a public minister in his character with the state or prince to whom they are addressed. If the state or prince receive the minister, he can be received only in the quality attributed to him in his credentials. They are as it were his letter of attorney, his mandate patent, *mandatum manifestum*. Vattel, liv. 4, c. 6, § 76.

CREDIBILITY. Worthiness of belief. The credibility of witnesses is a question for the jury to determine, as their competency is for the court. Best, Ev. §§ 76–86; 1 Greenl. Ev. §§ 49, 425; 3 Bla. Com. 369.

CREDIBLE WITNESS. One who, being competent to give evidence, is worthy of belief; 5 Mass. 229; 17 Pick. 154; 2 Curt. Eccl. 336.

In deciding upon the credibility of a witness, it is always pertinent to consider whether he is capable of knowing thoroughly the thing about which he testifies; whether he was actually present at the transaction; whether he paid sufficient attention to qualify himself to be a reporter of it; and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth.

In some of the states, wills must be attested by credible witnesses. In several of the states, *credible witness* is used, in certain connections, as synonymous with *competent witness*, and in Connecticut, in a statute providing for the certification of copies of records, it refers to a witness giving testimony under the sanction of the witness's oath; 26 Conn. 416; 18 Ga. 40; 2 Bail. 24; 9 Pick. 350; 23 *id.* 10; 5 Mass. 229; 12 *id.* 358.

CREDIT. The ability to borrow, on the opinion conceived by the lender that he will be repaid.

A debt due in consequence of a contract of hire or borrowing of money.

The time allowed by the creditor for the payment of goods sold by him to the debtor.

That which is due to a merchant, as distinguished from debit, that which is due by him.

That influence connected with certain social positions. 20 Toullier, n. 19.

See, generally, 5 Taunt. 338; 3 N. Y. 344; 24 *id.* 64, 71.

CREDIT, BILLS OF. See BILLS OF CREDIT.

CREDITOR. He who has a right to require the fulfilment of an obligation or contract.

Preferred creditors are those who, in consequence of some provision of law, are entitled to some special prerogative, either in the manner of the discovery or in the order in which their claims are to be paid. See Bouvier, Inst. Index.

CREDITOR, JUDGMENT. One who has obtained a judgment against his debtor, under which he can enforce execution.

CREDITORS' BILL. A bill in equity, filed by one or more creditors, by and in behalf of him or themselves and all other creditors who shall come in under the decree, for an account of the assets and a due settlement of the estate of a decedent.

The usual decree against the executor or administrator is *quod computet;* that is to say, it directs the master to take the accounts between the deceased and all his creditors, and to cause the creditors, upon due public notice, to come before him to prove their debts at a certain place and within a limited time; and it also directs the master to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges in a due course of administration; 1 Story, Eq. Jur. 546–549.

Under the chancery code of Illinois, a creditor's bill is defined to be, a bill by which a creditor seeks to satisfy his debt out of some equitable estate of defendant, which is not liable to a levy and sale under an execution at law; 52 Ill. 98.

CREEK. In Maritime Law. Such little inlets of the sea, whether within the precinct or extent of a port or without, as are narrow passages, and have shore on either side of them; Callis, Sew. 56; 5 Taunt. 705.

Such inlets that though possibly for their extent and situation they might be ports, yet they are either members of or dependent upon other ports.

In England the name arose thus. The king could not conveniently have a customer and comptroller in every port or haven. But such custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that port where these custom-officers were placed; 1 Chitty, Com. Law, 726; Hale, *de Portibus Maris*, pt. 2, c. 1, vol. 1, p. 46; Comyns, Dig. *Navigation* (C); Callis, Sew. 34.

A small stream, less than a river. 12 Pick. 184; Cowp. 86; 38 N. Y. 103.

A creek passing through a deep level marsh and navigable by small craft, may, under legislative authority, be obstructed by a dam, or wholly filled up and converted into house-lots,—such obstructions not being in conflict with any act of congress regulating commerce; 2 Pet. 245; 1 Pick. 180; 21 *id.* 344; 3 Metc. Mass. 202; 2 Stockt. 211. See 4 B. & Ald. 589.

CREMENTUM COMITATUS. The increase of the county. The increase of the king's rents above the old vicontiel rents for which the sheriffs were to account; Wharton, Dic.

CREPUSCULUM. Daylight; twilight. The light which immediately proceeds or follows the rising or setting of the sun; 4 Bla. Com. 224. Housebreaking during the period in which there is sunlight enough to discern a person's face (*crepusculum*) is not burglary; Co. 3d Inst. 63; 1 Russell, Cr. 820; 3 Greenl. Ev. § 75.

CRETIO. Time for deliberation allowed an heir (usually 100 days), to decide whether he would or would not take an inheritance. Calvinus, Lex.; Taylor, Gloss.

CREW. The word crew used in a statute in connection with *master*, includes officers as well as seamen; 3 Sumn. 209–212; 1 Law Rep. 63. Sometimes also the master is included; 6 Rob. (La.) 534.

CRIER (Norman, to proclaim). An officer whose duty it is to make the various proclamations in court, under the direction of the judges. The office of crier in chancery is now abolished, in England. Wharton.

CRIM. CON. An abbreviation for criminal conversation, of very frequent use, denoting adultery; unlawful sexual intercourse with a married woman. Bull. N. P. 27; Bacon, Abr. *Marriage* (E) 2; 4 Blackf. 157; 3 Bla. Com. 139.

The term is used to denote the act of adultery in a suit brought by the husband of the married woman with whom the act was committed, to recover damages of the adulterer. That the plaintiff connived at or assented to his wife's infidelity, or that he prostituted her for gain, is a complete answer to the action. But the fact that the wife's character for chastity was bad before the plaintiff married her, that he lived with her after he knew of the criminal intimacy with the defendant, that he had connived at her intimacy with other men, or that the plaintiff had been false to his wife, only go in mitigation of damages; 4 N. H. 501.

The wife cannot maintain an action for criminal conversation with her husband; and for this, among other reasons, because her husband, who is *particeps criminis*, must be joined with her as plaintiff. But the husband may maintain the action after a divorce granted; 2 Bishop, Marr. & Div. § 727; 1 Hill, N. Y. 63. This action is rare in the United States, and has been abolished in England by the Divorce Act, 20 & 21 Vict. c. 85, s. 59. The husband may, however, in suing for a divorce, claim damages from the adulterer; 3 Steph. Com. 437. See article 15 Am. L. Reg. N. S. 451.

CRIME. An act committed or omitted in violation of a public law forbidding or commanding it.

A wrong which the government notices as

injurious to the public, and punishes in what is called a criminal proceeding in its own name; 1 Bish. Cr. Law, § 43. See 4 Denio, 260; 6 Ark. 187, 461.

The word crime generally denotes an offence of a deep and atrocious dye. When the act is of an inferior degree of guilt, it is called a misdemeanor. 4 Bla. Com. 4. Crime, however, is often used as comprehending *misdemeanor* and even as synonymous therewith, and also with *offence;* in short as embracing every indictable offence; 2 N. Y. Rev. Stat. 702, § 22; T. U. P. Charlt. 235; 60 Ill. 168; 31 Wis. 383; 9 Wend. 212; 24 How. 102; 32 N. J. L. 139, 144.

Crimes are defined and punished by statutes and by the common law. Most common-law offences are as well known and as precisely ascertained as those which are defined by statutes: yet, from the difficulty of exactly defining and describing every act which ought to be punished, the vital and preserving principle has been adopted that all immoral acts which tend to the prejudice of the community are punishable criminally by courts of justice; 2 Rev. Swift, Dig. 284; 2 East, 5, 21; 7 Conn. 386; 5 Cow. 258; 3 Pick. 26.

A crime *malum in se* is an act which shocks the moral sense of the community as being grossly immoral and injurious. With regard to some offences, such as murder, rape, arson, burglary, and larceny, there is but one sentiment in all civilized countries, which is that of unqualified condemnation. With regard to others, such as adultery, polygamy, and drunkenness, in some communities they are regarded as heinous *mala in se;* while in others, owing to the perversion of the moral sentiment by prejudice, education, and custom, they are not even *mala prohibita.*

An offence is regarded as strictly a *malum prohibitum* only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law.

It is not only just, but it has been found necessary, to have the severity of punishment proportioned to the enormity of crimes. Different opinions are entertained as to what should be the highest in degree. In the United States this is generally death by hanging.

Capital punishment has been abolished in Rhode Island, Wisconsin, and, except for treason, in Michigan. R. I. Rev. Stat. Supp. 866; Wisc. Act of 1853, n. 100; Mich. Rev. Stat. 1846. See No. Am. Rev. (1881) 557.

There are three degrees of murder according to the statute laws of Minnesota and Wisconsin, and two degrees in Alabama, Arkansas, California, Connecticut, Delaware, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Virginia; and the death-penalty is inflicted for the first degree in all of them except Michigan and Wisconsin. In some of the other states murder remains as at common law, and in some it is somewhat modified by statute.

Crimes are sometimes classified according to the degree of punishment incurred by the commission of them. Ohio Rev. Stat. Swan ed. 266.

They are more generally arranged according to the nature of the offence.

The following is, perhaps, as complete a classification as the subject admits:—

Offences against the sovereignty of the state. 1. Treason. 2. Misprision of treason.

Offences against the lives and persons of individuals. 1. Murder. 2. Manslaughter. 3. Attempts to murder or kill. 4. Mayhem. 5. Rape. 6. Robbery. 7. Kidnapping. 8. False imprisonment. 9. Abduction. 10. Assault and battery.

Offences against public property. 1. Burning or destroying public property. 2. Injury to the same.

Offences against private property. 1. Arson. 2. Burglary. 3. Larceny. 4. Obtaining goods on false pretences. 5. Embezzlement. 6. Malicious mischief.

Offences against public justice. 1. Perjury. 2. Bribery. 3. Destroying public records. 4. Counterfeiting public seals. 5. Jail-breach. 6. Escape. 7. Resistance to officers. 8. Obstructing legal process. 9. Barratry. 10. Maintenance. 11. Champerty. 12. Contempt of court. 13. Oppression. 14. Extortion. 15. Suppression of evidence. 16. Compounding felony. 17. Misprision of felony.

Offences against the public peace. 1. Challenging or accepting a challenge to a duel. 2. Unlawful assembly. 3. Rout. 4. Riot. 5. Breach of the peace. 6. Libel.

Offences against chastity. 1. Sodomy. 2. Bestiality. 3. Adultery. 4. Incest. 5. Bigamy. 6. Seduction. 7. Fornication. 8. Lascivious carriage. 9. Keeping or frequenting house of ill-fame.

Offences against public policy. 1. False currency. 2. Lotteries. 3. Gambling. 4. Immoral shows. 5. Violations of the right of suffrage. 6. Destruction of game, fish, etc. 7. Nuisance.

Offences against the currency, and public and private securities. 1. Forgery. 2. Counterfeiting. 3. Passing counterfeit money.

Offences against religion, decency, and morality. 1. Blasphemy. 2. Profanity. 3. Sabbath-breaking. 4. Obscenity. 5. Cruelty to animals. 6. Drunkenness. 7. Promoting intemperance. See 2 Sharsw. Bla. Com. 42, etc.; 2 Comp. Stat. 305, etc.

Offences against the public, individuals, or their property. 1. Conspiracy.

CRIME AGAINST NATURE. Sodomy. 10 Ind. 355.

CRIMEN FALSI. In Civil Law. A fraudulent alteration, or forgery, to conceal or alter the truth, to the prejudice of another. This crime may be committed in three ways, namely: by forgery; by false declarations or

false oath,—perjury; by acts, as by dealing with false weights and measures, by altering the current coin, by making false keys, and the like; see Dig. 48. 10. 22; 34. 8. 2; Code, 9. 22; 2. 5. 9. 11. 16. 17. 23. 24; Merlin, *Répert.*; 1 Bro. Civ. Law, 426; 1 Phillips, Ev. 26; 2 Stark. Ev. 715.

At Common Law. Any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud; 1 Greenl. Ev. § 373; 13 Ga. 97; 29 Ohio, 351, 358; 55 Ala. 239; 4 Sawy. 211.

The meaning of this term at common law is not well defined. It has been held to include forgery; 5 Mod. 74; perjury, subornation of perjury; Co. Litt. 6 *b*; Comyns, Dig. *Testmoigne* (A 5); suppression of testimony by bribery or conspiracy to procure the absence of a witness; Ry. & M. 434; conspiracy to accuse of crime; 2 Hale, Pl. Cr. 277; 2 Leach, 496; 3 Stark. 21; 2 Dods. 191; barratry; 2 Salk. 690. The effect of a conviction for a crime of this class is infamy, and incompetency to testify. Statutes sometimes provide what shall be such crimes.

CRIMEN LÆSÆ MAJESTATIS (Lat.). Injuring or violating the majesty of the king's person; any crime affecting the king's person; 4 Bla. Com. 75.

CRIMINAL CONVERSATION. See CRIM. CON.

CRIMINAL INFORMATION. A criminal suit brought, without interposition of a grand jury, by the proper officer of the king or state. Cole, Cr. Inf.; 4 Bla. Com. 398. See INFORMATION.

CRIMINAL LAW. That branch of jurisprudence which treats of crimes and offences.

From the very nature of the social compact on which all municipal law is founded, and in consequence of which every man, when he enters into society, gives up part of his natural liberty, result those laws which, in certain cases, authorize the infliction of penalties, the privation of liberty, and even the destruction of life, with a view to the future prevention of crime and to insuring the safety and well-being of the public. *Salus populi suprema lex.*

The extreme importance of a knowledge of the criminal law is evident. For a mistake in point of law, which every person of discretion not only may know but is bound and presumed to know, is in criminal cases no defence. *Ignorantia eorum quæ quis scire tenetur non excusat.* This law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it; *Per Tindal*, C. J., in 10 Cl. & F. 210. This doctrine has been carried so far as to include the case of a foreigner charged with a crime which was no offence in his own country; 1 E. & B. 1; Dearsl. 51; 7 C. & P. 456; Russ. & R. 4. And, further, the criminal law, whether common or statute, is imperative with reference to the conduct of individuals: so that, if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute are offences at common law, and ordinarily indictable as such; Broom, Com. 865; Hawk. Pl. Cr. bk. 2, c. 25, § 4; 8 Q. B. 883. See 15 M. & W. 404.

In seeking for the sources of our law upon this subject, when a statute punishes a crime by its legal designation, without enumerating the acts which constitute it, then it is necessary to resort to the common law for a definition of the crime with its distinctions and qualifications. So if an act is made criminal, but no mode of prosecution is directed or no punishment provided, the common law furnishes its aid, prescribing the mode of prosecution by indictment, and as a mode of punishment, fine, and imprisonment. This is commonly designated the common law of England; but it might now be properly called the common law of this country. It was adopted by general consent when our ancestors first settled here. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law and have not been altered and modified by legislative enactments or judicial decisions, they have the same force and effect as laws formally enacted; 5 Cush. 303, 304; 4 Metc. Mass. 358; 13 *id.* 69, 70. "The common law of crimes," says a recent writer, "is at present that *jus vagum et incognitum* against which jurists and vindicators of freedom have strenuously protested. It is to be observed that the definitions of crimes, the nature of punishments, and the forms of criminal procedure originated, for the most part, in the principles of the most ancient common law, but that most of the unwritten rules touching crimes have been modified by statutes which assume the common-law terms and definitions as if their import were familiar to the community. The common law of crimes has, partly from humane and partly from corrupt motives, been pre-eminently the sport of judicial constructions. In theory, indeed, it was made for the state of things that prevailed in this island and the kind of people that inhabited it in the reign of Richard I.; in reality, it is the patchwork of every judge in every reign, from Cœur de Lion to Victoria." Ruins of Time Exemplified in Hale's Pleas of the Crown, by Amos, Pref. x.

Some of the leading principles of the English and American system of criminal law are —*First.* Every man is presumed to be innocent till the contrary is shown; and if there is any reasonable doubt of his guilt, he is entitled to the benefit of the doubt. *Second.* In general, no person can be brought to trial until a grand jury on examination of the charge has found reason to hold him for trial. *Third.* The prisoner is entitled to trial by a jury of his peers, who are chosen from the body of the people with a view to impartiality, and whose decision on questions of fact is final. *Fourth.* The question of his guilt is to be determined

without reference to his general character. By the systems of continental Europe, on the contrary, the tribunal not only examines the evidence relating to the offence, but looks at the probabilities arising from the prisoner's previous history and habits of life. *Fifth.* The prisoner cannot be required to criminate himself, nor permitted to exculpate himself, by giving his own testimony on his trial. The justice and expediency of this latter restriction are now much questioned. *Sixth.* He cannot be twice put in jeopardy for the same offence. *Seventh.* He cannot be punished for an act which was not an offence by the law existing at the time of its commission; nor can a severer punishment be inflicted than was declared by law at that time.

CRIMINAL LAW AMENDMENT ACT. This act was passed in 1871, 34 & 35 Vict. c. 32, to prevent and punish any violence, threats, or molestation, on the part either of master or workmen, in the various relations arising between them. 4 Steph. Com. 241.

CRIMINAL LAW CONSOLIDATION ACTS. The stats. 24 & 25 Vict. cc. 94–100, passed in 1861, for the consolidation of the criminal law of England and Ireland. 4 Steph. Com. 297. These important statutes amount to a codification of the modern criminal law of England. See Bruce's Archb. Pl. & Ev. in Cr. Ca. 1875.

CRIMINAL LETTERS. In Scotch Law. A summons issued by the lord advocate or his deputies as the means of commencing a criminal process. It differs from an indictment, and is like a criminal information at common law.

CRIMINAL PROCESS. Process which issues to compel a person to answer for a crime or misdemeanor; 1 Stew. 26.

CRIMINALITER. Criminally; on criminal process.

CRIMINATE. To exhibit evidence of the commission of a criminal offence.

It is a rule that a witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. 3 Bouvier, Inst. nn. 3213–3217; 4 St. Tr. 6; 6 *id.* 649; 10 How. St. Tr. 1090; 1 Cra. 144; 2 Yerg. 110; 5 Day, 260; 6 Cow. 254; 8 Wend. 598; 12 S. & R. 284; 18 Me. 272; 13 Ark. 307.

An accomplice admitted to give evidence against his associates in guilt is bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution; 10 Pick. 477; 2 Stark. Ev. 12, note; but he is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; 9 Cow. 721, note (a); 2 C. & P. 411.

CRITICISM. The art of judging skilfully of the merits or beauties, defects or faults, of a literary or scientific performance, or of a production of art. When the criticism is reduced to writing, the writing itself is called a criticism.

Liberty of criticism must be allowed, or there would be neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, is not a libel which has for its object not to injure the reputation of an individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure what is hostile to morality; 1 Campb. 351. As every man who publishes a book commits himself to the judgment of the public, any one may comment on his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. And the critic does a good service to the public who writes down any vapid or useless publication, such as ought never to have appeared; and, although the author may suffer a loss from it, the law does not consider such loss an injury; because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled; 1 Campb. 358, n. See 1 Esp. 28; Stark. Lib. and Sl. 228–234; 4 Bingh. N. S. 92; 3 Scott, 340; 1 Mood. & M. 74, 187; Cooke, Def. 52.

CROFT. A little close adjoining a dwelling-house, and enclosed for pasture and tillage or any particular use. Jacob, Law Dic. A small place fenced off in which to keep farm-cattle. Spelman, Gloss. The word is now entirely obsolete.

CROP. See EMBLEMENTS; AWAY-GOING CROP.

CROPPER. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. 2 Rawle, 12; 71 N. C. 7.

CROSS. A mark made by persons who are unable to write, instead of their names.

When properly attested, and proved to have been made by the party whose name is written with the mark, it is generally admitted as evidence of the party's signature.

CROSS-ACTION. An action by a defendant in an action, against the plaintiff in the same action, upon the same contract, or for the same tort. Thus, if Peter bring an action of trespass against Paul, and Paul bring another action of trespass against Peter, the subject of the dispute being an assault and battery, it is evident that Paul could not set off the assault committed upon him by Peter, in the action which Peter had brought against him: therefore a cross-action becomes necessary. 10 Ad. & E. 643.

CROSS-APPEAL. Where both parties to a judgment appeal therefrom, the appeal of each is called a cross-appeal as regards that of the other; 3 Steph. Com. 581.

CROSS-BILL. In Equity Practice. One which is brought by a defendant in a suit against a plaintiff in or against other defendants in the same suit, or against both, touching the matters in question in the original bill. Story, Eq. Pl. § 389; Mit. Eq. Pl. 80.

It is considered as a defence to the original bill, and is treated as a dependency upon the original suit; 1 Eden, Inj. 190; 3 Atk. 312; 19 E. L. & Eq. 325; 14 Ark. 346; 14 Ga. 674; 14 Vt. 208; 24 *id.* 181; 15 Ala. 501. It is usually brought either to obtain a necessary discovery, as, for example, where the plaintiff's answer under oath is desired; 3 Swanst. 474; 3 Y. & C. 594; 2 Cox, Ch. 109; or to obtain full relief for all parties, since the defendant in a bill could originally only pray for a dismissal from court, as to prevent subsequent suits; 1 Ves. 284; 7 *id.* 222; 2 Sch. & L. 9, 11 n., 144, n. (z); 2 Stockt. 107; 14 Ill. 229; 20 Ga. 472; Story, Eq. Pl. § 390, n.; or where the defendants have conflicting interests; 9 Cow. 747; 1 Sandf. 108; 2 Wisc. 299; but may not introduce new parties; 17 How. 130. It is also used for the same purpose as a plea *puis darrein continuance* at law; Cooper, Eq. Pl. 86; 2 Ball & B. 140; 2 Atk. 177, 553; 1 Stor. 218.

It should state the original bill, and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of a cross-litigation, or the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill; Mitf. Eq. Pl. 81; and it should not introduce new and distinct matters; 8 Cow. 361.

It should be brought before publication; 1 Johns. Ch. 62; 13 Ga. 478; and not after, —to avoid perjury; 7 Johns. Ch. 250; Nelson, 103.

In England it need not be brought before the same court; Mitford, Eq. Pl. 81 *et seq.* For the rule in the United States, see 11 Wheat. 446; Story, Eq. Pl. § 401.

CROSS-DEMAND. A demand is so called which is preferred by B. in opposition to one already preferred against him by A.

CROSS-ERRORS. Errors assigned by the respondent in a writ of error.

CROSS-EXAMINATION. In Practice. The examination of a witness by the party opposed to the party who called him, and who examined or was entitled to examine him in chief.

In England and some of the states of the United States, when a competent witness is called and sworn, the other party is ordinarily entitled to cross-examine him though he be not examined in chief; 2 Stark. 314, 472; 1 Esp. 357; 4 *id.* 67; 1 Armstr. M. & O. 204; 17 Pick. 490; 1 Cush. 189; 7 Cow. 238; 2 Wend. 166, 483; 23 Ga. 154; 32 Miss. 405; see 3 C. & P. 16; 7 *id.* 64; 1 Cr. M. & R. 94; 2 M. & R. 273; 23 Ga. 154; but it is held in other states and in the federal courts that the cross-examination is confined to facts and circumstances connected with matters stated in the direct examination; 3 Wash. C. C. 580; 14 Pet. 448; 16 S. & R. 77; 6 W. & S. 75; 2 Dutch. 463; 5 Cal. 450; 4 Iowa, 477; 4 Mich. 67. But see 12 La. An. 826; 2 Pat. & H. 616.

Inquiry may be made in regard to collateral facts in the discretion of the judge; 7 C. & P. 389; 5 Wend. 305; but not merely for the purpose of contradicting the witness by other evidence; 1 Stark. Ev. 164; 7 East, 108; 2 Lew. C. C. 154, 156; 7 C. & P. 789; 2 Campb. 637; 16 Pick. 157; 8 Me. 42; 2 Gall. 51. And see 3 C. & P. 75; 1 Exch. 91; 7 Cl. & F. 122; 16 Pick. 157; 4 Denio, 502; 7 Wend. 57; 2 Ired. 346; 14 Pet. 461.

As to whether the witness may be called subsequently to his examination in chief and cross-examined, see 1 Greenl. Ev. § 447; 1 Stark. Ev. 164; 16 S. & R. 77; 17 Pick. 498.

A written paper identified by the witness as having been written by him may be introduced in the course of a cross-examination as a part of the evidence of the party producing it, if necessary for the purposes of the cross-examination; 16 Jur. 103; 8 C. & P. 369; 2 Bro. & B. 289.

A cross-examination as to matters not otherwise admissible in evidence entitles the party producing the witness to re-examine him as to those matters; 3 Ad. & E. 554; 17 Tex. 417.

Leading questions may be put in cross-examination; 1 Stark. Ev. 96; 1 Phill. Ev. 210; 6 W. & S. 75. For some suggestions as to the propriety of cross-examination in various cases and the most expedient manner of conducting it, see 2 Pothier, Obl. Evans ed. 233; 1 Stark. Ev. 160, 161; Archb. Cr. Pl. 111.

CROSS-REMAINDER. Where a particular estate is conveyed to several persons in common, or various parcels of the same land are conveyed to several persons in severalty, and upon the termination of the interest of either of them his share is to remain over to the rest, the remainders so limited over are said to be cross-remainders. In deeds, such remainders cannot arise without express limitation. In wills, they frequently arise by implication; 1 Prest. Est. 94; 2 Hilliard, R. P. 44; 4 Kent, 201.

CROSSED CHECK. See CHECK.

CROWN. In England. A word often used for the sovereign.

CROWN CASES RESERVED. See COURT FOR CONSIDERATION OF CROWN CASES RESERVED.

CROWN DEBTS. Debts due to the crown, which are put, by various statutes, upon a different footing from those due to a subject.

CROWN LANDS. The demesne lands of the crown. See 29 & 30 Vict. c. 62; 2 Steph. Com. 534–536.

CROWN LAW. **In England.** Criminal law, the crown being the prosecutor.

CROWN OFFICE. The criminal side of the court of king's bench. The king's attorney in this court is called master of the crown office. 4 Bla. Com. 308.

CROWN SIDE. The criminal side of the court of king's bench. Distinguished from the pleas side, which transacts the civil business. 4 Bla. Com. 265; 4 Steph. Com. 308, 385.

CROWN SOLICITOR. **In England.** The solicitor to the treasury.

CRUEL AND UNUSUAL PUNISHMENT. See PUNISHMENT.

CRUELTY. *As between husband and wife.* Those acts which affect the life, the health, or even the comfort, of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty. What merely wounds the feelings is seldom admitted to be cruelty, unless the act be accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, will not amount to legal cruelty; 17 Conn. 189; *a fortiori*, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessaries, is not cruelty. The negative descriptions of cruelty are perhaps the best, under the infinite variety of cases that may occur, by showing what is not cruelty; 1 Hagg. Cons. 35; 4 Eccl. 238, 311, 312; 1 Hagg. Eccl. 733, 768, n.; 1 Add. Eccl. 29; 11 Jur. 490; 1 Hagg. Cons. 37, 458; 2 *id.* 154; 1 Phill. Eccl. 111, 132; 1 M'Cord, 205; 2 J. J. Marsh. 324; 2 Chitty, Pr. 461, 489; Poynton, Marr. & D. c. 15, p. 208; Shelf. Marr. & D. 425; 8 N. H. 307; 3 Mass. 321; 4 *id.* 487; 36 Ga. 286; 4 Wis. 135; 4 La. An. 137; 14 Tex. 356; 24 N. J. Eq. 195; 3 Dana, 28; 37 Penn. 225; 57 Ind. 568; 18 Kans. 371, 419, 73 N. Y. 369; 30 N. J. Eq. 119, 215; 10 Phila. 58; 30 Gratt. 307; 88 Ill. 248; 40 Mich. 493; 7 U. S. Dig. 322, ¶ 3755.

Cruelty towards weak and helpless persons takes place where a party bound to provide for and protect them either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessaries which their helpless condition requires. Exposing a person of tender years, under a party's care, to the inclemency of the weather; 2 Campb. 650; keeping such a child, unable to provide for himself, without adequate food; 1 Leach, 137; Russ. & R. 20; or an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them; Russ. & R. 46, 47, 48; are examples of this species of cruelty.

The improper treatment and employment of children has of late years attracted much attention, and in many of the chief cities of the U. S., beginning with New York, in April, 1875, societies for the prevention of cruelty to children have been formed, authorized to prosecute parties who maltreat children, or force them to pursue improper and dangerous employments; N. Y. Act of April 21, 1875; Delafield on Children, 1876; Stat. 42 & 43 Vict. c. 34 regulates certain employments for children.

Cruelty to animals is an indictable offence. A defendant was convicted of a misdemeanor for tying the tongue of a calf so near the root as to prevent its sucking, in order to sell the cow at a greater price, by giving to her udder the appearance of being full of milk while affording the calf all it needed; 6 Rog. N. Y. 62. A man may be indicted for cruelly beating his horse; 3 Rog. N. Y. 191; 4 Cra. 483; 3 Campb. 143; 9 L. T. R. N. S. 175; 7 Allen, 579; 1 Aik. 226; 3 B. & S. 382; 44 N. H. 392; Laws of N. Y. 1874, c. 12, § 8; 4 Tex. App. 12, 234, 486; 5 *id.* 475; 4 Mo. App. 215; 85 Ill. 457. See 101 Mass. 34; 2 Curt. C. C. 194; Stat. 12 & 13 Vict. c. 92.

The treatment of animals has been the subject of much recent legislation, and, beginning with New York, societies have been organized in all parts of the U. S. and Europe for their protection, similar in their scope and power to those referred to above for children.

CRUISE. A voyage or expedition in quest of vessels or fleets of the enemy which may be expected to sail in any particular track at a certain season of the year. The region in which these cruises are performed is usually termed the rendezvous, or cruising-latitude.

When the ships employed for this purpose, which are accordingly called *cruisers*, have arrived at the destined station, they traverse the sea backwards and forwards, under an easy sail, and within a limited space, conjectured to be in the track of their expected adversaries. Weskett, Ins.; Lex Merc. Rediv. 271, 284; Dougl. 509; Marshall, Ins. 196, 199, 520; 2 Gall. 268, 526.

CRY DE PAYS, CRY DE PAIS. A hue and cry raised by the country. This was allowable in the absence of the constable when a felony had been committed.

CRYER. See CRIER.

CUCKING-STOOL. An engine or machine for the punishment of scolds and unquiet women.

Called also a trebucket, tumbrill, and castigatory. Bakers and brewers were formerly also liable to the same punishment. Being fastened in the machine, they were immersed over head and ears in some pool. Blount; Co. 3d Inst. 219; 4 Bla. Com. 168.

CUI ANTE DIVORTIUM (L. Lat. The full phrase was, *Cui ipsa ante divortium contradicere non potuit*, whom she before the divorce could not gainsay). **In Practice.** A writ which anciently lay in favor of a woman who had been divorced from her husband to recover lands and tenements which she had in

fee simple, fee tail, or for life, from him to whom her husband had aliened them during marriage, when she could not gainsay it; Fitzh. N. B. 240; 3 Bla. Com. 183, n.; Stearns, Real Act. 143; Booth, Real Act. 188. Abolished in 1833 by stat. 3 & 4 Will. IV. c. 27.

CUI IN VITA (L. Lat. The full phrase was, *Cui in vita sua, ipsa contradicere non potuit*, whom in his lifetime she could not gainsay). **In Practice.** A writ of entry which lay for a widow against a person to whom her husband had in his lifetime aliened her lands; Fitzh. N. B. 193. The object of the writ was to avoid a judgment obtained against the husband by confession or default. It is now of no use in England, by force of the provisions of the statute 32 Hen. VIII. c. 28, § 6. See 6 Co. 8, 9; Booth, Real Act. 186. As to its use in Pennsylvania, see 3 Binn. App.; Rep. Comm. on Penn. Civ. Code, 1835, 90, 91. Abolished in England by 3 & 4 Will. IV. c. 27.

CUL DE SAC (Fr. bottom of a bag). A street which is open at one end only.

It seems not to be settled whether a *cul de sac* is to be considered a highway; but the authorities are generally to the contrary. See 1 Campb. 260; 11 East, 376, note; 5 Taunt. 137; 5 B. & Ald. 456; Hawk. Pl. Cr. b. 1, c. 76, s. 1; Dig. 50. 16. 43; 43. 12. 1. § 13; 47. 10. 15. § 7.

In order to become a public highway by dedication, a way must be a thoroughfare, which a *cul de sac* could not be; Washb. Easements, 182, 213.

CULPA. A fault; negligence. Jones, Bailm. 8.

Culpa is to be distinguished from *dolus*, the latter being a trick for the purpose of deception, the former merely negligence. There are three degrees of *culpa: lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect; and the definitions of these degrees are precisely the same as those in our law. Story, Bailm. § 18; 8 Allen, 121; 49 N. H. 387. See NEGLIGENCE.

CULPRIT. A person who is guilty, or supposed to be guilty, of a crime.

When a prisoner is arraigned, and he pleads not guilty, in English practice, the clerk, who arraigns him on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove the accusation. This is done by writing two monosyllabic abbreviations,—*cul. prit.* 4 Bla. Com. 339; 1 Chitty, Crim. Law, 416. See Christian's note to Bla. Com. cited; 3 Sharsw. Bla. Com. 340, n. 9. The technical meaning has disappeared, and the compound is used in the popular sense as above given.

CULTIVATED. A field may be cultivated ground, though lying fallow; 13 Ired. L. 36.

CULVERTAGE. A base kind of slavery. The confiscation or forfeiture which takes place when a lord seizes his tenant's estate. Blount; Du Cange.

CUM ONERE (Lat.). With the burden; subject to the incumbrance; subject to the charge. A purchaser with knowledge of an incumbrance takes the property *cum onere*. Co. Litt. 231 *a*; 7 East, 164; Paley, Ag. 175.

CUMULATIVE EVIDENCE. That which goes to prove what has already been established by other evidence; 20 Conn. 305; 28 Me. 379; 24 Pick. 246; 43 Barb. 203; 43 Iowa, 175.

CUMULATIVE LEGACY. See LEGACY.

CUMULATIVE PUNISHMENTS. See ACCUMULATIVE PUNISHMENT.

CUMULATIVE REMEDY. A remedy created by statute in addition to one which still remains in force.

CUNEATOR. A coiner. Du Cange. *Cuneare*, to coin. *Cuneus*, the die with which to coin. *Cuneata*, coined. Du Cange; Spelman, Gloss.

CURATE. One who represents the incumbent of a church, parson or vicar, and takes care of the church and performs divine services in his stead. An officiating temporary minister in the English church who represents the proper incumbent. Burn, Eccl. Law; 1 Bla. Com. 393.

CURATIO (Lat.). **In Civil Law.** The power or duty of managing the property of him who, either on account of infancy or some defect of mind or body, cannot manage his own affairs. The duty of a curator or guardian. Calvinus, Lex.

CURATOR. One who has been legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself; a guardian.

There are curators *ad bona* (of property), who administer the estate of a minor, take care of his person, and intervene in all his contracts; curators *ad litem* (of suits), who assist the minor in courts of justice, and act as curators *ad bona* in cases where the interests of the curator are opposed to the interests of the minor. La. Civ. Code, art. 357 to 366. There are also curators of insane persons, *id.*, art. 31; and of vacant successions and absent heirs; *id.* art. 1105, 1125.

Interim Curator. In England. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the crown of an administrator for the same purpose; Stat. 33 & 34 Vict. c. 23; 4 Steph. Conn. 462; Mozl. & W. Dic.

CURATOR BONIS (Lat.). **In Civil Law.** A guardian to take care of the property. Calvinus, Lex.

In Scotch Law. A guardian for minors, lunatics, etc. Halkers, Tech. Terms; Bell, Dict.

CURATOR AD HOC. A guardian for this special purpose.

CURATOR AD LITEM (Lat.). Guardian for the suit. In English law, the corresponding phrase is guardian *ad litem*.

CURATORSHIP. The office of a curator.

Curatorship differs from tutorship (*q. v.*) in this, that the latter is instituted for the protection of property in the first place, and secondly, of the person; while the former is intended to protect, first, the person, and, secondly, the property. 1 Leçons Elem. du Droit Civ. Rom. 241.

CURATRIX. A woman who has been appointed to the office of curator.

CURE BY VERDICT. See AIDER BY VERDICT.

CURE OF SOULS. The ordinary duties of an officiating clergyman.

Curate more properly denotes the incumbent in general who hath the *cure of souls;* but more frequently it is understood to signify a clerk not instituted to the *cure of souls*, but exercising the spiritual office in a parish under the rector or vicar. 2 Burn, Eccl. Law, 54; 1 H. Blackst. 424.

CURFEW (French, *couvre*, to cover, and *feu*, fire). This is generally supposed to be an institution of William the Conqueror, who required, by ringing of the bell at eight o'clock in the evening, that all lights and fires in dwellings should then be extinguished. But the custom is evidently older than the Norman; for we find an order of king Alfred that the inhabitants of Oxford should at the ringing of that bell cover up their fires and go to bed. And there is evidence that the same practice prevailed at this period in France, Normandy, Spain, and probably in most of the other countries of Europe. Henry, Hist. of Britain, vol. 3, 567. It was doubtless intended as a precaution against fires, which were very frequent and destructive when most houses were built of wood.

That it was not intended as a badge of infamy is evident from the fact that the law was of equal obligation upon the nobles of the court and upon the native-born serfs. And yet we find the name of *curfew law* employed as a by-word denoting the most odious tyranny.

It appears to have met with so much opposition that in 1103 we find Henry I. repealing the enactment of his father on the subject; and Blackstone says that, though it is mentioned a century afterwards, it is rather spoken of as a time of night than as a still subsisting custom. Shakspeare frequently refers to it in the same sense. This practice is still pursued, in many parts of England and of this country, as a very convenient mode of apprising people of the time of night.

CURIA. In Roman Law. One of the divisions of the Roman people. The Roman people were divided by Romulus into three tribes and thirty *curiæ:* the members of each *curia* were united by the tie of common religious rites, and also by certain common political and civil powers. Dion. Hal. l. 2, p. 82; Liv. l. 1, cap. 13; Plut. *in Romulo*, p. 30; Festus Brisson, *in verb.*

In later times the word signified the senate or aristocratic body of the provincial cities of the empire. Brisson, *in verb.;* Ortolan, Histoire, no. 25, 408; Ort. Inst. no. 125.

The senate-house at Rome; the senate-house of a provincial city. Cod. 10. 31. 2; Spelman, Gloss.

In English Law. The king's court; the palace; the royal household. The residence of a noble; a manor or chief manse; the hall of a manor. Spelman, Gloss.

A court of justice, whether of general or special jurisdiction. Fleta, lib. 2, l. 72, § 1; Feud. lib. 2, tit. 1, 2, 22; Spelman; Cowel; 3 Bla. Com. c. iv. See COURT.

A court-yard or enclosed piece of ground; a close. Stat. Edw. Conf. 1, 6; Bracton, 76, 222 *b*, 335 *b*, 356 *b*, 358; Spelman, Gloss. See CURIA CLAUDENDA.

The civil or secular power, as distinguished from the church. Spelman, Gloss.

CURIA ADVISARE VULT (Lat.). The court wishes to consider the matter.

In Practice. The entry formerly made upon the record to indicate the continuance of a cause until a final judgment should be rendered.

It is commonly abbreviated thus: *cur. adv. vult*, or *c. a. v.* Thus, from amongst many examples, in Clement *v.* Chivis, 2 B. & C. 172, after the report of the argument we find "*cur. adv. vult*," then, "on a subsequent day judgment was delivered," etc.

CURIA CLAUDENDA (Lat.). **In Practice.** A writ which anciently lay to compel a party to enclose his land. Fitzh. N. B. 297.

CURIA REGIS (Lat.). The king's court. A term applied to the *aula regis*, the *bancus* or *communis bancus*, and the *iter* or *eyre*, as being courts of the king, but especially to the *aula regis*, which title see.

CURIALITY. In Scotch Law. Curtesy.

CURRENCY. This term is commonly used for whatever passes among the people for money, whether gold or silver coin or bank notes; 32 Ill. 74; 9 Mo. 697; 1 Ohio, 115, 119; 1 Hask. 385.

Current. Current money means lawful money; current bank notes, such as are convertible into specie at the counter where they were issued; 1 Dall. 124; 7 Ark. 282; see 20 La. An. 368; 14 Mich. 501; 1 Yeates, 349; 28 Ill. 332, 388; 9 Ind. 135; 3 T. B. Monr. 166; 21 La. An. 624; 64 N. C. 381.

CURSITOR. A junior clerk in the court of chancery, whose business it formerly was to write out from the register those forms of writs which issued of course.

Such writs were called writs *de cursu* (of course), whence the name, which had been acquired as early as the reign of Edward III. The body of cursitors constituted a corporation, each clerk having a certain number of counties assigned to him. Coke, 2d Inst. 670; 1 Spence, Eq. Jur. 238. The office was abolished by 5 & 6 Will. IV. c. 82.

CURSITOR BARON. An officer of the court of exchequer, who is appointed by patent under the great seal to be one of the barons of the exchequer. The office was abolished by stat. 19 & 20 Vict. c. 86. Wharton, Dict. 2d Lond. ed.

CURTESY. The estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate.

It is a freehold estate for the term of his natural life. 1 Washb. R. P. 127. In the common law the word is used in the phrases *tenant by curtesy*, or *estate by curtesy*, but seldom alone; while in Scotland of itself it denotes the estate. See ESTATE BY CURTESY.

Some considerable question has been made as to the derivation both of the custom and its name. It seems pretty clear, however, that the term is derived from *curtis*, a court, and that the custom, in England at least, is of English origin, though a similar custom existed in Normandy and still exists in Scotland. 1 Washb. R. P. 128, n.; Wright, Ten. 192; Co. Litt. 30 *a*; 2 Bla. Com. 126; Erskine, Inst. 380; Grand Cout. de Normandie, c. 119. In Pennsylvania, by act of April 8, 1833, issue of the marriage is no longer necessary.

CURTILAGE. The enclosed space immediately surrounding a dwelling-house, contained within the same enclosure.

It is defined by Blount as a yard, backside, or piece of ground near a dwelling-house, in which they sow beans, etc., yet distinct from the garden. Blount; Spelman. By others it is said to be a waste piece of ground so situated. Cowel.

It has recently been defined as "a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the dwelling-house, the enclosure consisting either of a separate fence or partly of a fence and partly of the exterior of buildings so within this enclosure;" 10 Cush. 480.

The term is used in determining whether the offence of breaking into a barn or warehouse is burglary. See 4 Bla. Com. 224; 1 Hale, Pl. Cr. 558; 2 Russell, Cr. 13; 1 *id.* 790; Russ. & R. 289; 1 C. & K. 84; 10 Cush. 480.

In Michigan the meaning of curtilage has been extended to include more than an enclosure near the house. 2 Mich. 250. See 31 N. J. L. 485; 17 N. Y. Sup. Ct. 151.

CURTILLUM. The area or space within the enclosure of a dwelling-house. Spelman, Gloss.

CURTIS. The area about a building; a garden; a hut or farmer's house; a farmer's house with the land enrolled with it.

A village or a walled town containing a small number of houses.

The residence of a nobleman; a hall or palace.

A court; a tribunal of justice. 1 Wash. R. P. 120; Spelman, Gloss.; 3 Bla. Com. 320.

The similarity of the derivative meaning of this word and of *aula* is quite noticeable, both coming to denote the court itself from denoting the place where the court was held.

CUSTODES. Keepers; guardians; conservators.

Custodes pacis (guardians of the peace). 1 Bla. Com. 349.

Custodes libertatis Angliæ auctoritate parliamenti (guardians of the liberty of England by authority of parliament). The style in which writs and all judicial process ran during the grand rebellion, from the death of Charles I. till Cromwell was declared Protector. Jacob, Law Dic.

CUSTODY. The detainer of a person by virtue of a lawful authority. 3 Chitty, Pr. 355.

The care and possession of a thing.

Custody has been held to mean nothing less than actual imprisonment; 59 Penn. 320; 82 *id.* 306.

CUSTOM. Such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter, to which it relates.

Custom is a law established by long usage. 9 Wend. 349.

It differs from prescription, which is personal and is annexed to the person of the owner of a particular estate; while the other is local, and relates to a particular district. An instance of the latter occurs where the question is upon the manner of conducting a particular branch of trade at a certain place; of the former, where a certain person and his ancestors, or those whose estates he has, have been entitled to a certain advantage or privilege, as to have common of pasture in a certain close, or the like. 2 Bla. Com. 263. The distinction has been thus expressed: "While prescription is the making of a right, custom is the making of a law"; Lawson, Us. & Cust. 15, n. 2.

General customs are such as constitute a part of the common law of the country and extend to the whole country.

Particular customs are those which are confined to a particular district; or to the members of a particular class; the existence of the former are to be determined by the court, of the latter, by the jury; Lawson, Us. & Cust. 15, n. 3; see 23 Me. 90.

In general, when a contract is made in relation to matter about which there is an established custom, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract; 1 Hall, 602; 2 Pet. 138; 5 Binn. 285; 19 Wend. 389; 1 M. & W. 476; L. R. 17 Eq. 358; 25 Me. 401.

Evidence of a usage is admissible to explain technical or ambiguous terms; 3 B. & Ad. 728. But evidence of a usage contradicting the terms of a contract is inadmissible; 2 Cr. & J. 244; 113 Mass. 136; 74 N. Y. 586; 1 W. Va. 69.

"Merely that it varies the apparent con-

tract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract, without altering its effect more or less. To fall within the exception of repugnancy the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent;" *Per cur.* in 3 E. & B. 715. See Leake, Contr. 197; 7 E. & B. 274.

In order to establish a custom, it will be necessary to show its existence for so long a time that "the memory of man runneth not to the contrary," and that the usage has continued without any interruption of the right; for, if it has ceased for a time for such a cause, the revival gives it a new beginning, which will be what the law calls within memory. It will be no objection, however, that the exercise of the right has been merely suspended; 1 Bla. Com. 76; 2 *id.* 31; 14 Mass. 488; 3 Q. B. 581; 6 *id.* 383; L. R. 7 Q. B. 214.

It must also have been peaceably acquiesced in and not subject to dispute; for, as customs owe their origin to common consent, their being disputed, either at law or otherwise, shows that such consent was wanting; 2 Wend. 501; 3 Watts, 178. In addition to this, customs must be reasonable and certain. A custom, for instance, that land shall descend to the most worthy of the owner's blood is void; for how shall this be determined? But a custom that it shall descend to the next male of the blood, exclusive of females, is certain, and therefore good; 2 Bla. Com. 78; Browne, Us. & Cust. 21.

Evidence of usage is never admissible to oppose or alter a general principle or rule of land, so as, upon a given state of facts, to make the legal right, and liabilities of the parties other than they are by law; 2 Term, 327; 19 Wend. 252; 6 Pick. 131; 6 Binn. 416; 16 C. B. N. S. 646; 10 Wall. 383; 104 Mass. 518; but the rule is said by Mr. Lawson to extend no further than to usages which "conflict with an established rule of public policy, which it is not to the general interest to disturb." Lawson, Us. & Cust. 486. With respect to a usage of trade, however, it is sufficient if it appears to be known, certain, uniform, reasonable, and not contrary to law; 3 Wash. C. C. 150; 7 Pet. 1; 5 Binn. 287; 8 Pick. 360; 4 B. & Ald. 210; 1 C. & P. 59. But if not directly known to the parties to the transaction, it will still be binding upon them if it appear to be so general and well established that knowledge of it may be presumed; 1 Caines, 43; 4 Stark. 452; 1 Dougl. 510.

Among the leading cases not cited above, given by Mr. Lawson in his excellent work, are, 26 L. J. Ex. 219; 9 Pick. 198; 2 Caines, 219; 2 F. & F. 131; 14 Gray, 210; 9 Wheat. 582; 8 S. & R. 533; s. c. 11 Am. Dec. 632; Dougl. 201; 7 Mass. 36; 4 Taunt. 848; 49 Ala. 465; 7 Mass. 36; L. R. 2 Ex. 101; 19 Wend. 386; 3 Term, 271; 41 Md. 158; s. c. 20 Am. Rep. 66. See Lawson; Browne; Us. & Cust.; note to Wigglesworth *v.* Dallison, Sm. Lead. Cas.

CUSTOM OF MERCHANTS. A system of customs acknowledged and taken notice of by all nations, and which are, therefore, a part of the general law of the land. See LAW MERCHANT; 1 Chitty, Bla. Com. 76, n. 9.

CUSTOM-HOUSE. A place appointed by law, in ports of entry, where importers of goods, wares, and merchandise are bound to enter the same, in order to pay or secure the duties or customs due to the government.

CUSTOM-HOUSE BROKER. A person authorized to act for parties, at their option, in the entry or clearance of ships and the transaction of general business. Wharton. See act of July 13, 1866, § 9, 14 U. S. Stat. at L. 117.

CUSTOMARY COURT BARON. A court baron at which copyholders might transfer their estates, and where other matters relating to their tenures were transacted. 3 Bla. Com. 33.

This court was held on the manor, the lord or his steward sitting as judge. 1 Crabb, R. P. § 633. It might be held anywhere in the manor, at the pleasure of the judge, unless there was a custom to the contrary. It might exist at the same time with a court baron proper, or even where there were no freeholders in the manor.

CUSTOMARY ESTATES. Estates which owe their origin and existence to the custom of the manor in which they are held. 2 Bla. Com. 149.

CUSTOMARY FREEHOLD. A class of freeholds held according to the custom of the manor, derived from the ancient tenure in villein socage. Holders of such an estate have a freehold interest, though it is not held by a freehold tenure. 2 Bla. Com. 149.

CUSTOMARY SERVICE. A service due by ancient custom or prescription only. Such is, for example, the service of doing suit at another's mill, where the persons resident in a particular place, by usage, time out of mind have been accustomed to grind corn at a particular mill. 3 Bla. Com. 234.

CUSTOMARY TENANTS. Tenants who hold by the custom of the manor. 2 Bla. Com. 149.

CUSTOMS. This term is usually applied to those taxes which are payable upon goods and merchandise imported or exported. Story, Const. § 949; Bacon, Abr. *Smuggling.*

The duties, toll, tribute, or tariff payable upon merchandise exported or imported. These are called customs from having been paid from time immemorial. Expressed in law Latin by *custuma*, as distinguished by *consuetudines*, which are usages merely. 1 Bla. Com. 314.

CUSTOMS CONSOLIDATION ACT. The stat. 16 & 17 Vict. c. 107, which has been frequently amended. See 2 Steph. Com. 563.

CUSTOMS OF LONDON. Particular regulations in force within the city of London,

in regard to trade, apprentices, widows and orphans, etc., which are recognized as forming part of the English common law. 1 Bla. Com. 75; 3 Steph. Com. 588, and note. See DEAD MAN'S PART. The custom of London, as regards intestate succession, was abolished by 19 & 20 Vict. c. 94; as regards foreign attachment, it was extended to all England and Wales by the Common Law Procedure Act of 1854, ss. 60–67.

CUSTOM OF YORK. A custom of intestacy in the Province of York similar to that of London. Abolished by 19 & 20 Vict. c. 94.

CUSTOS BREVIUM (Lat.). Keeper of writs. An officer of the court of common pleas whose duty it is to receive and keep all the writs returnable to that court and put them upon file, and also to receive of the prothonotaries all records of *nisi prius*, called *posteas*. Blount. An officer in the king's bench having similar duties. Cowel; Termes de la Ley. The office is now abolished.

CUSTOS MARIS (Lat.). Warden or guardian of the seas. Among the Saxons, an admiral. Spelman, Gloss. *Admiralius.*

CUSTOS MOREUM. Applied to the court of queen's bench, as "the guardian of the morals" of the nation. 4 Steph. Com. 377.

CUSTOS PLACITORUM CORONÆ (Lat.). Keeper of the Pleas of the Crown (the criminal records). Said by Blount and Cowel to be the same as the *Custos Rotulorum.*

CUSTOS ROTULORUM (Lat.). Keeper of the rolls. The principal justice of the peace of a county, who is the keeper of the records of the county; 1 Bla. Com. 349. He is always a justice of the peace and *quorum*, is the chief civil officer of the king in the county, and is nominated under the king's sign-manual. He is rather to be considered a minister or officer than a judge. Blount; Cowel; Lambard, Eiren. lib. 4, cap. 3, p. 373; 4 Bla. Com. 272; 3 Steph. Com. 37.

CUSTUMA ANTIQUA SIVE MAGNA (Lat. ancient or great duties). The duties on wool, sheepskin, or wool-pelts and leather exported were so called, and were payable by every merchant, stranger as well as native, with the exception that merchant strangers paid one-half as much again as natives. 1 Bla. Com. 314.

CUSTUMA PARVA ET NOVA (Lat.). An impost of threepence in the pound sterling on all commodities exported or imported by merchant strangers. Called at first the alien's duty, and first granted by stat. 31 Edw. I. Maddox, Hist. Exch. 526, 532; 1 Bla. Com. 314.

CUT. A wound made with a sharp instrument. 3 La. An. 512; 1 Russ. & R. 104. See 12 How. 9, 20.

CYNEBOTE. A mulct anciently paid, by one who killed another, to the kindred of the deceased. Spelman; Gloss.

CY PRES (L. Fr. as near as). The rule of construction applied to a will (but not to a deed) by which, where the testator evinces a particular and a general intention and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. 3 Hare, 12; 2 Term, 254; 2 Bligh, 49; Sugden, Powers, 60; 1 Spence, Eq. Jur. 532.

The principle is applied to sustain wills in which perpetuities are attempted to be created, so that, if it can possibly be done, the devise is not regarded as utterly void, but is expounded in such a manner as to carry the testator's intention into effect as far as the law respecting perpetuities will allow. This is called a construction *cy pres*. Its rules are vague, and depend chiefly upon judicial discretion applied to the particular case. Sedgwick, Const. Law, 265; Story, Eq. Jur. §§ 1169 *et seq.*

It is also applied to sustain devises and bequests for charity (*q. v.*). Where there is a definite charitable purpose which cannot take place, the courts will not substitute another, as they once did; but if charity be the general substantial intention, though the mode provided for its execution fails, the English chancery will find some means of effectuating it, even by applying the fund to a different purpose from that contemplated by the testator, provided only it be charitable; Boyle, Char. 147, 155; Shelf. Mortm. 601; 3 Brown, Ch. 379; 4 Ves. 14; 7 *id.* 69, 82. Most of the cases carry the doctrine beyond what is allowed where private interests are concerned, and have in no inconsiderable degree to draw for their support on the prerogative of the crown and the statute of charitable uses, 43 Eliz. c. 4. This doctrine does not universally obtain in this country to the disinherison of heirs and next of kin. See CHARITIES; CHARITABLE USES; 1 Am. Law Reg. 538; 2 How. 127; 17 *id.* 369; 24 *id.* 465; 6 Wall. 337; 4 Wheat. 1; 8 N. Y. 548; 14 *id.* 380; 22 *id.* 70.

Where the perpetuity is attempted to be created by deed, all the limitations based upon it are void; Cruise, Dig. t. 38, c. 9, § 34. See, generally, 1 Vern. 250; 2 Ves. 336, 337, 364, 380; 3 *id.* 141, 220; 4 *id.* 13; Comyns, Dig. *Condition* (L, 1); 1 Roper, Leg. 514; Swinburn, Wills, pl. 4, § 7, a. 4, ed. 1590, p. 31; Dane, Abr. Index; Toullier, Dr. Civ. Fr. liv. 3, t. 3, n. 586, 595, 611; Domat, Lois Civ. liv. 6, t. 2, § 1; Shelf. Mortm.; Highmare, Mortm.

The *cy pres* doctrine has been repudiated by the states of North Carolina, Connecticut, Indiana, Iowa, Alabama, Maryland, Virginia, New York, South Carolina, and Pennsylvania, though in the last case it has been partially introduced by statute. But the doctrine has been approved in all the New England states but Connecticut, in Mississippi and Illinois, and in some states the question has not been decided. Bisph. Eq. § 130; 1

Dev. 276; 22 Conn. 31; 35 Ind. 198; 5 Clarke, 147; 17 S. & R. 88; 63 Penn. 465; 34 N. Y. 584; 33 N. H. 296; 49 Me. 302; 50 Mo. 167; 5 C. E. Green, 522.

CYROGRAPHARIUS. In Old English Law. A cyrographer. An officer of the common pleas court.

CYROGRAPHUM. A chirograph, which see.

D.

DACION. In Spanish Law. The real and effective delivery of an object in the execution of a contract.

DAKOTA. One of the territories of the United States.

Congress, by an act approved March 2, 1861 (R. S. § 1900), erected so much of the territory of the United States as is included within the following boundaries—viz.: commencing at a point in the main channel of Red River of the North where the forty-ninth degree of north latitude crosses the same; thence up the main channel of the same and along the boundary of the state of Minnesota to Big Stone lake; thence along the boundary-line of Minnesota to the Iowa line; thence along the boundary-line of Iowa to the point of intersection between the Big Sioux and Missouri rivers; thence up the Missouri river and along the boundary of Nebraska to the mouth of the Niobrara or Running-Water river; thence following up the same in the middle of the main channel thereof to the mouth of the Keha Paha or Turtle Hill river; thence up said river to the forty-third parallel of north latitude; thence due west to the 27th meridian of longitude west from Washington; thence due north on that meridian to the forty-ninth degree of north latitude; thence east along said forty-ninth degree of north latitude to the place of beginning—into a separate territory, by the name of The Territory of Dakota, with a temporary territorial government, excepting from the operation of the act any territory to which there are Indian rights not extinguished by treaty, with a proviso that the territory may be divided, or part thereof attached to another territory.

The provisions of the organic act are substantially the same as those of the act erecting the territory of New Mexico. See NEW MEXICO. See, for provisions affecting all the territories, R. S. §§ 1839-1895.

DAM. A construction of wood, stone, or other materials, made across a stream of water for the purpose of confining it; a mole. See 23 Mich. 93.

The owner of a stream not navigable may erect a dam across it, provided he do not thereby materially impair the rights of the proprietors above or below to the use of the water in its accustomed flow; 4 Mas. 401; 13 Johns. 212; 20 *id.* 90; 3 Caines, 307; 9 Pick. 528; 15 Conn. 366; 4 Dall. 211; 6 Penn. 32; 2 Binn. 475; 14 S. & R. 71; 3 N. H. 321; 3 Kent, 354; 127 Mass. 534; 69 Me. 19; 31 Gratt. 36; 49 Iowa, 490; 28 Am. L. Reg. 147, n. He may even detain the water for the purposes of a mill, for a reasonable time, to the injury of an older mill,—the reasonableness of the detention in each particular case being a question for the jury; 12 Penn. 248; 17 Barb. 654; 28 Vt. 459; 25 Conn. 321; 2 Gray, 394; 38 Me. 243. But he must not unreasonably detain the water; 6 Ind. 324; and the jury may find the constant use of the water by night and a detention of it by day to be an unreasonable use, though there be no design to injure others; 10 Cush. 367; see 77 N. Y. 525. Nor has such owner the right to raise his dam so high as to cause the stream to flow back upon the land of supra-riparian proprietors; 1 B. & Ald. 258; 6 East, 208; 1 S. & S. 203; 12 Ill. 281; 24 N. H. 364; 8 Cush. 595; 19 Penn. 134; 20 *id.* 95; 25 *id.* 519; 38 Me. 237; 59 Ga. 286; 124 Mass. 461. And see BACK-WATER. These rights may, of course, be modified by contract or prescription. See WATERCOURSE.

When one side of the stream is owned by one person and the other by another, neither, without the consent of the other, can build a dam which extends beyond the *filum aquæ*, thread of the river, without committing a trespass; Cro. Eliz. 269; Holt, 499; 12 Mass. 211; 4 Mas. 397; Angell, Waterc. 14, 104, 141. See Lois des Bât. p. 1, c. 3, s. 1, a. 3; Pothier, *Traité du Contrat de Société*, second app. 236; Hillier, Abr. Index; 7 Cow. 266; 2 Watts, 327; 3 Rawle, 90; 5 Pick. 175; 4 Mass. 401; 17 *id.* 289; 70 Me. 243.

The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of injury which will be likely to result to third persons provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, these must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own; 5 Vt. 371; 3 Hill, 531; 3 Denio, 433; Angell, Waterc. 336; 107 Mass. 492.

If a mill-dam be so built that it causes a watercourse to overflow the surrounding country, where it becomes stagnant and unwholesome, so that the health of the neighborhood is sensibly impaired, such dam is a public nuisance, for which its author is liable to indict-