incapable of direct proof, and partly because every contract is made by acts performed. Proof of the necessary acts carries with it presumptive proof of mutual consent. Thus, if two separate agreements be drawn up, signed and sealed, each of them purporting to be a contract between A and B, and the parties, intending to deliver one of the instruments, deliver the other by mistake, there is no contract made; Langd. Contr. 193. Where the plaintiff's acceptance of the defendant's offer inadvertently made a slight change in a date, there was held to be no contract, because there had not been mutual consent; 4 Bing. 653. Mutual consent must extend to the consideration as well as to the promise; Langd. Contr. 82.

MUTUAL CREDITS. Credits given by two persons mutually, *i. e.* each giving credit to the other. It is a more extensive phrase than mutual debts. Thus, the sum credited by one may be due at once, that by the other payable *in futuro:* yet the credits are mutual, though the transaction would not come within the meaning of mutual debts; 1 Atk. 230; 7 Term, 378. And it is not necessary that there should be intent to trust each other: thus, where an acceptance of A came into the hands of B, who bought goods of A, not knowing the acceptance to be in B's hands, it was held a mutual credit; 3 Term, 507, n.; 4 *id.* 211; 3 Ves. 65; 8 Taunt. 156, 499; 1 Holt, 408; 2 Sm. Lead. Cas. 179; 26 Barb. 310; 4 Gray, 284; 9 N. J. Eq. 44; 5 Robt. (N. Y.) 348; 7 D. & E. 378.

MUTUAL PROMISES. Promises simultaneously made by two parties to each other, each promise being the consideration of the other. Hob. 88; 14 M. & W. 855; Add. Contr. 22. If one of the promises be voidable, it will yet be good consideration, but not if void; Story, Contr. § 81; 2 Steph. Com. 114.

MUTUALITY. Reciprocity; an acting in return. Webster, Dict.; Add. Contr. 622; 26 Md. 37.

MUTUARY. A person who borrows personal chattels to be consumed by him and returned to the lender in kind; the person who receives the benefit arising from the contract of mutuum. Story, Bailm. § 47.

MUTUUM. A loan of personal chattels to be consumed by the borrower and to be returned to the lender in kind and quantity; as, a loan of corn, wine, or money which are to be used or consumed, and are to be replaced by other corn, wine, or money. Story, Bailm. § 228. See LOAN FOR USE.

MYSTERY (said to be derived from the French *mestier*, now written *métier*, a trade). A trade, art, or occupation. Co. 2d Inst. 668.

Masters frequently bind themselves in the indentures with their apprentices to teach them their art, trade, and *mystery*. See Hawk. Pl. Cr. c. 23, s. 11.

MYSTIC TESTAMENT. A will under seal. La. Civ. Code, art. 1567; 5 Mart. La. 182; 5 La. 396; 10 *id.* 328; 15 *id.* 88.

N.

NAAM. See NAMIUM.

NAIL. A measure of length, equal to two inches and a quarter. See MEASURE.

NAKED. This word is used in a metaphorical sense to denote that a thing is not complete, and for want of some quality it is either without power or it possesses a limited power. A naked contract is one made without consideration, and for that reason it is void; a naked authority is one given without any right in the agent, and wholly for the benefit of the principal. 2 Bouvier, Inst. n. 1302. See NUDUM PACTUM.

NAME. One or more words used to distinguish a particular individual: as, Socrates, Benjamin Franklin.

Names are Christian, as Benjamin, or surnames, as Franklin. One Christian name only is recognized in law; 1 Ld. Raym. 562; Bacon, Abr. *Misnomer* (A); 7 Cold. 69; 5 Johns. 84; though two or more names usually kept separate, as John and Peter, may undoubtedly be compounded, so as to form in contemplation of law but one; 5 Term, 195. A letter put between the Christian and surname as an abbreviation of a part of the Christian name, as John B. Peterson, is no part of either; 4 Watts, 329; 5 Johns. 84; 14 Pet. 322; 3 *id.* 7; 2 Cow. 463; 17 Ala. N. S. 179; 10 Miss. 391; Co. Litt. 3 *a;* 1 Ld. Raym. 562; Viner, Abr. *Misnomer* (C 6, pl. 5, 6); Comyns, Dig. *Indictment* (G 1, note u); Willes, 654; Bacon, Abr. *Misnomer and Addition;* 3 Chitty, Pr. 164, 173; 52 Ind. 347; s. c. 21 Am. Rep. 179 n. But see 7 W. & S. 406; 19 Ohio, 423; 1 Swan, 162; 20 Iowa, 98; 28 Tex. 772; 39 Ill.

457; 25 Alb. L. J. 322, 323. The words *junior* and *senior* are no part of a name; see 1 Pick. 388; 2 Caines, 165; 9 N. H. 519; 22 Me. 171; 8 Conn. 280. The title *Mrs.* is not a legal name; 13 Vroom, 69.

In general, a corporation must contract and sue, and be sued, by its corporate name; 8 Johns. 295; 14 *id.* 238; 19 *id.* 300; 4 Rand. 359. Yet a slight alteration in stating the name is unimportant if there be no possibility of mistaking the identity of the corporation suing; 12 La. 444. See 20 Me. 41; 2 Va. Cas. 362; 16 Mass. 141; 12 S. & R. 389. See MISNOMER.

The real name of a party to be arrested must be inserted in the warrant, if known; 8 East, 828; 6 Cow. 456; 9 Wend. 320; if unknown, some description must be given; 1 Chitty, Cr. Law, 39, 40; with the reason for the omission; 1 Mood. & M. 281.

As to mistakes in devises, see LEGACY. As to the use of names having the same sound, see IDEM SONANS; 1 Over. 434. As to the effect of using a name having the same derivation, see 2 Rolle, Abr. 135; 1 Wash. C. C. 285. At common law, one could change his name; 10 Fed. Rep. 894; 123 Mass. 415; 3 B. & Ald. 544.

When a person uses a name in making a contract under seal, he will not be permitted to say that it is not his name: as, if he sign and seal a bond "A and B" (being his own and his partner's name), and he had no authority from his partner to make such a deed, he cannot deny that his name is A and B; 1 T. Raym. 2; 1 Salk. 214. And if a man describes himself in the body of a deed by the name of James, and signs it John, he cannot, on being sued by the latter name, plead that his name is James; 3 Taunt. 505; Cro. Eliz. 897, n. a. See 3 P. & D. 271; 11 Ad. & E. 594.

The right to the exclusive use of a name in connection with a trade or business is familiar to the law; and any person using that name, after a relative right of this description has been acquired by another, is considered guilty of a fraud or at least an invasion of another's rights, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who has never been called by that name is a grievance to the family for which the law affords no redress; *per* Lord Chelmsford, L. R. 2 P. C. 441. See 11 Beav. 112; L. R. 2 Ch. 307. A name may be a trade-mark; L. R. 10 Ch. D. 436; 1 Eq. 518; 13 Beav. 209; 13 Am. Rep. 111. A person cannot, however, have an exclusive right of trade-mark in a name as against all others bearing the same name, unless the defendant uses the same brand or stamp in connection with the name; 122 Mass.; 96 U. S. 245; 50 Barb. 236. See 11 Cent. L. J. 3; ELECTION; TRADE-MARK.

NAMIUM. An old word which signifies the taking or distraining another person's movable goods. 2 Inst. 140; 3 Bla. Com. 149. A distress. Dalrymple, Feud. Pr. 113.

NANTISSEMENT. In French Law. The contract of pledge; if of a movable, it is called *gago*, and if of an immovable, *antichrèse*; Brown, Dict.

NARR (an abbreviation of the word *narratio*). A declaration in a cause.

NARRATOR. A pleader who draws narrs. *Serviens narrator*, a serjeant-at-law. Fleta, 1. 2, c. 37. Obsolete.

NARROW SEAS. In English Law. Those seas which adjoin the coast of England. Bacon, Abr. *Prerogative* (B 3).

NASCITURUS. Not yet born. This term is applied in marriage settlements to the unborn children of a particular marriage, *natus* (born) being used to designate those already born.

NATALE. The state or condition of a man acquired by birth.

NATION. An independent body politic. A society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.

But every combination of men who govern themselves independently of all others will not be considered a nation; a body of pirates, for example, who govern themselves, are not a nation. To constitute a nation, another ingredient is required. The body thus formed must respect other nations in general, and each of their members in particular. Such a society has her affairs and her interests; she deliberates and takes resolutions in common,—thus becoming a moral person, who possesses an understanding and will peculiar to herself, and is susceptible of obligations and rights. Vattel, Prelim. §§ 1, 2; 5 Pet. 52.

It belongs to the government to declare whether they will consider a colony which has thrown off the yoke of the mother-country as an independent state; and until the government have decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged; 1 Johns. Ch. 543; 13 Johns. 141, 561. See 5 Pet. 1; 1 Kent, 21.

In American constitutional law the word *state* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the federal government; Cooley, Const. Lim. 1. See 7 Wall. 720.

NATIONAL BANKS. Banks created and governed under the provisions of "The National Bank Act." See Rev. Stat. § 5133 *et seq.*; title 62.

Congress, in the exercise of an undisputed constitutional power to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain the circulation of any notes not issued under its

authority; 8 Wall. 548; this power, long dormant, has been exercised by the National Bank Act.

Any number of persons, not less than five, may organize a national bank. They must sign, acknowledge before a court of record or notary public, and transmit to the comptroller of the currency, an organization certificate, containing the name of the bank, its place of business, the amount of capital stock and the number of shares into which it is to be divided, the names and residences of the shareholders, and the number of shares held by them, and that the applicants desire to avail themselves of the act of congress. The comptroller decides whether the bank is lawfully entitled to begin business; see 19 Mich. 196; if he so finds, his certificate of this fact must be published in a newspaper of the place where the bank is to do business for sixty days.

One hundred thousand dollars is the minimum capital allowed, except in places not exceeding 6000 inhabitants, when, by consent of the comptroller, the capital may be $50,000; where the population exceeds 50,000 the capital must be at least $200,000. The term capital does not refer to borrowed money, but to the property or moneys of the bank permanently invested in its business; 7 Chi. L. News, 339. The capital stock is divided into shares of $100 each, which are personal property. At least fifty per cent. thereof must be paid in before organization, and the rest in monthly instalments of ten per cent. each. The stock of stockholders not paying these instalments may be sold, on notice; stockholders are individually responsible, in addition to what they have invested in their shares, for all contracts, debts, and engagements of the bank, to the extent of their stock at its par value. This liability is several and not joint; 8 Wall. 505.

Upon its organization a national bank has the usual corporate powers, also the right of succession for twenty years, and the power to exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, etc.; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of "title 62 of the Revised Statutes."

The powers of national banks are to be measured by the act creating them; 18 Wall. 589; 72 Penn. 456; 62 Mo. 329; the words of the act above quoted, "by discounting and negotiating promissory notes, etc.," are not to be read as limiting the mode of exercising the "incidental powers" necessary to carry on the business of banking, but as descriptive of the kind of business which is authorized; 22 Ohio St. 516. National banks are designed to aid the government in the administration of an important branch of the public service. The states cannot exercise any control over them, except so far as congress may permit; 91 U. S. 29; see 40 Md. 269.

National banks may purchase, hold, and convey real estate for the following purposes, and for no others: 1. Such as shall be necessary for its immediate accommodation in the transaction of its business. 2. Such as shall be mortgaged to it in good faith by way of security, for debts previously contracted. 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. 4. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it; title in the latter case to be held for no longer than five years.

It has been decided by the supreme court of the United States that real estate security on a contemporaneous loan of money by a national bank is valid between the parties; 98 U. S. 621. See *contra*, 62 Mo. 329; 72 Penn. 456; 87 Ill. 151. A national bank may take a purchase money mortgage on real estate sold by it; 29 La. An. 355.

The circuit courts of the United States have jurisdiction of all suits by or against national banks established in the district for which the court is held; R. S. § 629; see 3 Dill. 298; irrespective of the amount in controversy or the citizenship of the parties; 19 Alb. L. J. 182. A national bank may bring suit in the circuit court out of its district, against a citizen of the district where the court sits; 8 Blatch. 137; 9 Nev. 134. A national bank may waive its right to be sued in its own district; 2 Conn. 298; and state courts have jurisdiction of suits brought by national banks; 49 Vt. 1; 93 U. S. 130: but this must be a state court of its locality; 14 Wall. 383; 101 Mass. 240.

National banks may go into liquidation and be closed by a vote of the shareholders of two thirds of its stock; R. S. § 5220. In case of a failure to pay its circulating notes, the comptroller may appoint a receiver to wind up national banks; R. S. § 5234.

State banks may be changed into national banks; the change when made is a transit, and not a creation. See 40 Mo. 140. See DEPOSIT; INTEREST; PROXY; RESERVE.

NATIONAL DOMAIN. See PUBLIC DOMAIN.

NATIONALITY. Character, status, or condition with reference to the rights and duties of a person as a member of some one state or nation rather than another.

The term is in frequent use with regard to ships. Nationality determined by one's birthplace or parentage is called *nationality of origin*; that which results from naturalization is *by acquisition*. A woman upon marriage acquires the nationality of her husband; Morse on Citizenship, 142. In feudal times nationalty was determined exclusively by the place of birth, *jure solis*; but under the laws of Athens and Rome the child followed that of

the parents, *jure sanguinis*. "Of these two tests, the place of birth and the nationality of the father, neither is at present adopted without qualification by British, French, or American law. The laws of these countries exhibit, in fact, different combinations of the two, Great Britain and the United States laying chief stress on the place of birth, while in France the father's nationality determines, though not absolutely and in all cases, that of the child; and this latter theory has found acceptance among other European nations," as Belgium, Bavaria, Prussia, and Spain. Morse on Citizenship, 10.

Perhaps no more correct general rule can be found than that recommended by Westlake. "Legitimate children, wherever born, are regularly members of the state of which their parents form part the moment of their birth; but they may choose the nationality of the place of their birth." See 2 Kent, 49, n. 1; Cock. Nat.; Whart. Confl. Laws; Westlake, Priv. Int. Law. See, generally, ALLEGIANCE; CITIZEN; DENIZEN; DOMICIL; NATURALIZATION.

NATIVE, NATIVE CITIZEN. A natural-born subject. 1 Bla. Com. 366. Those born in a country, of parents who are citizens. Morse, Citizenship, 12. A person born within the jurisdiction of the United States, whether after declaration of independence or before, if he did not withdraw before the adoption of the constitution; or the child of a citizen born abroad, if his parents have ever resided here; or the child of an alien born abroad, if he be in the country at the time his father is naturalized. 8 Paige, Ch. 433; 21 Am. L. Reg. 77; 2 Kent, 39. See CITIZEN.

NATURAL AFFECTION. The affection which a husband, a father, a brother, or other near relative naturally feels towards those who are so nearly allied to him, sometimes supplies the place of a valuable consideration in contracts; and natural affection is a good consideration in a deed. 2 Steph. Com. 61. See BARGAIN AND SALE; COVENANT TO STAND SEIZED.

NATURAL CHILDREN. Bastards; children born out of lawful wedlock. But in a statute declaring that adopted shall have all the rights of "natural" children, the word "natural" was used in the sense of legitimate; 9 Am. L. Reg. 747.

In Civil Law. Children by procreation, as distinguished from children by adoption.

In Louisiana. Illegitimate children who have been adopted by the father. La. Civ. Code, art. 220.

NATURAL DAY. That space of time included between the rising and the setting of the sun. See DAY.

NATURAL EQUITY. That which is founded in natural justice, in honesty and right, and which arises *ex æquo et bono*.

It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to meet them, from the almost impossibility of enforcing them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, or kindness. 4 Bouvier, Inst. n. 3720.

NATURAL FOOL. An idiot; one born without the reasoning powers or a capacity to acquire them.

NATURAL FRUITS. The natural production of trees, bushes, and other plants, for the use of men and animals, and for the reproduction of such trees, bushes, or plants.

This expression is used in contradistinction to artificial or figurative fruits: for example, apples, peaches, and pears, are natural fruits; interest is the fruit of money, and this is artificial.

NATURAL INFANCY. A period of non-responsible life, which ends with the seventh year; Whart. Dict.

NATURAL LAW. The law of nature. The divine will, or the dictate of right reason, showing the moral deformity or moral necessity there is in any act, according to its suitableness or unsuitableness to a reasonable nature. Sometimes used of the law of human reason, in contradistinction to the revealed law, and sometimes of both, in contradistinction to positive law.

They are independent of any artificial connections, and differ from mere presumptions of law in this essential respect, that the latter depend on and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society. These presumptions fall within the exclusive province of the jury, who are to pass upon the facts. 3 Bouv. Inst. n. 3064; Greenl. Ev. § 44.

NATURAL OBLIGATION. One which in honor and conscience binds the person who has contracted it, but which cannot be enforced in a court of justice. Pothier, nn. 173, 191. See OBLIGATION.

NATURAL PRESUMPTIONS. In Evidence. Presumptions of fact; those which depend upon their own form and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience.

NATURALIZATION. The act by which an alien is made a citizen of the United States of America.

The act of adopting a foreigner and clothing him with all the privileges of a native-born citizen. 9 Wheat. 827; 9 Op. Att. Gen. 359.

A nation, or the sovereign who represents it, may grant to a stranger the quality of a citizen, by admitting him into the body of the political society. This is called naturalization.

Vattel, Laws of Nat., bk. 1, ch. xix. §§ 212–214.

It is believed that every state in Christendom accords to foreigners, with more or less restrictions, the right of naturalization, and that each has some positive law or mode of its own for naturalizing the native-born subjects of other states, without reference to the consent of the latter for the release or the transfer of the allegiance of such subjects; Hall, Int. Law, 693; see Morse, Citizenship, 66.

The constitution of the United States, art. 1, s. 8, vests in congress the power to establish a uniform rule of naturalization, and various laws have been passed in pursuance of this authority. See Rev. Stat. of U. S.

The power to regulate naturalization is exclusive in the federal government; 7 How. 556; 5 Cal. 300; 19 How. 393. Before the adoption of the constitution, each state exercised the right to naturalize citizens. A state cannot make a citizen of the United States; 4 Dill. 425. A state may confer the right of citizenship on any one it thinks proper, but only so far as the state itself is concerned; 19 How. 393. By naturalization, a foreigner becomes, to all intents and purposes, a citizen of the United States, with no disability except that he cannot become president or vice-president. The provision of the constitution applies to persons of foreign birth only; 19 How. 419; and not to a freeman of color, born in the United States; 26 Ind. 299. Indians may be naturalized by act of congress; 19 How. 393; but the naturalization acts do not apply to Indians; 7 Op. Att. Gen. 746. Entire communities have been naturalized by a single act of national sovereignty; 36 Cal. 658.

Congress may invest the state courts with jurisdiction to naturalize foreigners; 33 N. H. 89; and no state can confer jurisdiction on any court which does not come within the terms of the act of congress; 50 N. H. 245.

An applicant for naturalization must have been a resident of the United States for five years next preceding his admission to citizenship, but uninterrupted habitation is not required.

Courts of record, in naturalizing foreigners, act judicially, ascertaining the facts and applying the law to them; 4 Pet. 407; the certificate of naturalization is the usual proof of citizenship, though not the only proof. The judgment of the court, like every judgment, has been decided to be complete evidence of its own validity; *id.* The subject is fully discussed in Morse, Citizenship.

Naturalization, of itself, confers no right of suffrage; Pars. Rights of an Amer. Citizen, 190.

The 14th amendment to the constitution provides that all persons born or *naturalized* in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

A married woman may be naturalized; 1 Cra. C. C. 372; even without the concurrence of her husband; 16 Wend. 617. See CITIZEN; ALLEGIANCE.

NATURALIZED CITIZEN. One who, being born an alien, has lawfully become a citizen of the United States under the constitution and laws.

In foreign countries he has a right to be treated as such, and will be so considered, even in the country of his birth, at least for most purposes; 1 B. & P. 430. See CITIZEN; DOMICIL; INHABITANT; NATURALIZATION.

NAUCLERUS (Lat.). Master or owner of a vessel. Vicat, Voc. Jur.; Calvinus, Lex.

NAUFRAGE. In French Maritime Law. When, by the violent agitation of the waves, the impetuosity of the winds, the storm, or the lightning, a vessel is swallowed up, or so shattered that there remain only the pieces, the accident is called *naufrage*.

It differs from *échouement*, which is when the vessel remains whole, but is grounded; or from *bris*, which is when it strikes against a rock or a coast; or from *sombrer*, which is the sinking of the vessel in the sea when it is swallowed up, and which may be caused by any accident whatever. Pardessus, n. 643. See WRECK.

NAULUM (Lat.). Freight or passage money. 1 Pars. Mar. Law, 124, n.; Dig. 1. 6, § 1, *qui potiores in pignore.*

NAUTA (Lat.). One who charters (*exercet*) a ship. L. 1, § 1, ff. *nautæ, caupo;* Calvinus, Lex. Any one who is on board a vessel for the purpose of navigating her. 3 Sumn. 213; Vicat, Voc. Jur.; 2 Emerigon, 448; Pothier, Pand. lib. 4, tit. 9, n. 2; lib. 47, tit. 5, nn. 1, 2, 3, 8, 10. A carrier by water. 2 Ld. Raym. 917.

NAVAL LAW. A system of regulations for the government of the navy. 1 Kent, 377, n. Consult act of April 3, 1800; act of December 21, 1861; act of July 17, 1862; Homans, Nav. Laws; De Hart, Courts-Martial.

NAVAL OFFICER. An officer of the customs of the United States.

His office relates to the estimating duties, countersigning permits, clearances, etc., certifying the collectors' returns, and similar duties.

NAVARCHUS, NAVICULARIUS (Lat.). **In Civil Law.** The master of an armed ship. *Navicularius* also denotes the master of a ship (*patronus*) generally; Cic. Ver. 4, 55; also, a carrier by water (*exercitor navis*). Calvinus, Lex.

NAVIGABLE WATERS. Those waters which afford a channel for useful commerce. 20 Wall. 430.

In its technical sense, the term navigable, at common law, is only applied to the sea, to arms of the sea, and to rivers which flow and reflow with the tide,—in other words, to tide-waters, the bed or soil of which is the

property of the crown. All other waters are, in this sense of the word, unnavigable, and are *primâ facie*, strictly private property; but in England even such waters, if navigable in the popular sense of the term, are, either of common right or by dedication, subject to the use of the public as navigable highways, the fee or soil remaining in the riparian proprietors; Davies, 149; 5 Taunt. 705; 20 C. B. N. S. 1; 1 Pick. 180; 5 *id.* 199; Ang. Tide Wat. 75–79.

In the United States, this technical use of the term has been adopted in many of the states, in so far as it is employed to designate and define the waters the bed or soil of which belongs to the state; 4 N. Y. 472; 26 Wend. 404; 4 Pick. Mass. 268; 2 Conn. 481; 3 Me. 269; 31 *id.* 9; 16 Ohio, 540; 1 Halst. 31; 4 Wisc. 486; 2 Swan, 9. But in Pennsylvania; 2 Binn. 475; 14 S. & R. 71; in North Carolina; 3 Ired. 277; 2 Dev. 30; in Iowa; 3 Iowa, 1; 4 *id.* 199; and in Alabama; 11 Ala. 436; the technical use of the term has been entirely discarded, and the large fresh-water rivers of those states have been decided to be navigable, not only as being subject to public use as navigable highways, but also as having their bed or soil in the state.

The rule of the common law, by which the ebb and flow of the tide has been made the criterion of navigability, has never been adopted in any of the United States, or, if adopted, it has been in a form modified and improved to fit the condition of the country and the wants of its inhabitants. According to the rule administered in the courts of this country, all rivers which are found "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market;" 8 Barb. 239; or which are capable of use "for the floating of vessels, boats, rafts, or logs;" 31 Me. 9 (but see 6 Cal. 443); are subject to the free and unobstructed navigation of the public, independent of usage or of legislation; 20 Johns. 90; 5 Wend. 358; 42 Me. 552; 18 Barb. 277; 5 Ind. 8; 2 Swan, 9; 29 Miss. 21; 6 Cal. 180; 2 Stockt. 211. See 51 Me. 256; 3 Oreg. 445; S. C. 8 Am. Rep. 621; 42 Wisc. 202. It is not necessary that the stream should be navigable all the year round; 31 Mich. 336.

In 108 Mass. 447, Gray, J., says: "The term 'navigable waters' as commonly used in the law, has three distinct meanings; first, as synonymous with 'tide waters,' being waters whether fresh or salt wherever the ebb and flow of the sea is felt; or second, as limited to tide-waters which are capable of being navigated for some useful purpose; or third, as including all waters, whether within or beyond the ebb and flow of the tide which can be used for navigation." See 19 Am. L. Reg. N. S. 147; Ang. Waterc. § 542.

In New York, it seems that courts are bound to take judicial notice of what streams are, and what are not, highways, at common law; 8 Barb. 239; but it has been held that what is a navigable stream is a mixed question of law and fact; if a stream is not navigable the legislature cannot declare it to be so, because the legislature cannot appropriate it to public use without provision for compensation; 35 N. Y. 454.

A grant by a government to a private individual, of land upon a navigable river, is limited to the shore, while such a grant to a political community extends to the middle of the stream; 4 Iowa, 199; 94 U. S. 324; 11 Fed. Rep. 394.

All navigable waters are for the use of all citizens; 1 Pick. 180; 27 Tex. 68. The general right to regulate the public use of navigable waters is in the state, subject to the power of congress when the water is a highway of commerce with foreign nations or between states. The fact that it is so does not exclude state regulations if congress has not exercised its power; 2 Pet. 2115; or if the state regulations do not conflict with congressional regulations; Cooley, Const. Lim. 73–9.

In the case of navigable waters used as a highway of commerce between the states or with foreign nations, no state can grant a monopoly for the navigation of any portion of such waters; 9 Wheat. 1. A state has the same power to improve such waters as it has in the case of any highway; Cooley, Const. Lim. 738; and, having expended money for such improvement, it may impose tolls upon the commerce which has the benefit of the improvement; 3 McLean, 226; 8 Bush, 447. The states may authorize the construction of bridges over such waters, for railroads and other species of highways, notwithstanding they may to some extent interfere with navigation. See 4 Pick. 460; 38 Ill. 467; BRIDGE. A state may establish ferries over such waters; 1 Black, 603; 41 Miss. 27; and authorize the construction of dams; Cooley, Const. Lim. 740. A state may also regulate the speed and general conduct of ships and other vessels navigating its water highways, provided its regulations do not conflict with any regulations made by congress; 1 Hill, N. Y. 469, 470. See Cooley, Const. Lim. 737–741. See ARM OF THE SEA; RELICTION; RIVER; TIDE-WATER.

NAVIGATION ACT. The stat. 12 Car. II. c. 78. It was repealed by 6 Geo. IV. cc. 109, 110, 114. See 16 & 17 Vict. c. 107; 17 & 18 Vict. cc. 5 and 120; 3 Steph. Com. 145.

NAVIGATION, RULES OF. Rules and regulations which govern the motions of ships or vessels when approaching each other under such circumstances that a collision may possibly ensue.

These rules are firmly maintained in the United States courts.

The rules of navigation which prevailed under the general maritime law, in the absence of statutory enactments, will first be considered, although, as hereinafter stated,

they have lately been superseded by express enactment in most of the commercial countries of the world.

These rules were derived mainly from the decisions of the high court of admiralty in England, and of the superior courts of the United States, and they are based upon the rules promulgated by the corporation of the Trinity House on the 30th of October, 1840, and which may be found in full in 1 W. Rob. 488. These rules are substantially as follows:

For Sailing-Vessels about to meet.

First, those having the wind *fair* shall *give way* to those on a wind [or close-hauled].

Second, when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand.

Third, when both vessels have the wind large or abeam, and meet, they shall pass each other in the same way, on the larboard hand; to effect which two last-mentioned objects the helm must be put to port.

For a Sailing and a Steam Vessel about to meet.

First, steam-vessels are to be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack.

Second, a steam-vessel and a sailing-vessel going large, when about to meet, should each port her helm and pass on the larboard side of the other; 1 W. Rob. 478; 2 *id.* 515; 4 Thornt. 40.

But in the United States courts it has been almost uniformly held, and the rule is now firmly established, that when a sailing-vessel and a steamer are about to meet, the sailing-vessel must, under ordinary circumstances, and whether going large, or before the wind, or close-hauled by the wind, keep her course, and the steamer must take all the measures necessary to avoid a collision; 17 Bost. L. Rep. 384; 18 *id.* 181; 10 How. 557; 17 *id.* 152, 178; 18 *id.* 581; 2 West. Law Month. 425; 3 Blatch. 92; Desty, Adm. § 357.

For Steam-Vessels about to meet.

First, when steam-vessels on different courses are about to meet under such circumstances as to involve the risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of the other.

Second, a steam-vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand.

The following abstract of authorities may also be referred to as furnishing rules of decision (in addition to the general rules of navigation) in the particular cases alluded to; and they will generally be found applicable in cases of collision arising under the new regulations, as well as in cases arising under the general maritime law.

When a steamer or other vessel is about to pass another vessel proceeding in the same general direction, she must allow the foremost boat to keep her way and course, and must take the necessary measures to avoid a collision; 23 How. 448; Abb. Adm. Pr. 108, 110; Olc. 505; 1 Blatch. 363.

A vessel under sail or steam is bound to keep clear of a vessel stationary or at anchor, provided the latter is in a proper place, and exhibits a proper light,—the presumption in such cases being that the vessel in motion is at fault; 1 How. 89; 19 *id.* 103; 3 Kent, 231; Conkl. Adm. 394, 395; Daveis, 359; 1 Am. L. J. 387; 1 Swab. 88; 3 W. Rob. 49.

A vessel entering a harbor is bound to keep the most vigilant watch to avoid a collision; 18 How. 584; Daveis, 359; and in the night-time she ought generally to have her whole crew on deck; *id.* And see 3 Kent, 231; 1 Dods. 467.

By the general maritime law, vessels upon the high seas are not ordinarily required constantly to exhibit a light; 2 W. Rob. 4; 3 *id.* 49; 2 Wall. Jr. 268; but by statute law in England, the United States, Canada, and most of the continental maritime states, steam and sailing vessels were heretofore required in the night-time, and under the circumstances and in the situation pointed out, to carry lights. See 5 Stat. at L. 306, § 10; 9 *id.* 382, § 4; 10 *id.* 72, § 29; and the regulations of the supervising inspectors under the latter act; the English Merchant Shipping Act of 1854; 17 & 18 Vict. c. 104, § 295; and the regulations made under the same, which will be found in Pratt on Sea Lights, and Appendix; the statutes of Canada, and also the ordinances or regulations of France, Russia, Prussia, Holland, Norway, Denmark, Sweden, and Mecklenburg-Schwerin, in regard to lights and the rules of navigation, given in the Appendix to Pratt on Sea Lights.

The general rules above given may be, and have been, abrogated by regulations made by various governments, and which are binding upon all vessels within the jurisdiction of that government; The Aurora, before V. C. Adm. Judge Black, at Quebec, Oct. 1860; Story, Confl. Laws, ch. 14; 1 Swab. 38, 63, 96; 1 How. 28; 19 Bost. L. Rep. 220; 14 Pet. 99; but it is beyond the power of the legislature to make rules applicable to foreign vessels when beyond their jurisdiction; that is, more than a marine league from their shores; 1 Swab. 96. And see 18 How. 223; 21 *id.* 184. It has, accordingly, been held that the new English rule is not applicable in a case of collision on the high seas between a British and a foreign vessel, and that the latter could not set up in its defence a violation of the English statute by the British vessel; 1 Swab. 63, 96; and it was declared that in such a case the general maritime law must be the rule of the court. See 92 U. S. 31.

The rules of navigation under the general

maritime law, particular statutes, and also the rules of the maritime law, and of prior enactments, in regard to vessels carrying lights, have, in most commercial countries, been entirely superseded by general rules of navigation, and general regulations in respect to vessels' lights.

The British Government, by an Order in Council, in 1863, promulgated certain regulations for preventing collisions at sea. An Order in Council, in 1879, promulgated new regulations, to take effect on September 1, 1880. These were adopted in pursuance of the recommendation of representatives of different nations, and are stated in the last-mentioned Order to have been very generally adopted by commercial nations. Among the countries that have adopted them are Austria, Belgium, Chili, Denmark, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Russia, Spain, and Sweden. The various Orders in Council will be found in 2 Maude & Pollock, Merch. Ship., 173. They have not been adopted officially by the United States. In the latter country the Act of April 29, 1864, as re-enacted in the Revised Statutes, is in force. The sections of the Revised Statutes are as follows:

SEC. 4233. The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States.

Rule 1. Every steam-vessel which is under sail, and not under steam, shall be considered a sail-vessel; and every steam-vessel which is under steam, whether under sail or not, shall be considered a steam-vessel.

Rule 2. The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise.

Rule 3. All ocean-going steamers, and steamers carrying sail, shall, when under way, carry—

(A.) At the foremast head a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

(B.) On the starboard side, a green light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(C.) On the port side, a red light, of such a character as to be visible on a dark night, with a clear atmosphere, a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side.

(D.) The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so as to prevent these lights from being seen across the bow.

Rule 4. Steam-vessels, when towing other vessels, shall carry two bright white masthead lights vertically, in addition to their side-lights, so as to distinguish them from other steam-vessels. Each of these masthead lights shall be of the same character and construction as the masthead lights prescribed by rule Three.

Rule 5. All steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port side-lights of the same character and construction, and in the same position, as are prescribed for side lights by rule Three, except in the case provided in rule Six.

Rule 6. River-steamers navigating waters flowing into the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: one red light on the out-board side of the port smoke-pipe, and one green light on the out-board of the starboard smoke-pipe. Such lights shall show both forward and abeam on their respective sides.

Rule 7. All coasting steam-vessels, and steam-vessels other than ferry-boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in rule Six, shall carry the red and green lights as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after-light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after-light so as to show all around the horizon. The lights for ferry-boats shall be regulated by such rules as the board of supervising inspectors of steam-vessels shall prescribe.

Rule 8. Sail-vessels, under way or being towed, shall carry the same lights as steam-vessels under way, with the exception of the white masthead lights, which they shall never carry.

Rule 9. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and be provided with suitable screens.

Rule 10. All vessels, whether steam-vessels or sail-vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light visible all around the horizon, and at a distance of at least one mile.

Rule 11. Sailing pilot-vessels shall not carry the lights required for other sailing-vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Rule 12. Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be pre-

scribed by the board of supervising inspectors of steam-vessels.

Rule 13. Open boats shall not be required to carry the side-lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and, on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up, in addition, if considered expedient.

Rule 14. The exhibition of any light on board of a vessel of war of the United States may be suspended whenever, in the opinion of the secretary of the navy, the commander-in-chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.

Rule 15. Whenever there is a fog or thick weather, whether by day or night, the fog-signals shall be used as follows:—

(A.) Steam-vessels under way shall sound a steam-whistle placed before the funnel, not less than eight feet from the deck, at intervals of not more than one minute.

(B.) Sail-vessels under way shall sound a fog-horn at intervals of not more than five minutes.

(C.) Steam-vessels and sail-vessels, when not under way, shall sound a bell at intervals of not more than five minutes.

(D.) Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not in any port, shall sound a fog-horn, or equivalent signal which shall make a sound equal to a steam whistle, at intervals of not more than two minutes.

Rule 16. If two sail-vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Rule 17. When two sail-vessels are crossing so as to involve risk of collision, then, if they have the wind on different sides, the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side, except in the case in which the vessel with the wind on the port side is close-hauled and the other vessel free, in which case the latter vessel shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

Rule 18. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Rule 19. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Rule 20. If two vessels, one of which is a sail vessel and the other a steam-vessel, are proceeding in such direction as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel.

Rule 21. Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed.

Rule 22. Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel.

Rule 23. Where, by rules 17, 19, 20, and 22, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule Twenty-four.

Rule 24. In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger.

SEC. 4234. Collectors or other chief officers of the customs shall require all sail-vessels to be furnished with proper signal-lights; and every such vessel shall, on the approach of any steam-vessel during the night-time, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching. Every such vessel that shall be navigated without complying with the provisions of this and the preceding section, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel, in any district court of the United States having jurisdiction of the offence.

It is evident that these rules and regulations were intended to supersede all other rules of navigation, and every other system of vessels' lights, wherever they may be adopted. They establish a well-devised and complete system of vessels' lights, and furnish plain and simple rules of navigation applicable to all the ordinary cases of vessels approaching each other under such circumstances as to involve the risk of collision,—leaving extraordinary cases, such as the meeting of vessels in extremely narrow or other very difficult channels (in respect to which no safe general rule can be devised), to the practical good sense and professional skill of those in charge of such vessels. To such cases, and to cases in which one vessel has been suddenly and unexpectedly brought into circumstances of *immediate* danger entirely through the fault or mismanagement of another, or by inevitable accident, the exceptions contained in rule 24 will apply. But a departure from these rules, to be justifiable even in such cases, must *be necessary in order to avoid immediate* danger. But that necessity must not have been caused by the negligence or fault of the party disobeying the rule; and courts of admiralty lean against the exceptions; 11 N. Y. Leg. Obs. 353, 355; 18 How. 581, 583; 1 W. Rob. 157, 478. And see 2 Curt. C. C. 141, 363; 18 How. 581.

The maritime law, however, requires that in collision cases every violation of a rule of navigation, and every other act or omission alleged to be a fault, shall be considered in connection with all the attending circumstances; and when by inevitable accident, or the fault of one of two colliding vessels, a vessel free from fault is suddenly brought into such circumstances of imminent danger as probably to render the deliberate or proper exercise of the judgment and skill of an ex-

perienced seaman impossible, an error of judgment, or other mistake, is not regarded as a legal fault; 3 Blatch. 92; 12 How. 461; 14 Wall. 199; 19 *id.* 54.

The proper and continual exhibition of the bright and colored lights which these rules and regulations prescribe, and their careful observance by the officer of the deck and the lookout of every vessel, constitute the very foundation of the system of navigation established by such rules and regulations. The exhibition of such lights, and the strict compliance with the rules in respect to *stationing* and *keeping* a competent and careful person in the proper place and exclusively devoted to the discharge of the duties of a lookout, are of the utmost importance.

The stringent requirements of our maritime courts in respect to lookouts may be learned by consulting the following authorities: 10 How. 585; 12 *id.* 443; 18 *id.* 108, 223; 21 *id.* 548, 570; 23 *id.* 448, 3 Blatch. 92; Desty, Adm. § 367.

The neglect to carry or display the lights prescribed by these rules and regulations will always be held, *primâ facie*, a fault, in a collison case; 5 How. 441, 465; 21 *id.* 548, 556; 3 W. Rob. 191; Swab. 120, 245, 253, 519; 1 Lush. 382; 2 Wall. 538. And, upon the same principles, the neglect, in a fog, to use the prescribed fog-signals will also be considered, *primâ facie*, a fault; Desty, Adm. § 360

It will be observed that the duty of slackening speed, in all cases when risk of collision is involved, is absolutely and imperatively imposed upon every steam-vessel, by these regulations, and that they require that every steam-vessel shall stop and reverse her engine when necessary to avoid a collision.

The duty of slackening speed in order to avoid a collision had been frequently declared by the maritime courts before the adoption of these regulations; 3 Hagg. Adm. 414; 3 Blatch. 92; Swab. 138; 2 W. Rob. 1; 3 *id.* 95, 270, 377; 10 How. 557; 12 *id.* 443; 18 *id.* 108; but there was no inflexible rule requiring a steamer to slacken speed in all cases when there was risk of collision; and the neglect to do it was held to be a fault only in those cases where its necessity was shown by the proofs. This left the question open to be determined by the courts in each particular case, and perhaps upon vague and unreliabl estimates of time and distance and bearings, or upon conflicting and unsatisfactory testimony; but the legislature, in view of the great power and speed of the steamers now in general use, and the very disastrous consequences of a collision of such vessels when running at their ordinary speed, has wisely made the duty imperative; 5 Blatch. 256; 10 How. 586; 91 U. S. 200.

Some of these rules are different from the rules formerly applied by the general maritime law. They will appear upon an examination of the new rules for the *crossing* of two steam-vessels, or of two sail-vessels, in connection with the rules formerly applied to similar cases.

NAVY. The whole shipping, taken collectively, belonging to the government of an independent nation, and appropriated for the purposes of naval warfare. It does not include ships belonging to private individuals nor (in the United States, at least) revenue vessels or transports in the service of the war department.

Under the constitution, congress has power to provide and maintain a navy. This power authorizes the government to buy and build vessels of war, to establish a naval academy, and to provide for the punishment of desertion and other crimes, and to make all needful rules for the government of the navy. See 3 Wheat. 337; 20 How. 65; 3 Wheat. 370.

NE ADMITTAS (Lat.). The name of a writ now practically obsolete, so called from the first words of the Latin form, by which the bishop is *forbidden to admit* to a benefice the other party's clerk during the pendency of a *quare impedit*. Fitzh. N. B. 37; Reg. Orig. 31; 3 Bla. Com. 248; 1 Burn, Eccl. Law, 31.

NE BAILA PAS (he did not deliver). **In Pleading.** A plea in detinue, by which the defendant denies the delivery to him of the thing sued for.

NE DISTURBA PAS. In Pleading. The general issue in *quare impedit*. Hob. 162. See Rast. Entr. 517; Winch, Entr. 703.

NE DONA PAS, NON DEDIT. In Pleading. The general issue in formedon. It is in the following formula: "And the said C D, by J K, his attorney, comes and defends the right, when, etc., and says that the said E F did not give the said manor, with the appurtenances, or any part thereof, to the said G B, and the heirs of his body issuing, in manner and form as the said A B hath in his count above alleged. And of this the said C D puts himself upon the country." 10 Wentw. Pl. 182.

NE EXEAT REPUBLICA, NE EXEAT REGNO (Lat.). **In Practice.** The name of a writ originally employed in England as a high prerogative process, for political purposes; 50 N. H. 353; but now applied in civil matters only, issued by a court of chancery, directed to the sheriff, reciting that the defendant in the case is indebted to the complainant, and that he designs going quickly into parts without the state, to the damage of the complainant, and then commanding him to cause the defendnat to give bail in a certain sum that he will not leave the state without leave of the court, and for want of such bail that he, the sheriff, do commit the defendant to prison.

This writ is issued to prevent debtors from escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail, or to compel a party to give security to abide the decree to be made in his case; 2 Kent, 32; 1 Clark, 551; Beames, *Ne Exeat;* 13 Viner, Abr. 537; 1 Suppl. to Ves. Jr. 33, 352, 467; 4 Ves Ch. 577; 5 *id.* 91; Bacon, Abr. *Prerogative* (C); 8 Comyns, Dig. 232; 1 Bla. Com. 138; Blake, Ch. Pr. Index; Madd. Ch. Pr. Index; 1 Smith, Ch. Pr. 576; 19 V. & B. 312; 6 Johns. Ch. 138; 27 Ohio, 666; 46 Vt. 708.

The *writ* may be issued against foreigners subject to the jurisdiction of the court, citizens of the same state, or of another state, when it appears by a positive affidavit that the defendant is about to leave the state, or has threatened to do so, and that the debt would be lost or endangered by his departure; 3 Johns. Ch. 75, 412; 7 *id.* 192; 1 Hopk. Ch. 499. On the same principle which has been adopted in the courts of law that a defendant could not be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against a defendant who had been held to bail in an action at law; 8 Ves. 594.

This writ can be issued only for equitable demands; 4 Des. Eq. 108; 1 Johns. Ch. 2; 6 *id.* 138: 1 Hopk. Ch. 499; and not where the plaintiff by process of law may hold the defendant to bail; 3 Bro. C. C. 218; 8 Ves. Jr. 593; 36 Ga. 573; 18 N. J. Eq. 249; 28 Wisc. 245; and where there is an adequate remedy at law, the writ will be dissolved; 30 Ga. 965. It may be allowed in a case to prevent the failure of justice; 2 Johns. Ch. 191. When the demand is strictly legal, it cannot be issued, because the court has no jurisdiction. When the court has concurrent jurisdiction with the courts of common law, the writ may, in such case, issue, unless the party has been already arrested at law; 2 Johns. Ch. 170. In all cases when a writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill; 3 Johns. Ch. 414.

The amount of bail is assessed by the court itself; and a sum is usually directed sufficient to cover the existing debt, and a reasonable amount of future interest, having regard to the probable duration of the suit; 1 Hopk. Ch. 501.

This writ has been expressly abolished in very many of the states. Yet its place has been filled by other methods of procedure, similar in effect. The constitutions of Vermont, Pennsylvania, Kentucky, Mississippi, and Louisiana prohibit any restraint upon emigration. In Arkansas the writ is abolished, and in the new code of New York a system of arrest and bail is substituted. In Ohio and California it is abolished; 27 Ohio, 654; 49 Cal. 465. In those jurisdictions where *ne exeat* is still recognized, the circumstances under which the writ will be granted and the requisites to its issuance, are largely regulated by statute; but certain general principles govern in nearly every case. These will be found set forth in Rhodes *vs.* Cousins, 6 Rand. 191. See 14 Amer. Dec. 560, n.

NE INJUSTE VEXES (Lat.). **In Old English Law.** The name of a writ which issued to relieve a tenant upon whom his lord had distrained for more services than he was bound to perform.

It was a prohibition to the lord, *not unjustly* to distrain or *vex* his tenant. Fitzh. N. B. Having been long obsolete, it was abolished in 1833.

NE LUMINIBUS OFFICIATUR (Lat.). **In Civil Law.** The name of a servitude which restrains the owner of a house from making such erections as obstruct the light of the adjoining house. Dig. 8. 4. 15. 17; SERVITUDE.

NE RECIPIATUR (Lat.). That it be not received. A caveat or words of caution given to a law officer, by a party in a cause, not to receive the next proceedings of his opponent. 1 Sell. Pr. 8.

NE RELESSA PAS (Law Fr.). The name of a replication to a plea of release, by which the plaintiff insists he *did not release.* 2 Bulstr. 55.

NE UNQUES ACCOUPLE (Law Fr.). **In Pleading.** A plea by which the party denies that he ever was lawfully married to the person to whom it refers. See the form, 2 Wils. 118; 10 Wentw. Pl. 158; 2 H. Blackst. 145; 3 Chitty, Pl. 599.

NE UNQUES EXECUTOR. In Pleading. A plea by which the party who uses it denies that the plaintiff is an executor, as he claims to be; or that the defendant is executor, as the plaintiff in his declaration charges him to be. 1 Chitty, Pl. 484; 1 Saund. 274, n. 3; Comyns, Dig. *Pleader* (2 D 2); 2 Chitty, Pl. 498

NE UNQUES SEISIE QUE DOWER. In Pleading. A plea by which a defendant denies the right of a widow who sues for and demands her dower in lands, etc., late of her husband, because the husband was not on the day of her marriage with him, or at any time afterwards, seised of such estate, so that she could be endowed of the same. See 2 Saund. 329; 10 Wentw. Pl. 159; 3 Chitty, Pl. 598, and the authorities there cited.

NE UNQUES SON RECEIVER. In Pleading. The name of a plea in an action of account-render, by which the defendant affirms that he never was receiver of the plaintiff. 12 Viner, Abr. 183.

NE VARIETUR (Lat. that it be not changed). A form sometimes written by notaries public upon bills or notes, for the purpose of identifying them. This does not destroy their negotiability. 8 Wheat. 338.

NEAR. Near is a relative term, and its precise meaning depends upon circumstances; 44 Mo. 197; 5 Allen, 221.

NEAT CATTLE. Oxen or heifers. Whart. Dict. "Beeves" may include neat

stock, but all neat stock are not beeves; 36 Tex. 324; 32 *id.* 479.

NEAT, NET. The exact weight of an article, without the bag, box, keg, or other thing in which it may be enveloped.

NEATNESS. In Pleading. The statement in apt and appropriate words of all the necessary facts, and no more. Lawes, Plead. 62.

NEBRASKA. One of the states of the American Union.

This state lies between latitude 40° and 43° north, and longitude 95° 25′ and 104° west from Greenwich—near the centre of the Continent. It contains 76,000 square miles; and its population in 1880 was 450,000, having increased about 330,000 in the last ten years. Its territory forms a part of the province of Louisiana as ceded by France, and was afterwards included in the *district* and the *territory* of Louisiana as organized in 1804 and 1805, respectively, and in the territory of Missouri, to which the name of the last named territory was changed in 1812. The territory of Nebraska, extending beyond the limits of the present state westward to the summit of the Rocky Mountains, and northward to the British possessions, was organized by the act of May 30, 1854. An enabling act for the formation of a state government was passed April 19, 1864; a state constitution was adopted June 21, 1866; on the 9th of February, 1867, an act was passed for the admission of the state into the Union, on condition that civil rights and the elective franchise should be secured to all races, excepting Indians not taxed; and on the first of March, 1867, a proclamation by the president announced the acceptance of this condition, whereupon by the terms of the act the admission of the state became complete.

Constitution.—The present constitution was adopted October 12, 1875. The *Bill of Rights* prohibits slavery; secures life, liberty, and property, except against due process of law; declares religious freedom in the manner of worshipping Almighty God; prohibits religious tests as qualification for office; protects all denominations in the enjoyment of their mode of worship; makes the truth combined with justifiable motives, a defence in libel cases, civil or criminal; preserves trial by jury; forbids general warrants; provides that the *habeas corpus* shall only be suspended in rebellion or invasion, and then according to law; makes all offences bailable except treason and murder; requires indictment by the grand jury in all cases of felony, but provides that the legislature may change or abolish the grand jury system; forbids imprisonment for debt except in case of fraud; makes the writ of error a writ of right in felony, and a supersedeas in capital cases, and prohibits distinction between citizens and aliens in respect to property rights.

Every male person of lawful age, who is a citizen of the United States, or has declared his intention to become a citizen thirty days prior to an election, and who has resided in the state six months, is an elector, unless *non compos mentis*, a soldier in the regular army, or under conviction of treason or felony. A constitutional amendment conferring the elective franchise on women was submitted to the people by the legislature of 1881.

Amendments to the constitution may be made by the concurrence of three-fifths of the members chosen to each house of the legislature with a majority of the voters at a general election.

THE LEGISLATURE.—The *legislative power* is vested in a senate and a house of representatives. The senate consists of thirty-three members, and the house of one hundred, apportioned according to population every five years. The regular sessions are biennial, and begin on the first Tuesday in January. The pay of members is limited to a session of forty days. A majority of the members elected to each house is necessary for the passage of a bill. Money bills originate in the house of representatives. No bill can contain more than one subject, which must be expressed in its title. Amendments to laws must be express. The power of impeachment rests in the two houses, in joint convention. A majority of the elected members is requisite. Impeachments are tried by the supreme court, sitting for that purpose, except when a judge of that court is impeached, in which case the court of impeachment is composed of all the district judges, sitting together. The concurrence of two-thirds of the members of the court is necessary to conviction. Judgment extends only to removal from office and disqualification; and the trial is no bar to a prosecution. Acts of the legislature take effect three months after the end of the session at which passed, unless in case of an emergency declared by the vote of two-thirds of the elected members of each house.

THE EXECUTIVE.—The supreme executive power is vested in a *Governor*, who, with the Lieutenant-Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, and Commissioner of Public Lands and Buildings, is elected biennially. The governor must be thirty years of age, and must have been for two years a citizen of the United States and of the state. His salary is $2500 a year. The governor has the pardoning power, except in treason, when it rests with the legislature, and in cases of impeachment; and has a qualified veto, which may be applied to single items of appropriation. The treasurer is ineligible to the same office for two years after two consecutive terms. The secretary of state is the keeper of the seal.

THE JUDICIARY.—The courts of record are the *Supreme Court*, *District Courts*, and *County Courts*. Judges are elected. The *Supreme Court* is composed of three judges, elected, alternately, for six years, the senior judge presiding. The supreme court has original jurisdiction in civil cases in which the state is a party, in revenue cases, and in matters of *mandamus*, *quo warranto*, and *habeas corpus*. Terms are held twice a year at the capital. The state is divided into six judicial districts, in each of which a judge is elected for four years, who holds the district court in the several counties in his district successively. This is a court of first resort in civil cases involving over $100; and is the criminal trial court in all but petty cases. Inferior to the district courts are the county courts, with jurisdiction of probate business, and of minor civil and criminal matters; and police courts, and courts of justices of the peace, with the ordinary functions of such tribunals. Appeals lie in all cases from these lower courts to the district courts.

Jurisprudence.—The common law of England is the basis of the law of this state. The statutes are contained in the *general statutes*, one volume, being the acts in force September 1, 1873, and in biennial volumes of session laws, beginning with 1875. Practice is under a code of procedure, based on that of Ohio. The distinction between legal and equitable proceedings

is abolished. There is one form of civil action. The pleadings are the *petition*, the *answer*, and the *reply*. There is a very liberal rule as to amendments. Actions are in the name of "the real party in interest." Companies and firms sue in the partnership name. Married women have full civil and property rights. Exemptions are broad; and there is a liberal stay law. Prosecutions are instituted, and process runs, in the name of the state of Nebraska.

NECESSARIES. Such things as are proper and necessary for the sustenance of man.

The term necessaries is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties; 7 S. & R. 247. Ornaments and superfluities of dress, such as are usually worn by the party's rank and situation in life; 1 Campb. 120; 3 *id.* 326; 7 C. & P. 52; 1 Hodg. 31; 8 Term, 578; 1 Leigh, N. P. 135; some degree of education; 4 M. & W. 727; 6 *id.* 48; 16 Vt. 683; lodging and house-rent; 2 Bulstr. 69; 1 B. & P. 340; see 12 Metc. 559; 13 *id.* 306; 1 M. & W. 67; 5 Q. B. 606; horses, saddles, bridles, liquors, pistols, powder, whips, and fiddles, have been held not to be necessaries; 1 Bibb, 519; 1 M'Cord, 572; 2 N. & M'C. 524; 2 Humphr. 27; 2 Stra. 1101; 1 M. & G. 550. And see 7 C. & P. 52; 4 *id.* 104; Holt, 77; 11 N. H. 51; 8 Exch. 680.

The rule for determining what are necessaries is that whether articles of a certain *kind* or certain *subjects* of expenditure are or are not such necessaries as an infant may contract for, is a matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question, also, as to *quantity*, are generally matters for the jury to determine; 1 Pars. Contr. 241; 10 Vt. 225; 12 Metc. 559; 11 N. H. 51; 1 Bibb, 519; 2 Humphr. 27; 3 Day, 37; 1 M. & G. 550; 6 M. & W. 42; 6 C. & P. 690.

Infants, when not maintained by parent or guardian, may contract for necessaries; 4 M. & W. 727; 16 Mass. 28; 10 Mo. 451; 9 Johns. 141. But when living with and supported by their parents they are not liable for necessaries; 4 Wend. 403; 61 Ill. 177; Ewell, Lead. Cas. 55. Nor can an infant pledge his father's credit, as a wife can her husband's, for abandonment of duty; 17 Vt. 348; 6 M. & W. 482; Schoul. Dom. Rel. 328. Infants are not liable at law for borrowed money, though expended for necessaries; 10 Mod. 67; 1 Bibb, 519; 7 W. & S. 83, 88; 10 Vt. 225. See 1 P. Wms. 558; 7 N. H. 368; 2 Hill, So. C. 400; 32 N. H. 345. Otherwise in equity; 1 P. Wms. 558; 2 Duvall, 149; 7 W. & S. 88. But they are liable for money advanced at their request to a third party to pay for necessaries; 1 Denio, 460; 10 Cush. 436; 7 N. H. 368; 2 Sandf. 306; 2 Hill, S. C. 400. Necessaries for the infant's wife and children are necessaries for himself; Stra. 168; Comyns, Dig. *Enfant* (B 5); 2 Stark. Ev. 725; 3 Day, 37; 1 Bibb, 519; 2 N. & M'C. 523; 9 Johns. 144; 16 Mass. 31; 14 B. Monr. 232; Bacon, Abr. *Infancy* (1). See 13 M. & W. 252; 5 Harr. Del. 428; 4 Vt. 152.

When a wife is living with her husband, it is presumed that she has his assent to pledge his credit for necessaries. But this presumption may be rebutted by showing a prohibition on his part or that he has already supplied her with necessaries. The fact of cohabitation is not conclusive of the husband's assent; 2 Ld. Raym. 1006; 34 N. H. 420; 39 N. Y. 351; Schoul. Dom. Rel. 80; 29 Am. L. Reg. 324. But if the husband altogether neglects to supply the wife, she may pledge his credit notwithstanding he has forbidden tradesmen to trust her; the law here raising a presumption of agency to enforce the marital obligation and protect the wife; 40 Barb. 390; 41 Barb. 558; 15 Conn. 535; Schoul. Dom. Rel. 77. The husband is also liable when away from his wife without her fault or by his own misconduct; 24 Ala. 337; 8 Iowa, 51; 8 Gray, 172; 2 Kent, 146. But otherwise where it is the wife's fault; 10 Ill. 569; 29 N. H. 63; 40 Vt. 68; 19 Wisc. 268. But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessaries; the very fact of the elopement and separation is sufficient to put persons on inquiry, and whoever gives credit to the wife afterwards gives it at his peril; 1 Stra. 647; 11 Johns. 281; 12 *id.* 293; 3 Pick. 289; 2 Halst. 146; 2 Kent, 123; 2 Stark. Ev. 696; Bacon, Abr. *Baron and Feme* (H); 1 Hare & W. Sel. Dec. 104, 106; 6 C. B. N. S. 519; 19 Wisc. 268. Insane persons are liable for necessaries; 5 B. & C. 170; 10 Allen, 59; 56 Me. 308. See generally Schouler, Dom. Rel.; Ewell, Lead. Cas. on Coverture, etc.; 29 Am. L. Reg. 324; 32 Mich. 204.

NECESSITY. That which makes the contrary of a thing impossible.

Necessity is of three sorts: of conservation of life; see DURESS; of obedience, as the obligation of civil subjection, and, in some cases, the coercion of a wife by her husband; and necessity of the act of God, or of a stranger; Jacob; Moz. & W.

Whatever is done through necessity is done without any intention; and as the act is done without will (*q. v.*) and is compulsory, the agent is not legally responsible; Bacon, Max. Reg. 5. Hence the maxim, Necessity has no law; indeed, necessity is itself a law which cannot be avoided nor infringed. Clef des Lois Rom.; Dig. 10. 3. 10. 1; Comyns, Dig. *Pleader* (3 M 20, 3 M 30). As to the circumstances which constitute necessity, see 1 Russ. Cr. 16, 20; 2 Stark. Ev. 713; 31 Ind. 189; 4 Cush. 243; 55 Ga. 126.

NECK-VERSE. The Latin sentence *Miserere mei, Deus*, Ps. li. 1, because the reading of it was made a test for those who claimed benefit of clergy.

If a monk had been taken
For stealing of bacon,
For burglary, murder, or rape;
If he could but rehearse
(Well prompt) his *neck-verse*,
He never could fail to escape.'
Brit. Apollo, 1710; Whart. Dict.

NEGATIVE. Negative propositions are usually much more difficult of proof than affirmative, and in cases where they are involved, it is often a nice question upon which side lies the burden of proof. The general rule has been thus stated: Whoever asserts a right dependent for its existence upon a negative, must establish the truth of the negative, except where the matter is peculiarly within the knowledge of the adverse party. Otherwise rights of which a negative forms an essential element may be enforced without proof; 72 Ind. 113; s. c. 37 Am. Rep. 141. Thus in actions for malicious prosecution, the plaintiff must prove that there was no probable cause; 67 Ind. 375; 2 Greenl. Ev. § 454. The rule applies whenever the claim is founded in a breach of duty in not repairing highways, and in cases of mutual negligence; 78 N. Y. 480; Shearm. & Red. Neg. 312. So one must prove the allegation that a negotiable promissory note was not taken in payment of a debt; 68 Ind. 254. So the *onus* is on a plaintiff who assigns as a breach by tenant that he did not repair; 9 C. & P. 734; 6 H. L. C. 672; 12 Mod. 526. In all actions for breach of warranty of the soundness of a personal chattel, the plaintiff must prove the negative. "It may be stated as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain;" 1 Whart. Ev. § 357; see 14 M. & W. 95; 5 Cra. C. C. 298; 119 Mass. 469; 47 Penn. 476; 62 N. Y. 448; 33 Miss. 292; 97 Mass. 97; 107 *id.* 334; 39 Wisc. 520; 69 Ill. 423; 52 Mo. 390; article in 25 Alb. L. Jour. 124; BURDEN OF PROOF.

NEGATIVE AVERMENT. In Pleading. An averment in some of the pleadings in a case in which a negative is asserted.

NEGATIVE CONDITION. One where the thing which is the subject of it must not happen. 1 Bouvier, Inst. n. 751. See POSITIVE CONDITION.

NEGATIVE PREGNANT. In Pleading. Such a form of negative expression as may imply or carry within it an affirmative.

Thus, where a defendant pleaded a license from the plaintiff's daughter, and the plaintiff rejoined that he did not enter by her license, the rejoinder was objected to successfully as a negative pregnant; Cro. Jac. 87. The fault here lies in the ambiguity of the rejoinder, since it does not appear whether the plaintiff denies that the license was given or that the defendant entered by the license. Steph. Pl. 381.

This ambiguity constitutes the fault; Hob. 295; which, however, does not appear to be of much account in modern pleading; 1 Lev. 88; Comyns, Dig. *Pleader* (R 6); Gould, Pl. c. 6, § 36.

NEGATIVE STATUTE. One which is enacted in negative terms, and which so controls the common law that it has no force in opposition to the statute. Bacon, Abr. *Statutes* (G); Brook, Abr. *Parliament*, pl. 72.

NEGLIGENCE. The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. *Per* Alderson, B., in Blyth *vs.* Birmingham Waterworks Co., 11 Ex. 784.

The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. Cooley, Torts, 630.

The absence of care according to circumstances. See 78 Penn. 219; 46 Tex. 356; 9 W. Va. 252.

The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. 95 U. S. 441, *per* Swayne, J.

Dr. Wharton (Negligence, § 3) defines the term as follows: "Negligence, in its civil relation, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another." It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man. Bigel. Torts, 261.

The opposite of care and prudence, the omission to use the means reasonably necessary to avoid injury to others. 39 Ill. 353.

When a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Hence it is at the election of the party injured to sue either on the contract or on the tort; Whart. Negl. § 435; 4 Gray, 485; 24 Conn. 392. Some cases have gone to the extent of maintaining an action in tort even where no attempt has been made to perform the contract; 13 Ired. 39; 11 Cl. & F. 1.

It is said not to be essential to constitute negligence that the damage caused might reasonably have been expected from the negligent act; Whart. Negl. § 16. Thus Gray, C. J., says in 107 Mass. 494, "A man who negligently sets fire on his own land and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his

own land to the property of another, whether through the air or along the ground, and whether he might or not have reasonably anticipated the particular manner in which it was communicated." And in L. R. 6 C. P. 14, where the defendants, a railway company, left a pile of rubbish in hot weather by the side of their track, and the pile was ignited by sparks from the defendants' engine, and the fire crossed the hedge and field and burned the plaintiff's cottage, two hundred yards away, Channell, B., said: When there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, . . . but when it has been once determined that there has been evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

Where a person unlawfully injures another, he is liable in damages, without regard to the intention with which the act was done; 32 N. J. 554; 44 N. H. 211; and good faith does not excuse negligence; 32 Vt. 652; 3 Sneed, 677.

The damage caused must arise from inadvertence. If it be intentional, a suit for negligence will not lie; the remedy is in trespass and not case.

Proof of negligence. The first requisite for the plaintiff is to show the existence of the duty which he alleges has not been performed, and having shown this he must show a failure to observe this duty; that is, he must establish negligence on the defendant's part. This is an affirmative fact, the presumption always being, until the contrary appears, that every man will perform his duty; Cooley, Torts, 659, 661. In many cases evidence of the injury done makes out a *prima facie* case of negligence on the defendant's part; for instance, when a bailee returns in an injured condition an article loaned to him, or when a passenger on a railway train is injured without fault on his part.

Law or fact. It is generally said that the question of negligence is a mixed question of law and fact, to be decided by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed, and the evidence is conflicting; Whart. Negl. § 420. In the great majority of cases litigated, the question is left to the jury to determine whether the defendant's conduct was reasonable under the circumstances. When a well-recognized legal duty rested upon the plaintiff, it is usual for the court to define this duty to the jury, and leave to it the question as to whether the plaintiff fulfilled this duty. More recently the courts have drawn a distinction between what is evidence of negligence for the jury, and what is negligence *per se*, and therefore a question of law for the court, and the tendency has perhaps been rather to increase the number of cases in which the question of negligence is passed upon by the court. In Pennsylvania, when the standard of duty is defined by law, and is the same under all circumstances, and when there has been such an obvious disregard of duty and safety as amounts to misconduct, the courts have withdrawn the case from the consideration of the jury. It is said to be clear, by most of the authorities, that when the facts are found, and it is perfectly manifest that a prudent man would or would not do as the defendant has done, the court may rule accordingly, or rather, may direct the jury to find accordingly. The same is also true when the law has prescribed the nature of the duty, and also when there exists a well-known practice in the community, of a proper character. In other cases, the inference concerning negligence is left to the jury; Bigel. Torts, 263. See Bigel. L. C. Torts, 589–596.

"When the circumstances of a case are such that the standard of duty is fixed, when the measure of duty is defined by law and is the same under all circumstances, its omission is negligence and may be so declared by the court. But it is said that when the negligence is clearly defined and palpable, such that no verdict of a jury could make it otherwise, or when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law." 2 Thomp. Negl. 1236.

"As a general rule, a question whether a party has been guilty of negligence or not, is one of fact, not of law. Where, however, the plaintiff brings action for a negligent injury, and the action of the two parties must have concurred to produce it, it devolves upon him to show that he was not himself guilty of negligence; and if he gives no evidence to establish that fact, the court may properly instruct the jury that they should return a verdict for defendant. Where, however, the question of negligence depends upon a disputed state of facts, or when the facts, though not disputed, are such that different minds might honestly draw different conclusions from them, the court cannot give such positive instructions, but must leave the jury to draw their own conclusions upon the facts, and upon the question of negligence depending upon them. To warrant the court in any case in instructing the jury that the plaintiff was guilty of negligence, the case must be a very clear one against him, and which would warrant no other inference." *Per* Cooley, C. J., in 17 Mich. 99.

It is true, in many cases, that when the facts are undisputed, the effect of them is for the judgment of the court. That is true in that class of cases when the existence of such facts come in question, rather than when deductions or inferences are to be made from the facts (and see 25 Kan. 391). In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. Certain facts we may suppose to be

clearly established from which one sensible, impartial man would infer that proper care had not been used; another man, equally sensible, equally impartial, would infer that proper care had been used. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and of little education, men of learning and men whose learning consists in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experiences of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the final effort of the law to obtain. *Per* Hunt, J., in 17 Wall. 663. Although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given or whether they established negligence; 73 Ind. 261. The subject is fully treated in a note by the present writer in 13 Am. L. Reg. N. S. 284.

Contributory negligence. If the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, there can be no recovery. The distinction, however, must be drawn between conditions and causes, between *causa causans* and *causa sine qua non*. The question must always be considered whether the act of the plaintiff had a natural tendency to expose him directly to the danger which resulted in the injury complained of. If it had not, the plaintiff's negligence is not considered in law as contributing to the injury. Thus, when the defendant was driving carelessly along the highway, and ran into and injured the plaintiff's donkey which was straying improperly on the highway with his fore feet fettered, it was held that the plaintiff's negligence had not contributed to the accident; 10 M. & W. 546. It has also been held that if the plaintiff could by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover; 5 C. B. N. S. 573. And when it appears that the plaintiff, by the defendant's misconduct became frightened, and in endeavoring to escape the consequence of the defendant's misconduct, rushed into danger and was injured, the plaintiff's conduct does not contribute to the injury; 56 N. Y. 585. So, when the defendant might, by proper care, have avoided the consequences of the plaintiff's negligence, the plaintiff may still recover; 85 N. C. 512.

In some cases it has been held that the plaintiff must show affirmatively that he was in the exercise of due care, when the injury happened; 83 Ill. 354; 5 Bradw. 242; 19 Conn. 566; 78 N. Y. 480; 101 Mass. 455. Probably the proof need not be direct, but may be inferred from the circumstances of the case; 104 Mass. 137; 2 Thomp. Negl. 1178, n. In other states, contributory negligence is a matter of defence, the burden of proving which is on the defendant; 66 Penn. 30; 85 Penn. 275; 22 Minn. 152; 65 Mo. 34; 35 Ohio St. 627; 3 Mo. App. 565; 50 Cal. 70; 11 W. Va. 14; 43 Wisc. 513; S. C. 28 Am. Rep. 558, where the cases are discussed. But even in these courts, if the plaintiff's own showing disclose contributory negligence, he cannot recover. See, further, 15 Wall. 401; 41 Wisc. 105; 44 N. Y. 465; 28 Am. Rep. 563, n.; 20 Alb. L. J. 304, 359. See an article in 15 West. Jur. 529.

Comparative negligence. In Illinois a rule of comparative negligence has been laid down. It has been expressed thus: If, on comparing the negligence of the plaintiff with that of the defendant, or the negligence of the person injured with that of the person inflicting the injury, the former is found to have been slight and the latter gross, the plaintiff may recover. See 20 Ill. 478 (where the rule was first announced by Breese, J.); 83 *id.* 405; 95 Ill. 25. In 36 Ill. 409, it was said, "The rule of this court is that negligence is relative, and that the plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable if he has been guilty of a higher degree of negligence, amounting to wilful injury. The fact that the plaintiff is guilty of slight negligence does not absolve the defendant from the use of care and the use of reasonable efforts to avoid the injury." In a late case it was held that the negligence of the plaintiff must be but slight, and that of the defendant gross in comparison; and both of these terms, "gross" and "slight," or their equivalents, should be used in every instruction to a jury on the subject. "Want of ordinary care is not equivalent to gross negligence;" 8 Bradw. 133; a mere preponderance of negligence against the defendant will not make him liable; 96 Ill. 42.

This doctrine has been adopted to a certain extent in Kansas; 14 Kan. 37; and perhaps in Georgia.

Imputed negligence. In cases of actions brought by infants of tender years for damages caused by the defendant's negligence, it has sometimes been held that the negligence of the parent or guardian of the infant in permitting it to become exposed to danger, is to be imputed to the infant so as to bar its right of action. This rule was first laid down in Hartfield *vs.* Roper, 21 Wend. 615. The doctrine has been much discussed, and this case has been followed, sometimes with modification. See 104 Mass. 53; 88 Ill. 441; 28 Ind. 287; 2 Neb. 319; 50 Cal. 602; but in other states, especially Pennsylvania (57 Penn. 187; 81 *id.* 19), its doctrine has been denied; 22 Vt. 213; 30 Ohio St. 451; 53 Ala. 70. But see L. R. 1 Ex. 239. See, as to injuries to infants, 31 Am. Rep. 206; 14 Cent. L. J. 282.

In England where a passenger has been injured by concurrent negligence of his own carrier and a third party, the carrier's negli-

gence is imputed to the passenger, and bars his recovery against a third party; 8 C. B. 115 (but this case has been criticized in Lush. 388; 1 Sm. L. C. 481); see L. R. 9 Ex. 176. The contrary rule has been adopted in this country; 19 N. Y. 341; 38 N. Y. 260; 7 Vroom, 225; s. c. 13 Am. Rep. 435; 46 Penn. 151. When the plaintiff is riding in a private vehicle, the driver's negligence is not imputable to him; 66 N. Y. 11; s. c. 23 Am. Rep. 1; *contra*, 43 Wisc. 513; s. c. 28 Am. Rep. 558. See notes to the 23 & 28 Am. Rep. just cited.

See Moak's Underhill, Torts; Shearm. & R. Negligence; Bigel. L. C. Torts; as to degrees of negligence, BAILEE; 8 Am. L. Rev. 653.

NEGLIGENT ESCAPE. The omission on the part of a gaoler to take such care of a prisoner as he is bound to take, when in consequence thereof the prisoner departs from his confinement without the knowledge or consent of the gaoler, and eludes pursuit.

For a negligent escape, the sheriff or keeper of the prison is liable to punishment, in a criminal case; and in a civil case he is liable to an action for damages at the suit of the plaintiff. In both cases the prisoner may be retaken; 3 Bla. Com. 415. See ESCAPE.

NEGOTIABLE. In Mercantile Law. A term applied to a contract the right of action on which is capable of being transferred by indorsement (of which delivery is an essential part), in case the undertaking is to A or his order, A or his agent, and the like, or by delivery alone, in case the undertaking is to A or bearer,—the assignee in either case having a right to sue in his own name.

At common law, *choses in action* were not assignable; but exceptions to this rule have grown up by mercantile usage as to some classes of simple contracts, and others have been introduced by legislative acts, so that now bills of exchange, promissory notes, and bank-notes, to order or bearer, are universally negotiable; and notes not to order or bearer, have become *quasi* negotiable; that is, an indorsement will give a right of action in the name of the assignor; and in some states, by statute, bonds and other specialties are assignable by indorsement.

And, in general, any *chose in action* can be assigned so that the assignee can bring action in name of assignor, and with same rights. See Hare & W. Sel. Dec. 158–194; 1 Pars. Contr. 202; Daniel, Negot. Instr.; Benj. Chalm. Digest, Bills, etc.; NEGOTIABLE INSTRUMENTS.

NEGOTIABLE INSTRUMENTS. The weight of authority is in favor of the negotiability of instruments payable to bearer; 14 Conn. 362. Besides notes, bills, and checks, the following have been held to be negotiable instruments: exchequer bills; 4 B. & Ald. 1; 12 Cl. & F. 787, 805; state and municipal bonds; 3 B. & C. 45; 96 U. S. 51; 3 Wall. 327; corporate bonds; L. R. 3 Ch. App. 758; *id.* 154; L. R. 11 Eq. 478; 21 How. 575; coupon bonds of an individual; 6 Ben. 175; coupon bonds of a corporation; 9 Wall. 477; 14 *id.* 282; 20 *id.* 583; 66 N. Y. 14; 44 Penn. 63; (the question has been whether such coupons are negotiable apart from the bonds to which they were formerly attached, and the decisions establish their negotiability; 2 Mor. Tr. 660; 102 Mass. 503;) government scrip; L. R. 10 Ex. 337; U. S. Treasury notes; 21 Wall. 138; 57 N. Y. 573; post-office orders; 65 Law Times, 52; certificates of deposit; 13 How. 218, 228; Pars. Bills, 1, 2, 26; *contra*, 6 W. & S. 227; 8 W. & S. 353; 4 Cas. 452. The following have been held not to be negotiable: Lottery tickets; 8 Q. B. 134; dividend warrants; 9 Q. B. 396; iron scrip notes; 3 Macq. 1; debentures, on which authorities differ; L. R. 8 Q. B. 374.

In some of the states of the United States, statutes have been enacted in regard to the nature and operation of bills of lading and warehouse receipts, but the statutes and interpretations of them lack uniformity. Warehouse receipts, bills of lading; 14 M. & W. 403; 9 C. B. 297; 44 Md. 11; 115 Mass. 224; 12 Barb. 310; 4 Mor. Tr. 320; 101 U. S. 559; letters of credit; 2 How. U. S. 249; 40 Tex. 306, 318; 10 Pet. 482; 22 Pick. 228; 6 Hill, 543; 1 Macq. H. L. C. 513; certificates of stock; 28 N. Y. 600, 604; 13 Penn. 150; 86 Penn. 80; 10 Rep. 125; 2 W. N. 322; 17 N. Y. 592; 55 *id.* 41; 46 *id.* 325; 74 *id.* 226; are transferable or assignable; county warrants are negotiable, but not in the sense of the law merchant; 2 Mor. Tr. 266. See Dos Passos. Stock Brokers.

An instrument in the form of a promissory note drawn by a corporation, and bearing its seal, is not a promissory note negotiable by the law merchant; per Blatchford, C. J., in 8 Fed. Rep. 534.

NEGOTIATE. The power to negotiate a bill or note is the power to indorse and deliver it to another, so that the right of action therein shall pass to the indorser or holder; 42 Md. 581.

NEGOTIATION. The deliberation which takes place between the parties touching a proposed agreement.

That which transpires in the negotiation makes no part of the agreement, unless introduced into it. It is a general rule that no evidence can be given to add, diminish, contradict, or alter a written instrument; Leake, Contr. 26; 1 Dall. 426; 4 *id.* 340; 3 S. & R. 609.

But this rule has been much modified, and parol evidence is now held admissible to contradict, vary, or even avoid a written instrument where it would not have been executed but for the oral stipulation, except in the case of negotiable paper; 90 Penn. 82.

In Mercantile Law. The act by which a bill of exchange or promissory note is put

into circulation by being passed by one of the original parties to another person.

The transfer of a bill in the form and manner prescribed by the law merchant with the incidents and privileges annexed thereby, *i. e.*:—

The transferee can sue all parties to the instrument in his own name;

The consideration for the transfer is *prima facie* presumed;

The transferor can under certain conditions give a good title, although he has none himself;

The transferee can further negotiate the bill with the like privileges and incidents.

There are two modes of negotiation, viz.: by delivery and by indorsement. The former applies to bills, etc., payable to bearer; the latter to those payable to order. See Chalm. Dig. of Bills, etc., Benj. ed. § 106 *et seq.*

Until an accommodation bill or note has been negotiated, there is no contract which can be enforced on the note: the contract, either express or implied, that the party accommodated will indemnify the other, is, till then, conditional; 2 M. & G. 911.

NEGOTIORUM GESTOR (Lat.). **In Civil Law.** One who spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs.

In cases of this sort, as he acts wholly without authority, there can, strictly speaking, be no contract; but the civil law raises a *quasi* mandate by implication for the benefit of the owner, in many such cases; Mackeldey, Civ. Law, § 460; 2 Kent, 616, n.; Story, Bailm. §§ 82, 189.

NEIF. In Old English Law. A woman who was born a villein, or a bond-woman.

NEMINE CONTRADICENTE (usually abbreviated *nem. con.*). Words used to signify the unanimous consent of the house to which they are applied. In England, they are used in the house of commons; in the house of lords, the words used to convey the same idea are *nemine dissentiente.*

NEPHEW. The son of a brother or sister. Ambl. 514; 1 Jac. 207.

The Latin *nepos*, from which *nephew* is derived, was used in the civil law for nephew, but more properly for grandson; and we accordingly find *neveu*, the original form of nephew, in the sense of grandson. Britton, c. 119.

According to the civil law, a nephew is in the third degree of consanguinity; according to the common law, in the second: the latter is the rule of common law; 2 Bla. Com. 206. But in this country the rule of the civil law is adopted; 2 Hill. R. P. 194. In the United States generally, there is no distinction between whole and half blood; 1 Dev. 106; 2 Yerg. 115; 2 Jones, Eq. No. C. 202; 1 M'Cord, 456.

Nephews and nieces may be shown by circumstances to include grand-nephews and grand-nieces, and even a great-grand-niece; 3 Barb. Ch. 466; 1 Abb. App. Dec. 314; but in a bequest, would not include, without special mention, nephews and nieces by marriage; 42 Penn. 25.

NEPOS (Lat.). A grandson. See NEPHEW.

NEPTIS (Lat.). Granddaughter; sometimes great-granddaughter. Calvinus, Lex.; Vicat, Voc. Jur.; Code, 33.

NEUTRAL PROPERTY. Property which belongs to neutral owners, and is used, treated, and accompanied by proper *insignia* as such.

Where the insured party has property and commercial establishments and depositories in different countries, if the property and concern of any one are in, or belong to, a belligerent country, they will have the national character of such country though the national character of the owner may be that of a neutral; 1 Phill. Ins. § 164; 5 W. Rob. 302; 1 Wheat. 159; 16 Johns. 128. The declaration of war by a nation subsequently to the time in reference to which the policy takes effect will, however, only affect ownership thereafter acquired or acts thereafter done; 1 Wash. C. C. 219; 6 Cra. 274; 7 *id.* 506; 4 Mas. 256; 1 Johns. 192; 9 *id.* 388; 14 *id.* 308; 1 C. Rob. 107, 336; 5 *id.* 2; 6 *id.* 364; 1 Binn. 203, 393; 5 *id.* 464; 3 Wheat. 245; 3 Gall. 274; 12 Mass. 246; 8 Term, 230; 1 Johns. Ch. 363; 2 *id.* 191.

The description of the subject in the policy of insurance, as neutral or belonging to neutrals, is, as in other cases, a warranty that the property is what it is described to be, and must, accordingly, in order to comply with the warranty, not only belong to neutral owners at the time of making the insurance, but must continue to be owned during the period for which it is insured, and must, so far as it depends upon the assured, be accompanied by the usual *insignia*, as such, and in all respects represented, managed, and used as such; Dougl. 732; 3 Term, 477; 1 Johns. 192; 2 *id.* 168; 1 Wash. C. C. 219; 2 Caines, 73; 6 Cra. 274; 4 Mas. 256; 1 C. Rob. 26, 336; 2 *id.* 133, 218; 1 Edw. Adm. 340.

NEUTRALITY. The state of a nation which takes no part between two or more other nations at war with each other.

Neutrality consists in the observance of a strict and honest impartiality, so as not to afford advantage in the war to either party, and particularly in so far restraining its trade to the accustomed course which is held in time of peace as not to render assistance to one of the belligerents in escaping the effects of the other's hostilities. Even a loan of money to one of the belligerent parties is considered a violation of neutrality; 9 J. B. Moore, 586. A fraudulent neutrality is considered as no neutrality. But the exportation of contraband, if confined to subjects, is not a breach of neutrality, though otherwise held by some writers. The United States have always maintained the right of exporting arms to belligerents in the way of trade, and during the civil war the Federal Government purchased warlike stores from England to the value of over £2,000,000.

Wheat. Int. L. Eng. ed. 1878, § 501 *e*. See the same work, pp. 511-527, for a discussion of the leading English and American cases, including those growing out of the American civil war.

The violation of neutrality by citizens of the United States, contrary to the provisions of the act of congress of April 20, 1818, renders the individual liable to an indictment. One fitting out and arming a vessel in the United States to commit hostilities against a foreign power at peace with them is, therefore, indictable. And by the 8th section of the act, the president, or such other person as he shall have empowered for that purpose, may employ the land and naval forces and the militia of the United States for the purpose of taking possession of and detaining any ship or vessel, with her prize or prizes, etc., and for the purpose of preventing the carrying on of any expedition or enterprise contrary to the provisions of that act; Whart. Cr. Law, §§ 2778-2807, and cases there cited; Brightly, Dig. U. S. Law, 688-690, giving act of 1820, at length there cited; acts of 22 June, 1860, R. S. § 4090; 18 Feb. 1875, R. S. § 5287; 6 Pet. 445; 1 Pet. C. C. 487. See Wheaton, Law of Nat.; Phill. Int. Law; Marshall, Ins. 384 *a;* 1 Kent, 116; Burlamaqui, pt. 4, c. 5, ss. 16, 17; Bynkershoeck, lib. 1, c. 9; Cobbett, Parl. Deb. 406; Chitty, Law of Nat; Vattel, l. 3, c. 7, § 104; Woolsey, Int. L. §§ 155-165; Martens, Précis, liv. 8, c. 7, § 306; Hall, Neutrals; INTERNATIONAL LAW; BLOCKADE; CONTRABAND OF WAR.

NEVADA. One of the states of the United States of America.

It was admitted into the Union Oct. 31, 1864. By the enabling act, approved March 21, 1864, as amended by the act of May 5, 1866, its boundaries are defined as follows, to wit: Commencing at a point formed by the intersection of the thirty-eighth degree of longitude west from Washington, with the thirty-seventh degree o north latitude; thence due west, along said thirty-seventh degree of north latitude, to the eastern boundary line of the state of California; thence in a northwesterly direction, along the said eastern boundary line of the state of California, to the forty-third degree of longitude west from Washington; thence north, along said forty-third degree of west longitude, and said eastern boundary line of the state of California, to the forty-second degree of north latitude; thence due east, along the said forty-second degree of north latitude, to a point formed by its intersection with the aforesaid thirty-eighth degree of longitude west from Washington; thence due south, along said thirty-eighth degree of west longitude, to the place of beginning.

The constitution provides that every male citizen of the age of twenty-one years and upwards who shall have actually and not constructively resided in the state six months, and in the district or county thirty days, next preceding any election, shall be entitled to vote for all officers that now are, or hereafter may be, elected by the people, and upon all questions submitted to the electors on such elections, excepting that idiots and insane persons, and those who have been convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and those persons who, after arriving at the age of eighteen, have voluntarily borne arms against the United States, or held civil or military office under the so-called Confederate States, or either of them, unless an amnesty be granted them by the Federal Government, are debarred from the electoral privilege. During the day on which any general election shall be held in this state, no qualified elector shall be arrested by virtue of any civil process. Art. ii.

THE LEGISLATIVE POWER.—The legislative authority is vested in a senate and assembly, designated "the legislature of the state of Nevada."

The sessions are biennial, commencing on the first Monday of January.

Senators and members of the assembly must be duly qualified electors of the respective districts and counties which they represent, and the number of members of the senate must not be less than one-third, nor more than one-half of that of members of the assembly.

The members of the assembly are chosen biennially by the qualified electors of their respective districts, on the Tuesday next after the first Monday in November, and their terms of office are two years from the day next after the election.

Senators are chosen at the same time and place as members of the assembly, and their term of office is four years from the day next after their election.

Each house judges of the qualifications, elections, and returns of its own members, chooses its own officers (except the president of the senate), determines the rules of its proceedings, and, with the concurrence of two-thirds of all the members elected, may expel a member.

Members of the legislature are privileged from arrest on civil process during the session of the legislature, and for fifteen days next before the commencement of each session.

Any bill may originate in either house of the legislature, and all bills passed by one may be amended in the other.

THE EXECUTIVE POWER.—The *governor* is elected at the time and place of voting for members of the legislature, and holds his office for four years from the time of his installation, and until his successor is qualified.

No person is eligible to the office of governor who is not a qualified elector, and who, at the time of such election, has not attained the age of twenty-five years and been a citizen of the state for two years next preceding the election.

The governor is commander-in-chief of the military forces of the state, except when they are called into the service of the United States.

He transacts all executive business with the officers of the government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices. He may fill vacancies in offices where no mode is provided by the constitution and laws for filling such vacancy; the commissions of such appointees to expire at the next election and qualification of the person elected to such office. He may on extraordinary occasions convene the legislature in special session. In case of a disagreement between the two houses as to the time of adjournment, he may adjourn the legislature, provided it be not beyond the time fixed for the next meeting thereof.

The governor, justices of the supreme court, and attorney general, or a major part of them,

of whom the governor shall be one, may remit fines and forfeitures, commute punishments and grant pardons after conviction in all cases, except treason and impeachment, subject to such regulations as may be provided by law relative to the manner of applying for pardons.

A lieutenant-governor shall be elected at the same time and places and in the same manner as the governor, and his term of office, and his eligibility shall also be the same. He shall be president of the senate, and in case of the death, removal, inability, or absence of the governor, the duties of his office shall devolve upon the lieutenant governor for the remainder of his term, or until the disability shall cease. A *secretary of state*, a *treasurer*, a *controller*, a *surveyor general*, and an *attorney general* shall be elected at the same time and places, and in the same manner as the governor. The term of office is the same as that of the governor. Any elector is eligible to those offices.

THE JUDICIAL POWER.—The judicial power is vested in a supreme court, district courts, and in justices of the peace. The legislature may also establish courts for municipal purposes only, in incorporated towns and cities.

The *supreme court* consists of a chief justice and two associate justices, a majority of whom constitute a quorum. *Provided*, that the legislature may provide for the election of two additional associate justices, and if so increased, three shall constitute a quorum.

The justices of the supreme court are elected at the general election and hold office for the term of six years, the senior justice in commission being chief justice, and, in case of the commissions of two or more justices bearing the same date, the chief justice is determined by the drawing of lots between them. The jurisdiction of this court is appellate in all cases in equity; and also in law in which is involved the title of right of possession to, or the possession of real estate in mining claims, or the legality of any tax, imposts, assessment, toll, or municipal fine, or in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred dollars; also in all other civil cases not included in the general subdivisions of law and equity, and also in questions of law alone in all criminal cases in which the offence charged amounts to felony. This court also has power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*, and all writs necessary or proper for the complete exercise of its appellate jurisdiction.

Each of the justices has power to issue writs of *habeas corpus* to all parts of the state, returnable before himself, or the supreme court, or any district court in the state or judge thereof.

The state is divided into nine judicial districts, the judges of which are elected by the electors and hold office for four years, the first judicial district having three judges of concurrent jurisdiction.

The *district courts* have original jurisdiction in all cases in equity; and also all cases in law, involving the title to or possession of real property or mining claims, or the legality of any tax, impost, etc. in which the demand or value exceeds three hundred dollars, exclusive of interest; also in all cases relating to the estates of deceased persons, the persons and estates of minors and insane persons, and of the action of forcible entry and detainer, and all criminal cases not otherwise provided for by law. They have final appellate jurisdiction in cases arising in justices' courts and such other inferior tribunals as may be established by law. They have also the power to issue writs of *mandamus*, injunction, *quo warranto*, *certiorari*, etc.

The terms of the supreme court are held at the seat of government, and those of the district courts at the county seats of their respective counties, or at such place as the legislature may determine when more than one county is included in a district.

The *Justices of the Peace* have jurisdiction in such cases as the legislature may determine; provided, that the amount of the demand or value of the property does not exceed three hundred dollars, and that they shall not have jurisdiction in cases wherein the title to real estate or mining claims or questions of boundaries to land are involved, or of cases that conflict in any manner with the jurisdiction of the state courts of record.

The legislature may fix by law the powers, duties, and responsibilities of any municipal court that may be created. Art iv.

NEVER INDEBTED. A plea to an action of *indebitatus assumpsit*, by which the defendant asserts that he is not indebted to the plaintiff. 6 C. & P. 545; 1 M. & W. 542; 1 Q. B. 77. The plea of never indebted has, in England, been substituted for *nil debet*, in certain actions specified in schedule B (36) of the Common Law Procedure Act of 1852; and the effect of the plea never indebted is to deny those facts from which the liability of the defendant arises. In actions on negotiable bills or notes, never indebted is inadmissible; Reg. Gen. Hil. T. 1833, §§ 6, 7; 3 Chitty, Stat. 560. By the judicature act, 1875, Ord. xix. r. 20, a defendant is no longer allowed to deny generally the facts alleged by the plaintiff; Whart. Lex. A defendant cannot, under the plea of "never indebted," contend that, though a contract was made in fact, it was void in point of law, for the facts from which its invalidity is inferred must form the subject of a special plea; Moz. & W.

NEW AND USEFUL INVENTION. A phrase used in the act of congress relating to granting patents for inventions.

The invention to be patented must not only be new, but useful,—that is, useful in contradistinction to frivolous or mischievous inventions. It is not meant that the invention should in all cases be superior to the modes now in use for the same purposes; 1 Mas. 182, 302; 4 Wash. C. C. 9; 1 Pet. C. C. 480, 481; 1 Paine, 203; 3 C. B. 425. See PATENT.

NEW ASSIGNMENT. A re-statement of the cause of action by the plaintiff, with more particularity and certainty, but consistently with the general statement in the declaration. Steph. Pl. 241; 20 Johns. 43.

Its purpose is to avoid the effect of an evasive plea which apparently answers the declaration, though it does not really apply to the matter which the plaintiff had in view; 1 Wms. Saund. 299 *b*, note 6. Thus, if a defendant has committed two assaults on the plaintiff, one of which is justifiable and the other not, as the declaration may not distinguish one from the other, the defendant may justify, and the plaintiff, not being able either

to traverse, demur, or confess and avoid, must make a new assignment.

There may be several new assignments in the course of the same action; 1 Chitty, Pl. 614. A plaintiff may reply to a part of the plea and also make a new assignment. A new assignment is said to be in the nature of a new declaration; Bacon, Abr. *Trespass* (I 4, 2); 1 Saund. 299 *c*; but is more properly considered as a repetition of the declaration; 1 Chitty, Pl. 602; differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is, consequently, to be framed with as much certainty or specification of circumstances as the declaration itself. In some cases, indeed, it should be even more particular; Bacon, Abr. *Trespass* (I 4, 2); 1 Chitty, Pl. 610; Steph. Pl. 245. See 3 Bla. Com. 311; Archb. Civ. Pl. 286; Doctrina Plac. 318; Lawes, Civ. Pl. 163. In England, under the Judicature Act, 1875, Ord. xix. r. 14, no new assignment is necessary or is to be used; but everything which has heretofore been alleged by way of new assignment is to be introduced by way of amendment of the statement of claim; Whart. Dict. 6th ed.

NEW BRUNSWICK. A province of the Dominion of Canada.

It is bounded north by the river Restigouche and the bay of Chaleur, east by the gulf of St. Lawrence, south by Nova Scotia and the Bay of Fundy, and west by the state of Maine. Its length from north to south is one hundred and eighty miles, breadth one hundred and fifty miles, giving an area of twenty-five thousand square miles.

New Brunswick was originally part of the French province of Acadie (see NOVA SCOTIA), but was made a distinct province in 1784, having been first settled by the French A. D. 1639, ceded to the English in 1713 by the treaty of Utrecht, and settled by the British government in 1764. By the Imperial Act, known as the British North American Act, which went into operation July 1, 1867, New Brunswick became a province of the Dominion of Canada. See CANADA.

NEW FOR OLD. A term used in marine insurance in cases of adjustment of a loss when it has been but partial. In making such adjustment, the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for repairs, and to allow the deduction of one-third *new for old* upon the balance. See 1 Cow. 265; 4 *id.* 245; 4 Ohio, 284; 7 Pick. 259; 14 *id.* 141. The deduction, in the United States, is usually one-third, and is made from the cost of labor and material, and in practice also from the incidental expenses of repairs, as towage, etc.; but see, as to this last, 3 Sumn. 45; 9 Wall. 203. The deduction is without regard to the age of the vessel; 11 Johns. 315. A late writer criticizes the rule of *thirds*, and suggests that the increase of iron hulls will change the rule of law; Gourlie, Gen. Av. In Liverpool, no deduction is made on iron vessels for the first eighteen months.

NEW HAMPSHIRE. The name of one of the original thirteen United States of America.

It was subject to Massachusetts from 1641 to 1680. Many of its institutions and laws are to be traced to that connection. It was governed as a province, under royal commissions, by a governor and council appointed by the king, and a house of assembly elected by the people, until the revolution.

In January, 1776, a temporary constitution was adopted, which continued till 1784. The constitution adopted in 1784 was amended by a convention of delegates held at Concord, approved by the people in their town-meetings, and ertablished by the convention in February, 1792. This constitution was amended in 1850, by abolishing the property qualifications for certain offices, and amended again in 1877, changing it in eleven particulars, the principal of which were the abolition of the religious test, and adoption of biennial elections, increasing number of senators, and changing election from March to November.

Every male inhabitant of every town and place, of twenty-one years of age and upwards, except paupers and persons excused from paying taxes at their own request, is entitled to vote in the town-meetings for the officers elected by the people. By statute, the names of all voters are required to be placed by the supervisors of the check-list on a check-list; and no vote will be received unless the name of the voter is so registered. Six months' residence in the town is required to entitle a party to be registered on the check-list.

THE LEGISLATIVE POWER.—This is lodged in the senate and house of representatives, each of which has a negative upon the other, and which together are styled the *General Court of New Hampshire.*

The *Senate* is composed of twenty-four members, elected for the term of two years, one from each district, by the people of the district. If no person is elected by the people for any district, or if a vacancy occur, one is elected, by joint ballot of the two houses, from the two persons having the highest number of votes. A senator must be thirty years old, an inhabitant of the district, and, for seven years next before his election, of the state.

Representatives are elected biennially, for the term of two years, by the voters of the several towns and districts. Each town having six hundred inhabitants by the last general census of the state taken by authority of the United States or of this state, may elect one representative; if eighteen hundred such inhabitants, may elect two representatives; and so proceeding in that proportion, making twelve hundred such inhabitants the mean increasing number for any additional representative. Towns and places having less than six hundred inhabitants may be classed by law for the chance of a representative; and towns which cannot be classed without great inconvenience may be authorized by law to elect. A representative must be an inhabitant of the town for which he is elected, and, for two years next preceding his election, of the state. The constitution contains the usual provisions for securing the organization of each house, giving control of the conduct of members, providing for keeping and publishing a record of proceedings, for open sessions, limiting the power of adjournment of houses separately, securing members from arrest on civil

process while going to, remaining at, and returning from the session, and for securing freedom of debate. The general assembly has full legislative powers, may constitute courts, regulate taxes, secure equal representation, etc., under restrictions similar to those contained in the constitutions of the other states.

THE EXECUTIVE POWER.—This is lodged in a governor and council.

The *Governor* is elected biennially, and holds his office for two years from the first Wednesday in June. If no person has a majority of votes, the senate and house of representatives, by joint ballot, elect one of the two persons having the highest number of votes. In case of a vacancy, the president of the senate exercises the powers of the office, but cannot then act as senator. The governor must be of the age of thirty years, and an inhabitant of the state for seven years next preceding his election.

The governor is commander-in-chief of all the military forces of the state. He has a limited veto upon the acts and resolves of the general court, which are invalid unless they are approved and signed by him; but if he does not return any bill to the house in which it originated, with his objections, within five days after it is presented to him, provided the general court continue in session, or if the two houses, after considering his objections, shall again pass the same by a vote of two thirds of each house, the bill will become a law as if he had signed it. In case any cause of danger to the health of the members exists at their place of meeting, he may direct the session to be held at another place.

Councillors are elected biennially, must have the qualifications of senators, and hold office for the same term as the governor. The state is divided by law into five districts, in each of which a councillor is elected, and vacancies are filled by a like election. If no person has a majority of votes, the two houses, by joint ballot, elect a councillor from the two persons having the highest number of votes.

The *governor and council* may adjourn or prorogue the general court, in case of disagreement of the two houses, for any period not exceeding ninety days. They nominate and appoint all judicial officers, the attorney-general and coroners, and all general and field officers of the militia,—each having a negative upon the other. Nominations must be made three days before an appointment can be made, unless a majority of the council assent. All commissions must be in the name and under the seal of the state, signed by the governor and attested by the secretary, and the tenure of the office stated therein.

The power of pardoning offences—after conviction only, however—is vested in the governor and council, except in cases of impeachment. No money can be drawn from the treasury of the state but by warrant of the governor, with the advice and consent of the council.

THE JUDICIAL POWER.—The *Supreme Court* consists of a chief justice and six assistant justices, appointed by the governor and council, to hold during good behavior, until seventy years of age. It has original jurisdiction of all cases and proceedings at common law, civil and criminal, except those in which justices of the peace have jurisdiction; of all cases in equity; in all cases of divorce and alimony; and appellate jurisdiction in all appeals from courts of probate, and in all appeals from police courts and from justices of the peace.

Trial terms of the supreme court are held by a single judge in every county twice, and in the larger counties three times a year; but two judges must attend in any capital trial. At these terms are entered and tried most cases at common law and appeals from police courts and justices of the peace; and all trials by jury are had there; but cases may be tried without a jury, by consent of parties. The court has power to appoint a referee where the amount in dispute does not exceed a hundred dollars, and the title to real estate is not involved. Any question of law arising at these terms may be transferred to the law terms for decision by the whole court.

Two law terms are held annually at Concord. At these terms are entered and heard appeals from courts of probate, writs of error and certiorari, cases of mandamus, quo warranto, and the like, and all questions of law transferred from the trial terms. No trials by jury are held at law terms; but issues of fact are transferred to the trial terms. Four justices are a quorum at the law terms, and the concurrence of four is necessary to a decision of any law question.

Judges of Probate are appointed by the governor and council in each county, who hold their office during good behavior, unless sooner removed by address of both houses or by impeachment. They have jurisdiction of all matters relating to the estates of persons deceased and the guardianship of minors, insane persons, and spendthrifts, subject to appeal to the supreme court.

Justices of the Peace are appointed in sufficient number by the governor and council, who hold their office during the term of five years, unless sooner removed by address of both houses of the legislature. They have jurisdiction of all civil causes at common law in which the damages demanded do not exceed thirteen dollars and thirty-three cents, and where the title to real estate is not involved, and in many minor criminal cases, subject to appeal to the supreme court. They have authority to arrest, examine, and bind over for trial at the supreme court persons charged with higher offences.

Police Courts have exclusive jurisdiction, in the cities and places where they are established, in all cases where justices of the peace have jurisdiction elsewhere.

No judge, clerk, or register of any court, or justice of the peace, can act as attorney, be of counsel, or receive fees as advocate or counsel, in any case which may come before the court of which he is an officer.

County Commissioners are elected, three in each county, by the voters of the county, for the term of two years. They have general control and management of the financial affairs of the county, of the public buildings, of the roads, of paupers, and of levying the county tax.

NEW JERSEY. The name of one of the original thirteen states of the United States of America.

The territory of which the state is composed was included within the patent granted by Charles II. to his brother James, duke of York, bearing date on the 12th of March, 1663-4. This grant comprised all the lands lying between the western side of Connecticut river and the east side of Delaware bay, and conferred powers of government over the granted territory. At this time the province was in the possession and under the government of Holland. Before the close of the year the inhabitants of the province submitted to the government of England, on the 23d and 24th of June, 1664. The duke of York, by deeds of lease and release, conveyed to John Lord Berkely and Sir George Carteret, their heirs and assigns forever, "all that tract of land adjacent to New England and lying and being to

the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea, and part by Hudson river, and hath upon the west Delaware bay or river, and extendeth southward to the main ocean as far as Cape May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is in 41 degrees and 40 minutes of latitude, and crosseth over thence in a straight line to Hudson's river in forty-one degrees of latitude; which said tract of land is hereafter to be called Nova Cæsaria, or New Jersey.

This grant first defined the boundaries and gave the name of the province. It conferred upon the grantees, with the territory, powers of government in as full and ample manner as they were conferred by the crown upon the duke of York. Lord Berkely and Sir George Carteret, being by virtue of this conveyance the sole proprietors of New Jersey, on the 10th of February, 1664-5, signed a constitution which they published under the title of "The consessions and agreement of the lords proprietors of the province of Nova Cæsaria, or New Jersey, to and with all and every of the adventurers, and all such as shall settle or plant there." This document, under the title of "The Consessions," was regarded as the first constitution of New Jersey, and continued in force until the division of the province in 1676. The instrument was considered as irrevocable, and therefore of higher authority than the acts of assembly, which were subject to alteration and repeal. War having been declared by England against Holland in 1673, the Dutch were again in possession of the country, and the inhabitants submitted to their authority.

By the treaty of peace between England and Holland on the 9th of February, 1674, the country was restored to the possession of the English. On the conclusion of peace, in order to remove all grounds of objection to his title on account of the recapture of the country by the Dutch, the duke of York obtained from the crown a new patent, similar to the first, and dated on the 29th of June, 1674. On the 20th of July in the same year, the duke of York made a second grant of a portion of the province to Sir George Carteret individually. The partition which this patent was intended to secure, in addition to the confirmation of Carteret's grant, was accomplished by deeds of partition executed July 1, 1676, between Carteret and the trustees of Byllinge. In 1702, the proprietors of the two provinces, called respectively East New Jersey and West New Jersey, surrendered their powers of government to Queen Anne, still retaining their title to the land. The two divisions constituted thenceforth but one colony. The colony was governed by a governor and council appointed by the crown, and an assembly of the representatives of the people chosen by the freeholders. This form of government continued till the American revolution.

The first constitution of the *state* of New Jersey was adopted by the provisional congress on the second day of July, 1776. This body was composed of representatives from all the counties of the state, who were elected on the fourth Monday of May, and convened at Burlington on the tenth day of June, 1776. It was finally adopted on the second day of July, but was never submitted to a popular vote. This constitution continued in force until the first day of September, 1844, when it was superseded by the existing constitution. The new constitution was adopted May 14, 1844, by a convention composed of delegates elected by the people in pursuance of an act passed by the legislature. The constitution thus framed, having been submitted to and adopted by the people at an election held on the thirteenth day of August, took effect and went into operation, pursuant to one of its provisions, on the twenty-second of September, 1844. This constitution was amended at a special election held September 7, 1875.

The right of suffrage is by the constitution vested in every [male] citizen of the United States of the age of twenty-one years, who has been a resident of the state one year, and of the county in which he claims his vote five months, next before the election: provided that no person in the military, naval, or marine service of the United States shall be considered a resident of the state by being stationed in any garrison, barrack, or military or naval place or station within the state; and no pauper, idiot, insane person, or person convicted of a crime which now excludes him from being a witness, unless pardoned or restored by law to the right of suffrage, shall enjoy the right of an elector; and provided further, that in time of war no elector in the actual military or naval service of the state or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district.

THE LEGISLATIVE POWER.—This is lodged in a senate and general assembly, which meet separately the second Tuesday in January each year.

The *Senate* is composed of one senator from each county, elected by the people for three years. They are divided into classes, so that one-third of the senate is changed each year. A senator must be entitled to vote, at least thirty years old, have been a citizen and inhabitant of the state for four years, and of the county for which he is chosen one year, next before election.

The *General Assembly* is composed of members elected annually by the voters of the several counties. They are apportioned on the basis of population; and each county is to have one member at least, and the whole number is not to exceed sixty. Each member must be entitled to vote, at least twenty one years old, must have been a citizen and inhabitant of the state for two years, and of the county for which he is chosen one year, next before his election.

THE EXECUTIVE POWER.—The *Governor* is elected by the legal voters of the state for the term of three years, commencing on the third Tuesday of January next ensuing his election. He is incapable of holding the office for three years next after his term of service. He must be not less then thirty years of age, and have been for twenty years at least a citizen of the United States, and a resident of this state seven years next before his election, unless he has been absent during that time on the public business of the United States or of this state.

He is the commander-in-chief of all the military and naval forces of the state; has power, except in cases of impeachment, to suspend the collection of fines and forfeitures, and to grant reprieves, to extend until the expiration of a time not exceeding ninety days after conviction; in connection with the chancellor and the six judges of the court of errors and appeals, or the major part of them, can remit fines and forfeitures, and grant pardons in all cases after conviction, except impeachment; and is liable to impeachment for misdemeanor in office during his continuance in office and for two years thereafter. In case of the death, resignation, or removal from office of the governor, the powers, duties, and emoluments of the office devolve upon the president of the senate; and in case of his death, resignation, or removal, then upon the speaker of the house of assembly, until an-

other governor shall be elected and qualified; but in such case another governor shall be chosen at the next election for members of the legislature, unless such vacancy occur within thirty days preceding such election, in which case a governor shall be chosen at the next succeeding election for members of the legislature.

THE JUDICIAL POWER.—The *Court of Errors and Appeals* consists of a chancellor, the justices of the supreme court, and six judges, or a major part of them. These six judges are appointed for six years by the governor, with the consent of the senate.

The seat of one of the judges is vacated each year: so that one judge is annually appointed. No member of the court who has given a judicial opinion in the cause in favor of or against any error complained of, may sit as a member or have a voice on the hearing; but the reasons for such opinion shall be assigned to the court in writing. Three sessions are held annually, at Trenton. It is the highest court of appeals from decisions of the supreme court, court of chancery, and circuit court. After decision pronounced, the cause is remitted to the inferior courts for judgment and execution according to the decision.

The *Court of Chancery* consists of a chancellor, appointed by the governor for a term of seven years, who is also the ordinary or surrogate general and judge of the prerogative court. Appeals lie from the order or decree of the orphans' court to the prerogative court. The chancellor is assisted by a vice-chancellor, who is appointed by the chancellor for five years.

The *Supreme Court* consists of one chief and four assistant judges, appointed by the governor, with the advice and consent of the senate, for the term of seven years. This number may be increased or decreased by law, but may never be less than two. The judges are *ex officio* justices of the inferior court of common pleas, orphans' court, and court of general quarter sessions. At least three stated terms are to be held annually, at Trenton, at such times as the court may appoint. This is the court of general inquiry, common-law jurisdiction. When issues of fact arise, they are sent to the circuit to be found by a jury and single judge.

Circuit Courts are held in every county in the state, by one or more justices of the supreme court, or a judge appointed for the purpose. For this purpose the state is divided into nine districts, and one judge assigned to each district. In all cases within the county, except in those of a criminal nature, these courts have common-law jurisdiction concurrent with the supreme courts; and any final judgment of a circuit court may be docketed in the supreme court, and operates as a judgment obtained in the supreme court from the time of such docketing. Final judgments in any circuit court may be removed by writ of error into the supreme court, or directly into the court of errors and appeals; and questions of law which arise are to be certified by the presiding judge to the supreme court for decision.

Common Pleas Court. This in some counties is composed of three judges, and, in certain counties, of four judges, one of whom must be a counsellor at law, and is the president judge. The judges are appointed for five years by senate and general assembly by joint ballot. No more than one judge may be appointed in each year.

Oyer and Terminer and General Jail Delivery. This court is held by one or more justices of the supreme court, and one or more of the court of common pleas, in each county, at the times of holding the circuit court, and such other times as the judge of the supreme court may appoint. It has cognizance of all crimes whatever of an indictable or presentable nature committed in the county where the court is held.

Court of Quarter Sessions. This court is composed of two or more justices of the court of common pleas in each county. It has cognizance of all crimes for purposes of indictment; but all capital crimes and those of the graver character must be tried by the court of oyer and terminer or supreme court.

The *Orphans' Court* is held in each county, by two or more judges of the common pleas court. It has the original jurisdiction of the probate of wills, settlement of the estates of decedents, appointment and control of administrators and executors, and the care of minors, including the appointment and control of guardians. Three terms of this court are held annually. An appeal lies to the prerogative court held by the chancellor. The duties of clerk or register of this court are discharged by a surrogate, elected by the people of the county for five years.

Justices of the Peace are elected by the people of each township, or ward of city, not less than two nor more than five for each such division, for five years. They have cognizance within their counties of civil matters to an amount not exceeding two hundred dollars, except those cases involving land titles, and actions of replevin, slander, or trespass for assault and battery or imprisonment. A jury of six must be impanelled on demand of either party. In cities containing twenty thousand inhabitants there are district courts which have the civil jurisdiction of justices of the peace.

NEW MATTER. In Pleading. Matter not previously alleged. Statements of fact not previously alleged by either party to the pleadings. Where special pleading prevails, such matter must be pleaded in avoidance, and it must, in general, be followed by a verification; Gould, Pl. c. 3, § 195; 1 Chitty, Pl. 538; Steph. Pl. 251; Comyns, Dig. *Pleader* (E 32); 1 Wms. Saund. 103, n. 1; 2 Lev. 5; Ventr. 121; 3 Bouvier, Inst. n. 2983. See PLEA.

In equity, new matter, discovered by either plaintiff or defendant, may be introduced by cross or supplemental bill before a decree has been pronounced, but not by amendment after an answer has been filed; 1 Paige, Ch. 200; Harr. Ch. 438; 4 Bouvier, Inst. nn. 4385–4387.

NEW MEXICO. One of the territories of the United States.

By act of congress, approved September 9, 1850, the territory of New Mexico was constituted and described as "all that portion of the territory of the United States bounded as follows: Beginning at a point in the Colorado river where the boundary line with the republic of Mexico crosses the same; thence eastwardly with that boundary line to the Rio Grande; thence, following the main channel of the Rio Grande, to the parallel of the 32° of north latitude; thence east with that degree to its intersection with the 103° of longitude W. of Greenwich; thence north with that degree of longitude to the parallel of 38° of north latitude; thence west with that parallel to the summit of Sierra Madre; thence south with the crest of those mountains to the 37th parallel of north latitude; thence west with that parallel to its intersection with the boundary-line

of the state of California; thence with such boundary-line to the place of beginning." A proviso was annexed that the United States might divide the territory into two or more, and that when admitted as a state the said territory, or any portion of the same, should be received into the Union with or without slavery, as their constitution might prescribe at the time of admission. 9 U. S. Stat. at Large, 446.

Colorado was partly formed from New Mexico in 1861, and in 1863 the entire territory of Arizona, which reduced New Mexico to its present boundaries. By the organic act, the powers of the territory are lodged in three branches,—the legislative, executive, and judicial. The operation of this act was suspended until the Texan boundary was agreed upon, when it went into force by proclamation of the president, December 13, 1850. 9 Stat. at L. App.

The regulations as to the qualifications of voters, subject to change by the territorial legislature, are that all male inhabitants who have lived three months in the territory and are citizens of the United States, or who have declared their intention to become such, and fifteen days next before election in the county in which they offer to vote, are qualified. In addition to these classes, also, all persons who are recognized as citizens under the treaties with Mexico are so entitled. But no person under guardianship, *non compos mentis*, or convicted of treason, felony, or bribery, may vote, unless restored to civil rights.

THE LEGISLATIVE POWER.—The *Council* is composed of thirteen members, elected by the people of the districts into which the territory is divided, for the term of two years.

The *House of Representatives* consists of twenty-six members, elected by the people of the districts into which the territory is divided, for the term of one year. The two houses have power to legislate on all subjects of legislation not inconsistent with the laws and constitution of the United States. No laws may interfere with the primitive disposition of the soil. No tax may be levied of United States property. Property of non-residents may not be taxed higher than that of residents. No bank may be incorporated and no debt incurred by the territory.

THE EXECUTIVE POWER.—The *Governor* is appointed by the president of the United States, by and with the advice and consent of the senate, for four years, but he may be sooner removed. He must reside in the territory. He is commander-in-chief of the military of the territory; is superintendent of Indian affairs, is to approve all acts passed by the legislature before they can become laws; may grant pardons and remit fines for offences against the laws of the territory, and reprieves for offences against the laws of the United States till the will of the president can be known; must take care that the laws be executed.

A *Secretary of the Territory* is also appointed in the same manner and for the same time. He is to record and preserve laws passed by the legislature, and acts done by the governor, in his executive capacity, and to transmit copies, etc.

THE JUDICIAL POWER.—The *Supreme Court* consists of a chief and two assistant justices, appointed by the president of the United States, with the advice and consent of the senate, for the term of four years. Two of the three judges constitute a quorum. The jurisdiction is appellate solely, and extends to all matters of appeal and writs of error that may be taken from the judgments or decrees of the district courts, in cases of errors apparent on the face of the record.

Special terms may be called by the chief justice for the hearing of causes in both civil and criminal matters, when the parties or the accused, and the district attorney, agree. No jury trials are held by this court. An appeal lies to the supreme court of the United States as from a decision of the United States circuit court, where the amount involved exceeds the sum of one thousand dollars.

The *District Court* is held in each of the three districts into which the territory is divided for the purpose, by one of the judges of the supreme court.

It has exclusive original jurisdiction of all matters at law or in equity, except those of which justices of the peace have concurrent jurisdiction, and of all crimes and misdemeanors, except those of which justices of the peace have exclusive cognizance.

Probate Courts are also to be provided for by law. They have, in general, the control of the settlement of the estates of decedents, and the appointment and control of guardians.

Justices of the Peace have a jurisdiction coextensive with the county of all civil cases where the amount involved does not exceed one hundred dollars, except in actions for slander, libel, and false imprisonment, or where the title or boundary of lands shall come in question. Act. 1876, ch. 27.

An *Attorney* and a *Marshal* are also appointed, for four years, by the president and senate, and are subject to removal by them.

NEW PROMISE. A contract made after the original promise has, for some cause, been rendered invalid, by which the promisor agrees to fulfil such original promise.

NEW TRIAL. In Practice. A re-examination of an issue in fact, before a court and a jury, which has been tried at least once before the same court; Hilliard, N. Tr. § 1. A re-hearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose; 4 Chitty, Gen. Pr. 30; 2 Grah. & W. N. Tr. 32. It is either upon the same, or different, or additional evidence, before a *new jury*, and probably, but not necessarily, before a different judge.

The origin of the practice of granting new trials is of extremely ancient date, and, consequently, involved in some obscurity. Blackstone gives the most connected and satisfactory account of it of any writer; 3 Bla. Com. 387, 388.

Courts have, in general, a discretionary power to grant or refuse new trials, according to the exigency of each particular case, upon principles of substantial justice and equity; 1 Burr. 390. This discretion is generally not reviewable on error; 10 Vt. 520; 14 N. H. 441; 20 Pick. 285; 10 Ga. 93. But see 4 Mo. 86; 160 Mo. St. 328.

The usual grounds for a new trial may be enumerated as follows:—

The *not giving the defendant sufficient notice* of the time and place of trial, unless

waived by an appearance and making defence, will be a ground for setting aside the verdict; 3 Price, 72; 1 Wend. 22. But to have this effect the defendant's ignorance of the trial must not have been owing to his own negligence, and the insufficiency of the notice must have been reasonably calculated to mislead him; 7 Term, 59; 2 Bibb, 177; 3 B. & P. 1; 3 Price, 72; 13 Tex. 516; 32 Conn. 402; 36 N. H. 74.

Mistakes or omissions of officers in summoning and drawing jurors, when the irregularity deprives the party complaining of a substantial right, will entitle him to a new trial; 2 Halst. 244; 16 Ark. 37; 12 Pick. 496. Likewise, where the officer summoning the jury is nearly related to one of the parties; 10 S. & R. 334; 1 South. 364; 20 Tex. 234; 1 Dev. & B. 196; or is interested in the event; 5 Johns. 133; unless the objection to the officer was waived by the party; 3 Me. 215; 21 Pick. 457; or the authority of the officer be so circumscribed as to put it out of his power to select an improper jury; 7 Ala. 253; 7 Cow. 720. And the verdict will be set aside for the following causes: the unauthorized interference of a party, or his attorney, or the court, in selecting or returning jurors,—unless the interference can be satisfactorily explained; 8 Humphr. 412; that a juror not regularly summoned and returned personated another; Barnes, 455; 7 Dowl. & R. 684; but not if the juror personated another through mistake, was qualified in other respects, and no injustice has been done; 12 East, 229. See MISTRIAL. That a juror sat on the trial after being challenged and set aside,—unless the party complaining knew of it, and did not object; 3 Yeates, 318; that a juror was discharged without any sufficient reason, after being sworn; 1 Ohio St. 66; but not if the juror was discharged by mistake and with the knowledge and acquiescence of the party; 9 Metc. Mass. 572; 5 Ired. 58; that the jury were not sworn, or that the oath was not administered in the form prescribed by law; 1 How. 497; 2 Me. 270.

The *disqualification of jurors*, if it has not been waived, will be ground for a new trial; as, the want of a property qualification, 4 Term, 473; 15 Vt. 61; relationship to one of the parties; 32 Me. 310; unless the relationship be so remote as to render it highly improbable that it could have had any influence; 12 Vt. 661; interest in the event; 2 Johns. 194; 21 N. H. 438; conscientious scruples against finding a verdict of guilty; 13 N. H. 536; 16 Ohio, 364; 13 Wend. 351; mental or bodily disease unfitting jurors for the intelligent performance of their duties; 6 Humphr. 59; 8 Ill. 368; alienage; 6 Johns. 332; 2 Ill. 476. But see 8 Ill. 202; 4 Dall. 353.

When *indirect measures have been resorted to to prejudice the jury*, or tricks practised or disingenuous attempts made to suppress or stifle evidence or thwart the proceedings, or to obtain an unconscionable advantage, they will be defeated by granting a new trial. For example: where papers material on the point in issue, not previously submitted, are surreptitiously handed to the jury; Cas. *temp.* Hardw. 116; 2 Yeates, 273; or where the party, or some one in his behalf, directly approaches the jury on the subject of the trial; 7 S. & R. 458; 13 Mass. 218. But if the other party is aware of such attempts, and neglects to correct them when in his power, he will be deemed to have waived all objection; 11 Mod. 118. If the interference with the jury comes from a stranger, be without fault in the jury, and without the knowledge of the parties, and no injury has thereby ensued, the verdict will not be disturbed; 5 Mo. 525; 3 Bibb, 8; 11 Humphr. 169, 491. But see 9 Miss. 187; 16 *id.* 465; 20 *id.* 398. Where the jury, after retiring to deliberate, examine witnesses in the case, a new trial will be granted; Cro. Eliz. 189; 2 Bay, 94; 1 Brev. 16; so, also, when one of their number communicates to his fellows private information possessed by him, which influences the finding; 1 Sid. 235; 1 Swan, 61; 2 Yeates, 166; 4 Yerg. 111; or the judge addresses a note to them, or privately visits them, after they have retired to deliberate; 1 Pick. 337; 10 Johns. 238; 13 *id.* 487.

Misconduct of the jury will sometimes avoid the verdict; as, for example, jurors betting as to the result; 4 Yerg. 111; sleeping during the trial; 8 Ill. 368; unauthorized separation; 1 Va. Cas. 271; 11 Humphr. 502; 3 Harr. N. J. 468; taking refreshment at the charge of the prevailing party; 1 Ventr. 124; 4 Wash. C. C. 32; drinking spirituous liquor; 4 Cow. 17, 26; 7 *id.* 562; 4 Harr. 367; 1 Hill, 207; talking to strangers on the subject of the trial; 3 Day, 223; 9 Humphr. 646; determining the verdict by a resort to chance; 15 Johns. 87; 8 Blackf. 32; see LOT. But every irregularity which would subject jurors to censure will not overturn the verdict, unless there be some reason to suspect that it may have had an influence on the final result. In general, if it does not appear that the misconduct was occasioned by the prevailing party or any one in his behalf, does not indicate any improper bias, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict will not be disturbed. Where, however, the misconduct of the jury amounts to a gross deviation from duty, decency, and order, a new trial will sometimes be granted, on grounds of public policy, without inquiring whether or not any injury has been sustained in that particular cese; Hilliard, New T. 198.

Error of the judge will be ground for a new trial; such as, admitting illegal evidence which has been objected to,—unless the illegal evidence was wholly immaterial, or it is certain that no injustice has been done; and where the illegal testimony was admitted in gross violation of the well-settled principles which govern proof, it has been

deemed *per se* ground for a new trial, not withstanding the jury were directed to disregard it; 13 Johns. 350; 15 *id.* 239; but see 6 N. H. 333; improperly rejecting evidence tending in any degree to aid the jury in determining a material fact; 3 J. J. Marsh. 229; withdrawing testimony once legally before the jury,—unless the excluded testimony could not be used on a second trial; 4 Humphr. 22; denying to a party the right to be heard through counsel; 2 Bibb, 76; 3 A. K. Marsh. 465; erroneously refusing to grant a nonsuit; 19 Johns. 154; improperly restricting the examination or cross-examination of witnesses, or allowing too great latitude in that respect, under circumstances which constitute a clear case of abuse; 6 Barb. 383; 4 Edw. Ch. 621; refusing to permit a witness to refer to documents to refresh his memory, where by the denial, the complaining party has sustained injury; 3 Litt. 338; improperly refusing an adjournment, whereby injustice has been done; 2 South. 518; 9 Ga. 121; refusing to give such instructions to the jury as properly arise in the case, where it is manifest that the jury erred through want of instruction; 4 Ohio, 389; 1 Mo. 68; 9 *id.* 305; giving to the jury binding instructions, when there are circumstances in the case which ought to have been submitted to them,—unless the verdict is in strict accordance with the weight of evidence; 19 Wend. 402; 5 Humphr. 476; giving an erroneous exposition of the law on a point material to the issue,—unless it is certain that no injustice has been done, or the amount in dispute is very trifling, so that the injury is scarcely appreciable; 4 Conn. 356; 5 Sandf. 180; 3 Johns. 239; misleading the jury by a charge which is not explicit, or which is absurd and impossible, or contradictory, or argumentative and evasive; 9 Humphr. Tenn. 411; 11 Wend. 83; 6 Cow. 682; erroneous instruction as to the proof that is requisite; 3 Bibb, 481; 21 Me. 20; misapprehension of the judge as to a material fact, and a direction to the jury accordingly, whereby they are misled; 1 Mills, 200; instructing the jury as to the law upon facts which are purely hypothetical,—but not if the charge was correct in point of law, and the result does not show that the jury were misled by the generality of the charge; 8 Ga. 114; 2 Ala. N. S. 694; submitting as a contested point what has been admitted; 9 Conn. 216; erroneously leaving to the jury the determination of a question that should have been decided by the court, whereby they have mistaken the law; charging as to the consequences of the verdict; 1 Pick. 106; 2 Graham & W. New Tr. 595–703; 3 *id.* 705–873.

Surprise, as a ground for setting aside the verdict, is, cautiously allowed. When it is occasioned by the act of the adverse party, or by circumstances out of the knowledge and beyond the control of the party injured by it, this has sometimes been held to constitute grounds for relief; but not when he might have been fully informed by the exercise of ordinary diligence; 6 Halst. 242; although, even when the complainant is not entirely free from fault, the court, in cases where great wrong would otherwise be done, will, for the sake of promoting justice, grant a new trial. Among the cases of surprise which will justify the interposition of the court may be enumerated the following: the unexpectedly being summoned and detained as a witness or juror in another court, or sudden and serious illness, which prevents the party from attending at the trial; 3 T. B. Monr. 113; 7 *id.* 59; 4 Litt. 1; 1 Halst. 344; that the cause was brought on prematurely, in the absence of the party; 6 Dana, 89; erroneous ruling of the court as to the right to begin, which has worked manifest injustice; 4 Pick. 156; but see 8 Conn. 254, 296; perturbation of counsel, arising from sudden and dangerous sickness occurring in his family and coming to his knowledge during the trial; 14 Pick. 494; where some unforeseen accident has prevented the attendance of a material witness; 6 Mod. 22; 11 *id.* 1; 2 Salk. 645; 1 Harp. 267; that testimony beyond the reach of the party injured, and completely under the control of the opposite party, was not produced at the trial; 7 Yerg. 502; 7 Wend. 62; that competent testimony was unexpectedly ruled out on the trial; 9 Dana, 26; 2 Vt. 573; 2 J. J. Marsh. 515; where a party's own witnesses, through forgetfulness, mistake, contumacy, or perjury, testify differently than anticipated, or where evidence is unexpectedly sprung upon a party by his opponent; 8 Ga. 136; 18 Miss. 326; the withdrawal of a material witness before testifying, attended with suspicions of collusion; 25 Wend. 663; that a matertial witness was suddenly deprived of the power of testifying by a paralytic stroke, or other affection, or that the testimony of the witness was incoherent on account of his being disconcerted at the trial; 1 Root, 175; where it is discovered after the trial that a material witness who testified is interested in the event, or where it is probable that the verdict was obtained by false testimony, which the party injured could not until after the trial contradict or expose; 2 C. B. 342; 3 Burr. 1771; 1 Bingh. 339; 1 Me. 322.

New trials *on account of after-discovered testimony* are granted but rarely, and with great caution. The court, in order to set aside the verdict on this ground, must be satisfied that the evidence has come to the applicant's knowledge since the trial; 3 Stor. C. C. 1; 21 N. H. 166; that it is not owing to the want of diligence that it did not come sooner; 6 Johns. Ch. 479; 1 Blackf. 367; that it is so material that it will probably produce a different result; 1 Dudl. 85; and that it is not cumulative; 3 Woodb. & M. C. C. 348. Nor must the sole object of the newly discovered evidence be to impeach witnesses examined on the former trial; 7 Barb. 271; 11 *id.* 216; 8 Gratt. 637. The moving

party must state what the evidence is, and what diligence he has used in the preparation of his case; and his application must be accompanied by the affidavits of the newly-discovered witness, unless some cause be shown why they cannot be produced; 5 Halst. 250; 1 Tyl. Vt. 441; 22 Me. 246.

Excessive damages may be good cause for granting a new trial; first, where the measure of damages is governed by fixed rules and principles, as in actions on contracts, or for torts to property the value of which may be ascertained by evidence; second, in suits for personal injuries where, although there is no fixed criterion for assessing the damages, yet it is clear that the jury acted from passion, partiality, or corruption; 10 Ga. 37. In actions for personal torts, a new trial will not, in general, be granted on account of the smallness of the damages, unless the verdict is the result of contrivance by the defendant, or surprise on the plaintiff, or of partiality or misconduct of the jury, or unless the finding is entirely disproportioned to the injury. Where the verdict is for an amount exceeding the damages laid in the writ, it will be set aside unless the plaintiff will release the excess; 7 Wend. 330.

When the verdict is clearly against law, it will be set aside notwithstanding the jury had power to decide both the law and the fact, or the issue was one exclusively of fact and there have been concurrent verdicts by two successive juries; Dudl. 213; 4 Ga. 193. If, however, substantial justice has been done, a new trial will not be granted though the law arising on the evidence would have justified a different result; 1 Burr. 54; 4 Term, 468.

Courts are at all times reluctant to grant a new trial *on the ground that the verdict is against evidence;* and where the jury have passed upon a mere question of fact, they will only do so when the verdict is palpably against the evidence: injustice must have been done by the verdict, and there must be a probability that justice will be done on retrial; 21 Conn. 245; 5 Ohio, 509; 3 Strobh. 358. Where the verdict is founded on circumstantial evidence, the court will rarely, if ever, interfere with it; 16 Mass. 345; 11 Ill. 36. On the other hand, when the issue approximates to a purely legal question, courts are somewhat more liberal in granting new trials; 2 M'Mull. 44. The verdict will be set aside where the witnesses upon whose testimony it was obtained have since the trial been convicted of perjury; 3 Dougl. 24; so where the testimony on which the verdict is founded derives its credit from circumstances, and those circumstances are afterwards clearly falsified by affidavit; 1 B. & P. 427; 3 Grah. & W. N. Tr. 1203–1374.

The verdict may be void *for obscurity or uncertainty*; 1 S. & R. 367. It will be set aside where it is not responsive to the issue, or does not comprehend all of the issues unless the finding of one or more of the issues will be decisive of the cause; 2 Ala. N. S. 359; 11 Pick. 45. That it was not recorded in open court, or was received in the absence of the plaintiff, or was altered after it was recorded and the jury dismissed, will be ground for a new trial; 1 Ill. 109; 1 Wend. 36; 16 S. & R. 414. If rendered on Sunday, it will, in general, be void; but there are many instances in which verdicts have been sustained though rendered on that day; 1 South. 156; 15 Johns. 119; 3 Watts, 56; 13 Ohio, 490.

Courts of equity have always proceeded with great caution in awarding new trials at law. At the present day they are but seldom applied to for this purpose, as courts of law are liberal in exercising the same jurisdiction, and it has been held to be unconscionable and vexatious to bring into courts of equity a discussion which might have been had at law; 1 Sch. & L. 201. But, in general, when it would have been proper for a court of law to have granted a new trial if the application had been made while that court had the power, it is equally proper for a court of equity to do so if the application be made on grounds arising after the court of law can no longer act; 1 A. K. Marsh. 237. A court of equity will not grant a new trial at law to enable a party to impeach a witness, or because the verdict is against evidence; 1 Johns. Ch. 432. It will only interpose in cases of newly-discovered evidence, surprise, fraud, or the like, where the party is deprived of the means of defence by circumstances beyond his control; 1 Litt. 140; 2 Bibb, 241; 2 Hawks, 605; Willard, Eq. Jur. 357; 3 Grah. & W. N. Tr. 1455–1580.

A court of equity will often grant a second, and sometimes a third, fourth, and even fifth trial of a feigned issue, in cases where a court of law would not disturb a first verdict; 1 Edw. Ch. 96. This arises from the consideration that the responsibility of the decision rests upon the judge in equity; 3 Grah. & W. N. Tr. 1570, 1571.

New trials may be granted *in criminal* as well as in civil cases, at the solicitation of the defendant, when he is convicted even of the highest offences. But a person once lawfully convicted on a sufficient indictment can never after, against his consent, be a second time put in peril for the same offence, unless the former conviction was instituted by the fraudulent procurement of the defendant with a view to shield himself from adequate punishment; 2 Grah. & W. N. Tr. 61–84. Where the accused has been acquitted, and his acquittal has not been procured by his own fraud or evil practice, the law, mingling justice with mercy *in favorem vitæ et libertatis*, does not permit a new trial; 16 Conn. 54. In civil actions for the recovery of penalties, and in some cases where the form of proceeding is criminal, if the object be only to establish a civil right, as in cases of *quo warranto* and the like, new trials may be granted even after acquittal. But, in such cases, when the verdict is for the defendant it will not, in general, be disturbed

unless some rule of law be violated in the admission or rejection of evidence or in the charge of the court to the jury; 4 Term, 753; 2 Cow. 811; 2 Graham & W. New Tr. 61. See Graham & Waterman, and Hilliard on New Trials.

NEW YORK. The name of one of the original states of the United States of America.

In its colonial condition this state was governed from the period of the revolution of 1688 by governors appointed by the crown, assisted by a council, which received its appointments also from the parental government, and by the representatives of the people. 1 Story, Const. b. 1, ch. 10.

There have been three constitutions adopted by the state since its colonial period: one in 1777, which remained in force until January 1, 1823, when the second went into operation. This second constitution remained until January 1, 1847, when the present constitution, which was adopted by a convention of the people at Albany, went into force. This last constitution has since been amended in certain particulars. See 1 Rev. St. of N. Y. 82.

The qualifications of the electors are thus described, namely: "Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days and an inhabitant of this state one year next preceding any election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people.

THE LEGISLATIVE POWER.—This is lodged in a senate and assembly.

The *Senate* consists of thirty-two members, chosen, one for each senatorial district, for the term of two years, by the electors of the district.

The *Assembly* consists of one hundred and twenty-eight members, elected, one from each of the assembly districts, for the term of one year, by the people. A certain number of members is elected from each county, according to an apportionment by the legislature, and each county, except Hamilton, is to be always entitled to one member. The counties entitled to more than one member are divided into districts, each of which elects one member of the assembly. The allotment and division are to be revised after each census. No town is to be divided in forming assembly districts. The districts must contain, as nearly as possible, an equal number of inhabitants, excluding aliens. No member of the legislature can receive any civil appointment within the state, or to the senate of the United States, from the governor, or the governor and senate, or governor and legislature, during the term for which he was elected, or from any city goverment.

The constitution contains the usual provisions for organization of the legislature; making each house judge of the qualifications of members; giving it power to regulate their conduct; to choose its own officers; for the keeping and publication of a record of proceedings; for open sessions; freedom of debate; preventing one house from adjourning without the consent of the other. Local bills are not to be passed in certain cases. Art. iii. § 18. Corporations may be formed by the legislature, but only under general laws, except in cases wherein, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. Special charters may not be granted to banks, but they may be formed under general laws.

THE EXECUTIVE POWER.—The *Governor* is elected biennially, for the term of three years, by the people, or by the legislature in consequence of a failure to elect by the people. The governor must be a citizen of the United States, thirty years old at least, and have been for five years next preceding his election a resident within the state. He is commander-in-chief of the military and naval forces of the state; has power to convene the legislature (or the senate only) on extraordinary occasions, during which sessions no subjects may be acted upon except those recommended by the governor for consideration, communicates by message to the legislature, at every session, the condition of the state, and recommends such matters to them as he judges expedient; transacts all necessary business with the officers of the government, civil and military; is to take care that the laws are faithfully executed; has the power to grant reprieves, commutations, and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he has power to suspend the execution of the sentence until the case is reported to the legislature at its next meeting, when the legislature either pardons or commutes the sentence, directs the execution of the sentence, or grants a further reprieve. He must annually communicate to the legislature each case of reprieve, commutation, or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve. He has the veto power, but a bill may be passed over his veto by a vote of two-thirds of both houses.

The *Lieutenant-Governor* is elected at the same time, for the same term, and must possess the same qualifications, as the governor. He is president of the senate,—with only a casting vote therein. In case of the impeachment of the governor, of his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the state, the powers and duties of the office devolve upon the lieutenant-governor for the residue of the term or until the disability ceases. But when the governor, with the consent of the legislature, is out of the state in time of war, at the head of a military force thereof, he continues commander-in-chief of all the military force of the state. If during the vacancy of the office of governor the lieutenant-governor is impeached, displaced, resigns, dies, or becomes incapable of performing the duties of his office, or is absent from the state, the president of the senate acts as governor until the vacancy is filled or the disability ceases.

A *Secretary of State*, a *Comptroller*, a *Treasurer*, an *Attorney-General*, and a *State Engineer and Surveyor* are elected by the people biennially, for the term of two years each.

THE JUDICIAL POWER.—The *Court of Appeals* consists of seven judges, the chief judge and six associate judges, who are chosen by the electors of the state for the term of fourteen years, from

and including the first day of January next after their election. Five members of the court form a quorum, and the concurrence of four is necessary to a decision. It exercises an appellate jurisdiction for the correction of errors at law and in equity. It has exclusive jurisdiction to review upon appeal every act or determination (7 Barb. N. Y. 581; 1 N. Y. 428) made at a general term by the supreme court, or by the supreme court of the city of New York, or by the court of common pleas of the city and county of New York, in a judgment in an action of contract tried therein or brought there from another court, and, upon the appeal from such judgment, to review any intermediate order involving the merits and necessarily affecting the judgment; (2 N. Y. 416-566) in an order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken; 1 N. Y. 188, 228, 423, 534; in a final order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment. But such appeal is not allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New York, or in a justice's court in the state; Code of Proc. tit. ii.

The *Supreme Court* is composed of thirty-four judges; five of the judges reside in New York, five in the second judicial district, and four in each of the other districts into which the state is divided. The legislature may alter the districts without increasing their numbers, once after every enumeration of the inhabitants of the state. It has general jurisdiction in law and equity subject to such appellate jurisdiction of the court of appeals as is now or may be prescribed by law.

The *Court of Oyer and Terminer* is composed in each county of a justice of the supreme court, the county judge, and two justices of the peace, elected for the purpose for the term of two years by the people of the county. The supreme judge and any two of the others constitute a quorum. In the city and county of New York the court is composed of a judge of the superior court and any two of the following: the judges of the court of common pleas, the mayor, recorder, or aldermen. It is to inquire into all crimes and misdemeanors committed or triable in the county, to hear and determine all such, and to deliver the jails of all prisoners according to law.

A Court of Sessions, more fully described as the court of general sessions of the peace, is held in each county by the county judge and two justices of the peace; the former must designate the terms at which a jury is to be drawn. This court is to inquire into all the crimes and misdemeanors committed or triable in the county, and to hear, determine, and punish according to law all crimes and misdemeanors not punishable with death or imprisonment in state prison for life.

County Courts are held in each county, by a single judge, elected by the people for the term of six years. They have original civil jurisdiction only in cases where the defendants reside in the county, in which cases money or personal property not exceeding one thousand dollars in amount is demanded, for the foreclosure of mortgages on real estate, and the collection of the balance due after sale of the property, partition of real estate in the county, admeasurement of dower, management of the property of infants, mortgage and sale of the property of religious corporations, and such other original jurisdiction as the legislature may confer upon them. They have also supervision of, and an appellate jurisdiction from, the decisions of justices of the peace. The county judge acts also as surrogate in counties which have a population of less than forty thousand.

Mayors' Courts are held in the various cities, with a civil and criminal jurisdiction varying somewhat in the different cities.

Recorders' Courts are held in Utica and Oswego.

Justices of the Peace are elected in each town and certain cities and villages of New York, for the term of four years, in number and classes as directed by law.

The *Justices' Courts* of the various cities have jurisdiction in cases under the charters and by-laws where the penalty does not exceed one hundred dollars. It also extends to one hundred dollars, and, on confession of judgment, to two hundred and fifty dollars, with the exception of certain actions where the people are concerned, and where the title to land comes in question, and actions for an assault and battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, and seduction, and matters of account where the sum total of the accounts exceeds four hundred dollars, and actions against an executor or administrator. There are also justices' courts of Albany and Troy, and district courts of New York city, and the municipal court of the city of Rochester.

A *Surrogate*, whose term of office is the same as that of the county judge, is elected in each county having a population of more than forty thousand inhabitants: having less than that population, the county judge discharges the duties of the surrogate. The Code of Procedure does not apply to matters testamentary and of intestacy; and hence the rules of evidence and practice in the surrogates' courts are the same as formerly; Will. Executors, 174 *et seq.*; 26 Barb. 316. The appeal from the decision of the surrogate is to the supreme court, and from that court to the court of appeals. The former jurisdiction of the court of probate is vested in the surrogates, subject to appeal as aforesaid.

The *Superior Court of the City of New York* is composed of six judges, elected by the people, of whom one is selected by his associates as chief justice. It has jurisdiction of actions for the recovery of real property or an interest or estate therein; for the foreclosure of personal-property mortgages; for recovery of personal property distrained; for recovery of forfeitures imposed by statute; against an officer or person appointed by him for acts done in virtue of said office or appointment, where the cause has arisen or the property is situated in said city; and of all other actions where all the defendants reside or are personally served with summons within the city, and of actions against corporations having their place of business in the city; such further criminal and civil jurisdiction as may be conferred by law. There are also, the court of common pleas of the city and county of New York, the city court of Brooklyn, the superior court of Buffalo, and the city court of Yonkers.

The *Court of Common Pleas for the City and County of New York* is composed of three judges, elected by the people. It has the same jurisdiction as the superior court within its limits, and, in addition, has power to review the judgments of the marine court of New York city, and of justices in that city.

The *Marine Court of the City of New York* has the jurisdiction of justices of the peace, and also of actions arising under the charter or by-laws of New York city where the penalty is more than twenty-five and less than one hundred dollars; actions of contract for services rendered on board a vessel on the high seas, where the state courts have jurisdiction, though the damage exceeds

one hundred dollars. But no admiralty powers are given.

All the changes produced by the Code of Procedure cannot be noticed in so brief an article. The prominent ones are: 1. The abolition of the distinction between law and equity, according to the constitution, and the adoption of a new system of pleading applicable to all remedies. Code, § 140. 2. The abolition of the rule with respect to interest as a ground of exclusion of witnesses. Code, § 398. 3. The abolition of all bills of discovery, and allowing parties to the action to be examined as witnesses for and against each other. Code, § 389, as amended in 1859, stat. of 1859, p. 970. 4. Requiring the real parties in interest to be the parties to the action. Code, § 111. 5. Preventing an action from abating by the death, marriage, or other disability of a party, or by any transfer of interest if the cause of action survive, and allowing the action to be continued in the name of the party in interest. Code, 121. 6. Providing as a substitute for voluntary and compulsory references either of all or any of the issues of law or fact, or both, to one, or not exceeding three, referees. Code, 270–273.

The constitution provides for tribunals of conciliation. A court of arbitration is established by two acts, in which power is given to the chamber of commerce, of the city of New York, upon voluntary submission by the parties, either in writing or otherwise, to settle controversies and differences upon any mercantile or commercial subject. Ch. 278, Laws of 1874; and ch. 495, Laws of 1875.

NEWLY DISCOVERED EVIDENCE. **In Practice.** Proof of some new and material fact in the case, which has been ascertained since the verdict.

The discovery of such evidence will afford a ground for a new trial; but courts only interfere with verdicts for this cause under very special circumstances.

To entitle the party to relief, certain well-defined conditions are indispensable. It is a rule subject to rare exceptions, and applied perhaps with more stringency in criminal than in civil cases, that the sole object of the new evidence must not be to impeach or contradict witnesses sworn on the former trial; 7 Barb. 271; 8 Gratt. 637; it must not merely multiply testimony to any one or more of the facts already investigated, but must bring to light some new and independent truth of a different character; 3 W. & M. 348; 1 Sumn. 441; 6 Pick. 114; 10 *id.* 16; 2 Caines, 129; 8 Johns. 84; 15 *id.* 210; 4 Wend. 579; 7 W. & S. 415; 5 Ohio, 375; 11 *id.* 147; 4 Halst. 228; 1 Green, 177; 3 Vt. 72; 1 A. K. Marsh. 151; 3 *id.* 104; it must be to a point before in issue, and be so material as to impress the court with the belief that if a new trial were granted the result would probably be different; Dudl. 85; 3 Humphr. 222; it must not have been known to the party until after the trial; 3 Stor. 1; 2 Sumn. 19; 2 N. H. 166; and the least fault in not procuring and using it at the trial must not be imputable to him; 6 Johns. Ch. 482; 1 Blackf. 367; 5 Halst. 250; 7 *id.* 225; 1 Mo. 49; 11 Conn. 15; 10 Me. 218; 20 *id.* 246; 14 Vt. 415; 7 Metc. 748; 3 Grah. & W. N. Tr. 1015–1112. See NEW TRIAL.

NEWSPAPERS. Papers for conveying news, printed and distributed periodically.

NEXI. In Roman Law. Persons bound (*nexi*); that is, insolvents, who might be held in bondage by their creditors until their debts were discharged. Vicat, Voc. Jur.; Heineccius, Antiq. Rom. ad Inst. lib. 3, tit. 330; Calvinus, Lex.; Mackeldey, Civ. Law, § 486 *a*.

NEXT FRIEND. One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not *sui juris*. See PROCHEIN AMI.

NEXT OF KIN. This term is used to signify the relations of a party who has died intestate.

In general, no one comes within this term who is not included in the provisions of the statutes of distribution; 3 Atk. 422, 761; 1 Ves. Sen. 84; 28 How. Pr. 417. The phrase means relation by blood; 72 N. Y. 312. It has been held, on the other hand, that next of kin in a will means "nearest of kin;" 10 Cl. & F. 215; 63 N. C. 242. A wife cannot, in general, claim as next of kin of her husband, nor a husband as next of kin of his wife; 113 Mass. 430; 4 Ired. Eq. 56. But see 34 Barb. 410; 28 Ohio, 192. But when there are circumstances in a will which induce a belief of an intention to include them under this term, they will be so considered, though in the ordinary sense of the word they are not; Hovenden, Fr. 288, 289; 1 My. & K. 82; the same rule holds as to the interpretation of statutes; 25 Alb. L. J. 496. See LEGACY; DISTRIBUTION; DESCENT.

NEXUM (Lat.). **In Roman Law.** The transfer of the ownership of a thing, or the transfer of a thing to a creditor as a security.

In one sense *nexum* includes *mancipium*; *in* another sense, *mancipium* and *nexum* are opposed, in the same way as sale and mortgage or pledge are opposed. The formal part of both transactions consisted in a transfer *per æs et libram*. The person who became *nexus* by the effect of a *nexum* placed himself in a servile condition, not becoming a slave, his *ingenuitas* being only in suspense, and was said *nexum inire*. The phrases *nexi datio*, *nexi liberatio*, respectively express the contracting and the release from the obligation.

The Roman law as to the payment of borrowed money was very strict. A curious passage of Gellius (xx. 1) gives us the ancient mode of legal procedure in the case of debt, as fixed by the Twelve Tables. If the debtor admitted the debt, or had been condemned in the amount of the debt by a *judex*, he had thirty days allowed him for payment. At the expiration of this time he was liable to the *manus injectio*, and ultimately to be assigned over to the creditor (*addictus*) by the sentence of the prætor. The creditor was required to keep him for sixty days in chains, during which time he publicly exposed the debtor, on three *nundinæ*, and proclaimed the amount of his debt. If no person released the prisoner by paying the debt, the creditor might sell him as a slave or put him to death. If there were several creditors, the letter of the law allowed them to cut the debtor in pieces and take

their share of his body in proportion to their debt. Gellius says that there was no instance of a creditor ever having adopted this extreme mode of satisfying his debt. But the creditor might treat the debtor, who was *addictus*, as a slave, and compel him to work out his debt; and the treatment was often very severe. In this passage Gellius does not speak of *nexi*, but only of *addicti*, which is sometimes alleged as evidence of the identity of *nexus* and *addictus*, but it proves no such identity. If a *nexus* is what he is here supposed to be, the laws of the Twelve Tables could not apply; for when a man became *nexus* with respect to one creditor, he could not become *nexus* to another; and if he became *nexus* to several at once, in this case the creditors must abide by their contract in taking a joint security. This law of the Twelve Tables only applied to the case of a debtor being assigned over by a judicial sentence to several creditors, and it provided for a settlement of their conflicting claims. The precise condition of a *nexus* has, however, been a subject of much discussion among scholars. Smith, Dict. Rom. & Gr. Antiq.; MANCIPIUM.

NICHILLS. In English Practice. Debts due to the exchequer which the sheriff could not levy, and as to which he returned *nil*. These sums were transcribed once a year by the clerk of the nichills, and sent to the treasurer's remembrancer's office, whence process was issued to recover the "nichill" debts. Both of these offices were abolished in 1833; Manning's Exch. Pr. 321; Moz. & W.

NIECE. The daughter of a brother or sister. Ambl. 514; 1 Jac. 207. See NEPHEW.

NIEFE. In Old English Law. A woman born in vassalage.

NIENT COMPRISE (Law Fr. not included). An exception taken to a petition because the thing desired is not contained in that deed or proceeding whereon the petition is founded. Tomlyn, Law Dict.

NIENT CULPABLE (Law Fr. not guilty). The name of a plea used to deny any charge of a criminal nature, or of a tort.

NIENT DEDIRE (Law Fr. to say nothing).

Words used to signify that judgment be rendered against a party because he does not deny the cause of action: *i. e.* by default.

When a fair and impartial trial cannot be had in the county where the venue is laid, the practice in the English courts is, on an affidavit of the circumstances, to change it, in transitory actions; or, in local actions, they will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in another county. 1 Tidd, Pr. 8th ed. 655.

NIENT LE FAIT (Law Fr.). **In Pleading.** The same as *non est factum*, a plea by which the defendant asserts that the deed declared upon is not his deed.

NIGHT. That space of time during which the sun is below the horizon of the earth, except that short space which precedes its rising and follows its setting, during which by its light the countenance of a man may be discerned. It is night when there is daylight, *crepusculum* or *diluculum*, enough left or begun to discern a man's face withal. 1 Hale, Pl. Cr. 550; 4 Bla. Com. 224; Bacon, Abr. *Burglary* (D); 2 Russ. Cr. 32; Rosc. Cr. Ev. 278.

The common law rule has been modified by statute in some of the states, and by the stat. 9 Geo. IV. c. 69, the night, for purposes of poaching, was held to begin one hour after sunset, and end one hour before sunrise. By the stat. 24 & 25 Vict. c. 96, the night, during which a burglary may be committed, is deemed to commence at 9 P. M., and end at 6 A. M.; 4 Steph. Com. 105.

NIGHT WALKERS. Persons who sleep by day and walk by night, 5 Edw. III. c. 14; that is, persons of suspicious appearance and demeanor, who walk by night. In many of the states there are statutes against it; 1 Bish. Cr. L. § 501, n.

Watchmen may undoubtedly arrest them; and it is said that private persons may also do so; 2 Hawk. Pl. Cr. 120. But see 3 Taunt. 14; Hamm. N. P. 135. See 15 Viner, Abr. 555; Dane, Abr. Index.

NIHIL CAPIAT PER BREVE (Lat. that he take nothing by his writ). **In Practice.** The form of judgment against the plaintiff in an action, either in bar or in abatement. When the plaintiff has commenced his proceedings by bill, the judgment is *nihil capiat per billam*. Co. Litt. 363.

NIHIL DICIT (Lat. he says nothing). The name of the judgment rendered against a defendant who fails to put in a plea or answer to the plaintiff's declaration by the day assigned. In such a case, judgment is given against the defendant of course, as he says nothing why it should not. See 15 Viner, Abr. 556; Dane, Abr. Index.

NIHIL HABET (Lat. he has nothing). The name of a return made by a sheriff, marshal, or other proper officer, to a *scire facias* or other writ, when he has not been able to serve it on the defendant. 5 Whart. 367.

Two returns of *nihil* in proceedings *in rem* are, in general, equivalent to a service, Yelv. 112; 1 Cow. 70; 1 Law Rep. No. C. 491; 4 Blackf. 188; 5 S. & R. 211; 24 Penn. 491; 71 Penn. 81.

NIL DEBET (Lat. he owes nothing). **In Pleading.** The general issue in debt on simple contract. It is in the following form: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." When, in debt on specialty, the deed is the only inducement to the action, the general issue is *nil debet*. Steph. Pl. 174, n.; 8 Johns. 83; Dane, Abr. Index. In English practice,

by rule 11, Trinity Term, 1853, the plea of *nil debet* was abolished; 2 Chitty, Pl. 275.

NIL HABUIT IN TENEMENTIS (Lat.). **In Pleading.** A plea by which the defendant, who is sued by his landlord in debt for rent upon a lease, but by deed indented, denies his landlord's title to the premises, alleging *that he has no interest in the tenements.* 2 Lilly, Abr. 214; 12 Viner, Abr. 184; 15 *id.* 556.

NISI PRIUS (Lat. unless before). **In Practice.** For the purpose of holding trials by jury. Important words in the writ (*venire*) directing the sheriff to summon jurors for the trial of causes depending in the superior courts of law in England, which have come to be adopted, both in England and the United States, to denote those courts or terms of court held for the trial of civil causes with the presence and aid of a jury.

The origin of the use of the term is to be traced to a period anterior to the institution of the commission of *nisi prius* in its more modern form. By Magna Charta it was provided that the common pleas should be held in one place, and should not follow the person of the king; and by another clause, that assizes of novel disseisin and of mort d'ancestor, which were the two commonest forms of actions to recover land, should be held in the various counties before the justices in eyre. A practice obtained very early, therefore, in the trial of trifling causes, to continue the cause in the superior court from term to term, provided the justices in eyre did not sooner (*nisi justiciarii diu*) come into the county where the cause of action arose, in which case they had jurisdiction when they so came. Bracton, l. 3, c. 1, § 11. By the statute of *nisi prius*, 13 Edw. I. c. 30, enforced by 14 Edw. III. c. 16, justices of assize were empowered to try common issues in trespass and other suits, and return them, when tried, to the superior court, where judgment was given. The clause was then left out of the continuance and inserted in the venire, thus: "*Præcipimus tibi quod venire facias coram justiciaris nostris apud Westm. in Octavis Scti Michælis*, nisi *talis et talis, tali die et loco, ad partes illas venerint, duodecim*," etc. (we command you that you cause to come before our justices at Westminister, on the octave of Saint Michael, *unless* such and such a one, on such a day and place shall come to those parts, twelve, etc.). Under the provisions of 42 Edw. III. c. 11, the clause is omitted from the venire, and the jury is respited in the court above, while the sheriff summons them to appear before the justices, upon a *habeas corpora juratorum*, or, in the king's bench, a *distringas*. See Sell. Pr. Introd. lxv.; 1 Spence, Eq. Jur. 116; 3 Shars. Bla. Com. 352–354; 1 Reeve, Hist. Eng. Law, 245, 382.

See, also, ASSIZE; COURTS OF ASSIZE AND NISI PRIUS; JURY.

NISI PRIUS ROLL. In Practice. The transcript of a case made from the record of the superior court in which the action is commenced, for use in the nisi prius court.

It includes a history of all the proceedings in the case, including the declaration, plea, replication, rejoinder, issue, etc. It must be presented in proper manner to the nisi prius court. When a verdict has been obtained and entered on this record, it becomes the *postea*, and is returned to the superior court.

Under the Judicature Act of 1875, 1st Sched. Ord. xxxvi. r. 17, the party entering the action for trial is to deliver to the officer a copy of the pleadings for the use of the judge. Moz. & W.

NO AWARD. The name of a plea in an action or award. 2 Ala. 520; 1 N. Chipm. 131; 3 Johns. 367.

NO BILL. Words frequently indorsed on a bill of indictment by the grand jury when they have not sufficient cause for finding a true bill. They are equivalent to *Not found*, or *Ignoramus*. 2 N. & M'C. 558.

NOBILE OFFICIUM. In Scotch Law. An equitable power of the court of sessions, by which it is able, to a certain extent, to give relief when none is possible at law. Stair, Inst. b. iv. tit. 3, § 1; Erskine, Inst. 1. 3. 22; Bell, Dict.

NOBILITY. An order of men, in several countries, to whom special privileges are granted. The constitution of the United States provides, Art. I. § 10, that "no state shall grant any title of nobility," and § 9, that "no title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any title of any kind, whatever, from any king, prince, or foreign state." It is singular that there should not have been a general prohibition against any citizen whatever, whether in private or public life, accepting any foreign title of nobility. An amendment for this purpose has been recommended by congress, but it has not been ratified by a sufficient number of states to make it a part of the constitution, probably from a growing sense that it is unnecessary; Rawle, Const. 120; Story, Const. §§ 1350–52; Fed. No. 84. A marshal of the United States cannot at the same time hold the office of commercial agent of a foreign nation; 8 Opin. of Att. Gen. 409.

NOCUMENTUM (Lat. harm, nuisance). **In Old English Law.** A thing done whereby another man is annoyed in his free lands or tenements. Also, the *assize* or writ lying for the same. Fitzh. N. B. 183; Old N. B. 108, 109. Manw. For. Laws, c. 17, divides *nocumentum* into *generale*, *commune*, *speciale*. Reg. Orig. 197, 199; Coke, Will Case. *Nocumentum* was also divided into *damnosum*, for which no action lay, it being done by an irresponsible agent, and *injuriosum et damnosum*, for which there were several remedies. Bracton, 221; Fleta, lib. 4, c. 26, § 2.

NOLLE PROSEQUI. In Practice. An entry made on the record, by which the prosecutor or plaintiff declares that he will proceed no further.

A *nolle prosequi* may be entered either in a criminal or a civil case. In *criminal* cases, before a jury is impanelled to try an indictment, and also after conviction, the attorney-general has power to enter a *nolle prosequi*

without the consent of the defendant; but after a jury is impanelled a *nolle prosequi* cannot be entered without the consent of the defendant; 17 Pick. 395; 20 *id.* 356; 1 Gray, 490; 7 *id.* 328; 12 Vt. 93; 3 Hawks, 613; 7 Humphr. 152; 1 Bail. 151; 9 Ga. 306. It is for the prosecuting officer to enter a nol. pros. in his discretion; 3 Hawks, 613; but in some states leave must be obtained of the court; 1 Hill, N. Y. 377; 1 Va. Cas. 139; 12 Vt. 93; 7 Smith, Penn. Laws, 227.

It may be entered as to one of several defendants; 11 East, 307.

The effect of a *nolle prosequi*, when obtained, is to put the defendant without day; but it does not operate as an acquittal; for he may be afterwards reindicted, and, it is said, even upon the same indictment fresh process may be awarded; 6 Mod. 261; 1 Salk. 59; Comyns, Dig. *Indictment* (K); 2 Mass. 172; 4 Cush. 235; 13 Ired. 256. See 3 Cox, C. C. 93; 7 Humphr. 159.

In *civil cases*, a *nolle prosequi* is considered not to be of the nature of a *retraxit* or release, as was formerly supposed, but an agreement only not to proceed either against *some* of the defendants, or as to *part* of the suit. See 1 Wms. Saund. 207, note 2, and the authorities there cited; 1 Chitty, Pl. 546. A *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff; 3 Term, 511; 1 Wils. 98.

In civil cases, a *nolle prosequi* may be entered as to one of several counts; 7 Wend. 301; or to one of several defendants; 1 Pet. 80; as in the case of a joint contract, where one of two defendants pleads infancy, the plaintiff may enter a *nolle prosequi* as to him and proceed against the other; 1 Pick. 500. See, generally, 1 Pet. 74; 2 Rawle, 334; 1 Bibb, 337; 4 *id.* 387, 454; 3 Cow. 335, 374; 5 Gill & J. 489; 5 Wend. 224; 12 *id.* 110; 20 Johns. 126; 3 Watts, 460.

NOMEN (Lat.). **In Civil Law.** A name of a person or thing. In a stricter sense, the name which declared the *gens* or family: as, Porcius, Cornelius; the *cognomen* being the name which marked the individual: as Cato, Marcus; *agnomen*, a name added to the cognomen for the purpose of description. The name of the person himself: *e. g. nomen curiis addere.* The name denoting the condition of a person or class: *e. g. nomen liberorum*, condition of children. Cause or reason (*pro causa aut ratione*): *e. g. nomine culpæ*, by reason of fault. A mark or sign of any thing, corporeal or incorporeal. *Nomen supremum*, *i. e.* God. Debt, or obligation of debt. A debtor. See Vicat, Voc. Jur.; Calvinus, Lex.

In Old English Law. A name. The Christian name, *e. g.* John, as distinguished from the family name: it is also called *prænomen.* Fleta, lib. 4, c. 10, §§ 7, 9; Law Fr. & Lat. Dict.

In Scotch Law. *Nomen debiti.* Right to payment of a debt.

NOMEN COLLECTIVUM (Lat.). A word in the singular number which is to be understood in the plural in certain cases.

Misdemeanor, for example, is a word of this kind, and when in the singular may be taken as *nomen collectivum* and including several offences. 2 B. & Ad. 75. *Heir*, in the singular, sometimes includes all the heirs. *Felony* is not such a term.

NOMEN GENERALISSIMUM (Lat.). A most universal or comprehensive term: *e.g.* land. 2 Bla. Com. 19; 3 *id.* 172; Tayl. Law Gloss. So *goods.* 2 Will. Ex. 1014.

NOMINAL DAMAGES. In Practice. A trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.

Wherever any act injures another's right, and would be evidence in future in favor of a wrong-doer, an action may be obtained for an invasion of the right without proof of any specific injury; 1 Wms. Saund. 346 *a*; 28 N. H. 438; 13 Conn. 269; and wherever the breach of an agreement or the invasion of a right is established, the law infers some damage, and if none is shown will award a trifling sum: as, a penny, one cent, six and a quarter cents, etc.; 14 Ill. 301; 4 Denio, 554; Sedgw. Dam. 47; Mayne, Dam. 5.

Thus, such damages may be awarded in actions for flowing lands; 2 Stor. 661; 1 Rawle, 27; 12 Me. 183; 28 N. H. 438; injuries to commons; 2 East, 154; violation of trademarks; 4 B. & Ad. 410; and see 7 Cush. 322; 2 R. I. 566; infringement of patents; 1 Gall. 429, 483; diversion of water-courses; 5 B. & Ad. 1; 1 Bingh. N. C. 549; 17 Conn. 288; 2 Ill. 544; 6 Ind. 39; 32 N. H. 90; but see 21 Ala. N. S. 309; 6 Ohio St. 187; trespass to lands; 24 Wend. 188; 2 Tex. 206; see 4 Jones, No. C. 139; neglect of official duties, in some cases, 5 Mete. Mass. 517; 12 *id.* 535; 1 Denio, 548; 27 Vt. 563; 23 *id.* 306; 12 N. H. 341; breach of contracts; 1 Du. N. Y. 363; 2 Hill, N. Y. 644; 5 *id.* 290, 505; 6 Md. 274; and many other cases where the effect of the suit will be to determine a right; 2 Wils. 414; 12 Ad. & E. 488; 3 Scott, N. R. 390; 13 Conn. 361; 20 Mo. 603; 28 Me. 505; 19 Miss. 98; 2 La. An. 907. And see, in explanation and limitation; 10 B. & C. 145; 14 C. B. 595; 1 Q. B. 636; 18 *id.* 252; 22 Vt. 231; 1 Dutch. 255; 14 B. Monr. 330; 5 Ind. 250; 6 Rich. 75.

The title or right is as firmly established as though the damages were substantial; Sedgw. Dam. 47. As to its effect upon costs, see Sedgw. Dam. 55; 2 Metc. Mass. 96; 1 Dow, P. C. 201; 1 Curt. C. C. 434; 22 Vt. 231.

NOMINAL PARTNER. One who allows his name to appear as a member of a firm, wherein he has no real interest, is liable as a partner to strangers who have no notice

of his want of interest in the partnership; 2 Steph. Com. 101.

NOMINAL PLAINTIFF. One who is named as the plaintiff in an action, but who has no interest in it, having assigned the cause or right of action to another, for whose use it is brought.

In general, he cannot interfere with the rights of his assignee, nor will he be permitted to discontinue the action, or to meddle with it; 1 Wheat. 233; 7 Cra. 152; 1 Johns. Cas. 411; 3 *id.* 242; 1 Johns. 532, n.; 3 *id.* 426; 11 *id.* 47; 12 *id.* 237; 1 Phill. Ev. 90, Cowen's note, 172; Greenl. Ev. § 173.

NOMINATE CONTRACT. A contract distinguished by a particular name, the use of which name determines the rights of all the parties to the contract: as, purchase and sale, hiring, partnership, loan for use, deposit, and the like. The law thus supersedes the necessity for special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary to the explication of that contract. In Roman law there were twelve nominate contracts, with a particular action for each. Bell, Dict. *Nominate and Innominate;* Mackeldey, Civ. Law, §§ 395, 408; Dig. 2. 14. 7. 1.

NOMINATION (from Lat. *nominare*, to name). An appointment: as I nominate A B executor of this my last will.

A proposal. The word nominate is used in this sense in the constitution of the United States, art. 2, s. 2, § 2: the president "shall nominate, and by and with the consent of the senate shall appoint, ambassadors," etc.

NOMINE PŒNÆ (Lat. in the nature of a penalty). **In Civil Law.** A condition annexed to heirship by the will of the deceased person. Domat, Civ. Law; Hallifax, Anal.

At Common Law. A penalty fixed by covenant in a lease for non-performance of its conditions. 2 Lilly, Abr. 221.

It is usually a gross sum of money, though it may be any thing else, appointed to be paid by the tenant to the reversioner, if the duties are in arrear, in addition to the duties themselves. Hamm. N. P. 411, 412.

To entitle himself to the *nomine pœnæ*, the landlord must make a demand of the rent on the very day, as in the case of a re-entry; 1 Saund. 287 *b*, note; 7 Co. 28 *b*; Co. Litt. 202 *a*; 7 Term, 117. A distress cannot be taken for a *nomine pœnæ* unless a special power to distrain be annexed to it by deed; 3 Bouvier, Inst. n. 2451. See Bacon, Abr. *Rent* (K 4); Woodf. Landl. & T. 253; Dane, Abr. Index.

NOMINEE. One who has been named or proposed for an office.

NON ACCEPTAVIT (Lat. he did not accept). **In Pleading.** The name of a plea to an action of assumpsit brought against the drawee of a bill of exchange upon a supposed acceptance by him. See 4 M. & G. 561.

NON-ACCESS. The non-existence of sexual intercourse between husband and wife is generally expressed by the words non-access of the husband to the wife; which expressions, in a case of bastardy, are understood to mean the same thing. 2 Stark. Ev. 218, n.

In Pennsylvania, when the husband has access to the wife, no evidence short of his absolute impotence is sufficient to bastardize the issue; 6 Binn. 283.

In the civil law the maxim is, *Pater is est quem nuptiæ demonstrant.* Toullier, tom. 2, n. 787. The Code Napoléon, art. 312, enacts "*que l'enfant conçu pendant le mariage a pour père le mari.*" See, also, 1 Browne, Penn. Appx. xlvii.

A married woman cannot prove the non-access of her husband. See 8 East, 193, 202; 11 *id.* 132; 12 *id.* 550; 13 Ves. 58; 4 Term, 251, 336; 6 *id.* 330.

NON-AGE. By this term is understood that period of life from birth till the arrival of twenty-one years. In another sense it means under the proper age to be of ability to do a particular thing: as, when non-age is applied to one under the age of fourteen, who is unable to marry.

NON ASSUMPSIT (Lat. he did not undertake). **In Pleading.** The general issue in an action of assumpsit.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise, in manner and form as the said A B hath above complained. And of this he puts himself upon the country."

Under this plea almost every matter may be given in evidence, on the ground, it is said, that as the action is founded on the contract, and the injury is the non-performance of it, evidence which disaffirms the obligation of the contract, at the time when the action was commenced, goes to the gist of the action. Gilbert, C. P. 65; Salk. 279; 2 Stra. 738; 1 B. & P. 481. See 12 Viner, Abr. 189; Comyns, Dig. *Pleader* (2 G 1).

NON ASSUMPSIT INFRA SEX ANNOS (Lat. he has not undertaken within six years). **In Pleading.** The plea by which, when pleadings were in Latin, the defendant alleged that the obligation was not undertaken and the right of action had not accrued within six years, the period of limitation of the right to bring suit.

NON BIS IN IDEM. In Civil Law. A phrase which signifies that *no one shall be twice tried for the same offence:* that is, that when a party accused has been once tried by a tribunal in the last resort, and either convicted or acquitted, he shall not again be tried. Code, 9. 2. 9. 11; Merlin, Répert. See JEOPARDY.

NON CEPIT MODO ET FORMA (Lat. he did not take in manner and form). **In Pleading.** The plea which raises the

general issue in an action of replevin; or rather which involves the principal part of the declaration, for, properly speaking, there is no general issue in replevin; Morris, Repl. 142.

Its form is "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the said cattle (*or*, goods and chattels, according to the subject of the action) in the said declaration mentioned, or any of them, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

It denies the taking the things and having them in the place specified in the declaration, both of which are material in this action. Stephen, Pl. 183, 184; 1 Chitty, Pl. 490.

NON-CLAIM. An omission or neglect by one entitled to make a demand within the time limited by law: as, when a continual claim ought to be made, a neglect to make such claim within a year and a day.

NON COMPOS MENTIS (Lat. not of sound mind, memory, or understanding). A generic term, including all the species of madness, whether it arise from idiocy, sickness, lunacy, or drunkenness. Co. Litt. 247; 4 Co. 124; 1 Phill. 100; 4 Comyns, Dig. 613; 5 *id.* 186; Shelf. Lun. 1; IDIOCY; LUNACY.

In some states, idiots and lunatics are expressly excluded from the right of suffrage; and it has been supposed that these classes, by the common political law of England and of this country, were excluded from exercising the right of suffrage even though not prohibited therefrom by any express constitutional or statutory provisions; Cooley, Const. Lim. 753.

NON CONCESSIT (Lat. he did not grant). **In English Law.** The name of a plea by which the defendant denies that the crown granted to the plaintiff by letters-patent the rights which he claims as a concession from the king: as, for example, when a plaintiff sues another for the infringement of his patent right, the defendant may deny that the crown has granted him such a right. It does not deny the grant of a patent, but of the patent as described in the plaintiff's declaration; 3 Burr. 1544; 6 Co. 15 *b*. Also a plea resorted to by a stranger to a deed, because estoppels do not hold with respect to strangers. It brought into issue the title of the grantor as well as the operation of the deed; Whart. Dic.

NON-CONFORMISTS. In English Law. A name given to certain dissenters from the rites and ceremonies of the church of England.

NON CONSTAT (Lat. it does not appear. It is not certain). Words frequently used, particularly in argument, to express dissatisfaction with the conclusions of the other party: as, it was moved in arrest of judgment that the declaration was not good, because *non constat* whether A B was seventeen years of age when the action was commenced. Swinb. pt. 4, § 22, p. 331.

NON CULPABILIS (Lat.). **In Pleading.** Not guilty. It is usually abbreviated *non cul.*; 16 Viner, Abr. 1; 2 Gabb. Cr. Law, 317.

NON DAMNIFICATUS (Lat. not injured). **In Pleading.** A plea in the nature of a plea of performance to an action of debt on a bond of indemnity, by which the defendant asserts that the plaintiff has received no damage. 1 B. & P. 640, n. *a*; 1 Taunt. 428; 1 Saund. 116, n. 1; 2 *id.* 81; 7 Wentw. Pl. 615, 616; 1 H. Blackst. 253; 14 Johns. 177; 5 *id.* 42; 20 *id.* 153; 10 Wheat. 396; 405; 3 Halst. 1.

NON DECIMANDO. See DE NON DECIMANDO.

NON DEDIT. In Pleading. The general issue in formedon. See NE DONA PAS.

NON DEMISIT (Lat. he did not demise). **In Pleading.** A plea proper to be pleaded to an action of debt for rent, when the plaintiff declares on a parol lease. Gilb. Debt, 436, 438; Bull. N. P. 177; 1 Chitty, Pl. 477. A plea in bar, in replevin, to an avowry for arrears of rent, that the avowant did not demise. Morris, Repl. 179; 5 A. & E. N. S. 373.

It cannot be pleaded when the demise is stated to have been by indenture. 12 Viner, Abr. 178; Comyns, Dig. *Pleader* (2 W 48). See Jud. Act, 1875, Ord. xix. rr. 20, 23.

NON DETINET (Lat. he does not detain). **In Pleading.** The general issue in an action of detinue. Its form is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not detain the said goods and chattels (or "deeds and writings," according to the subject of the action) in the said declaration specified; or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

It puts in issue the detainer only: a justification must be pleaded specially. 8 Dowl. Pract. Cas. 347. It is a proper plea to an action of debt on a simple contract in the case of executors and administrators. 6 East, 549; Bacon, Abr. *Pleas* (I); 1 Chitty, Pl. 476. See Jud. Act, 1875, Ord. xix. rr. 20, 23. See DETINET.

NON EST FACTUM (Lat. is not *his* deed). **In Pleading.** A plea to an action of debt on a bond or other specialty.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that the said supposed writing obligatory (or "indenture," or "articles of agreement," according to the subject of the action) is not his deed. And of this he puts himself upon the country." 6 Rand. 86; 1 Litt. 158.

It is a proper plea when the deed is the foundation of the action; 1 Wms. Saund. 38,

note 3; 2 *id.* 187 *a*, note 2; 2 Ld. Raym. 1500; 11 Johns. 476: and cannot be proved as declared on; 4 East, 585; on account of non-execution; 6 Term, 317; or variance in the body of the instrument; 1 Campb. 70; 11 East, 633; 6 Taunt. 394; 4 Maule & S. 470; 2 D. & R. 662. Under this plea the plaintiff may show that the deed was void *ab initio;* 2 Wils. 341; 2 Campb. 272; 3 *id.* 33; 12 Mod. 101; 1 Ld. Raym. 315; 12 Johns. 337; 13 *id.* 430; 10 S. & R. 25; 14 *id.* 208; see 2 Salk. 275; 6 Cra. 219; or became so after making and before suit; 5 Co. 119 *b*; 11 *id.* 27; 4 Cruise, Dig. 368. See 1 Chitty, Pl. 417, n.

In covenant, the defendant may, under this plea, avail himself of a mis-statement or omission of a qualifying covenant; 2 Stra. 1146; 9 East, 188; 11 *id.* 639; 1 Campb. 70; 4 *id.* 20; or omission of a condition precedent; 11 East, 639; 7 D. & R. 249. See Jud. Act, 1875, Ord. xix. rr. 20, 23.

NON EST INVENTUS (Lat. he is not found). **In Practice.** The sheriff's return to a writ requiring him to arrest the person of the defendant, which signifies that he is *not to be found* within his jurisdiction. The return is usually abbreviated *N. E. I.* Chitty, Pr. The English form "not found" is also commonly used.

NON-FEASANCE. The non-performance of some act which ought to be performed.

When a legislative act requires a person to do a thing, its non-feasance will subject the party to punishment: as, if a statute require the supervisors of the highways to repair such highways, the neglect to repair them may be punished. See 1 Russ. Cr. 48. See, also, MANDATUM.

NON FECIT (Lat. he did not make it). The name of a plea, for example, in an action of assumpsit on a promissory note. 3 M. & G. 446. Rarely used.

NON FECIT VASTUM CONTRA PROHIBITIONEM (Lat. he did not commit waste against the prohibition). **In Pleading.** The name of a plea to an action founded on a writ of estrepement, that the defendant did not commit waste contrary to the prohibition. 2 Bla. Com. 226, 227.

NON IMPEDIVIT (Lat. he did not impede). **In Pleading.** The plea of the general issue in *quare impedit.* 3 Bla. Com. 305; 3 Woodd. Lect. 36. In law French, *ne disturba pas.*

NON INFREGIT CONVENTIONEM (Lat. he has not broken the covenant). **In Pleading.** A plea in an action of covenant. This plea is not a general issue: it merely denies that the defendant has broken the covenants on which he is sued. It being in the negative, it cannot be used where the breach is also in the negative. Bacon, Abr. *Covenant* (L); 3 Lev. 19; 2 Taunt. 278; 1 Aik. 150; 4 Dall. 436; 7 Cow. 71.

NON-JOINDER. In Pleading. The omission of one or more persons who should have been made parties to a suit at law or in equity, as plaintiffs or defendants.

IN EQUITY. Parties may be omitted when the number is great. 1 Smedes & M. 404. The relief granted in such cases will be so modified as not to affect the interests of others; 1 Pet. 299; 2 Paine, 536; 11 Ill. 254; 2 Johns. Ch. 242. See PARTIES. It must be taken advantage of before the final hearing; Ril. Ch. 138; 1 Ala. N. S. 580; 18 *id.* 576; 24 Conn. 586; 1 Des. 315; 1 Stockt. Ch. 401; 10 Paige, Ch. 445; 2 Sandf. Ch. 17; 2 Iowa, 55; 2 McLean, 376; except in very strong cases; 1 Pet. 299; as, where a party indispensable to rendering a decree appears to the court to be omitted; 14 Vt. 178; 19 Ala. N. S. 213; 5 Ill. 424; 24 Me. 119. The objection may be taken by demurrer, if the defect appear on the face of the bill; 5 Ill. 424; 1 Des. 315; 8 Ga. 506; 19 Ala. N. S. 121; 4 Rand. 451; or by plea, if it do not appear; 9 Mo. 605. See 3 Cra. 220. The objection may be avoided by waiver of rights as to the party omitted; 4 Wisc. 54; or a supplemental bill filed, in some cases; 4 Johns. Ch. 605. It will not cause dismissal of the bill in the first instance; 3 Cra. 189; 6 Conn. 421; 17 Ala. 270; 1 T. B. Monr. 189; 1 Dev. Eq. 354; 1 Hill, So. C. 53; but will, if it continues after objection made; 17 Ala. 270; 5 Mas. 561; without prejudice; 5 Mas. 561; 1 J. J. Marsh. 76; 3 *id.* 103; 6 *id.* 622; 4 .B Monr. 594; 6 *id.* 330; 7 Paige, Ch. 451; 1 Sandf. Ch. 46. The cause is ordered to stand over in the first instance; 20 Me. 59; 9 Cow. 320; 2 Edw. Ch. 242.

IN LAW. See ABATEMENT; PARTIES.

In England, the Judicature Act of 1875, Ord. xvi., has made very full provisions as to the joinder of parties, and the consequences of misjoinder and non-joinder. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.

NON JURIDICUS. See DIES NON.

NON JURORS. In English Law. Persons who refuse to take the oaths, required by law, to support the government. See 1 Dall. 170.

NON LIQUET (Lat. it is not clear). **In Civil Law.** Words by which the judges (*judices*), in a Roman trial, were accustomed to free themselves from the necessity of deciding a cause when the rights of the parties were doubtful. On the tablets which were given to the judges wherewith to indicate their judgment, was written N. L. Vicat, Voc. Jur.

NON OBSTANTE. In English Law. These words, which literally signify *notwithstanding*, are used to express the act of the English king by which he dispenses with the law, that is, authorizes its violation.

He cannot by his license or dispensation make an offence dispunishable which is *malum in se;* but in certain matters which are *mala*

prohibita he may, to certain persons and on special occasions, grant a *non obstante*. Vaugh. 330–359; Lev. 217; Sid. 6, 7; 12 Co. 18; Bacon, Abr. *Prerogative* (D 7); 2 Reeve, Eng. L. C. 8, p. 83. But the doctrine of *non obstante*, which set the prerogative above the laws, was demolished by the bill of rights at the revolution; 1 W. & M. Stat. 2 c. 2; 1 Bla. Com. 342; 1 Steph Com. 460. See JUDGMENT NON OBSTANTE VEREDICTO.

NON OBSTANTE VEREDICTO. Notwithstanding the verdict. See JUDGMENT NON OBSTANTE VEREDICTO.

NON OMITTAS (Lat. more fully, *non omittas propter libertatem*, do not omit on account of the liberty or franchise). **In Practice.** A writ which lies when the sheriff returns on writ to him directed, that he hath sent to the bailiff of such a franchise, which hath return of writs, and he hath not served the writ; then the plaintiff shall have this writ directed to the sheriff, that he *omit not on account of any franchise*, but himself enter into the franchise and execute the king's writ.

This clause is now usually inserted in all processes addressed to sheriffs. Wharton, Lex.; 2 Will. IV. c. 39; 3 Chitty, Stat. 494; 3 Chitty, Pr. 190, 310.

NON-PLEVIN. In Old English Law. A neglect to replevin land taken into the hands of the king upon default, within fifteen days, by which seisin was lost, as by default. Heugh. de Magn. Ch. c. 8. By 9 Edw. III. c. 2, no man shall lose his land by *non-plevin*.

NON PROS. An abbreviation of *non prosequitur*, he does not pursue. Where the plaintiff, at any stage of the proceedings, fails to prosecute his action, or any part of it, in due time, the defendant enters *non prosequitur*, and signs final judgment, and obtains costs against the plaintiff, who is said to be *non pros'd*. 2 Archb. Pr. Chitty ed. 1409; 3 Bla. Com. 296; 1 Tidd, Pr. 458; 3 Chitty, Pr. 10; Caines, Pract. 102. The name *non pros.* is applied to the judgment so rendered against the plaintiff; 1 Sell. Pr., and authorities above cited.

In modern English practice under the Jud. Act, 1875, a plaintiff, failing to deliver a statement of his claim in due time, may have his action dismissed for want of prosecution. And the same course may be taken with a plaintiff who fails to comply with an order to answer interrogatories; besides that the party so making default renders himself liable to "attachment." If the plaintiff fail in due time to give "notice of trial," the defendant may do so for him; Moz. & W.

NON-RESIDENCE. In Ecclesiastical Law. The absence of spiritual persons from their benefices.

NON-RESIDENTS. Service of process on non-resident defendants is void, excepting cases which proceed *in rem*, such as proceedings in admiralty or by foreign attachment, in which the property of a non-resident debtor is seized as security for the satisfaction of any judgment that may be obtained against him.

NON SUBMISSIT (Lat.). The name of a plea to an action of debt, or a bond to perform an award, by which the defendant pleads that he did not submit. Bacon, Abr. *Arbitration, etc.* (G).

NON SUM INFORMATUS (Lat.). **In Pleading.** I am not informed. See JUDGMENT.

NON TENENT INSIMUL (Lat. they do not hold together). **In Pleading.** A plea to an action in partition, by which the defendant denies that he holds the property which is the subject of the suit, together with the complainant or plaintiff.

NON TENUIT (Lat. he did not hold). **In Pleading.** The name of a plea in bar in replevin, when the defendant has avowed for rent-arrear, by which the plaintiff avows that he did not hold in manner and form as the avowry alleges; Rose. Real Act. 628.

NON-TENURE. In Pleading. A plea in a real action, by which the defendant asserted that he did not hold the land, or at least some part of it, as mentioned in the plaintiff's declaration; 1 Mod. 250; in which case the writ abates as to the part with reference to which the plea is sustained. 8 Cra. 242. It may be pleaded with or without a disclaimer. It was a dilatory plea, though not strictly in abatement; 2 Saund. 44, n. 4; Dy. 210; Booth, Real Act. 179; 3 Mass. 312; 11 *id.* 216; but might be pleaded as to part along with a plea in bar as to the rest; 1 Lutw. 716; Rast. Ent. 231 *a*, *b*; and was subsequently considered as a plea in bar; 14 Mass. 239; 1 Me. 54; 2 N. H. 10; Bacon, Abr. *Pleas* (I 9).

NON-TERM. The vacation between two terms of a court.

NON-USER. The neglect to make use of a thing.

A right which may be acquired by use may be lost by non-user; and an absolute discontinuance of the use for twenty years affords presumption of the extinguishment of the right in favor of some other adverse right. 5 Whart. 584; 23 Pick. 141. See ABANDONMENT; EASEMENT.

Every public officer is required to use his office for the public good: a non-user of a public office is, therefore, a sufficient cause of forfeiture; 2 Bla. Com. 153; 9 Co. 50. *Non-user* for a great length of time will have the effect of repealing an old law. But it must be a very strong case which will have that effect; 13 S. & R. 452; 1 Bouvier, Inst. n. 94.

NONSENSE. That which in a written agreement or will is unintelligible.

It is a rule of law that an instrument shall be so construed that the whole, if possible, shall stand. When a matter is written grammatically right, but it is unintelligible and the

whole makes nonsense, some words cannot be rejected to make sense of the rest; 1 Salk. 324; but when matter is nonsense by being contrary and repugnant to some precedent sensible matter, such repugnant matter is rejected; 14 Viner, Abr. 142; 15 *id.* 560. The maxim of the civil law on this subject agrees with this rule: Quæ in testamento ita sunt scripta, ut intelligi non possent: perinde sunt, ac si scripta non essent; Dig. 50. 17. 73. 3. See AMBIGUITY; CONSTRUCTION; INTERPRETATION.

In pleading, when matter is nonsense by being contradictory and repugnant to something precedent, the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected: as in ejectment where the declaration is of a demise on the *second* day of January, and that the defendant *postea scilicet*, on the *first* of January, ejected him, here the *scilicet* may be rejected as being expressly contrary to the *postea* and the precedent matter; 5 East, 255; 1 Salk. 324.

NONSUIT. The name of a judgment given against the plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue.

A *voluntary* nonsuit is an abandonment of his cause by plaintiff, who allows a judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict; 1 Dutch. 556.

An *involuntary* nonsuit takes place when the plaintiff, on being called, when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury could find a verdict; 13 Johns. 334.

In English practice, when issue has been joined, and the plaintiff neglects to bring on the issue to be tried during or before the following term and vacation, etc., the defendant may give twenty days' notice to the plaintiff to bring on the issue, to be tried at the sittings or assizes next after the expiration of the notice; and if plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of such notice of defendant, the defendant may suggest on record that the plaintiff has failed to proceed to trial, etc., and may sign judgment for his costs: provided that the judge may have power to extend time for proceeding to trial with or without terms; Com. Law Proc. Act 1852, §§ 100, 101; 3 Chitty, Stat. 519, 550.

A nonsuit is no bar to another action for the same cause. The courts of the United States; 1 Pet. 469, 476; 1 McCrary, 436; 9 Ind. 551; 14 Ark. 706; *Wisconsin;* 50 Wis. 247; *Massachusetts;* 6 Pick. Mass. 117; *Tennessee;* 2 Ov. Tenn. 57; 4 Yerg. 528; and *Virginia;* 1 Wash. Va. 87, 219; cannot order a nonsuit against a plaintiff who has given evidence of his claim. In *Alabama,* unless authorized by statute, the courts cannot enter a nonsuit; 1 Ala. 75; 4 *id.* 42. See 22 Ala. N. S. 613.

In *New York;* 12 Johns. 299; 13 *id.* 334; 1 Wend. 376; *South Carolina;* 2 Bay, 126, 445; 2 Bail. 321; 2 M'Cord, 26; *Maine;* 2 Me. 5; 42 *id.* 259; *New Hampshire;* 26 N. H. 351; 31 *id.* 92; *Ohio;* 4 Ohio, 628; *Illinois;* 17 Ill. 494; *Florida;* 5 Fla. 476; *Indiana;* 9 Ind. 179; *Georgia;* 16 Ga. 154; *California;* 1 Cal. 108, 125, 221; *Missouri;* 19 Mo. 101; a nonsuit may, in general, be ordered where the evidence is insufficient to support the action, but not till final submission of the cause. See 3 Chitty, Pr. 910; 1 Archb. Pr. 787; Bacon, Abr.; 15 Viner, Abr. 560; 3 Bla. Com. 376; 2 Tidd. Pr. 916 *et seq*; 1 T. & H. Pr. § 715.

NORTH CAROLINA. The name of one of the original states of the United States of America.

The territory which now forms this state was included in the grant made in 1663 by Charles II., to Lord Clarendon and others, of a much more extensive country. The boundaries were enlarged by a new charter granted by the same prince to the same proprietaries in the year 1665. By this charter the proprietaries were authorized to make laws, with the assent of the freemen of the province or their delegates, and they were invested with various other powers. Being dissatisfied with the form of government, the proprietaries procured the celebrated John Locke to draw up a plan of government for the colony, which was adopted, and proved to be impracticable: it was highly exceptionable on account of its disregard of the principles of religious toleration and national liberty, which are now universally admitted. After a few years of unsuccessful operation it was abandoned. The colony had been settled at two points, one called the Northern and the other the Southern settlement, which were governed by separate legislatures. In 1729 the proprietaries surrendered their charter, when it became a royal province, and was governed by a commission and a form of government in substance similar to that established in other royal provinces. In 1732 the territory was divided, and the divisions assumed the names of North Carolina and South Carolina.

A constitution of North Carolina was adopted December 18, 1776. To this constitution amendments were made in convention June 4, 1835, which were ratified by the people on the 9th day of November of the same year, and took effect on the 1st day of January, 1836. There was a second constitution of 1868, and the amended constitution of 1876.

Every man of the age of twenty-one years, being a native or naturalized citizen of the United States, and who has been an inhabitant of the state for twelve months immediately preceding the day of any election, and ninety days in the county in which he offers to vote, is entitled to vote. Amended Const. 1876, art. 6, § 1.

THE LEGISLATIVE POWER.—The *Senate* consists of fifty members, chosen biennially, for the term of two years, by ballot. Each senator must be twenty-five years of age, a resident of the state as a citizen for two years, and usually a resident of the district for which he is chosen one year immediately preceding his election. Art. 2, §§ 3, 7.

The *House of Representatives* is composed of

one hundred and twenty representatives, apportioned among the counties in the ratio of the population as enumerated for the purposes of federal representation. They are elected biennially, for the term of two years. The qualifications required are that each representative be a qualified elector of the state and a resident in the county for which he is chosen, one year immediately preceding his election. Art. 2, §§ 5, 8.

The following classes of persons are disqualified for office: 1. All persons denying the being of Almighty God. 2. All persons having been convicted of treason, perjury, or any other infamous crime, since becoming citizens of the United States, or of corruption or malpractice in office, unless such person has been legally restored to the rights of citizenship. Const. art. 6, § 5.

THE EXECUTIVE POWER.—The *Governor* is elected by the qualified voters of the state, for the term of four years from the first day of January next following his election. He is not eligible more than four years in any term of eight years, unless the office shall have been cast upon him as lieutenant-governor or president of the senate. He must be thirty years of age, and a citizen of the United States five years, and a resident of the state for two years next before election. Const. art. 3, §§ 1–3. The candidate having the largest number of votes is elected; and in case of no election or a contested election, the matter is to be decided by the joint action of the two houses.

There are also a lieutenant-governor, a secretary of state, an auditor, a treasurer, a superintendant of public instruction, and an attorney-general, elected for a term of four years by the qualified electors of the state; the attorney-general being ex-officio the legal adviser of the executive department, and the secretary of state, auditor, treasurer, and superintendent of public instruction forming a council of state ex-officio to advise the governor in the execution of his office. Any three constitute a quorum.

THE JUDICIAL POWER.—The distinction between law and equity is done away with. There is but one form of action in all civil actions. Feigned issues also are abolished, and the issue is tried before a jury.

The *Supreme Court* is composed of three judges, elected by joint ballot in the two houses of assembly, to hold their office for eight years. Of these, one is selected by his associates to preside, and is styled the chief justice. It is almost entirely an appellate tribunal, having original jurisdiction only in proceedings by a bill in equity, or an information in the nature of a bill in equity, filed on behalf of the state, in the name of the attorney-general, to repeal grants and other letters patent obtained by fraud or false suggestions, and such decisions are merely recommendations to the general assembly. It has appellate jurisdiction over all cases in law or equity brought before it by appeal or otherwise from a superior court of law or a court of equity. It has also power to issue writs of certiorari, scire facias, habeas corpus, and other writs which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law. Criminal cases are to be certified to the superior court from which the appeal was taken, which court proceeds to judgment in accordance with the decision of the supreme court.

A *Superior Court* is held by one judge, at the court house in each county of the state, twice in each year. For this purpose the state is divided into nine circuits, each composed of ten or more counties; and the nine judges who are appointed to hold these courts ride the circuits alternately, with the power to interchange; but no judge rides the same circuit twice in succession. The judges are appointed in the same manner and for the same term as the supreme judges. The superior courts "have cognizance and legal jurisdiction, unless otherwise provided, of all pleas, real, personal, and mixed, and also all suits and demands relative to dower, partition, legacies, filial portions, and estates of intestates; and, unless it be otherwise provided, of all pleas of the state, and criminal matters of what nature, degree, or denomination soever, whether brought before them by original or by mesne process, or by certiorari, writ of error, appeal from any inferior court, or by any other way or manner whatsoever; and they are hereby declared to have full power and authority to give judgment and to award execution and all necessary process therein," etc. See Revised Code, c. 31, § 17.

The same judges who hold the superior courts of law are required and authorized to hold, at the same times and places, courts of equity, and in doing so shall "possess all the powers and authorities within the same that the court of chancery, which was formerly held in this state under the colonial government, used and exercised, and that are properly and rightfully incident to such a court, agreeable to the laws and usages now in force and practice." See Revised Code, c. 32, §§ 1–3.

The *Courts of Pleas and Quarter Sessions* are held four times in each year, in the several counties of the state, by three or more justices of the peace, who "shall take cognizance of, and have full power and authority and original jurisdiction to hear, try, and determine, all causes of a civil nature whatever at the common law within their respective counties, where the original jurisdiction is not by statute confined to one or more magistrates out of court, or to the supreme or superior courts; of all penalties to the amount of one hundred dollars and upwards incurred by violation of the penal statutes of the state or of laws passed by the congress of the United States, where by such law jurisdiction is given to the courts of the several states; of suits for dower, partition, filial portions, legacies, and distributive shares of intestates' estates, and all other matters relating thereto; to try, hear, and determine all matters relating to orphans, idiots, and lunatics, and the management of their estates, in like manner as courts of equity exercise jurisdiction in such cases; to inquire of, try, hear, and determine all petit larcenies, assaults and batteries, all trespasses and breaches of the peace, and all other crimes and misdemeanors the judgment upon conviction whereof shall not extend to life, limb, or member: excepting those only whereof the original jurisdiction is given exclusively to a single justice or to two justices of the peace, to the superior or to the supreme court."

In some of the counties jury trials are abolished by special acts of the legislature, and in others such trials are had twice only in the year.

Justices of the Peace are elected. They have jurisdiction of civil actions founded on contract, where the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy, and all criminal matters arising within their counties, where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. Jurisdiction may be given to them by the assembly in other civil actions where the value of the property in controversy does not exceed fifty dollars. In issues of fact, on demand of either party, a jury of six

men is summoned to try the same. Amended Const. 1876, art. 4, § 27.

NOSOCOMI. In Civil Law. Persons who have the management and care of hospitals for paupers. Clef Lois Rom. mot *Administrateurs*.

NOT FOUND. Words indorsed on a bill of indictment by a grand jury, when they have not sufficient evidence to find a true bill. See IGNORAMUS.

NOT GUILTY. In Pleading. The general issue in several sorts of actions.

In *trespass*, its form is as follows: "And the said C D, by E F, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in the manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

Under this issue the defendant may give in evidence any matter which directly controverts the truth of any allegation, which the plaintiff on such general issue will be bound to prove; 1 B. & P. 213; and no person is bound to justify who is not *primâ facie* a trespasser; 2 B. & P. 359; 2 Saund. 284 *d*. For example, the plea of not guilty is proper in trespass to *persons*, if the defendant have committed no assault, battery, or imprisonment, etc.; and in trespass to *personal* property, if the plaintiff had no property in the goods, or the defendant were not guilty of taking them, etc.; and in trespass to *real* property, this plea not only puts in issue the fact of trespass, etc., but also the title, which, whether freehold or possessory in the defendant or a person under whom he claims, may be given in evidence under it, which matters show *primâ facie* that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant or the person under whom he justifies; 7 Term, 354; 8 *id*. 403; Willes, 222; Steph, Pl. 178; 1 Chitty, Pl. 491, 492.

In *trespass on the case in general*, the formula is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

This, it will be observed, is a mere traverse, or denial, of the facts alleged in the declaration, and therefore, on principle, should be applied only to cases in which the defence rests on such a denial. But here a relaxation has taken place; for, under this plea, a defendant is permitted not only to contest the truth of the declaration, but, with some exceptions, to prove any matter of defence that tends to show that the plaintiff has no cause of action, though such matters be in confession and avoidance of the declaration: as, for example, a release given, or satisfaction made; Steph. Pl. 182, 183; 1 Chitty, Pl. 486.

In *trover*. It is not usual in this action to plead any other plea, except the statute of limitations: and a release, and the bankruptcy of the plaintiff, may be given in evidence under the general issue; 7 Term, 391.

In *debt* on a judgment suggesting a *devastavit*, an executor may plead not guilty; 1 Term, 462.

In *criminal cases*, when the defendant wishes to put himself on his trial, he pleads not guilty. This plea makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment, information, or complaint. On the other hand, the defendant may give in evidence under this plea not only every thing which negatives the allegations in the indictment, but also all matter of excuse and justification.

In English practice, under the Jud. Act, 1875, it is not sufficient for a defendant to deny generally the facts alleged by the plaintiff's statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth. But this does not affect defendant's right to plead "not guilty by statute," which is a plea of the general issue by a defendant in a civil action, when he intends to give special matter in evidence by virtue of some act or acts of parliament; in which case he must add the reference to such act or acts, and state whether they are public or otherwise. Rule 21 of the Rules of Trinity Term, 1853. But if a defendant so plead, he will not be allowed to plead any other defence without the leave of the court or a judge. Jud. Act, 1875, 1st Sched. Ord. xix. r. 16. Moz. & W.

NOT POSSESSED. In Pleading. A plea sometimes used in actions of trover, when the defendant was not possessed of the goods at the commencement of the action. 3 M. & G. 101, 103. This plea would probably be held "evasive" within the meaning of Ord. xix. r. 22, Jud. Act, 1875. Moz. & W.

NOT PROVEN. In Scotch Criminal Law. It is a peculiarity of the Scotch jury system in criminal trials that it admits a verdict of not proven, corresponding to the *non liquet* of the Roman law. The legal effect of this is equivalent to not guilty; for a prisoner in whose case it is pronounced cannot be tried again. According to the homely but expressive maxim of the law, no man can be made to thole an assize twice. But, although the verdict of not proven is so far tantamount to an acquittal that the party cannot be tried a second time, it falls very far short of it with regard to the effect upon his reputation and character. He goes away from the bar of the court with an indelible stigma upon his fame. There stands recorded against him the opinion of a jury that the evidence respecting his guilt was so strong that they did not dare to pronounce a verdict of acquittal. So that many of the evil consequences of a conviction follow, although the jury refuse to convict. When Sir Nicholas Throckmorton was tried and acquitted by an English jury in 1554, he said, "It is better to be tried than to live suspected." But in Scotland a man may be not

only tried, but acquitted, and yet live suspected, owing to the sinister influence of a verdict of not proven. Forsyth, Hist. Trial by Jury, 334–339.

NOTARIUS. In Civil Law. One who took notes or draughts in short-hand of what was said by another, or of proceedings in the senate or in a court. One who draughted written instruments, wills, conveyances, etc. Vicat, Voc. Jur.; Calvinus, Lex.

In English Law. A notary. Law Fr. & Lat. Dict.; Cowel.

NOTARY, NOTARY PUBLIC. An officer appointed by the executive or other appointing power, under the laws of different states.

Notaries are of ancient origin; they existed in Rome during the republic, and were called *tabelliones forenses*, or *personæ publicæ*. Their employment consisted in the drawing up of legal documents. They exist in all the countries of Europe, and as early as A. D. 803 were appointed by the Frankish kings and the popes. Notaries in England are appointed by the archbishop of Canterbury. 25 Hen. VIII. c. 21, § 4. They are officers of the civil and canon law; Brooke, Office & Pr. of a Notary, 9. In most of the states, notaries are appointed by the governor alone, in others by the governor, by and with the advice of his council, in others by and with the advice and consent of the senate. As a general rule, throughout the United States, the official acts of a notary public must be authenticated by seal as well as signature; 10 Iowa, 305; 49 Ala. 242; 12 Ill. 162.

Their duties differ somewhat in the different states, and are prescribed by statutes. They are generally as follows: to protest bills of exchange and draw up acts of honor; to authenticate and certify copies of documents; to receive the affidavits of mariners and draw up protests relating to the same; to attest and take acknowledgments of deeds and other instruments, and to administer oaths.

By act of congress, Sept. 16, 1850, notaries are authorized to administer oaths and take acknowledgments in all cases where under the laws of the United States justices of the peace were formerly authorized to act.

By act of Aug. 15, 1876, c. 304, notaries are authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, and to take acknowledgments and affidavits with the same effect as commissioners of the United States circuit courts may do. R. S. § 1778. By act of June 22, 1874, c. 390, notaries may take proof of debts against the estate of a bankrupt. By act of Feb. 26, 1881, c. 82, reports of national banks may be sworn to before notaries; R. S. § 5211. By act of Aug. 18, 1856, c. 127, every secretary of legation and consular officer may, within the limits of his legation, perform any notarial act; R. S. § 1750.

The acts of notaries are respected by the custom of merchants and the law of nations. Their protest of a bill is received as evidence in the courts of all civilized countries. Except in cases of protest of bills, the signature of a notary to an instrument going to a foreign country ought to be authenticated by the consul or representative of that country.

The notaries of England have always considered themselves authorized to administer oaths; and the act 5 & 6 Will. IV. has placed it beyond dispute. In this country they do not exercise the power unless authorized by statute, except in cases where the oath is to be used out of the state or in the courts of the United States.

Where an action is brought against a notary for a false certificate of acknowledgment, the presumption is that the defendant, acting in his judicial capacity, did so on reasonable information, and discharged his full duty. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty. 97 Penn. 228; Proff. Notaries §§ 48 and 135; Sewell, Bank; Notary's Manual.

NOTE OF A FINE. The fourth step of the proceedings in acknowledging a fine, which is only an abstract of the writ of covenant and the concord, naming the parties, the parcel of land, and the agreement, and enrolled of record in the proper office. 2 Sharsw. Bla. Com. 351, App. n. iv. § 3; 1 Steph. Com. 518.

NOTE OF HAND. A popular name for a promissory note.

NOTE, OR MEMORANDUM. An informal note or abstract of a transaction made on the spot, and required by the Statute of Frauds.

The form of it is immaterial; but it must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without reference to parol evidence to show intent of parties; Browne, Stat. of Frauds, 353, 386, and cases cited; 43 Me. 158; 4 R. I. 14; 14 N. Y. 584; 1 E. D. Smith, 144; 2 *id.* 93; 31 Miss. 17; 11 Cush. 127; 9 Rich. 215; 10 *id.* 60; 23 Mo. 423; 17 Ill. 354; 3 Iowa, 430. In some states, and in England, the consideration need not be stated in the note or memorandum; 5 East, 10; 4 B. & Ald. 595; 5 Cra. 142; 17 Mass. 122; 6 Conn. 81. See Browne, Stat. of Frauds; MEMORANDUM.

NOTE OF PROTEST. A note or minute of the protest, made by the notary, at time of protest, on the bill, to be completed or filled out at his leisure. Byles, Bills, 9.

NOTES. See JUDGE'S NOTES; MINUTES.

NOTICE. The information given of some act done, or the interpellation by which some act is required to be done. Knowledge: as, A had notice that B was a slave. 5 How. 216; 7 Penn. L. J. 119.

Actual notice exists when knowledge is actually brought home to the party to be affected by it. This definition is criticized, as being too narrow, in Wade, Notice, 4. This writer divides actual knowledge into two classes, express and implied: the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty

of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them, choosing to remain ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest; Wade, Notice, 5. In 42 Conn. 146, there is a division into "particular or explicit" and "general or implied" notice.

Constructive notice exists when the party, by any circumstance whatever, is put upon inquiry (which is the same as *implied notice, supra*), or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy; 2 Mas. 531; 14 Pick. 224; 4 N. H. 397; 14 S. & R. 333. The *recording* a deed; 23 Mo. 237; 25 Barb. 635; 28 Miss. 354; 4 Kent, 182, n.; an *advertisement in a newspaper*, when authorized by statute as a part of the process, *public acts* of government, *lis pendens* (but see LIS PENDENS), and the *record of a deed*, furnish constructive notice. Judge Story defines the term as "knowledge" imputed by the court on presumption, too strong to be rebutted, that the information must have been communicated; Story, Eq. Jur. § 399; and see 2 Anstr. 432. "Constructive notice is a legal inference of notice, of so high a nature, as to be conclusive, unless disproved, and is in most cases insusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice, and believed the vendor's title to be good;" 2 Lead. Cas. Eq. 77. Constructive notice is sometimes called notice in law; 1 Johns. Ch. 261. The constructive notice given by the record of a deed is sometimes called record notice. Where an instrument affecting the title to real estate is properly recorded, the record thereof is notice to subsequent purchasers, etc., from the same grantor; Wade, Notice, 54; 38 Tex. 530; 30 Ark. 407; 28 N. J. Eq. 49.

Notice to an agent in the same transaction is, in general, notice to the principal; 25 Conn. 444; 10 Rich. 293; 3 Penn. 67; 39 N. Y. 70. See 25 Am. L. Reg. 1.

The giving notice in certain cases is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus, in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is that he will pay the bill or note, provided it be not paid, on presentment at maturity, by the acceptor or maker (being the party *primarily* liable), and provided that he (the indorser) has due *notice* of the dishonor, and without which he is discharged from all liability: consequently, it is essential for the holder to be prepared to prove affirmatively that *such notice was given*, or some facts dispensing with such notice; 1 Chitty, Pr. 496.

Whenever the defendant's liability to perform an act depends on another occurrence which is *best known* to the *plaintiff*, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. So, in cases of insurances on ships, a *notice of abandonment* is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures.

Notice may be written or oral, in many cases, at the option of the party required to give it; but written notice is generally preferable, both as avoiding doubt and ambiguity in its terms, and as admitting more easy and exact proof of delivery.

NOTICE, AVERMENT OF. In Pleading. The statement in a pleading that notice has been given.

When the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof: as, when the defendant promised to give the plaintiff as much for a commodity as another person had given or should give for the like.

But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred; 1 Saund. 117, n. 2; 2 *id.* 62 *a*, n. 4; Freem. 285. Therefore, if the defendant contracted to do a thing on the performance of an act by a stranger, notice need not be averred; for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice of it at his peril; Comyns, Dig. *Pleader* (C 65). See Comyns, Dig. *Pleader* (C 73, 74, 75); Viner, Abr. *Notice;* Hardr. 42; 5 Term, 621.

The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default; Cro. Jac. 432; but may be aided by verdict; 1 Stra. 214; 1 Saund. 228 *a*; unless in an action against the drawer of a bill, when the omission of the averment of notice of non-payment by the acceptor is fatal, even after verdict; Dougl. 679.

NOTICE OF DISHONOR. A notice given to a drawer or indorser of a bill, or an indorser of a negotiable note, by a subsequent party, that it has been dishonored either by non-acceptance in the case of a bill, or by non-payment in the case of an accepted bill or a note.

The notice must contain a description of the bill or note; 5 Cush. 546; 14 Conn. 362; 1 Fla. 301; 1 Wisc. 264; sufficient to leave no doubt in the mind of the indorser, as a reasonable man, what note was intended; 3 Metc. Mass. 495; 5 Cush. 546; 7 Ala. N. S. 205; 12 N. Y. 551; 19 *id.* 518; 26 Me. 45; 11 Wheat. 431. See 10 N. Y. 279; 11 M. & W. 809; 5 Humphr. 335. As to what is a mis-description, see 7 Exch. 578; 1 M. & G. 76; 11 M. & W. 809; 15 *id.* 231; 9 Q. B. 609; 9 Pet. 33; 11 Wheat. 431; 17 How. 606; 1 N. Y. 413; 7 *id.* 19; 13 Miss.

44; 19 *id.* 382; 2 Mich. 238; 12 Mass. 6; 2 Penn. 355; 14 *id.* 483; 2 Ohio St. 345.

It must also contain a clear statement of the dishonor of the bill; 7 Bingh. 530; 1 Bingh. N. C. 194; 3 *id.* 368; 2 Cl. & F. 93; 2 M. & W. 799; 11 C. B. 1011; 3 Metc. Mass. 495; 18 Conn. 361; and something more than the mere fact of non-acceptance or non-payment must be stated; 3 Bingh. N. C. 688; 10 Ad. & E. 125; 8 C. & P. 355; 2 Q. B. 388; 14 M. & W. 44; 11 Wheat. 431; 3 Metc. Mass. 495; 9 *id.* 174; 5 Barb. 490; 1 Spears, 244; 2 Ohio St. 345; 3 Md. 202, 251; 11 *id.* 148; 1 Litt. Ky. 194; 2 Hawks, 560; 5 How. Miss. 552; except in some cases; 5 Cush. 546; 1 Md. 59, 504; 4 *id.* 409; as to 279; 19 Me. 31; 23 *id.* 392; 10 N. H. 526; the effect of the use of the word *protested;* 11 Wheat. 431; 9 Pet. 33; 7 Ala. N. S. 205; 2 Dougl. Mich. 495; 1 N. Y. 413; 10 *id.* 9 Rob. La. 161; 14 Conn. 362; 5 Cush. 546; 1 Wisc. 264; 4 N. J. 71. See some cases where the notice was held sufficient; 2 M. & W. 109, 799; 6 *id.* 400; 7 *id.* 515; 14 *id.* 7, 44; 6 Ad. & E. 499; 10 *id.* 131; 2 Q. B. 421; 1 E. & B. 801; 5 C. B. 687; 1 H. & W. 3; and others where it was held insufficient; 2 Exch. 719; 1 E. & B. 801; 4 B. & C. 339; 10 Ad. & E. 125; 7 Bingh. 530; 3 Bingh. N. C. 688; 8 C. & P. 355; 2 Q. B. 388; 1 M. & G. 76.

As to whether there must be a statement that the party to whom the notice is sent is looked to for payment, see 1 Term, 169; 11 M. & W. 372; 2 Exch. 719; 2 Q. B. 388, 419; 14 *id.* 200; 7 C. B. 400; 4 D. & L. 744.

The notice is generally *in writing*, but may be oral; 4 Wend. 566; 16 Barb. 146; 3 Metc. Mass. 495; 8 Mo. 336; 7 C. B. 400; 11 *id.* 1011; 2 M. & W. 348; 8 C. & P. 355; 1 H. & W. 3. It need not be personally served, but may be sent by mail; 7 East, 385; 6 Wheat. 102; 6 Mass. 316; 14 *id.* 116; 1 Pick. 401; 28 Vt. 316; 15 Md. 285; 5 Penn. 178; 1 Conn. 329; 2 R. I. 467; 23 Mo. 213; 13 N. Y. 549; otherwise, perhaps, if the parties live in the same town; see 5 Metc. Mass. 352; 10 Johns. 490; 20 *id.* 372; 3 McLean, 96; 1 Conn. 367; 28 N. H. 302; 15 Me. 141; 15 Md. 285; 3 Rob. La. 261; 6 Blackf. 312; 3 Jones, 387; 3 Ala. N. S. 34; 3 Harr. Del. 419; 8 Ohio, 507; or left in the care of a suitable person, representing the party to be notified; 15 Me. 207; 2 Johns. 274; 20 Miss. 332; 16 Pick. 392; 14 La. 494; 19 Ill. 598; Holt, 476.

It should be sent to the place where it will most probably find the party to be notified most promptly; 6 Metc. 1, 7; 1 Pet. 578; 2 *id.* 543; whether the place of business; 1 Pet. 578; 3 McLean, 96; 5 Metc. Mass. 212, 352; 11 Johns. 231; 15 Me. 139; 8 W. & S. 138; 5 Penn. 178; 3 Harr. Del. 419; 6 Blackf. 312; 5 Humphr. 403; 3 Rob. La. 261; 1 La. An. 95; 1 Maule & S. 545; or place of residenee; 4 Wash. C. C. 464; 28 Vt. 316; 1 Conn. 329. When sent by mail, it should be to the post-office to which the party usually resorts; 2 Pet. 543; 4 Wend. 328; 5 Denio, 329; 5 Penn. 160; 3 McLean, 91; 15 La. 38; 4 Humphr. 86; 3 Ga. 486; 11 Md. 486; 3 Ohio, 307; 8 Mo. 443; 6 Metc. 106; 6 H. & J. 172. See 2 Pet. 543; 8 Cush. 425; 2 Halst. 130.

Every person who, by and immediately upon the dishonor of the note or bill, and only upon such dishonor, becomes liable to an action either on the paper or on the consideration for which the paper was given, is entitled to immediate notice; 1 Pars. Notes & B. 499. The holder need give notice only to the parties and to the indorser whom he intends to hold liable; 25 Barb. 138; 19 Me. 62; 16 Mart. La. 220; 11 La. An. 137; 1 Ohio St. 206; 1 Rich. 369; 5 Miss. 272; 17 Ala. 258; 15 M. & W. 231.

Notice may be given by any party to a note or bill not primarily liable thereon as regards third parties, and not discharged from liability on it at the time notice is given; 8 Mo. 336; 16 S. & R. 157; 3 Dana, 126; 5 Miss. 272; 17 Ala. 258; 3 Wend. 173; 25 Barb. 138; 15 Md. 150; 15 La. 321; 14 Mass. 116; 2 Campb. 373; 4 *id.* 87; 5 Maule & S. 68; 3 Ad. & E. 193; 9 C. B. 46; 13 *id.* 249; 15 M. & W. 231. The late English doctrine that any party to a note or bill may give the notice by which an antecedent party may be held liable to subsequent parties, is now quite firmly established; Wade, Notice, § 709. Such notice may be by the holder's agent; 4 How. 336; 11 Rob. La. 454; 21 Tex. 680; 8 Mo. 704; 7 Ala. N. S. 205; 4 D. & L. 744; 15 M. & W. 231; an indorsee for collection; 2 Hall, N. Y. 112; 3 N. Y. 243; a notary; 2 How. 66; 28 Mo. 339; the administrator or executor of a deceased person; Story, Pr. Notes, § 304; the holder of the paper as collateral security; 14 C. B. N. S. 728. It has been held that notice by a stranger, pretending to be the holder, may be ratified by the real holder; 2 C. & K. 1016.

The notice must be forwarded as early as by a mail of the day after the dishonor which does not start at an unreasonably early hour; 9 N. H. 558; 2 Harr. N. J. 587; 24 Me. 458; 2 R. I. 437; 24 Penn. 148; 4 N. J. 71; 1 Ohio St. 206; 9 Miss. 261, 644; 13 Ark. 645; 7 Gill & J. 78; 4 Wash. C. C. 464; 2 Stor. 416; 4 Bingh. 715.

Notice of dishonor may be excused: where it is prevented by inevitable accident, or overwhelming calamity; by the prevalence of a malignant disease which suspends the operations of trade; by war, blockade, invasion or occupation by the enemy; by the interdiction of commerce between the countries from which or to which the notice is to be sent; by the impracticability of giving notice, by reason of the party entitled thereto having absconded, or having no fixed place of residence, or his place of business or residence being unknown, and incapable of being ascertained upon reasonable inquiries. These are the excuses of

a general nature given by Story, on Pr. Notes and on Bills. Special excuses are: That the note was for the accommodation of the indorser only; an original agreement on the part of the indorser, made with the maker or other party, at all events to pay the note at maturity; the receiving security or indemnity from the maker, or other party for whose benefit the note is made, by the indorser, or money to take it up with; receiving the note as collateral security for another debt where the debtor is no party to the note, or, if a party has not indorsed it; an original agreement by the indorser to dispense with notice; an order or direction from the makee to the maker not to pay the note at maturity. See Story, Prom. Notes, §§ 293, 357.

Consult Bayley, Byles, Chitty, Story, on Bills of Exchange; Story, Promissory Notes; Parsons, Notes & Bills; Daniel, Negotiable Instruments; Wade, Notice.

NOTICE TO PLEAD. Written notice to defendant, requiring him to plead within a certain time. It must always be given before plaintiff can sign judgment for want of a plea. 1 Chitty, Archb. Pr. Prent. ed. 221. Notice to plead, indorsed on the declaration or delivered separately, is sufficient without demanding plea or rule to plead, in England, by statute. See 3 Chitty, Stat. 515.

NOTICE OF PROTEST. A notice given to a drawer or indorser of a bill, or to an indorser of a note, by a prior party that the bill has been protested for refusal of payment or acceptance. See NOTICE OF DISHONOR.

NOTICE TO PRODUCE PAPERS.

In Practice. When it is intended to give secondary evidence of a written instrument or paper which is in the possession of the opposite party, it is, in general, requisite to give him notice to produce the same on the trial of the cause, before such secondary evidence can be admitted.

To this general rule there are some exceptions: *first*, in cases where, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in the case of trover for a bond; 14 East, 274; 4 Taunt. 865; 6 S. & R. 154; 4 Wend. 626; 1 Campb. 143; *second*, where the party in possession has obtained the instrument by fraud; 4 Esp. 256. See 1 Phill. Ev. 425; 1 Stark. Ev. 362; Rosc. Civ. Ev. 4.

In general, a notice to produce papers ought to be given in writing, and state the title of the cause in which it is proposed to use the papers or instruments required; 2 Stark. 19. It seems, however, that the notice may be by parol; 1 Campb. 440. It must describe with sufficient certainty the papers or instruments called for, and must not be too general and by that means be uncertain; Ry. & M. 341; M'Cl. & Y. 139.

The notice may be given to the party himself, or to his attorney; 2 Term, 203, n.; 3 *id.* 306; Ry. & M. 327; 1 Mood. & M. 96.

The notice must be served a reasonable time before trial, so as to afford an opportunity to the party to search for and produce the instrument or paper in question; 1 Stark. 283; Ry. & M. 47, 327; 1 Mood. & M. 96, 335, n.

When a notice to produce an instrument or paper in the cause has been proved, and it is also proved that such paper or instrument was, at the time of the notice, in the hands of the party or his privy, and upon request in court he refuses or neglects to produce it, the party having given such notice and made such proof will be entitled to give secondary evidence of such paper or instrument thus withheld.

NOTICE TO QUIT. A request from a landlord to his tenant to quit the premises leased, and to give possession of the same to him, the landlord, at a time therein mentioned. 3 Wend. 337, 357; 7 Halst. 99.

The form of the notice. The notice or demand of possession should contain a request from the landlord to the tenant or person in possession to quit the premises which he holds from the landlord (which premises ought to be particularly described, as being situate in the street and city or place, or township and county), and to deliver them to him on or before a day certain,—generally, when the lease is for a year, the same day of the year on which the lease commences. But where there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy." 2 Esp. 589. It should be dated, signed by the landlord himself, or by some person in his name, who has been authorized by him, and directed to the tenant. The notice must include all the premises under the same demise; for the landlord cannot determine the tenancy as to part of the premises demised and continue it as to the residue. For the purpose of bringing an ejectment, it is not necessary that the notice should be in writing, except when required to be so under an express agreement between the parties; Comyns, Dig. *Estate by Grant* (G 11, n. p.); 2 Campb. 96; 2 M. & R. 439. But it is the general and safest practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes and renders the evidence certain and correct. Care should be taken that the words of a notice be clear and decisive, without ambiguity or giving an alternative to the tenant; for if it be really ambiguous or optional, it will be invalid; Adams, Ej. 122.

As to the person by whom the notice is to be given. It must be given by the person interested in the premises, or his agent properly appointed; Adams, Ej. 120. See 3 C. B. 215. As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may act upon with security, and should, therefore, be binding upon all the parties concerned at the time

it is given. Where, therefore, several persons are jointly interested in the premises, they need not all join in the notice; but, if any of them be not a party at the time, no subsequent ratification by him will be sufficient by relation to render the notice valid. But see 5 East, 461; 2 Phill. Ev. 184; 2 Esp. 677; 1 B. & Ad. 135; 7 M. & W. 139. But if the notice be given by an agent, it is sufficient if his authority is afterwards recognized; 3 B. & Ald. 689. But see 10 B. & C. 621.

As to the person to whom the notice should be given. When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. It should invariably be given to the tenant of the party serving the notice notwithstanding a part may have been underlet or the whole of the premises may have been assigned; Adams, Ej. 119; 5 B. & P. 330; 14 East, 234; 6 B. & C. 41; unless, perhaps, the lessor has recognized the sub-tenant as his tenant; 10 Johns. 270. When the premises are in possession of two or more as joint tenants or tenants in common, the notice should be to all. A notice addressed to all and served upon one only will, however, be a good notice; Adams, Ej. 123.

As to the mode of serving the notice. The person about serving the notice should make two copies of it, both signed by the proper person, then procure one or more respectable persons for witnesses, to whom he should show the copies, who, upon comparing them and finding them alike, are to go with the person who is to serve the notice. The person serving the notice then, in their presence, should deliver one of these copies to the tenant personally, or to one of his family, at his usual place of abode, although the same be not upon the demised premises; 2 Phill. Ev. 185; or serve it upon the person in possession; and where the tenant is not in possession, a copy may be served on him, if he can be found, and another on the person in possession. The witnesses should then, for the sake of security, sign their names on the back of the copy of the notice retained, or otherwise mark it so as to identify it; and they should also state the manner in which the notice was served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of the service of the notice upon him has been held to be sufficient ground for the jury to presume that the notice so served upon the premises has reached the other who resided in another place; 7 East, 553; 5 Esp. 196.

At what time it must be served. At common law it must be given six calendar months before the expiration of the lease; 1 Term, 159; 3 *id.* 13; 8 Cow. 13; 1 Vt. 311; 1 Dana, 30; 5 Yerg. 431; 4 Ired. 291; 17 Mass. 287; see 2 Pick. 70, 71; 8 S. & R. 458; 2 Rich. 346; and three months is the common time under statutory regulations; and where the letting is for a shorter period the length of notice is regulated by the time of letting; 6 Bing. 362; 5 Cush. 563; 23 Wend. 616. Difficulties sometimes arise as to the period of the commencement of the tenancy; and when a regular notice to quit on any particular day is given, and the time when the term began is unknown, the effect of such notice, as to its being evidence or not of the commencement of the tenancy, will depend upon the particular circumstances of its delivery: if the tenant, having been applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and in consequence of such information a notice to quit on that day is given at a subsequent period, the tenant is concluded by his act, and will not be permitted to prove that in point of fact the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into error; Adams, Ej. 130; 2 Esp. 635; 2 Phill. Ev. 186. In like manner, if the tenant at the time of delivery of the notice assent to the terms of it, it will waive any irregularity as to the period of its expiration; but such assent must be strictly proved; 4 Term, 361; 2 Phill. Ev. 183. When the landlord is ignorant of the time when the term commenced, a notice to quit may be given not specifying any particular day, but ordering the tenant in general terms to quit and deliver up the possession of the premises at the end of the current year of his tenancy thereof, which shall expire next after the end of three months from the date of the notice. See 2 Esp. 589.

What will amount to a waiver of the notice. The acceptance of rent accruing subsequently to the expiration of the notice is the most usual means by which a waiver of it may be produced; but the acceptance of such rent is open to explanation; and it is the province of the jury to decide with what views and under what circumstances the rent is paid and received; Adams, Ej. 139; 2 Campb. 387. If the money be taken with an express declaration that the notice is not thereby intended to be waived, or accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance: the rent must be paid and received *as rent*, or the notice will remain in force; Cowp. 243. The notice may also be waived by other acts of the landlord; but they are generally open to explanation, and the particular act will or will not be a waiver of the notice, according to the circumstances which attend it; 2 East, 236; 10 *id.* 13; 1 Term, 53. It has been held that a notice to quit at the end of a certain year is not waived by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease,—that is, to clear and fence the land and pay the taxes; 1 Binn. 333. In cases, however, where the act of the landlord

cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover in an action for use and occupation, the notice of course will be waived; Adams, Ej. 144; 1 H. Blackst. 311; 6 Term, 219; 19 Wend. 391. See 13 C. B. 178.

NOTING. A term denoting the act of a notary in minuting on a bill of exchange, after it has been presented for acceptance or payment, the initials of his name, the date of the day, month, and year when such presentment was made, and the reason, if any has been assigned, for non-acceptance or non-payment, together with his charge. The noting is not indispensable, it being only a part of the protest: it will not supply the protest. 4 Term, 175.

NOTOUR. In Scotch Law. Open; notorious. A notour bankrupt is a debtor who, being under diligence by horning and caption of his creditor, retires to sanctuary, or absconds, or defends by force, and is afterwards found insolvent by court of sessions. Bell, Dict.; Act of 1696, c. 5; Burton, Law of Scotl. 601.

NOVA CUSTOMA. An imposition or duty. See ANTIQUA CUSTOMA.

NOVA SCOTIA. A province of British North America, and now, by the "British North American Act, 1867," a part of the Dominion of Canada.

It includes Nova Scotia proper, a peninsula two hundred and eighty miles long and from fifty to one hundred miles wide, trending E. N. E., and connected with the province of New Brunswick by an isthmus only eight miles wide in its widest part, and the island of Cape Breton, separated from the eastern extremity of Nova Scotia proper by the Gut of Canso. Nova Scotia proper lies between latitude 43° 25′ and 46° north, and long. 61° and 66° 30′ west.

England founds her claim to the original discovery of this province upon the patent granted by Queen Elizabeth to Sir Humphrey Gilbert, A. D. 1578.

This was followed by De la Roche's unfortunate attempt to colonize the Isle of Sable.

De Monts, having in 1603 received an appointment from Henri IV. of France, sailed the following year, with Champlain, De Poutrincourt, and others.

After exploring the outer shore of the peninsula, having entered the bay of Fundy, De Poutrincourt settled Port Royal, A. D. 1605,—the first permanent settlement in British North America. From this time the English began to assert their claims, and colonists from Virginia expelled the colony of De Monts.

The French regained possession, but only to be again expelled by the strong force sent against them by Cromwell, A. D. 1654.

Thirteen years later, England ceded the province to France by the treaty of Breda, A. D. 1667; but in the new wars it was again ravaged by the English, who reacquired it in A. D. 1713; and in 1749 it was formally colonized by the British Government.

The French colonists, having resisted and joined the Indians, were defeated by the British, and their stronghold, Louisburgh on Cape Breton, was taken by Massachusetts colonists acting under a plan suggested by a Massachusetts lawyer.

In 1758 the province received its constitution, and in 1763 France, by the treaty of Paris, ceded all rights whatsoever.

In 1784 New Brunswick and Cape Breton were separated from Nova Scotia; but Cape Breton was reattached in 1819.

In 1867 it became a province of the Dominion of Canada. See *supra;* CANADA.

NOVA STATUTA. New statutes. A term including all statutes passed in the reign of Edw. III. and subsequently. VETERA STATUTA.

NOVÆ NARRATIONES. "New counts or talys." A book of such pleadings as were then in use, published in the reign of Edw. III. 3 Bla. Com. 297; 3 Reeve, Hist. Eng. Law, 439.

NOVATION (from Lat. *novare, novus*, new). The substitution of a new obligation for an old one, which is thereby extinguished.

Novation takes place when a debtor contracts towards his creditor a new debt that is substituted for the old one that is extinguished. French Civil Code, art. 1271. It is one of the modes by which debts become extinct.

In Civil Law. There are three kinds of novation.

First, where the debtor and creditor remain the same, but a *new debt* takes the place of the old one. Here, either the subject-matter of the debt may be changed, or the conditions of time, place, etc. of payment.

Second, where the debt remains the same, but a *new debtor* is substituted for the old. This novation may be made without the intervention or privity of the old debtor (in this case the new agreement is called *expromissio*, and the new debtor *expromissor*), or by the debtor's transmission of his debt to another, who accepts the obligation and is himself accepted by the creditor. This transaction is called *delegatio*. Domat lays down the essential distinction between a delegation and any other novation, thus: that the former demands the consent of all three parties, but the latter that only of the two parties to the new debt.

Third, where the debt remains the same, but a *new creditor* is substituted for the old. This also is called *delegatio*, for the reason adduced above, to wit: that all three parties must assent to the new bargain. It differs from the *cessio nominis* of the civil law by completely cancelling the old debt, while the *cessio nominis* leaves the creditor a claim for any balance due after assignment.

In every novation the old debt is wholly extinguished by the new. To effect such a transformation, several things are requisite.

First, there must be an *anterior obligation* of some sort, to serve as a basis for the new contract. If the old debt be void, as being, *e. g.*, *contra bonos mores*, then the new debt is likewise void; because the consideration for the pretended novation is null. But if the old contract is only voidable, in some cases

the new one may be good, operating as a ratification of the old. Moreover, if the old debt be conditional, the new is also conditional, unless made otherwise by special agreement,—which agreement is rarely omitted.

Second, the parties innovating must *consent* thereto. In the modern civil law, every novation is voluntary. Anciently, a novation not having this voluntary element was in use. And not only consent is exacted, but a *capacity* to consent. But capacity to make or receive an absolute payment does not of itself authorize an agreement to innovate.

Third, there must be an *express intention* to innovate,—the *animus novandi*. A novation is never presumed. If an intent to destroy the old debt be not proved, two obligations now bind the debtor,—the old and the new. Conversely, if the new contract be invalid, without fraud in the transaction, the creditor has now lost all remedy. The anterior obligation is destroyed without being replaced by a new one.

An important rule of novation is that the extinction of the debt destroys also all rights and liens appertaining thereto. Hence, if any hypothecations be attached to the ancient agreement, they are cancelled by the new one, unless express words retain them. The second contract is simple and independent, and upon its terms is the action *ex stipulatu* to be brought. Hence, too, the new parties cannot avail themselves of defences, claims, and set-offs which would have prevailed between the old parties.

Obviously, a single creditor may make a novation with two or more debtors who are each liable *in solido*. In this case any one debtor may make the contract to innovate; and if such a contract be completed, all his fellow-debtors are discharged with him from the prior obligation. Therefore Pothier says that, under the rule that novation cancels all obligations subsidiary to the main one, *sureties* are freed by a novation contracted by their principal. The creditor must specially stipulate that co-debtors and guarantors shall consent to be bound by the novation, if he wish to hold them liable. If they do not consent to such novation, the parties all remain, as before, bound under the old debt. So in Louisiana the debt due to a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgages to secure its payment. 11 La. An. 687.

It follows that the new debtor, in a delegation, can claim nothing under the old contract, since he has consented to the destruction of that contract. For the same reason, a creditor cannot proceed against the discharged debtor. And this is true though the new debtor should become insolvent while the old remains solvent. And even though at the time of the novation the new debtor was insolvent, still the creditor has lost his remedy against the old debtor. But the rule, no doubt, applies only to a *bona fide* delegation. And a suit brought by the creditor against a delegated debtor is not evidence of intention to discharge the original debtor. 11 La. An. 93.

In a case of *mistake*, the rule is this: if the new debtor agree to be substituted for the old, under the belief that he himself owes so much to the discharged debtor, although he do not in fact owe the amount, yet he is bound to the creditor on the novation; because the latter has been induced to discharge the old debtor by the contract of the new, and will receive only his due in holding the new debtor bound. But where the supposed creditor had really no claim upon the original debtor, the substitute contracts no obligation with him; and even though he intended to be bound, yet he may plead the fact of no former debt against any demand of the creditor, as soon as this fact is made known to him.

A novation may be made dependent on a condition. In that case the parties remain bound, as before, until the condition is fulfilled. The new debtor is not freed from a conditional novation as to the creditor until the condition happens; and he is not liable in an action to the old debtor until it is performed.

Any obligation which can be destroyed at all may be destroyed by novation. Thus, legacies, judgments, etc., with mortgages, guarantees, and similar accessories, are as much the subjects of novation as simple contract debts. But a covenant by the obligee of a bond not to sue the obligor within a certain time is not an example of the civil-law novation. The agreement was not a release, not a substituted contract, but a covenant merely, for the breach of which the obligee has his action; 19 Johns. 129.

The preceding summary is founded on Massi, Droit Commercial, liv. v. tit. 1, ch. 5, § 2; Mackeldey, Römischen Rechts, and Pothier, Traité des Obligations, pt. 3, ch. 2. See, also, Domat's Civil Law, trans. by Dr. Strahan (Cushing's ed.), part. i. b. iv. tit. 3, 4; and Burge, Suretyship, b. 2, c. 5, Am. ed. pp. 168–190.

At Common Law. The common-law doctrine of novation mainly agrees with that of the civil law, but in some parts differs from it.

The term novation is rarely employed. The usual common-law equivalent is assignment, and sometimes merger. Still, this form of contract found its way into common-law treatises as early as Fleta's day, by whom it was called *innovatio*. *Item, per innovationem, ut si transfusa sit obligatio de una persona in aliam, quæ in se susceperit obligationem.* Fleta, lib. 2, c. 60, § 12. The same words here quoted are also in Bracton, lib. 3, c. 2, § 13, but we have *novationem* for *innovationem*. In England, recently, the term novation has been revived in some cases.

A case of novation is put in Tatlock *vs.* Harris, 3 Term, 180. "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover that sum against A."

The subject of novation has been much before the courts in reference to the transfers of the business of life assurance companies. In order to constitute a novation the old obligation must be discharged; and it has often been the interest of claimants on the transferor company, where the transferee company has become insolvent, to contend that there is no "novation," but that the old obligation is still in force. In England the questions which have arisen on this matter are for the most part set at rest by the stat. 35 & 36 Vict. c. 41, s. 7, providing that no policy-holder shall be deemed to have abandoned any claim against the original company, and to have accepted in lieu thereof the liability of the new company, unless such abandonment and acceptance shall have been signified by some writing signed by him, or by his agent lawfully authorized. Moz. & W.

There must always be a debt once existing and now cancelled, to serve as a *consideration* for the new liability. The action in all cases

is brought on the new agreement. But in order to give a right of action there must be an extinguishment of the original debt; 4 B. & C. 163; 1 M. & W. 124; 14 Ill. 34; 4 La. An. 281; 15 N. H. 129.

No mere agreement for the transformation of one contract into another is of effect until actually carried into execution and the consent of the parties thereto obtained. A good novation is an accord executed; 5 B. & Ad. 925; 3 N. & M'C. 171; 1 Stra. 426; 15 M. & W. 23; see 1 Ad. & E. 106; 2 Campb. 383; 1 La. 410; 1 Exch. 601; 24 Conn. 621; otherwise, if there be no satisfaction; 2 Scott, N. R. 938.

But where an agreement is entered into by deed, that deed gives in itself a substantial cause of action; and the giving such deed may be a sufficient accord and satisfaction for a simple contract debt; Co. Litt. 212 *b*; 1 Burr. 9; 2 Rich. 608; 3 W. & S. 276; 1 Hill, N. Y. 567. See 1 Mass. 503; 11 Wend. 321.

In the civil law *delegatio*, no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of contract between them. To establish such privity there must be a new promise founded on sufficient consideration; 14 East, 582; 3 Mer. 652; 5 Wheat. 277; 12 Ga. 406; 15 *id.* 486; 5 Ad. & E. 115; 7 Harr. & J. 213, 219; 21 Me. 484.

But in equity a creditor may assign his claim fully to another without any intervention of the debtor; and the assignee is not even compelled to sue in his assignor's name; 14 Conn. 141; 3 Swanst. 392; 4 Rand. 392; Mart. & Y. 378.

The extinction of the prior debt is consideration enough to support a novation. If A holds B's note, payable to A, and assigns this for value to C, B is by such transfer released from his promise to A, and this is sufficient consideration to sustain his promise to C; 1 Pars. Contr. ch. 13; 2 Barb. 349. And a consideration need not be expressed in the contract of novation; though one must be proved in order to defend in a suit brought by creditors of the assignor.

When assent or consideration is wanting, the novation operates only as a species of collateral security. The transferee cannot sue in his own name, and will be subject to all the equitable defences which the debtor had against the original creditor. This assent on the debtor's part is said to be essential, for the reason that he may have an account with his assignor, and he shall not be barred of his right to a set-off. Still, if any thing like an assent on the part of a holder of money can be inferred, he will be considered as the debtor; 4 Esp. 203; 6 Tex. 163; If the debtor's assent be not secured, the order of transfer may be revoked before it is acted on.

In a delegation, if the old debtor agree to provide a substitute, he must put his creditor into such a position that the latter can claim full satisfaction from the delegated debtor, or otherwise the original liability remains, and there is no novation; 19 Mo. 322, 637. See 3 B. & Ald. 64; 5 *id.* 925; 5 B. & C. 196; 4 Esp. 89; 4 Price, 200; 2 M. & W. 484; 6 Cra. 253; 12 Johns. 409; 7 *id.* 311; 21 Wend. 450.

The existing Louisiana law is based upon the doctrines of the Civil Code considered above. It is held in numerous cases that "novation is not to be presumed:" hence the receipt of a bill or note is not necessarily a novation, or extinguishment of the debt for which it is given. An express declaration to that effect is required in most of our states, or else acts tantamount to a declaration. An intention to discharge the old debt must be shown in all cases; and this intention is sufficient to work a novation; 4 La. An. 329, 543; 6 *id.* 669; 9 *id.* 228, 497; 12 *id.* 299. "The delegation by which the debtor gives to the creditor another debtor, who obliges himself towards such creditor, does not operate a novation unless the creditor has expressly declared his intention to discharge the debtor who made the delegation." 13 La. An. 238.

One of the most common of modern novations is the surrender and destruction of an old promissory note or bill of exchange, and the receipt of a new one in payment thereof. The rules of novation apply as completely to debts evidenced by mercantile paper as to all other obligations; Story, Bills, § 441; Pothier, de Change, n. 189; Thoms. Bills, ch. 1, § 3. Hence, everywhere, if the parties *intend* that a promissory note or bill shall be absolute payment, it will be so considered; 10 Ad. & E. 593; 4 Mas. 336; 1 Rich. 37, 112; 9 Johns. 310; 13 Vt. 452. In some states, the receipt of a negotiable promissory note is *prima facie* payment of the debt upon which it is given, and has an action upon the account unless the presumption is controverted; 12 Mass. 237; 12 Pick. 268; 5 Cush. 158; 8 Me. 298; 29 Vt. 32. "If a creditor gives a receipt for a draft in payment of his account, the debt is novated." 2 La. 109. But see the cases cited *supra* for the full Louisiana law. In most states, however, the rule is, as in England, that, whether the debt be pre-existing or arise at the time of giving the note, the receipt of a promissory note is *prima facie* a conditional payment only, and works no novation.

It is payment only on fulfilment of the condition, *i. e.* when the note is paid; 5 Beav. 415; 40 E. L. & Eq. 625; 6 Cra. 264; 2 Johns. Cas. 438; 15 Johns. 224, 247; 27 N. H. 253; 11 Gill & J. 416; 4 R. I. 383; 8 Cal. 501; 2 Speers, 438; 2 Rich. 244; 15 S. & R. 162.

If a vendor transfer his vendee's note, he can only sue on the original contract when he gets back the note, and has it in his power to return it to his vendee; 1 Pet. C. C. 262; 4 Rich. 59. See DISCHARGE; PAYMENT;

10 Pet. 532; 8 Cow. 390; 6 W. & S. 165; 1 Hill, N. Y. 516; 3 Wash. C. C. 396; 5 Day, 511; 9 Watts, 273; 10 Md. 27; 1 Sneed, 501; Hempst. 431; 27 Ala. N. S. 254; Dixon on Substituted Liabilities.

NOVEL ASSIGNMENT. See NEW ASSIGNMENT.

NOVEL DISSEISIN. The name of an old remedy which was given for a new or recent disseisin.

When tenant in fee-simple, fee-tail, or for term of life, was put out and disseised of his lands or tenements, rents, and the like, he might sue out a writ of assize or novel disseisin; and if, upon trial, he could prove his title and his actual seisin, and the disseisin by the present tenant, he was entitled to have judgment to recover his seisin and damages for the injury sustained; 3 Bla. Com. 187. This remedy is obsolete.

NOVELLÆ LEONIS. The ordinances of the emperor Leo, which were made from the year 887 till the year 893, are so called. These novels changed many rules of the Justinian law. This collection contains one hundred and thirteen Novels, written originally in Greek, and afterwards, in 1560, translated into Latin by Agilæus.

NOVELS, NOVELLÆ CONSTITUTIONES. In Civil Law. The name given to the constitutions or laws of Justinian and his immediate successors, which were promulgated soon after the Code of Justinian.

It appears to have been the intention of Justinian, after the completion of the second and revised edition of the Code, to supply what had not been foreseen in the preceding laws, together with any necessary amendments or alterations, not by revising the Code, but by supplementary laws. Such laws he promulgated from time to time; but no official compilation of them is known to have been made until after his death, when his laws, 159 in number, with those of the reigns of Justin II. and Tiberias, nine in number, were collected, together with some local edicts, under this name. They belong to various times between 535 and 565 A.D.

Although the Novels of Justinian are the best known, and when the word Novels only is mentioned those of Justinian are always intended, he was not the first who used that name. Some of the acts of Theodosius, Valentinian, Leo, Severus, Authennius, and others, were also called Novels. But the Novels of the emperors who preceded Justinian had not the force of law after the legislation of that emperor. Those Novels are not, however, entirely useless; because, the Code of Justinian having been compiled to a considerable extent from the Theodosian Code and the earlier Novels, the latter frequently remove doubts which arise on the construction of the Code.

The original language of the Novels was for the most part Greek; but they are represented in the Corpus Juris Civilis by a Latin translation of 134 of them. These form the fourth part of the Corpus Juris Civilis. They are directed either to some officer, or an archbishop or bishop, or to some private individual of Constantinople; but they all had the force and authority of law.

The 118th Novel is the foundation and groundwork of the English Statute of Distribution of Intestates' Effects, which has been copied in many states of the Union. See 1 P. Wms. 27; Prec. in Chanc. 593.

NOVELTY. In Patent Law. Every device for which a patent is sought should have, to some extent, the attributes of novelty. It is said to be difficult to lay down a rule as to novelty which will meet all cases. The subject matter of a patent is said to be new when it is substantially different from what has gone before; Curtis, Pat. § 41. In patents for a composition of matter the test is said to be not whether the materials of which the combination is made are new, but whether the combination is new. See Curtis, Pat.; 12 O. G. 351; 2 Fish. 120.

NOVUS HOMO (Lat. a new man). This term is applied to a man who has been pardoned of a crime, by which he is restored to society and is rehabilitated.

NOXA (Lat.). **In Civil Law.** Damage resulting from an offence committed by an irresponsible agent. The offence itself. The punishment for the offence. The slave or animal who did the offence, and who is delivered up to the person aggrieved (*datur noxæ*) unless the owner choose to pay the damage. The right of action is against whoever becomes the possessor of the slave or animal (*noxa caput sequitur*). D. *de furt.* L. 41; Vicat, Voc. Jur.; Calv. Lex.

NOXAL ACTION. See NOXA.

NUBILIS (Lat.). **In Civil Law.** One who is of a proper age to be married. Dig. 32. 51.

NUDE. Naked. Figuratively, this word is applied to various subjects.

A nude contract, *nudum pactum*, is one without a consideration. Nude matter is a bare allegation of a thing done, without any evidence of it.

NUDUM PACTUM. A contract made without consideration.

It is a mere agreement, without the requisites necessary to confer upon it a legal obligation to perform. 3 McLean, 330; 2 Denio, 403; 6 Ired. 480; 1 Strobh. 329; 1 Ga. 294; 1 Dougl. Mich. 188. The term, and the rule which decides upon nullity of its effects, are borrowed from the civil law; yet the common law has not in any degree been influenced by the notions of the civil law in defining what constitutes a *nudum pactum*. Dig. 19. 5. 5. See, on this subject, a learned note in Fonbl. Eq. 335, and 2 Kent, 364. Toullier defines *nudum pactum* to be an agreement not executed by one of the parties. Tom. 6, n. 13, page 10.

It is of no consequence whether the agreement be oral or written; 7 Term, 350; 7

Bro. P. C. 550; 4 Johns. 235; 5 Mass. 301, 392; 2 Day, 22; but a contract under seal cannot be held a *nudum pactum* for lack of consideration, since the seal imports consideration; 2 B. & Ald. 551. See CONSIDERATION; MAXIMS, *Ex nudo pacto;* 2 Bla. Com. 445; 16 Vin. Abr. 16.

NUISANCE. Any thing that unlawfully worketh hurt, inconvenience, or damage. 3 Bla. Com. 5, 216.

That class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or to the right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Wood, Nuisance.

A *private* nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. It produces damage to but one or a few persons, and cannot be said to be public; 36 N. Y. 297; 35 N. H. 357; 5 R. I. 185; Adams, Eq. 210; 3 Bla. Com. 215.

A *public* or common nuisance is such an inconvenience or troublesome offence as annoys the whole community in general, and not merely some particular person. It produces no special injury to one more than another of the people; 1 Hawk. Pl. Cr. 197; 4 Bla. Com. 166.

A *mixed* nuisance is one which, while producing injury to the public at large, does some special damage to some individual or class of individuals; Wood, Nuisance, 22.

It is difficult to say what degree of annoyance constitutes a nuisance. If a thing is calculated to interfere with the comfortable enjoyment of a man's house, it is a nuisance; 3 Jur. N. S. 571. In relation to offensive trades, it seems that when such a trade renders the enjoyment of life and property uncomfortable it is a nuisance; 1 Burr. 333; 5 Esp. 217; 13 Allen, 95; 116 E. C. L. 608; 45 Cal. 55; 35 Iowa, 221; for the neighborhood have a right to pure and fresh air; 2 C. & P. 485; 6 Rog. 61; 26 L. T. (N. S.) 277; 22 N. J. 26; 58 Penn. 275; 4 B. & S. 608.

A thing may be a nuisance in one place which is not so in another; therefore the situation or *locality* of the nuisance must be considered. A tallow-chandler, for example, setting up his business among other tallow-chandlers, and increasing the noxious smells of the neighborhood, is not guilty of setting up a nuisance unless the annoyance is much increased by the new manufactory; Peake, 91. Such an establishment might be a nuisance in a thickly populated town of merchants and mechanics where no such business was carried on; 3 Grant, 302. The same doctrine obtains as regards other trades or employments. Persons living in populous manufacturing towns must expect more noise, smoke, and disturbance than those living elsewhere, and the circumstances of every case must govern; 21 Conn. 213; 58 Penn. 275; 54 Me. 272. Carrying on an offensive trade for several years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travellers upon which it is a nuisance. Formerly the contrary doctrine obtained, on the ground that the complainants were in fault in *coming to a nuisance.* This doctrine is now very properly exploded, as it is manifest that an observance of it would interfere greatly with the growth of towns and cities; 6 Gray, 473; 7 Blackf. 534; 2 C. & P. 483; 7 East, 191; 23 Wend. 446; 8 Phila. 10; 5 Scott, 500; 3 Barb. 167. The trade may be offensive for *noise;* 51 N. Y. 300; 10 L. T. (N. S.) 241; 2 Bing. 34; Keames, Sel. Dec. 175; L. R. 4 Ch. App. 388; 2 Sim. N. S. 133; L. R. 8 Ch. App. 467; 2 Show. 327; 22 Vt. 321; 6 Cush. 80; or *smell;* 2 C. & P. 485; 13 Metc. Mass. 365; 1 Denio, 524; 34 Tex. 230; 100 Mass. 597; 33 Conn. 121; 43 N. H. 415; or for other reasons; 1 Johns. 78; 1 Swan, 213; Thach. Crim. Cas. 14; 3 East, 192; 3 Jur. N. S. 570; 73 Penn. 84; L. R. 5 Eq. Ca. 166; 52 N. H. 262.

To constitute a *public* nuisance, there must be such a number of persons annoyed that the offence can no longer be considered a private nuisance; 1 Burr. 337; 4 Esp. 200; 1 Stra. 686, 704; 2 Chitty, Crim. Law, 607, n.; 8 Ind. 494; 1 Wheat. 469; 37 Barb. 301.

Public nuisances arise in consequence of following *particular trades,* by which the air is rendered offensive and noxious; Cro. Car. 510; Hawk. Pl. Cr. b. 1, c. 75, § 10; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Stra. 686; 4 B. & S. 608; 23 Vt. 92; from acts of public *indecency,* as bathing in a public river in sight of the neighboring houses; 1 Russell, Crimes, 302; 2 Campb. 89; Sid. 168; 29 Ind. 517; 18 Vt. 574; 5 Barb. 203; 20 Ala. 65; 5 Rand. 627; or for acts tending to a *breach of the public peace,* as for drawing a number of persons into a field for the purpose of pigeon-shooting, to the disturbance of the neighborhood; 3 B. & Ald. 184; or for rude and riotous sports or pastimes; 5 Hill, 121; 1 Mod. 76; 8 Cow. 169; 3 Keb. 510; 1 S. & R. 40; 6 C. P. 324; or keeping a *disorderly house;* 1 Russell, Crimes, 298; 13 Gray, 26; 5 Cranch, 304; 8 Blackf. 208; 1 Salk. 282; 30 N. J. 103; or a *gaming-house;* Hawk. Pl. Cr. b. 1, c. 75, § 6; or a *bawdy-house;* Hawk. Pl. Cr. b. 1. c. 74 § 1; 9 Conn. 350; 13 Gray, 26; 26 N. Y. 190; 54 Barb. 299; or a *dangerous animal,* known to be such, and suffering him to go at large, as a large bulldog accustomed to bite people; 4 Burn, Just. 578; 90 B. 101; 28 Wisc. 430; 40 Vt. 347; or *exposing a person having a contagious disease,* as the smallpox, in public; 4 M. & S. 73, 472; and the like. The bringing a horse infected with the glanders

into a public place, to the danger of infecting the citizens, is a misdemeanor at common law; Dearsl. Cr. Cas. 24; 2 H. & N. 299; 16 Conn. 272; 41 Barb. 329. The selling of tainted and unwholesome food is likewise indictable; 4 N. C. L. 309; 3 Hawks. 376; 3 M. & S. 11. The leaving unburied the corpse of a person for whom the defendant was bound to provide Christian burial, as a wife or child, is an indictable nuisance, if he is shown to have been of ability to provide such burial; 2 Den. Cr. Cas. 325. See 3 Jur. N. S. 570. So of storing combustible articles in undue quantities or in improper places; 56 Barb. 72; 3 East, 192; 57 Penn. 274; 2 Hen. & M. 345; or the erection and maintenance of purprestures; Story, Eq. § 921; 9 Wend. 571; 28 N. Y. 396; 55 Barb. 404; 10 Pet. 623; 23 Vt. 92; 2 Wall. 403; 10 *id.* 557.

Private nuisances may be to *corporeal* inheritances: as, for example, if a man should build his house so as to throw the rain-water which fell on it on my land; Fitzherbert, Nat. Brev. 184; 39 Barb. 400; 5 Rep. 101; keep hogs or other animals so as to incommode his neighbor and render the air unwholesome; 9 Co. 58; or to *incorporeal* hereditaments; as, for example, obstructing a right of way by ploughing it up or laying logs across it, and the like; Fitzherbert, Nat. Brev. 183; 2 Rolle, Abr. 140; or obstructing a spring; 1 Campb. 463; 6 East, 208; interfering with a franchise, as a ferry or railroad, by a similar erection unlawfully made. It is impossible to state here a list of the offences held to be nuisances. Any annoyance arising from odors, smoke, unhealthy exhalations, noise, interference with water-power, etc. etc., whereby a man is prevented from fully enjoying his own property, may be ranked as a private nuisance.

The remedies are by an *action* for the damage done, by the owner, in the case of a private nuisance; 3 Bla. Com. 220; or by any party suffering special damage, in the case of a public nuisance; 4 Wend. 9; 3 Vt. 529; 1 Penn. 309; Carth. 194; Vaugh. 341; 3 M. & S. 472; 2 Bingh. 283; 1 Esp. 148; 28 Vt. 142; 36 Cal. 193; 2 R. I. 493; by *abatement* by the owner, when the nuisance is private; 2 Rolle, Abr. 565; Rolle, 394; 3 Bulstr. 198; 3 Dowl. & R. 556; 37 Penn. 503; 8 Dana, 158; and in some cases when it is *public;* 9 Co. 55; 2 Salk. 458; 3 Bla. Com. 5. But in neither case must there be any riot, and very pressing exigency is requisite to justify summary action of this character, particularly in the case of a public nuisance; 14 Wend. 397; 11 Ark. 252; 16 Q. B. 546; by *injunction*, which is the most usual and efficacious remedy; see INJUNCTION; or by *indictment* for a public nuisance; 2 Bish. Crim. Law, § 856; Whart. Crim. Law (2 ed.) § 1410, etc.

See Wood on Nuisance.

NUL AGARD (L. Fr. no award). **In Pleading.** A plea to an action on an arbitration bond, when the defendant avers that there was no legal award made. 3 Burr. 1730; 2 Stra. 923.

NUL DISSEISIN. In Pleading. No disseisin. A plea in a real action, by which the defendant denies that there was any disseisin. It is a species of the general issue.

NUL TIEL RECORD (Fr. no such record). **In Pleading.** A plea which is proper when it is proposed to rely upon facts which disprove the existence of the *record* on which the plaintiff founds his action.

Any matters may be introduced under it which tend to destroy the validity of the record as a record, provided they do not contradict the recitals of the record itself; 10 Ohio, 100. It is frequently used to enable the defendant to deny the jurisdiction of the court from which the alleged record emanates; 2 McLean, 129; 22 Wend. 293.

It is said to be the proper plea to an action on a foreign judgment, especially if of a sister state, in the United States; 2 Leigh, 72; 6 *id.* 570; 17 Vt. 302; 6 Pick. 232; 11 Miss. 210; 1 Penn. 499; 2 South. 778; 2 Breese, 2; though it is held that *nil debet* is sufficient; 33 Me. 268; 3 J. J. Marsh. 600; especially if the judgment be that of a justice of the peace; 3 Harr. N. J. 408. See CONFLICT OF LAWS.

NUL TORT (L. Fr. no wrong). **In Pleading.** A plea to a real action, by which the defendant denies that he committed any wrong. It is a species of general issue.

NUL WASTE. In Pleading. The general issue in an action of waste; Co. 3d Inst. 700 *a*, 708 *a*. The plea of *nul waste* admits nothing, but puts the whole declaration in issue; and in support of this plea the defendant may give in evidence any thing which proves that the act charged is no waste, as that it happened by tempest, lightning, and the like; Co. Litt. 283 *a*; 3 Wms. Saund. 238, n. 5.

NULL. Properly, that which does not exist; that which is not in the nature of things. In a figurative sense it signifies that which has no more effect than if it did not exist. 8 Toullier, n. 320.

NULLA BONA (L. Lat. no goods). The return made to a writ of fieri facias by the sheriff, when he has not found any goods of the defendant on which he could levy. 3 Bouvier, Inst. n. 3393.

NULLITY. An act or proceeding which has absolutely no legal effect whatever. See Chitty, Contr. 228.

NULLITY OF MARRIAGE. The requisites of a valid and binding marriage have been considered in the article on that subject. If any of these requisites are wanting in a given case, the marriage is either absolutely void, or voidable at the election of one or both of the parties. The more usual imperfections which thus render a marriage void or voidable are: 1. Unsoundness of mind in either of the parties. 2. Want of age; *i. e.*,

fourteen in males and twelve in females. 3. Fraud or error; but these must relate to the *essentials* of the relation, as personal identity, and not merely to the *accidentals*, as character, condition, or fortune. 4. Duress. 5. Physical impotence, which must exist at the time of the marriage and be incurable. 6. Consanguinity or affinity within the prohibited degrees. 7. A prior subsisting marriage of either of the parties. The fifth and sixth are termed canonical, the remainder, civil impediments.

The distinction between the two is important,—the latter rendering the marriage absolutely *void*, while the former only renders it *voidable*. In the one case, it is not necessary (though it is certainly advisable) to bring a suit to have nullity of the marriage ascertained and declared: it may be treated by the parties as no marriage, and will be so regarded in all judicial proceedings. In the other case, the marriage will be treated as valid and binding until its nullity is ascertained and declared by a competent court in a suit instituted for that purpose; and this must be done during the lifetime of both parties: if it is deferred until the death of either, the marriage will always remain good. But the effect of such sentence of nullity, when obtained, is to render the marriage null and void from the beginning, as in the case of civil impediments.

For the origin and history of this distinction between void and voidable marriages, see Bish. Marr. & D. c. 4.

A suit for nullity is usually prosecuted in the same court, and is governed by substantially the same principles, as a suit for divorce; Bish. Marr. & D. c. 15.

In its consequences, a sentence of nullity differs materially from a divorce. The latter assumes the original validity of the marriage, and its operation is entirely prospective. The former renders the marriage void from the beginning, and nullifies all its legal results. The parties are to be regarded legally as if no marriage had ever taken place: they are single persons, if before they were single; their issue are illegitimate; and their rights of property as between themselves are to be viewed as having never been operated upon by the marriage. Thus, the man loses all right to the property, whether real or personal, which belongs to the woman; and the woman loses her right to dower; Bish. Marr. & D. §§ 647, 659.

Neither is the woman, upon a sentence of nullity, entitled to permanent alimony; though the better opinion is that she is entitled to alimony *pendente lite*; Bish. Marr. & D. §§ 563, 579–580. See ALIMONY.

NULLIUS FILIUS (Lat.). The son of no one; a bastard.

A bastard is considered *nullius filius* as far as regards his right to inherit. But the rule of *nullius filius* does not apply in other respects, and has been changed by statute in most states so as to make him the child of his mother.

The mother of a bastard, during its age of nurture, is entitled to the custody of her child, and is bound to maintain it; 6 S. & R. 255; 2 Johns. 375; 15 *id.* 208; 2 Mass. 109; 12 *id.* 387, 433; 4 B. & P. 148. But see 5 East, 224, n.

The putative father, too, is entitled to the custody of the child as against all but the mother; 1 Ashm. 55. And it seems that the putative father may maintain an action, as if his child were legitimate, for marrying him without his consent, contrary to law. Add. Penn. 212. See BASTARD; CHILD; FATHER; MOTHER; PUTATIVE FATHER.

NULLUM ARBITRIUM (Lat.). **In Pleading.** The name of a plea to an action on an arbitration bond for not fulfilling the award, by which the defendant asserts that there is *no award*.

NULLUM FECERUNT ARBITRIUM (Lat.). **In Pleading.** The name of a plea to an action of debt upon an obligation for the performance of an award, by which the defendant denies that he submitted to arbitration, etc. Bacon, Abr. *Arbitr. etc.* (G).

NULLUM TEMPUS ACT. The statute 3 Geo. III. c. 16. See 32 Geo. III. c. 58, and 7 Will. c. 3. It was so called because the right of the crown to sue, etc., was limited by it to sixty years, in contradiction to the maxim, *Nullum tempus occurrit regi;* 3 Chitty, Stat. 63.

NUMBER. A collection of units.

In pleading, numbers must be stated truly when alleged in the recital of a record, written instrument, or express contract; Lawes, Pl. 48; 4 Term, 314; Cro. Car. 262; Dougl. 669; 2 W. Blackst. 1104. But in other cases it is not, in general, requisite that they should be truly stated; because they are not required to be strictly proved. If, for example, in an action of trespass the plaintiff proves the wrongful taking away of any part of the goods duly described in his declaration, he is entitled to recover *pro tanto;* Bacon, Abr. *Trespass* (I 2); Lawes, Pl. 48.

And sometimes, when the subject to be described is supposed to comprehend a multiplicity of particulars, a general description is sufficient. A declaration in trover alleging the conversion of "a library of books," without stating their number, titles, or quality, was held to be sufficiently certain; 3 Bulstr. 31; Carth. 110; Bacon, Abr. *Trover* (F 1); and in an action for the loss of goods by burning the plaintiff's house, the articles may be described by the simple denomination of "goods" or "divers goods." 1 Kebl. 825; Plowd. 85, 118, 123; Cro. Eliz. 837; 1 H. Blackst. 284.

NUMERATA PECUNIA (Lat.). **In Civil Law.** Money counted or paid; money given in payment by count. See PECUNIA NUMERATA and PECUNIA NON-NUMERATA. L. 3, 10, C. *de non numerat. pecun.;* Vicat, Voc. Jur.

NUNC PRO TUNC (Lat. now for then). A phrase used to express that a thing is done at one time which ought to have been performed at another.

Leave of court must be obtained to do things *nunc pro tunc;* and this is granted to answer the purposes of justice, but never to do injustice. A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court; 3 C. B. 970. See 1 V. & B. 312; 1 Moll. 462; 13 Price, 604.

A plea puis darrein continuance may be entered *nunc pro tunc* after an intervening continuation, in some cases; 11 N. H. 299; and lost pleadings may be replaced by new pleadings made *nunc pro tunc;* 1 Mo. 327.

By the Jud. Act of 1875, Ord. xli. r. 2, the entry of a judgment pronounced by a judge in court, shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date. And in other cases, by r. 3, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date. Moz. & W.

NUNCIATIO. In Civil Law. A formal proclamation or protest. It may be by acts (*realis*) or by words. Mackeldey, Civ. Law, § 237. Thus, *nunciatio novi operis* was an injunction which one man could place on the erection of a new building, etc. near him, until the case was tried by the prætor. *Id.;* Calv. Lex. An information against a criminal. Calv. Lex.

NUNCIO. The name given to the pope's ambassador. Nuncios are ordinary or extraordinary; the former are sent upon usual missions, the latter upon special occasions.

NUNCIUS. In International Law. A messenger; a minister; the pope's legate, commonly called a *nuncio.*

NUNCUPATIVE WILL. An oral will, declared by testator *in extremis*, or under circumstances considered equivalent thereto, before witnesses, and afterwards reduced to writing. 4 Kent. 576; 2 Bla. Com. 500; 1 Jarm. Wills, 130, 136. In early times this kind of will was very common, and before the Statute of Frauds, by which it was virtually abolished, save in the case of soldiers and sailors, was of equal efficacy, except for lands, tenements, and hereditaments, with a written testament. Such wills are subject to manifest abuses, and by stat. 1 Vict. c. 26, §§ 9, 11 (preceded by 1 Will. IV. c. 20), the privilege is confined to soldiers in actual service, and sailors at sea, and extends only to personal estate. Similar provisions have been enacted in Massachusetts, Minnesota, New York, Rhode Island, Virginia, West Virginia, and the territory of Montana. In Georgia, the statute embraces both real and personal property. In California and Dakota, the decedent must have been in actual military service, or at sea, and in immediate fear of death. In the other states, nuncupative wills by persons *in extremis* are still recognized, subject to restrictions as to amount of property bequeathed similar to those of the English statute of frauds. The following principles, among others, are well established: Statutes relating to nuncupative wills are strictly construed; 2 Phillim. 194; *id.* 190; 78 Ill. 287; 47 Penn. 31; 33 Miss. 629. The testator must be *in extremis*, overtaken by violent sickness, in contemplation of death, and without time to make a written will; 1 Addams, 389; 20 Johns. 502; 6 W. & S. 184; 10 Gratt. 548; but see 2 Ala. (N. S.) 242; 82 Ill. 50; the deceased must have clearly intimated by word or signs to those present that he intended to make the will; 9 B. Monr. 553; 27 Ill. 247; 26 N. H. 372; 14 La. An. 729; 36 Md. 630; 2 Greenl. 298; 63 Ill. 455; 46 Iowa, 694; testamentary capacity must be most clearly proved; 12 Gill & J. 192; 78 Ill. 287. In "actual military service," is held to mean during warfare, and while on an expedition; 3 Curt. 531; 53 Me. 561; but this rule has been somewhat freely treated; 39 Vt. 498; 1 Abb. Pr. (U. S.) 112. Sailors must be *serving* on shipboard; 2 Curt. 339; 2 R. I. 133. The term mariner applies to every one in the naval or mercantile service; 4 Bradf. 154. See, in general, 1 Wms. Exec. 59; Swinb. Wills; Redf. Wills, 185; Ayliffe, Pand.; Proff. Wills; note to Sykes *vs.* Sykes, 20 Am. Dec. 44.

NUNDINÆ (Law Lat.). **In Civil and Old English Law.** Fair or fairs. Dion. Halicarnass. lib. 2, p. 98; Vicat, Voc. Jur.; Law Fr. & Lat. Dict. Hence *Nundination*, traffic at fairs.

NUNQUAM INDEBITATUS (Lat. never indebted). **In Pleading.** A plea to an action of indebitatus assumpsit, by which the defendant asserts that he is not indebted to the plaintiff. 6 C. & P. 545; 1 M. & W. 542; 1 Q. B. 77. In England, this plea has been substituted for *nil debet, q.v.*, as the general issue in debt on a simple contract.

NUNTIUS, NUNCIUS. In Old English Practice. One who made excuse for absence of one summoned. An apparitor, beadle, or sergeant. Cowel. A messenger or legate: *e.g.* pope's nuncio. Jacob, Law Dict. *Essoniator* was sometimes wrongly used for *nuntius* in the first sense. Bracton, fol. 345, § 2.

NUPER OBIIT (Lat. he or she lately died). **In Practice.** The name of a writ which in the English law lies for a sister coheiress dispossessed by her coparcener of lands and tenements whereof their father, brother, or any common ancestor died seised of an estate in fee-simple. Fitzh. N. B. 197. Abolished in 1833.

NURTURE. The act of taking care of children and educating them. The right to the nurture of children generally belongs to the father till the child shall arrive at the age of fourteen years, and not longer. Till then he is guardian by nurture; Co. Litt. 38 *b.*

But in special cases the mother will be preferred to the father; 5 Binn. 520; 2 S. & R. 174; and after the death of the father the mother is guardian by nurture. Fleta, l. 1, c. 6; Comyns, Dig. *Guardian* (D). See GUARDIAN; HABEAS CORPUS.

NURUS (Lat.). A daughter-in-law. Dig. 50. 16. 50.

O.

OATH. An outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God. Tyler, Oaths, 15.

The term has been variously defined: as, "a solemn invocation of the vengeance of the Deity upon the witness if he do not declare the whole truth, so far as he knows it," 1 Stark. Ev. 22; or, "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth," 2 Leach, 482; or, as "a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or, in other words, to punish his perjury if he shall be guilty of it," 10 Toullier, nn. 343-348; Puffendorff, b. 4, c. 2, § 4. The essential idea of an oath would seem to be, however, that of a recognition of God's authority by the party taking it, and an undertaking to accomplish the transaction to which it refers as required by his laws.

In its broadest sense, the term is used to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense, it excludes all those forms of attestation or promise which are not accompanied by an imprecation.

Assertory oaths are those required by law other than in judicial proceedings and upon induction to office: such, for example, as custom-house oaths.

Extra-judicial oaths are those taken without authority of law. Though binding *in foro conscientiæ*, they do not, when false, render the party liable to punishment for perjury.

Judicial oaths are those administered in judicial proceedings.

Promissory or *official* oaths are oaths taken, by authority of law, by which the party declares that he will fulfil certain duties therein mentioned: as, the oath which an alien takes, on becoming naturalized, that he will support the constitution of the United States: the oath which a judge takes that he will perform the duties of his office. The breach of this does not involve the party in the legal crime or punishment of perjury; 3 Zabr. 49. Where an appointee neglects to take an oath of office when required by statute to do so, he cannot be considered qualified, nor justify his doings as an officer; 2 N. H. 202; s. c. 9 Am. Dec. 50.

The *form* of administering the oath may be varied to conform to the religious belief of the individual, so as to make it binding upon his conscience; 16 Pick. 154; 2 Gall. 346; 3 Park. Cr. 590; 2 Hawkes, 458; 7 Ill. 540; Ry. & M. 77. The most common form is upon the gospel, by taking the book in the hand: the words commonly used are, "You do swear that," etc., "so help you God," and then kissing the book; 9 C. & P. 137. The origin of this oath may be traced to the Roman law; Nov. 8, tit. 3; Nov. 74, cap. 5; Nov. 124, cap. 1; and the kissing the book is said to be an imitation of the priest's kissing the ritual, as a sign of reverence, before he reads it to the people; Rees, Cycl. In New England, New York, and in Scotland the gospels are not generally used, but the party taking the oath holds up his right hand and repeats the words here given; 1 Leach, 412, 498.

Another form is by the witness or party promising holding up his right hand while the officer repeats to him, "You do swear by Almighty God, the searcher of hearts, that," etc., "and this as you shall answer to God at the great day."

In another form of attestation, commonly called an affirmation (*q. v.*), the officer repeats, "You do solemnly, sincerely, and truly declare and affirm that," etc.

A Jew is sworn on the Pentateuch, or Old Testament, with his head covered; Stra. 821, 1113; a Mohammedan, on the Koran; 1 Leach, 54; a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest; Wils. 549; 1 Atk. 21; a Chinaman, by breaking a china saucer; 1 C. & M. 248. See 25 Alb. L. J. 301.

The form and time of administering oaths, as well as the person authorized to administer, are usually fixed by statute. See Gilp. 439; 1 Tyl. 347; 1 South. 297; 4 Wash. C. C. 555; 2 Blackf. 35; 2 McLean, 135; 9 Pet. 238; 1 Va. Cas. 181; 8 Rich. So. C. 456; 1 Swan, 157; 5 Mo. 21; 48 Cal. 197; 41 Conn. 206. The administering of unlawful oaths is an offence against the government, punishable in England by transportation; Whart. Lex.

The subject of oaths has undergone much