exclusion of all others. La. Civ. Code, art. 480.

OXGANG (fr. Sax. *gang*, going, and ox; Law Lat. *bovata*). **In Old English Law.** So much land as an ox could till. According to some, fifteen acres. Co. Litt. 69 *a*; Crompton, Jurisd. 220. According to Balfour, the Scotch *oxengang*, or *oxgate*, contained twelve acres; but this does not correspond with ancient charters. See Bell, Dict. *Ploughgate*. Skene says thirteen acres. Cowel.

OYER (Lat. *audire;* through L. Fr. *oyer*, to hear).

In Pleading. A prayer or petition to the court that the party may hear read to him the deed, etc., stated in the pleadings of the opposite party, and which deed is by intendment of law in court when it is pleaded with a profert. The same end is now generally attained by giving a copy of the deed of which oyer is asked, or, in other instances, by setting forth the instrument in full in the plaintiff's statement of his case. Oyer as it existed at common law seems to be abolished in England; 1 B. & P. 646, n. *b*; 3 *id.* 398; 25 E. L. & E. 304. Oyer may be demanded of any specialty or other written instrument, as, bonds of all sorts, deeds-poll, indentures, letters testamentary and of administration, and the like, which the adverse party is obliged to plead with a *profert in curia*. But pleading with a profert unnecessarily does not give a right to demand oyer; 1 Salk. 497; and it may not be had except when profert is made; Hempst. 265. Denial of oyer when it should be granted is ground for error; 1 Blackf. 126. In such cases the party making the claim should move the court to have it entered on record, which is in the nature of a plea, and the plaintiff may counterplead the right of oyer, or strike out the rest of the pleading following the oyer, and demur; 1 Saund. 9 *b*, n. 1; Bac. Abr. *Pleas*, 1; upon which the judgment of the court is either that the defendant have oyer, or that he answer without it; *id.;* 2 Lev. 142; 6 Mod. 28. See PROFERT IN CURIA.

After craving oyer, the defendant may set forth the deed or a part thereof, or not, at his election; 1 Chitty, Pl. 372; and may afterwards plead *non est factum*, or any other plea, without stating the oyer; 2 Stra. 1241; 1 Wils. 97; and may demur if a material variance appear between the oyer and declaration; 2 Saund. 366, n.

See, generally, Comyns, Dig. *Pleader* (P), *Abatement* (I 22); 3 Bouvier, Inst. n. 2890.

OYER AND TERMINER. See ASSIZE; COURT OF OYER AND TERMINER.

OYEZ (Fr. hear ye). The introduction to any proclamation or advertisement by public crier. It is wrongly and usually pronounced oh yes. 4 Bla. Com. 340, n.

P.

PACE. A measure of length, containing two feet and a half. The geometrical pace is five feet long. The common pace is the length of a step; the geometrical is the length of two steps, or the whole space passed over by the same foot from one step to another.

PACIFICATION (Lat. *pax*, peace, *facere*, to make). The act of making peace between two countries which have been at war; the restoration of public tranquillity.

PACK. To deceive by false appearances; to counterfeit; to delude: as, packing a jury. See JURY; Bacon, Abr. *Juries* (M); 12 Conn. 262.

PACKAGE. A bundle put up for transportation or commercial handling. A parcel is a small package; 1 Hugh. 529; 44 Ala. 468. Certain duties charged in the port of London on the goods imported and exported by aliens. Now abolished. Whart. Lex.

PACT. In Civil Law. An agreement made by two or more persons on the same subject, in order to form some engagement, or to dissolve or modify one already made: *Conventio est duorum in idem placitum consensus de re solvendâ, id est faciendâ vel præstandâ.* Dig. 2. 14; Clef des Lois Rom.; Ayliffe, Pand. 558; Merlin, Rép. *Pacte.*

PACTIONS. In International Law. Contracts between nations which are to be performed by a single act, and of which execution is at an end at once. 1 Bouvier, Inst. n. 100.

PACTUM CONSTITUTÆ PECUNIÆ (Lat.). **In Civil Law.** An agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay; or it may be defined simply an agreement by which a person promises a creditor to pay him.

When a person by this pact promises his own creditor to pay him, there arises a new obligation, which does not destroy the former by which he was already bound, but which is accessory to it; and by this multiplicity of obligations the right of the creditor is strengthened. Pothier, Obl. pt. 2, c. 6, s. 9.

There is a striking conformity between the *pactum constitutæ pecuniæ*, as above defined, and our *indebitatus assumpsit*. The *pactum constitutæ pecuniæ* was a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding debt, and introduced by the prætor to obviate some formal difficulties. The action of *indebitatus assumpsit* was brought upon a promise for the payment of a debt: is not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise the right to the action of debt was not extinguished nor varied; 4 Co. 91, 95. See 1 H. Blackst. 550-555, 850; Dougl. 6, 7; 3 Wood, Inst. 168, 169, n. *c*; 1 Viner, Abr. 270; Brooke, Abr. *Action sur le Case* (pl. 7, 69, 72); Fitzh. N. B. 94 A, n. a, 145 G; 4 B. & P. 295; 1 Chitty, Pl. 89; Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 4, nn. 388, 396.

PACTUM DE NON PETENDO (Lat.). **In Civil Law.** An agreement made between a creditor and his debtor that the former will not demand from the latter the debt due. By this agreement the debtor is freed from his obligation. This is not unlike the *covenant not to sue*, of the common law. Wolff, Dr. de la Nat. § 755; Leake, Contr. 504.

PACTUM DE QUOTA LITIS (Lat.). **In Civil Law.** An agreement by which a creditor of a sum difficult to recover promises a portion—for example, one third—to the person who will undertake to recover it. In general, attorneys will abstain from making such a contract: yet it is not unlawful at common law.

PAGODA. In Commercial Law. A denomination of money in Bengal. In the computation of *ad valorem* duties it is valued at one dollar and ninety-four cents. Act of March 2, 1799, s. 61, 1 Story, U. S. Laws, 626. See FOREIGN COINS.

PAINE FORTE ET DURE. See PEINE FORTE ET DURE.

PAINS AND PENALTIES. See BILL OF PAINS AND PENALTIES.

PAIRING-OFF. A kind of system of negative proxies, in vogue both in parliament and in legislative bodies in this country, whereby a member agrees with a member on the opposite side, that they shall both be absent from voting during a given time, or upon a particular question. Said to have originated in the house of commons in Cromwell's time. See May's Parl. Prac.

PAIS, PAYS. A French word, signifying country. In law, matter *in pais* is matter of fact, in opposition to matter of record: a trial *per pais* is a trial by the country,—that is, by a jury.

PALACE COURT. In English Law. A court which had jurisdiction of all personal actions arising between any parties within twelve miles of Whitehall, not including the city of London.

It was erected in the time of Charles I., and was held by the steward of the household, the knight-marshal and steward of the court, or his deputy. It had its sessions once a week, in the borough of Southwark. It was abolished by 12 & 13 Vict. c. 101, § 13. See MARSHALSEA, COURT OF.

PALFRIDUS (L. Lat.) A palfrey; a horse to travel on. Fitzherbert, Nat. Brev. 93.

PALLIO COOPERIRE. (To cover with a cloak.) An ancient custom, where the parents of children born out of wedlock, afterwards intermarried, of the parents and children standing together under a cloth extended, while the marriage was solemnized, the act being in the nature of adoption; Toml.

PANDECTS. In Civil Law. The name of an abridgment or compilation of the civil law, made by Tribonian and others, by order of the emperor Justinian, and to which he gave the force of law A.D. 533.

It is also known by the name of the Digest, because in his compilation the writings of the jurists were reduced to order and condensed *quasi digestiæ*. The emperor, in 530, published an ordinance entitled *De Conceptione Digestorum*, which was addressed to Tribonian, and by which he was required to select some of the most distinguished lawyers to assist him in composing a collection of the best decisions of the ancient lawyers, and compile them in fifty books, without confusion or contradiction. The instructions of the emperor were to select what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and by the necessary changes, to produce a complete body of law. This work was a companion to the Code of Justinian, and was to be governed in its arrangement of topics by the method of the Code. Justinian allowed the commissioners, who were sixteen in number, ten years to compile it; but the work was completed in three years, and promulgated in 533. A list of the writers from whose works the collection was made, and an account of the method pursued by the commissioners, will be found in Smith's Dict. of Gr. & R. Antiq. About a third of the collection is taken from Ulpian; Julius Paulus, a contemporary of Ulpian, stands next: these two contributed one half of the Digest. Papinian comes next. The Digest, although compiled in Constantinople, was originally written in Latin, and afterwards translated into Greek.

The Digest is divided in two different ways: the first into fifty books, each book in several titles, and each title into several extracts or *leges*, and at the head of each series of extracts is the name of the lawyer from whose work they were taken.

The *first* book contains twenty-two titles. The subject of the first is *De Justicia et Jure*, of the division of person and things, of magistrates, etc. The *second*, divided into fifteen titles, treats of the power of magistrates and their jurisdiction, the manner of commencing suits, of agreements and compromises. The *third*, composed of six titles, treats of those who can and those who cannot sue, of advocates and attorneys and syndics, and of calumny. The *fourth*, divided into nine titles, treats of causes of restitution, of submissions and arbitrations, of minors, carriers by water, inn-keepers, and those who have the care of the property of others. In the *fifth* there are six titles, which treat of jurisdiction and inofficious testaments. The subject of the *sixth*, in which there are three titles, is actions. The *seventh*, in nine titles, embraces whatever concerns usufructs, personal servitudes, habitations, the uses of real estate and its appurtenances, and of the sureties required of the usu-

fructuary. The *eighth* book, in six titles, regulates urban and rural servitudes. The *ninth* book, in four titles, explains certain personal actions. The *tenth*, in four titles, treats of mixed actions. The object of the *eleventh* book, containing eight titles, is to regulate interrogatories, the cases of which the judge was to take cognizance, fugitive slaves, of gamblers, of surveyors who made false reports, and of funerals and funeral expenses. The *twelfth* book, in seven titles, regulates personal actions in which the plaintiff claims the title of a thing. The *thirteenth*, in seven titles, and the *fourteenth*, in six titles, regulate certain actions. The *fifteenth*, in four titles, treats of actions to which a father or master is liable in consequence of the acts of his children or slaves, and those to which he is entitled, of the *peculium* of children and slaves, and of the actions on this right.

The *sixteenth*, in three titles, contains the law relating to the senatus-consultum Velleianum, of compensation or set-off, and of the action of deposit. The *seventeenth*, in two titles, expounds the law of mandates and partnership. The *eighteenth* book, in seven titles, explains the contract of sale. The *nineteenth*, in five titles, treats of the actions which arise on a contract of sale. The law relating to pawns, hypothecation, the preference among creditors, and subrogation, occupy the *twentieth* book, which contains six titles. The *twenty-first* book explains, under three titles, the edict of the ediles relating to the sale of slaves and animals, then what relates to evictions and warranties. The *twenty-second* book, in six titles, treats of interest, profits, and accessories of things, proofs, presumptions, and of ignorance of law and fact. The *twenty-third*, in five titles, contains the law of marriage, and its accompanying agreements. The *twenty-fourth*, in three titles, and the *twenty-fifth*, in seven titles, regulates donations between husband and wife, divorces and their consequence. The *twenty-sixth* and *twenty-seventh*, each in two titles, contain the law relating to tutorship and curatorship. The *twenty-eighth*, in eight titles, and the *twenty-ninth*, in seven, contain the law on last will and testaments.

The *thirtieth*, *thirty-first*, and *thirty-second*, each divided into two titles, contain the law of trusts and specific legacies.

The *thirty-third*, *thirty-fourth*, and *thirty-fifth*—the first divided into ten titles, the second into nine titles, and the last into three titles—treat of various kinds of legacies. The *thirty-sixth*, containing four titles, explains the senatus-consultum Trebellianum, and the time when trusts become due.

The *thirty-seventh* book, containing fifteen titles, has two objects,—to regulate successions and to declare the respect which children owe their parents and freedmen their patrons. The *thirty-eighth* book, in seventeen titles, treats of a variety of subjects: of successions, and of the degree of kindred in successions; of possession; and of heirs. The *thirty-ninth* explains the means which the law and the prætor take to prevent a threatened injury, and donations *inter vivos* and *mortis causâ*. The *fortieth*, in sixteen titles, treats of the state and condition of persons, and of what relates to freedmen and liberty. The different means of acquiring and losing title to property are explained in the *forty-first* book, in ten titles. The *forty-second*, in eight titles, treats of the *res judicata*, and of the seizure and sale of the property of a debtor. Interdicts, or possessory actions, are the object of the *forty-third* book, in three titles. The *forty-fourth* contains an enumeration of defences which arise in consequence of the *res judicata*, from the lapse of time, prescription, and the like. This occupies six titles; the seventh treats of obligations and actions. The *forty-fifth* speaks of stipulations, by freedmen or by slaves. It contains only three titles. The *forty-sixth*, in eight titles, treats of securities, novations and delegations, payments, releases, and acceptilations. In the *forty-seventh* book are explained the punishments inflicted for private crimes, *de privatis delictis*, among which are included larcenies, slander, libel, offences against religion and public manners, removing boundaries, and similar offences.

The *forty-eighth* book treats of public crimes, among which are enumerated those of *læsæ-majestatis*, adultery, murder, poisoning, parricide, extortion, and the like, with rules for procedure in such cases. The *forty-ninth*, in eighteen titles, treats of appeals, of the rights of the public treasury, of those who are in captivity, and of their repurchase. The *fiftieth* and last book, in seventeen titles, explains the rights of municipalities, and then treats of a variety of public officers.

These fifty books are allotted in seven parts: the first contains the first four books; the second, from the fifth to the eleventh book inclusive; the third, from the twelfth to the nineteenth inclusive; the fourth, from the twentieth to the twenty-seventh inclusive; the fifth, from the twenty-eighth to the thirty-sixth inclusive; the sixth commences with the thirty-seventh and ends with the forty-seventh book; and the seventh, or last, is composed of the last six books.

The division into *digestum vetus* (book first to and including title second of book twenty-fourth), *digestum infortiatum* (title third of book twenty-fourth, to and including book thirty-eighth), and *digestum novum* (from book thirty-ninth to the end), has reference to the order in which these three parts appeared.

The Pandects are more usually cited by English and American jurists by numbers, thus: Dig. 23. 3. 5. 6, meaning book 23, title 3, law or fragment 5, section 6; sometimes, also, otherwise, as, D. 23. 3. fr. 5. § 6. or fr. 5. § 6. D. 23. 3. The old mode of citing was by titles and initial words, thus: D. *de jure dotium*, L. *profectitia*, § *si pater;* or the same references in reverse order. From this afterwards originated the following: L. *profectitia* 5. § *si pater* 6. D. *de jure dotium*, and lastly, L. 5. § 6. D. *de jure dotium*,—which is the form commonly used by the continental jurists of Europe. 1 Mackeldy, Civ. Law, 54, 55, § 65. And see Taylor, Civ. Law, 24, 25. The abbreviation *ff*. was commonly used instead of Dig. or Pandects.

The Pandects—as well indeed as all Justinian's laws, except some fragments of the Code and Novels—were lost to all Europe for a considerable period. During the pillage of Amalfi, in the war between the two soi-disant popes Innocent II. and Anaclet II., a soldier discovered an old manuscript, which attracted his attention by its envelope of many colors. It was carried to the Emperor Clothaire, and proved to be the Pandects of Justinian. The work was arranged in its present order by Warner, a German, whose Latin name is Irnerius, who was appointed by that emperor Professor of Roman Law at Bologna. 1 Fournel, Hist. des Avocats, 44, 46, 51. The style of the work is very grave and pure, and contrasts in this respect with that of the Code, which is very far from classical. On the other hand, the learning of the Digest stands rather in the discussing of subtle questions of law, and enumerations of the variety of opinions of ancient lawyers thereupon, than in practical matters of daily use, of which the Code so simply and directly treats. See Ridley, View, pt. i. ch. 1, 2.

While the Pandects form much the largest fraction of the Corpus Juris, their relative value and importance are far more than proportional to their extent. They are, in fact, the soul of the Corpus Juris. Hadley, Rom Law, 11.

PANEL (diminutive from either *pane*, apart, or *page*, *pagella*. Cowel). **In Practice.** A schedule or roll, containing the names of jurors summoned by virtue of a writ of *venire facias*, and annexed to the writ. It is returned into court whence the *venire* issued. Co. Litt. 158 *b*; 3 Bla. Com. 353; 40 Cal. 586.

In Scotch Law. The prisoner at the bar, or person who takes his trial before the court of justiciary for some crime. So called from the time of his appearance. Bell, Dict. Spelled, also, *pannel*.

PAPER BLOCKADE. An ineffective blockade. See BLOCKADE.

PAPER-BOOK. In Practice. A book or paper containing an abstract of all the facts and pleadings necessary to the full understanding of a case.

Courts of error, and other courts, on arguments, require that the judges shall each be furnished with such a paper-book. In the court of king's bench, in England, the transcript containing the whole of the proceedings filed or delivered between the parties, when the issue joined, in an issue in fact, is called the *paper-book*. Steph. Pl. 95; 5 Bla. Com. 317; 3 Chitt. Pr. 521; 2 Stra. 1131, 1266; 1 Chitty, Bail, 277; 2 Wils. 243; Tidd, Pr. 727.

In modern English practice under the Jud. Act of 1875, printed copies of every special case must now be delivered by the plaintiff (Ord. xxxiv. r. 3). And any party who enters an action for trial must deliver to the officer of the court a copy of the whole of the pleadings in the action for the use of the judge at the trial (Ord. xxxvi. r. 17).

PAPER-DAYS. In English Law. Days on which special arguments are to take place. Tuesdays and Fridays in term-time are paper-days appointed by the court. Lee, Dict. of Pr.; Archb. Pr. 101.

Since the Judicature Acts have come into force, similar arrangements continue to be made.

PAPER MONEY. The engagements to pay money which are issued by governments and banks, and which pass as money. Pardessus, Droit Com. n. 9. Bank-notes are generally considered as cash, and will answer all the purposes of currency; but paper money is not a legal tender if objected to. See LEGAL TENDER; NATIONAL BANKS.

PAPER OFFICE. An ancient office in the palace of Whitehall, wherein state papers are kept. Also an ancient office for the court records in the court of queen's bench, sometimes called the paper-mill; Moz. & W.

PAPERS. The constitution of the United States provides that the rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. See SEARCH-WARRANT.

PAPIST. A term applied by Protestants to Roman Catholics. By the act of 10 Geo. IV. c. 7, known as the Catholic Emancipation Act, Roman Catholics were restored in general to the full enjoyment of all civil rights, except that of holding ecclesiastical offices and certain high appointments in the state. Before that act their condition had been much ameliorated by various statutes, beginning with 18 Geo. III. c. 60. As to the right of holding property for religious purposes, the 2 & 3 Wm. IV. c. 115, placed them on a level with Protestant dissenters, and the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 49, repealed all enactments oppressive to Roman Catholics. See Whart. Lex.

PAR. In Common Law. Equal. It is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; *above* par, or *below* par, when they sell for more or less; 57 Ga. 324; 8 Paige, 527; 22 Penn. 479.

PAR OF EXCHANGE. The par of the currencies of any two countries means the equivalence of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. The exchange between the two countries is said to be at par when bills are negotiated on this footing,—*i. e.* when a bill for £100 drawn on London sells in Paris for 2520 frs., and *vice versâ*. Bowen, Pol. Econ. 321. See 11 East, 267.

PARAGE. Equality of blood, name, or dignity, but more especially of land in the partition of an inheritance between co-heirs. Co. Litt. 166 *b*. Hence disparage, and disparagement. Blount.

In Feudal Law. Where heirs took of the same stock and by same title, but from right of primogeniture, or some other cause, the shares were unequal, the younger was said to hold of the elder, *jure et titulo paragii*, by right and title of parage being equal in everything but the quantity, and owing no homage or fealty. Calv. Lex.

PARAGIUM (from the Latin adjective *par*, equal; made a substantive by the addition of *agium*; 1 Thomas, Co. Litt. 681). Equality.

In Ecclesiastical Law. The portion which a woman gets on her marriage. Ayl. Par. 336.

PARAMOUNT (*par*, by, *mounter*, to ascend). Above; upwards. Kelh. Norm. Dict. *Paramount especifié*, above specified. Plowd. 209 *a*.

That which is superior: usually applied to the highest lord of the fee of lands, tenements, or hereditaments Fitzh. N. B. 135. Where A lets lands to B, and he underlets them to C, in this case A is the paramount

and B is the mesne landlord. See MESNE; 2 Bla. Com. 91; 1 Thomas, Co. Litt. 484, n. 79, 485, n. 81.

PARAPHERNA (Lat.). **In Civil Law.** Goods brought by wife to husband over and above her dower (*dos*). Voc. Jur. Utr.; Fleta, lib. 5, c. 23, § 6; Mack. C. L. § 529.

PARAPHERNALIA. Apparel and ornaments of a wife, suitable to her rank and degree. 2 Bla. Com. 435.

These are subject to the control of the husband during his lifetime; 3 Atk. 394; but go to the wife upon his death, in preference to all other representatives; Cro. Car. 343; and cannot be devised away by the husband; Noy, Max. They are liable to be sold to pay debts on a failure of assets; 1 P. Wms. 730. See, also, 2 Atk. 642; 11 Vin. Abr. 176. The judge of probate is, in the practice of most states, entitled to make an allowance to the widow of a deceased person which more than takes the place of the paraphernalia. See 4 Bouv. Inst. 3996, 3997.

While a married woman may acquire title to articles of apparel by gift from her husband, yet her mere use and enjoyment of such articles purchased by her husband does not give title thereto as her separate property; 12 S. C. 180; s. c. 32 Am. Rep. 508. See also 35 Ohio St. 514. In New York, by statute, a married woman may sue in her own name for injury to her paraphernalia; 48 N. Y. 212; s. c. 8 Am. Rep. 543; but in the absence of proof of a gift to her, the husband can sue; 74 N. Y. 116; s. c. 30 Am. Rep. 271.

PARATITLA (Lat.). **In Civil Law.** An abbreviated explanation of some titles or books of the Code or Digest.

PARATUM HABEO (Lat. I have ready). **In Practice.** A return made by the sheriff to a *capias ad respondendum*, which signified that he had the defendant ready to bring into court. This was a fiction, where the defendant was at large. Afterwards he was required, by statute, to take bail from the defendant, and he returned *cepi corpus* and bail-bond. But still he might be ruled to bring in the body; 7 Penn. 535.

PARAVAIL. Tenant paravail is the lowest tenant of the fee, or he who is the immediate tenant to one who holds of another. He is called tenant paravail because it is presumed he has the avails or profits of the land. Fitzh. N. B. 135; Co. 2d Inst. 296.

PARCEL. A part of the estate; 38 Iowa, 141; 1 Comyns, Dig. *Abatement* (H 51), *Grant* (E 10). To parcel is to divide an estate. Bacon, Abr. *Conditions* (O).

A small bundle or package.

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen. The prisoner was indicted for stealing "one parcel, of the value of one shilling, of the goods," etc. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner. Held an insufficient description; 7 Cox, C. C. 13.

PARCENARY. The state or condition of holding title to lands jointly by parceners, before the common inheritance has been divided. See COPARCENARY.

PARCENERS. The daughters of a man or woman seised of lands and tenements in fee-simple or fee-tail, on whom, after the death of such ancestor, such lands and tenements descend, and they enter. See COPARCENERS.

PARCHMENT. Sheepskins dressed for writing, so called from *Pergamus*, Asia Minor, where they were invented. Used for deeds, and was used for writs of summons in England previous to the Judicature Act, 1875. (Ord. v. r. 5). Whart. Lex.

PARCO FRACTO (Lat.). **In English Law.** The name of a writ against one who violently breaks a pound and takes from thence beasts which, for some trespass done, or some other just cause, were lawfully impounded.

PARDON. An act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 7 Pet. 160.

Every pardon granted to the guilty is in derogation of the law: if the pardon be equitable, the law is bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But, as human actions are necessarily imperfect, the pardoning power must be vested somewhere, in order to prevent injustice when it is ascertained that an error has been committed.

An *absolute* pardon is one which frees the criminal without any condition whatever.

A *conditional* pardon is one to which a condition is annexed, performance of which is necessary to the validity of the pardon. 1 Bail. 283; 10 Ark. 284; 1 M'Cord, 176; 1 Park. Cr. Cas. 47.

A *general* pardon is one which extends to all offenders of the same kind. It may be express, as when a general declaration is made that all offenders of a certain class shall be pardoned, or implied, as in case of the repeal of a penal statute. 2 Over. 423.

The pardoning power is lodged in the executive of the United States and of the various states, and extends to all offences except in cases of impeachment. In some states a concurrence of one of the legislative bodies is required; in other states, boards of pardon have been provided, whose recommendation of a pardon to the executive is a prerequisite to the exercise of the power.

The power of pardon conferred by the constitution upon the president is unlimited, except in cases of impeachment. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or

during their pendency, or after conviction and judgment. The power is not subject to legislative control. A pardon reaches the punishment prescribed for an offence, and the guilt of the offender. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching: if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It gives him a new credit and capacity. There is only this limitation to its operation; it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment; 4 Wall. 333.

There are several ways (as given by Judge Cooley) in which the pardoning power of the president may be exercised: 1. A pardon may be given to a person under conviction by name, and this will take effect from its delivery, unless otherwise provided therein. 2. It may be given to one or more persons named, or to a class of persons, before conviction, and even before prosecution begun. Such a pardon is rather in the nature of an amnesty. 3. It may be given by proclamation, forgiving all persons who may have been guilty of the specified offence, or offences; 4 Wall. 330, 380; 13 *id.* 128; and in this case the pardon takes effect from the time the proclamation is signed; 17 Wall. 191. 4. It may in any of these ways be made a pardon, on conditions to be first performed, in which case it has effect only on performance; or on conditions to be thereafter performed, in which case a breach in the condition will place the offender in the position occupied by him before the pardon was issued; 7 Pet. 150; 2 Caines, 57; 1 McCord, 176.

It is to be exercised in the discretion of the power with whom it is lodged. As to promises of pardon to accomplices, see 1 Chitty, Cr. Law, 83; 1 Leach, 115.

In order to render a pardon valid, it must express with accuracy the crime intended to be forgiven; 4 Bla. Com. 400; 3 Wash. C. C. 335; 7 Ind. 359; 1 Jones, No. C. 1.

The effect of a pardon is to protect from punishment the criminal for the offence pardoned; 6 Wall. 766; 16 *id.* 147; 91 U. S. 474; but for no other; 10 Ala. 475; 1 Bay, 34. It seems that the pardon of an assault and battery, which afterwards becomes murder by the death of the person beaten, would not operate as a pardon of the murder; 12 Pick. 496. See Plowd. 401; 1 Hall, N. Y. 426. In general, the effect of a full pardon is to restore the convict to all his rights. But to this there are some exceptions. *First*, it does not restore civic capacity; 2 Leigh, 724. See 1 Strobh. 150; 2 Wheel. Cr. Cas. 451; 33 N. H. 388. *Second*, it does not affect a *status* of other persons which has been altered or a right which has accrued in consequence of the commission of the crime or its punishment; 10 Johns. 232; 2 Bay, 565; 5 Gilm. 214; or third persons who, by the prosecution of judicial proceedings, may have acquired rights to a share in penalties or to property forfeited and actually sold; 4 Wash. C. C. 64; 1 Abb. U. S. 110; 9 Fed. Rep. 645; but see 4 Biss. 336; 6 Wall. 766 (as to forfeiture to U. S.).

When the pardon is general, either by an act of amnesty, or by the repeal of a penal law, it is not necessary to plead it; because the court is bound, *ex officio*, to take notice of it; Baldw. 91; and the criminal cannot even waive such pardon, because by his admittance no one can give the court power to punish him when it judicially appears there is no law to do it. But when the pardon is special, to avail the criminal it must judicially appear that it has been accepted; and for this reason it must be specially pleaded; 7 Pet. 150, 162; and if he has obtained a pardon before arraignment, and instead of pleading it in bar he pleads the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment; 1 Rolle, 297. See 1 Dy. 34 *a*; Keilw. 58; T. Raym. 13; 3 Metc. Mass. 453.

The power to pardon extends to punishments for contempt; 7 Blatch. 23.

All contracts made for the buying or procuring a pardon for a convict are void; and such contracts will be declared null by a court of equity, on the ground that they are opposed to public policy; 4 Bouvier, Inst. n. 3857.

See, generally, Bacon, Abr. *Pardon;* Comyns, Dig. *Pardon;* Viner, Abr. *Pardon;* 13 Petersd. Abr.; Dane, Abr.; Co. 3d Inst. 233–240; Hawk. Pl. Cr. b. 2, c. 37; 1 Chitty, Cr. Law, 762–778; 2 Russ. Cr. 595; Stark. Cr. Pl. 368, 380.

PARENS PATRIÆ (Lat.). Father of his country. In England, the king; 3 Bla. Com. 427; 2 Steph. Com. 528; in America, the power is reserved to the states; 4 Kent, 508, n.; 17 How. 393.

PARENT AND CHILD. See FATHER; MOTHER.

PARENTAGE. Kindred in the direct ascending line. See 2 Bouv. Inst. n. 1955.

For a discussion of the subject in connection with Citizenship, see 2 Kent, 49; Morse on Citizenship; CITIZEN; NATURALIZATION.

PARENTS. The lawful father and mother of the party spoken of; 1 Murph. No. C. 336; 11 S. & R. 93.

The term parent differs from that of ancestor, the latter embracing not only the father and mother, but every person in an ascending line. It differs also from predecessor, which is applied to corporators. Wood, Inst. 68; 7 Ves. Ch. 522; 1 Murph. No. C. 336; 6 Binn. Penn. 255. See FATHER; MOTHER.

By the civil law, grandfathers and grandmothers, and other ascendants, were, in certain cases, considered parents. Dict. de Jur. *Parente.* See 1 Ashm. Penn. 55; 2 Kent, 159; 5 East, 223; Bouvier, Inst. Index.

PARES (Lat.). A man's equals; his peers; 3 Bla. Com. 349.

PARES CURIÆ (Lat.). **In Feudal Law.** Those vassals who were bound to attend the lord's court; Erskine, Inst. b. 2, tit. 3, s. 17; 1 Washb. R. P.

PARI DELICTO (Lat.). **In Criminal Law.** In a similar offence or crime; equal in guilt.

A person who is *in pari delicto* with another differs from a *particeps criminis* in this, that the former term always includes the latter, but the latter does not always include the former. 8 East, 381, 382.

PARI MATERIA (Lat.). Of the same matter; on the same subject: as, laws *pari materia* must be construed with reference to each other. Bacon, Abr. *Statute* (I 3).

PARI PASSU (Lat.) By the same gradation. Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.

PARISH. A district of country, of different extents.

In Ecclesiastical Law. The territory committed to the charge of a parson, or vicar, or other minister. Ayl. Par. 404; 2 Bla. Com. 112; Hoffm. Eccl. Law.

Although, in the absence of a state church in this country, the status of parishes is comparatively unimportant, yet in the Prot. Epis. Church, at least, their boundaries and the rights of the clergy therein are quite clearly defined by canon. In the leading case of Stubbs and Boggs *vs.* Tyng, decided in New York, in March, 1868, the defendant was found guilty of violating a canon of the church, in having officiated, without the permission of plaintiffs within the corporate bounds of the city of New Brunswick, N. J., which then constituted the plaintiffs' parochial cure; Baum, 103–148.

In Louisiana. Divisions corresponding to counties. The state is divided into parishes.

In New England. Divisions of a town, originally territorial, but which now constitute quasi-corporations, consisting of those connected with a certain church. See 2 Mass. 501; 16 *id.* 457, 488, 492 *et seq.*; 1 Pick. 91.

In English Law. The children of parents unable to maintain them, who are apprenticed by the overseers of the poor of their parish, to such persons as may be willing to receive them; 2 Steph. Com. 230.

PARISH CLERK. In English Law. An officer, in former times often in holy orders, and appointed to officiate at the altar; now his duty consists chiefly in making responses in church to the minister. By common law he has a freehold in his office, but it seems now to be falling into desuetude; 2 Steph. Com. 700; Moz. & W.

PARISHIONERS. Members of a parish. In England, for many purposes they form a body politic. See PARISH.

PARISH CONSTABLE. See CONSTABLE.

PARISH COURT. In Louisiana the local courts in each parish, corresponding generally to county and probate courts, and, in some respects, justices' courts, in other states were formerly so called.

PARIUM JUDICIUM (Lat. the decision of equals). The right of trial by one's peers: *i. e.* by jury in the case of a commoner, by the house of peers in the case of a peer.

PARK (L. Lat. *parcus*). An inclosure; 2 Bla. Com. 38. A pound. Reg. Orig. 166; Cowel. An inclosed chase extending only over a man's own grounds. 13 Car. II. c. 10; Manw. For. Laws; Crompton, Jur. fol. 148; 2 Bla. Com. 38.

Pairk is still retained in Ireland for "pound."

PARLE HILL (also called Parling Hill). A hill where courts were held in olden times. Cowel.

PARLIAMENT (said to be derived from *parler la ment*, to speak the mind, or *parum lamentum*).

In English Law. The legislative branch of the government of Great Britain, consisting of the house of lords and the house of commons.

The parliament is usually considered to consist of the king, lords, and commons. See 1 Bla. Com. 147*, 157*, Chitty's note; 2 Steph. Com. 537. In 1 Woodd. Lect. 30, the lords temporal, the lords spiritual, and the commons are called the three estates of the realm: yet the king is called a part of the parliament, in right of his prerogative of veto and the necessity of his approval to the passage of a bill. That the connection between the king and the lords temporal, the lords spiritual, and the commons, who when assembled in parliament form the three estates of the realm, is the same as that which subsists between the king and those estates—the people at large—out of parliament, the king not being in either case a member, branch, or co-estate, but standing solely in the relation of sovereign or head, see Colton, Records, 710; Rot. Parl. vol. iii. 623 *a*; 2 M. & G. 457, n.

Records of writs summoning knights, burgesses, and citizens to parliament are first found towards the end of the reign of Henry III., such writs having issued in the thirty-eighth and forty-ninth years of his reign. 4 Bla. Com. 425; Prynne, 4th Inst. 2. In the reign of Edward III. it assumed its present form. *Id.* Since the reign of Edward III. the history of England shows an almost constant increase in the power of parliament. Anne was the last sovereign who exercised the royal prerogative of *veto*; and, as this prerogative no longer practically exists, the authority of parliament is absolutely unrestrained. The parliament can only meet when convened by the sovereign, exept on the demise of the sovereign with no parliament in being, in which case the last parliament is to assemble. 6 Anne, c. 7. The sovereign has also power to prorogue and dissolve the parliament. May, Imperial Parliament. The origin of the English parliament seems traceable to the *witena gemote* of the Saxon kings. Encyc. Brit. See May's Law, Priv. and Proc. of Parliament; HIGH COURT OF PARLIAMENT.

PARLIAMENTUM INDOCTUM (Lat. unlearned parliament). A name applied to a parliament assembled, under a

law that no lawyer should be a member of it, at Coventry. 6 Hen. IV.; 1 Bla. Com. 177; Walsingham, 412, n. 30; Rot. Parl. 6 Hen. IV.

PARLOR CAR. See SLEEPING CAR.

PAROL (more properly, *parole*. A French word, which means, literally, word, or speech). A term used to distinguish contracts which are made verbally, or in writing not under seal, which are called parol contracts, from those which are under seal, which bear the name of deeds or specialties; 1 Chitty, Contr. 1; 7 Term, 350, 351, n.; 3 Johns. Cas. 60; 1 Chitty, Pl. 88. It is proper to remark that when a contract is made under seal, and afterwards it is modified verbally, it becomes wholly a parol contract; 2 Watts, 451; 9 Pick. Mass. 298; 13 Wend. 71.

Pleadings are frequently denominated the *parol*. In some instances the term parol is used to denote the entire pleadings in a cause: as, when in an action brought against an infant heir, on an obligation of his ancestors, he prays that the parol may demur, *i. e.* that the pleadings may be stayed till he shall attain full age; 3 Bla. Com. 300; 4 East, 485; 1 Hoffm. 178. See a form of a plea in abatement, praying that the parol may demur, in 1 Wentw. Pl. 43, and 2 Chitty, Pl. 520. But a devisee cannot pray the parol to demur; 4 East, 485.

PAROL DEMURRER. The staying of proceedings in a real action brought by or against an infant, until the infant should come of age. Abolished by Stat. 11 Geo. IV.; Moz. & W.

PAROL EVIDENCE. Evidence verbally delivered by a witness. As to the cases when such evidence will be received or rejected, see Stark. Ev. pt. 4, pl. 995–1055; 1 Phill. Ev. 466, c. 10, s. 1; Sugd. Vend. 97; 78 N. Y. 74; 24 Alb. L. J. 430; 5 Am. Rep. 241; 6 *id.* 678. See EVIDENCE; CONTRACT.

PAROL LEASE. An agreement made orally between parties, by which one of them leases to the other a certain estate.

By the English Statute of Frauds of 29 Car. II. c. 3, ss. 1, 2, 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered unless in writing." The principles of this statute have been adopted, with some modifications, in nearly all the states of the Union. 4 Kent, 95; 1 Hill, Abr. 130.

PAROLE. In International Law. The agreement of persons who have been taken by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war. Vattel, liv. 3, c. 8, § 151.

PARRICIDE (from Lat. *pater*, father, *caedere* to slay). **In Civil Law.** One who murders his father. One who murders his mother, his brother, his sister, or his children. Merlin, Rep. *Parricide;* Dig. 48. 9. 1. 3, 4.

This offence is defined almost in the same words in the penal code of China. Penal Laws of China, b. 1, s. 2, § 4.

The criminal was punished by being scourged, and afterwards sewed in a sort of sack, with a dog, a cock, a viper, and an ape, and then thrown into the sea or into a river; or, if there were no water, he was thrown in this manner to wild beasts. Dig. 48. 9. 9; Code, 9, 17. 1. 1. 4, 18, 6; Brown, Civ. Law, 423; Wood, Civ. Law, b. 3, c. 10, s. 9.

By the laws of France, parricide is the crime of him who murders his father or mother, whether they be the legitimate, natural, or adopted parents of the individual, or the murder of any other legitimate ascendant. Code Penal, art. 297. This crime is there punished by the criminal's being taken to the place of execution without any other garment than his shirt, barefooted, and with his head covered with a black veil. He is then exposed on the scaffold, while an officer of the court reads his sentence to the spectators; his right hand is then cut off, and he is immediately put to death. *Id.* art. 13.

The common law does not define this crime, and makes no difference between its punishment and the punishment of murder; 1 Hale, Pl. Cr. 380; Prin. Penal Law, c. 18, § 8, p. 243; Dalloz, Dict. *Homicide*, § 3.

PARS ENITIA (Lat.). **In Old English Law.** The share of the eldest daughter where lands were parted between daughters by lot, she having her first choice after the division of the inheritance. Co. Litt. 166 *b*; Glanv. lib. 7, c. 3; Fleta, lib. 5, c. 10, § *in divisionem*.

PARS RATIONABILIS (Lat. reasonable part). That part of a man's goods which the law gave to his wife and children. 2 Bla. Com. 492; Magn. Chart.; 9 Hen. III. c. 18; 2 Steph. Com. 228, 254.

PARSON. In Ecclesiastical Law. One that hath full possession of all the rights of a parochial church.

So called because the church, which is an invisible body, is represented by his *person*. In England he is himself a body corporate, in order to protect and defend the church (which he personates) by a perpetual succession; Co. Litt. 300.

The parson has, during life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues, unless these are appropriated, *i. e.* given away, to some spiritual corporation, sole or aggregate, which the law esteems as capable of providing for the service of the church as any single private clergyman; 4 Bla. Com. 384; 1 Hagg. Cons. 162; Plowd. 493; 3 Steph. Com. 70.

The ecclesiastical or spiritual rector of a rectory. 1 Woodd. Lect. 311; Fleta, lib. 7, c. 18; Co. Litt. 300. Also, any clergyman having a spiritual preferment. Co. Litt. 17,

18. Holy orders, presentation, institution, and induction are necessary for a parson; and a parson may cease to be such by death, resignation, cession, or deprivation, which last may be for simony, non-conformity to canons, adultery, etc.; Co. Litt. 120; 4 Co. 75, 76.

PARSON IMPARSONA (Lat.). A *persona*, or parson, may be termed *impersonata*, or impersonee, only in regard to the possession he hath of the rectory by the act of another. Co. Litt. 300. One that is inducted and in possession of a benefice: *e. g.* a dean and chapter. Dy. 40, 221. He that is in possession of a church, be it presentative or appropriate, and with whom the church is full,—*persona* in this case meaning the patron who gives the title, and *persona impersonata* the parson to whom the benefice is given in the patron's right. Reg. Jud. 24; 1 Barb. 330; 1 Busb. Eq. 55; 10 Pet. 618; 70 Penn. 210.

PARSONAGE. The house set apart for the minister's residence. A portion of lands and tithes established by law for the maintenance of a minister. Toml.

PART. A share: a purpart. This word is also used in contradistinction to counterpart: covenants were formerly made in a script and rescript, or *part* and *counterpart*.

PART AND PERTINENT. In Scotch Law. A term in a conveyance including lands or servitudes held for forty years as part of, or pertinent to, lands conveyed, natural fruits before they are separated, woods and parks, etc.; but not steelbow stock, unless the lands have been sold on a rental. Bell, Dict.; Erskine, Inst. 2. 5. 3 *et seq.*

PART-OWNERS. Those who own a thing together, or in common.

In Maritime Law. A term applied to two or more persons who own a vessel together, and not as partners.

In general, when a majority of the part-owners are desirous of employing such a ship upon a particular voyage or adventure, they have a right to do so upon giving security in the admiralty by stipulation to the minority, if required to bring her back and restore the ship, or, in case of her loss, to pay them the value of their respective shares; 4 Bouv. Inst. n. 3780; Abb. Shipp. 70; 3 Kent, 151; Story, Partn. § 489; 11 Pet. 175. When the majority do not choose to employ the ship, the minority have the same right, upon giving similar security; 11 Pet. 175; 1 Hagg. Adm. 306; Jacobsen, Sea-Laws, 442.

Where part-owners are equally divided as to the employment upon any particular voyage, the courts of admiralty have manifested a disposition to support the right of the court to order a sale of the ship; Story, Partn. § 439; Bee, 2; Gilp. 10; 18 Am. Jur. 486. See Pars. Mar. L.

PARTES FINIS NIL HABUERUNT (Lat. the parties to the fine had nothing; *i. e.* nothing which they could convey). **In Old English Pleading.** The plea to a fine levied by a stranger, and which only bound parties and privies. 2 Bla. Com. 356*; Hob. 334; 1 P. Wms. 520; 1 Woodd. Lect. 315.

PARTIAL LOSS. A loss of a part of a thing or of its value, as contrasted with a total loss.

Where this happens by damage to an article, it is also called a particular average, which is to be borne by the owner, as distinguished from a general average loss, which is to be contributed for by the other interests exposed to the same perils; 1 Phill. Ins. §§ 1269, 1422. See AVERAGE; ABANDONMENT.

PARTICEPS CRIMINIS. A partner in crime.

PARTICULAR AVERAGE. Every kind of expense or damage, short of total loss, which regards a particular concern, and which is to be wholly borne by the proprietor of that concern or interest alone. See 3 Bosw. N. Y. 385; 14 Allen, 320; 2 Phill. Ins. § 354; 1 Pars. Marit. Law, 284; Gourlie, Gen. Average; AVERAGE.

PARTICULAR AVERMENT. See AVERMENT.

PARTICULAR CUSTOM. A custom which only affects the inhabitants of some particular district.

To be good, a particular custom must have been used so long that the memory of man runneth not to the contrary; must have been continued; must have been peaceable; must be reasonable; must be certain; must be consistent with itself; must be consistent with other customs. 1 Bla. Com. 74, 79.

PARTICULAR ESTATE. An estate which is carved out of a larger, and which precedes a remainder: as, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail: this precedent estate is called the particular estate, and the tenant of such estate is called the particular tenant; 2 Bla. Com. 165; 4 Kent, 226; 16 Vin. Abr. 216; 4 Comyns, Dig. 32; 5 *id.* 346. See REMAINDER.

PARTICULAR LIEN. A right which a person has to retain property in respect of money or laber expended on such particular property. See LIEN.

PARTICULAR STATEMENT. In Pennsylvania Pleading and Practice. A statement particularly specifying the date of a promise, book-account, note, bond (penal or single), bill, or all of them, on which an action is founded and the amount believed by the plaintiff to be due from the defendant. 6 S. & R. 21. It is founded on the provisions of a statute passed March 21, 1806. See 4 Sm. Penn. Laws, 328. It is an unmethodical declaration, not restricted to any particular form; 2 S. & R. 537; 3 *id.* 405; 8 *id.* 316, 567.

PARTICULARS. See BILL OF PARTICULARS.

PARTIES (Lat. *pars*, a part). Those who take part in the performance of an act, as, making a contract, carrying on an action. A party in law may be said to be those united in interest in the performance of an act: it may then be composed of one or more persons. Parties includes every party to an act. It is also used to denote all the individual separate persons engaged in the act,—in which sense, however, a corporation may be a party.

To Contracts. Those persons who engage themselves to do or not to do the matters and things contained in agreement.

In general, all persons may be parties to contracts. But no person can contract with himself in a different capacity, as there must be an agreement of minds; 1 Vern. 465; 9 Ves. Ch. 234; 13 *id.* 156; 2 Bro. C. C. 400; 1 Pet. C. C. 373; 3 Binn. 54; 13 S. & R. 210; 9 Paige, Ch. 238, 650; 2 Johns. Ch. 252; 4 How. 503. And no want, immaturity, or incapacity of mind, in the consideration of the law, disables a person from becoming a party. Such disability may be entire or partial, and must be proved; 2 Stark. 326; 1 Term, 648; 11 Ad. & E. 634; 17 L. J. Ex. 233.

Aliens were under greater disabilities at common law with reference to real than to personal property; 7 Co. 25 *a*; 1 Ventr. 417; 6 Pet. 102; 11 Paige, Ch. 292; 1 Cush. 531. The disability is now removed, in a greater or less degree, by statutes in the various states; 2 Kent, Lect. 25; and alien friends stand on a very different footing from alien enemies; 2 Sandf. Ch. 586; 2 W. & M. 1; 3 Stor. 458; 2 How. 65; 5 *id.* 103; 8 Cra. 110; 3 Dall. 199.

Bankrupts and *insolvents* are disabled to contract, by various statutes, in England, as well as by insolvent laws in the states of the United States.

Duress renders a contract voidable at the option of him on whom it was practised. See DURESS.

Excommunication can have no effect in the United States, as there is no national church recognized by the law.

Infants are generally incapable of contracting before the age of twenty-one years. This provision is intended for their benefit; and therefore most of their contracts are voidable, and not void. It is the infant's privilege at maturity to elect whether to avoid or ratify the contract he has made during minority. Though the infant is not bound, the adult with whom he may contract is. The infant may always sue, but cannot be sued; Stra. 937,—which seems to be an exception to the mutuality of contracts. The infant cannot avoid his contract for necessaries; 10 Vt. 225; 11 N. H. 51; 12 Metc. 559; 6 M. & W. 42.

Married women, at common law, were almost entirely disabled to contract, their personal existence being almost entirely merged in that of their husbands; 2 J. J. Marsh. 82; 23 Me. 305; 2 Chitty, Bail, 117; 5 Exch. 388; so that contracts made by them before marriage may be taken advantage of and enforced by their husbands, but not by themselves; 13 Mass. 384; 17 Me. 29; 2 Dev. 360; 9 Cow. 230; 14 Conn. 99; 6 T. B. Monr. 257. The contract of a feme covert is, then, generally void, unless she be the agent of her husband in which case it is the husband's contract, and not hers; 15 East, 607; 6 Mod. 171; 6 N. H. 124; 16 Vt. 390; 5 Binn. 285; 15 Conn. 347. See WIFE.

Non compotes mentis. At common law, formerly, in this class were included *lunatics*, *insane persons*, and *idiots*. It is understood now to include *drunkards;* 4 Conn. 203; 2 N. H. 435; 15 Johns. 503; 2 Harr. & J. 421; 11 Pick. 304; 1 Rice, 56; 5 Munf 466; 3 Blackf. 51; 1 Green, N. J. 233; 1 Bibb, 168; 17 Miss. 94; 13 M. & W. 623. *Spendthrifts* under guardianship are not competent to make a valid contract for the payment of money; 13 Pick. 206. *Seamen* "are the wards of the admiralty, and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees." 2 Mas. 541. See 3 Kent, 193; 2 Dods. 504; 2 Sumn. 444.

Outlawry does not exist in the United States.

As to the character in which parties contract. They may act independently or severally, jointly, or jointly and severally. The decision of the question of the kind of liability incurred depends on the terms of the contract, if they are express, or, if not express, upon the intention of the parties as gathered from the circumstances of the case. Whenever, however, the obligation is undertaken by two or more, or a right given to two or more, it is a general presumption of law that it is a joint obligation or right; words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to produce a several responsibility or a several right; 1 Taunt. 7; 13 M. & W. 499; 8 C. & P. 332; Shepp. Touchst. 375; 6 Wend. 629; 7 Mass. 58; 10 Barb. 385, 638; 14 *id.* 644; 1 Lutw. 695; Peake, N. P. 130; Holt, N. P. 474; 1 B. & C. 407; 12 Gill & J. 265. It may be doubted, however, whether any thing less than express words can raise at once a joint and several liability. Parties may act as the representatives of others, as *agents*, *factors* or *brokers*, *servants*, *attorneys*, *executors*, or *administrators*, and *guardians*. See these titles.

They may act in a collective capacity, as corporations, joint-stock companies, or as partnerships. See these titles.

New parties may be made to contracts already in existence, by *novation*, *assignment*, and *indorsement*, which see.

To Suits in Equity. The person who seeks a remedy in chancery by suit, commonly called the plaintiff, or complainant, and the person against whom the remedy is sought, usually denominated the defendant, are the parties to a suit in equity.

Active parties are those who are so involved in the subject-matter in controversy that no decree can be made without their being in court. *Passive* parties are those whose interests are involved in granting complete relief to those who ask it. 1 Wash. C. C. 517. See 3 Ala. 361.

Plaintiffs.

In general, all persons, whether natural or artificial, may sue in equity; and an equitable title only is sufficient; 10 Ill. 332. Incapacities which prevent suit are *absolute*, which disable during their continuance, or *partial* which disable the party to sue alone.

Alien enemies are under an absolute incapacity to sue. Alien friends may sue; Mitf. Eq. Pl. 129; Coop. Eq. Pl. 27; if the subject-matter be not such as to disable them; Co. Litt. 129 *b*; although a sovereign; 1 Sim. 94; 2 Gall. 105; 8 Wheat. 464; 4 Johns. Ch. 370; Adams, Eq. 314. In such case he must have been first recognized by the executive of the forum; Story, Eq. Pl. § 55; 3 Wheat. 324.

In such case the sovereign submits to the jurisdiction, as to the subject-matter, and must answer on oath; Mitf. Eq. Pl. 30; Adams, Eq. 313; 6 Beav. 1.

Attorney-general. Government (in England, the *crown*) may sue both in its own behalf, for its own political rights and interests, and in behalf of the rights and interests of those partaking of its prerogatives or claiming its peculiar protection; Mitf. Eq. Pl. 421–424; Coop. Eq. Pl. 21, 101; usually by the agency of the attorney-general or solicitor-general; Mitf. Eq. Pl. 7; Adams, Eq. 312. See INJUNCTION; QUO WARRANTO; TRUSTS.

Corporations, like natural persons, may sue; Grant, Corp. 198; although foreign; *id.* 200; but in such case the corporate act must be set forth; 1 Stra. 612; 1 Cr. M. & R. 296; 4 Johns. Ch. 327; as it must if they are domestic and created by a private act; 3 Conn. 199; 15 Viner, Abr. 198. All the members of a voluntary association must be joined; 15 Ill. 251; unless too numerous. 2 Pet. 566; 3 Barb. Ch. 362.

Idiots and *lunatics* may sue by their committees; Mitf. Eq. Pl. 29; Adams, Eq. 301. As to when a mere petition is sufficient, see 7 Johns. Ch. 24; 2 Ired. Eq. 294.

Infants may sue; Mitf. Eq. Pl. 25; and, if they be on the wrong side of the suit, may be transferred at any time, on suggestion; 3 Edw. Ch. 32. The bill must be filed by the next friend; Coop. Eq. Pl. 27; 1 Sm. Ch. Pr. 54; 2 Ala. 406; who must not have an adverse interest; 2 Ired. Eq. 478; and who may be compelled to give bail; 1 Paige, Ch. 178. If the infant have a guardian, the court may decide in whose name the suit shall continue; 12 Ill. 424.

A *married woman* is under partial incapacity to sue; 7 Vt. 369. Otherwise, when in such condition as to be considered in law a *feme sole;* 2 Hayw. 406. She may sue on a separate claim by aid of a next friend of her own choice; Story, Eq. Pl. § 61; Fonbl. Eq. b. 1, c. 2, § 6, note p; 1 Freem. 215; but see 2 Paige, Ch. 454; and the defendant may insist that she shall sue in this manner; 2 Paige, Ch. 255; 4 Rand. 397.

Societies. A certain number of persons belonging to a voluntary society may sue on behalf of themselves and their associates for purposes common to them all; 2 Pet. 366.

Defendants.

Generally, all who are able to sue may be sued in equity. To constitute a person defendant, process must be prayed against him; 2 Bland, Ch. 106; 4 Ired. Eq. 175; 5 Ga. 251; 1 A. K. Marsh. 594. Those who are under incapacity may be made defendants, but must appear in a peculiar manner. One, or more, interested with the plaintiff, who refuse to join may be made defendants; 2 Bland, Ch. 264; 3 Des. 31; 10 Ill. 534; 15 *id.* 251.

Corporations must be sued by their corporate names, unless authorized to come into court in the name of some other person, as president, etc.; Story, Eq. Pl. § 70; 4 Ired. Eq. 195. Governments cannot, generally, be sued in their own courts; Story, Eq. Pl. § 69: yet the attorney-general may be made a party to protect its rights when involved; 1 Barb. Ch. 157; and the rule does not prevent suits against officers in their official capacity; 1 Dougl. Mich. 225.

Idiots and lunatics may be defendants and defend by committees, usually appointed guardians *ad litem* as of course; Mitf. Eq. Pl. 103; Story, Eq. Pl. § 70; Shelf. Lun. 425; 6 Paige, Ch. 237.

A guardian *de facto* may not have a bill against a lunatic for a balance due him, but must proceed by petition; 2 D. & B. Eq. 385; 2 Johns Ch. 242; 2 Paige, Ch. 422; 8 *id.* 609.

Infants defend by guardians appointed by the court; Mitf. Eq. Pl. 103; 9 Ves. 357; 11 *id.* 563; 1 Madd. 290; 8 Pet. 128; 12 Mass. 16; 2 Tayl. 125.

On becoming of age, an infant is allowed, as of course, to put in a new plea, or to demur on showing that it is necessary to protect his rights; 6 Paige, Ch. 353.

Married women may be made defendants, and may answer as if femes sole, if the husband is plaintiff, an exile, or an alien enemy, has abjured the realm or been transported under criminal sentence; Adams, Eq. 313; Mitf. Eq. Pl. 104.

She should be made defendant where her

husband seeks to recover an estate held in trust for her separate use; 9 Paige, Ch. 225; and, generally, where the interests of her husband conflict with hers in the suit, and he is plaintiff; 3 Barb. Ch. 397. See, also, 11 Me. 145; Mitf. Eq. Pl. 104. See, generally, as to who may be defendants. JOINDER OF PARTIES.

At Law. *In actions ex contractu.*

Plaintiffs. In general, all persons who have a just cause of action may sue, unless some disability be shown; Dicey, Part. 1. An action on a contract, of whatever description, must be brought in the name of the party in whom the legal interest is vested; 1 East, 497; Yelv. 25, n. 1; 1 Lev. 235; 3 B. & P. 147; 1 H. Blackst. 84; 5 S. & R. 27; 10 Mass. 230, 287; 15 *id.* 286; 1 Pet. C. C. 109; 2 Root, 119; 2 Wend. 158; 21 *id.* 110; Hempst. 541.

On simple contracts by the party from whom (in part, at least) the consideration moved; Browne, Act. 99; 1 Stra. 592; 2 W. & S. 237; although the promise was made to another, if for his benefit; Browne, Act. 103; 10 Mass. 287; 3 Pick. 83; 2 Wend. 158; 10 *id.* 87, 156; 5 Dana, 45; and not by a stranger to the consideration, even though the contract be for his sole benefit; Browne, Act. 101. On contracts under seal by parties to the instrument only; 10 Wend. 87; Co. Litt. 231.

Agents contracting in their own name, without disclosing their principals, may, in general, sue in their own names; 3 B. & Ald 280; 5 *id.* 393; 1 Campb. 337; 4 B. & C. 656; 10 *id.* 672; 5 M. & W. 650; 5 Penn. 41; or the principals may sue; 6 Cow. 181; 3 Hill, N. Y. 72; 2 Ashm. 485; Broom, Part. 44.

So they may sue on contracts made for an unknown principal; 3 E. L. & E. 391; and also when acting under a *del credere* commission; 4 Maule & S. 566; 6 *id.* 172; 4 Campb. 195; 10 Barb. 202; but not an ordinary merchandise broker. An auctioneer may sue for the price of goods sold; 1 H. Blackst. 81; 16 Johns. 1; but a mere attorney having no beneficial interest may not sue in his own name; 10 Johns. 383.

Alien enemies, unless resident under a license or contracting under specfic license, cannot sue, nor can suit be brought for their benefit; Broom, Part. 84; 1 Campb. 482; 1 Kent, 67; 11 Johns. 418; 2 Paine, 639. License is presumed if they are not ordered away; 10 Johns. 69; 6 Binn. 241. See, also, Co. Litt. 129 *b*; 15 East, 260; 1 Kent, 68.

Alien friends may bring actions concerning personal property; Browne, Act. 304; Bacon, Abr. *Aliens;* for libel published here; 8 Scott, 182; and now, in regard to real estate generally, by statute; 12 Wend. 342; see 15 Tex. 495; and, by common law, till office found, against an intruder; 13 Wend. 546; 1 Johns. Cas. 399; 3 *id.* 109; 3 Hill, N. Y. 79. But see 5 Cal. 373. As a general rule, an alien may maintain a personal action in the federal courts; 3 Story, 458; 4 McLean, 516.

Assignees of choses in action cannot, at common law, maintain actions in their own names; Broom, Part. 10; 42 Me. 221. Promissory notes, bills of exchange, bail-bonds, and replevin-bonds, etc., are exceptions to this rule; Hamm. Part. 108.

An assignee of real estate may have an action in his own name for breaches of a covenant running with the land, occurring after assignment; 3 Bouvier, Inst. 150; Broom, Part. 9; 14 Johns. 89; and he need not be named in an express covenant of this character; Broom, Part. 8.

An assignee in insolvency or bankruptcy should sue in his own name on a contract made before the act of bankruptcy or the assignment in insolvency; 1 Chitty, Pl. 14; Hamm. Part. 167; Comyns. Dig. *Abatement* (E 17); 3 Dall. 276; 5 S. & R. 394; 7 *id.* 182; 9 *id.* 434. See 3 Salk. 61; 3 Term, 779. Otherwise of a suit by a foreign assignee; 11 Johns. 488. The discharge of the insolvent pending suit does not abate it; 2 Johns. 342; 11 *id.* 488. But see 1 Johns. 118.

An assignee who is to execute trusts may sue in his own name; 4 Abb. 106. *Cestuis que trustent* cannot sue at law; 3 Bouvier, Inst. 135.

Civil death occurring in case of an outlaw, an attainted felon or one sentenced to imprisonment for life, incapacitates the person for suing as plaintiff during the continuance of the condition; Broom, Part. 85. Sentence as above, during suit, abates it; 1 Du. N. Y. 664; but the right to sue is suspended only; Broom, Part. 85.

Corporations may sue in their true corporate name, on contracts made in their behalf by officers or agents; 2 Blatchf. 343; 6 Cal. 258; 5 Vt. 500; 20 Me. 45; 3 N. J. 321; 9 Ind. 359; Dicey, Part. 276; as, a bank, on a note given to a cashier; 5 Mo. 26; 4 How. Pr. 63; 21 Pick. 486 See, also, 15 Me. 443.

The name must be that at the time of suit; 3 Ind. 285; 4 Rand. 359; with an averment of the change, if any, since the making of the contract; 6 Ala. 327, 494; even though a wrong name were used in making the contract; 6 S. & R. 16; 10 Mass. 360; 5 Ark. 234; 10 N. H. 123; 5 Halst. 323.

If the corporation be a foreign one, proof of its existence must be given; 1 C. & P. 569; 13 Pet. 519; 2 Gall. 105; 5 Wend. 478; 7 *id.* 539; 10 Mass. 91; 2 Tex. 531; 1 T. B. Monr. 170; 7 *id.* 584; 2 Rand. 465; 2 Green, N. J. 439; 1 Mo. 184.

As to their ability to sue in the United States courts, see 5 Cra. 57.

Executors and administrators in whom is vested the legal interest are to sue in all personal contracts; 5 Term, 393; Will. Exec. Index; see 15 S. & R. 183; or covenants affecting the realty but not running with the

land; 2 H. Blackst. 310; and on such covenants running with the land, for breach during the decedent's lifetime occasioning special damage; 2 Johns. Cas. 17; 4 Johns. 72. They must sue as such, on causes accruing prior to the death of the decedent; 1 Saund. 112; Comyns, Dig. *Pleader* (2 D 1); 3 Dougl. 36; 2 Swan, 170; and as such, or in their own names, at their election, for those accruing subsequent; 16 Ark. 36; 3 Dougl. 36; Will. Exec. 1590; and upon contracts made by them in their official capacity; 30 Ala. 482; 32 Miss. 319; 15 Tex. 44; in their own names only, in some states; 4 Jones, 159.

On death of an executor, his executor, or administrator *de bonis non* if he die intestate, is the legal representative of the original decedent; 7 M. & W. 306; 2 Swan, 127; 2 Bla. Com. 506.

Foreign governments, whether monarchical or republican; 5 Du. N. Y. 634; if recognized by the executive of the forum; 3 Wheat. 324; Story, Eq. Pl. § 55; see 4 Cra. 272; 2 Wash. C. C. 43; 9 Ves. 347; 10 *id.* 354; 11 *id.* 283; may sue; 26 Wend. 212; 6 Hill, 33.

Husband must sue alone for wages accruing to the wife, for the profits of business carried on by her, or money lent by her during coverture; Broom, Part. 71; 2 W. Blackst. 1239; 4 E. D. Smith, 384; and see 1 Salk. 114; 2 Wils. 424; 9 East, 472; 1 Maule & S. 180; 4 Term, 516; for slanderous words spoken of the wife which are actionable only by reason of special damage; 2 Du. N. Y. 633; on a fresh promise, for which the consideration was in part some matter moving from him, renewing a contract made with the wife *dum sola;* 1 Maule & S. 180; and see 2 Penn. 827; for a legacy accruing to the wife during coverture; 22 Pick. Mass. 480; and as administrator of the wife to recover chattels real and personal not previously reduced into possession; Broom, Part. 74.

He may sue alone for property that belonged to the wife before coverture; 1 Murph. 41; 5 T. B. Monr. 264; on a joint bond given for a debt due to the wife *dum sola;* 1 Maule & S. 180; 4 Term, 616; 1 Chitty, Pl. 20; on a covenant running to both; Cro. Jac. 399; 2 Mod. 217; 1 B. & C. 443; 1 Bulstr. 31; to reduce choses in action into possession; 2 Maule & S. 396, n. (b); 2 Mod. 217; 2 Ad. & E. 30; and, after her death, for any thing he became entitled to during coverture; Co. Litt. 351 *a*, n. 1. And see 4 B. & C. 529.

Infants may sue only by guardian or *prochein ami;* 3 Bouvier, Inst. 138; 13 M. & W. 640; Broom, Part. 84; 11 How. Pr. 188; 13 *id.* 413; 13 B. Monr. 193.

Joint tenants. See JOINDER.

Lunatic, or *non compos mentis*, may maintain an action, which should be in his own name; Broom, Part. 84; Browne, Act. 301; Hob. 215; 8 Barb. 552. His wife may appear, if he have no committee; 7 Dowl. 22. An idiot may by a next friend who petitions for that purpose; 2 Chitty, Archb. Pr. 909.

Married women cannot, in general, sue alone at common law; Broom, Part. 74; but a married woman may sue alone where her husband is civilly dead; see 4 Term, 361; Cro. Eliz. 519; 9 East, 472; 2 B. & P. 165; 1 Selw. N. P. 286; or, in England, where he is an alien out of the country, on her separate contracts; 2 Esp. 544; 1 B. & P. 357; 2 *id.* 226; 11 East, 301; 3 Campb. 123; while he is in such condition; Broom, Part. § 114.

So she may sue alone after a sentence of nullity or divorce *a vinculo;* 9 B. & C. 698; 8 Term, 548; but not after a divorce *a mensa et thoro*, or voluntary separation merely; 3 B. & C. 297.

She may, where he is legally presumed to be dead; 2 Campb. 113; 5 B. & Ad. 94; 2 M. & W. 894; or where he has been absent from the country for a very long time; 12 Mo. 30; 23 E. L. & E. 127. See 11 East, 301; 2 B. & P. 226.

When the wife survives the husband, she may sue on all contracts entered into by others with her before coverture, and she may recover all arrears of rent of her real estate which became due during the coverture, on their joint demise; 8 Taunt. 181; 1 Rolle, Abr. 350 *d.* She is also entitled to all her real property, and her chattels real and choses in action not reduced into possession by the husband; Broom, Part. 76.

Partners. One cannot, in general, sue another for goods sold; 9 B. & C. 356; for work done; 1 B. & C. 74; 7 *id.* 419; for money had and received in connection with a partnership transaction; 6 B. & C. 194; or for contribution towards a payment made under compulsion of law; 5 B. & Ad. 936; 1 M. & W. 504. See 1 M. & W. 168; 2 Term, 476. But one may sue the other for a final balance struck; Broom, Part. 57; 2 Term, 479; 5 M. & W. 21; 2 Cr. & M. 361; see JOINDER; and they may sue the administrator of a deceased partner; 4 Wisc. 102.

Survivors. The survivor or survivors of two or more jointly interested in a contract not running with the land must sue as such; Broom, Part. 21; Archb. Pl. 54; 1 East, 497; Yelv. 177; 1 Dall. 65, 248; 4 *id.* 354; 2 Johns. Cas. 374; 7 Ala. 89.

The survivor of a partnership must sue alone as such; 9 B. & C. 538; 4 B. & Ald. 374; 2 Maule & S. 225.

The survivor of several, parties to a simple contract, should describe himself as such; 3 Conn. 203.

Tenants in common may sue each other singly for actual ouster; Woodf. Landl. & T. 789. See JOINDER.

Trustees must sue, and not the cestuis que trustent; 1 Lev. 235; 15 Mass. 286; 12 Pick. 554; 4 Dana, 474. See JOINDER.

Defendants.

All persons having a direct and immediate legal interest in the subject-matter of the suit

are to be made parties. The proper defendants to a suit on a specialty are pointed out by the instrument.

In case of simple contracts, the person made liable expressly by its terms; 3 Bingh. N. C. 732; 8 East, 12; or by implication of law, is to be made defendant; 2 Bla. Com. 443; 3 Campb. 356; 1 H. Blackst. 93; 2 *id.* 563. See 6 Mass. 253; 11 *id.* 335; 1 Chitty, Pl. 24. Where there are several persons parties, if the liability be joint, all must be joined as defendants, either on specialties; 1 Wms. Saund. 154; or simple contracts; Chitty, Contr. 99. If it be joint and several, all may be joined; 1 Wms. Saund. 154, n. 4; or each sued separately; 1 Wms. Saund. 191, c; Comyns, Dig. *Obligations* (G); 3 Term, 782; 1 Ad. & E. 207; if it be several, each must be sued separately; 1 East, 226. The presumption is, in such case, that a written agreement is joint; 2 Campb. 640; 3 *id.* 49, 51, n.; otherwise of verbal contracts; 1 Ad. & E. 691; 3 B. & Ald. 89; 1 Bingh. 201.

Alien enemies may be sued; Broom, Part. 18–21; 1 W. Blackst. 30; Cro. Eliz. 516; 4 Bingh. 421; Comyns, Dig. *Abatement* (E 3); and, of course, alien friends.

Assignees of a mere personal contract cannot, in general, be sued; of covenants running with the realty may be, for breach after assignment; 2 Saund. 304, n. 12; Woodf. Landl. & T. 113; 1 Fonbl. Eq. 359, n. y; 3 Salk. 4; 7 Term, 312; 1 Dall. 210; but not after an assignment by him; Bacon, Abr. *Covenant* (E 4). See, on this subject, Bouvier, Inst. 162.

Assignees of bankrupts cannot be sued as such at law; Cowp. 134; Chitty, Pl. 11, n. (f).

Bankrupts after discharge cannot be sued. An insolvent after discharge may be sued on his contracts, but his person is not liable to arrest in a suit on a debt which was due at the date of his discharge; Dougl. 93; 8 East, 311; 1 Saund. 241, n. 5; Ingr. Insolv. 377.

See CONFLICT OF LAWS; BANKRUPTCY; INSOLVENCY.

Corporations must be sued by their true names; 7 Mass. 441; 2 Cow. 778; 15 Ill. 185; 4 Rand. 359; 2 Blatchf. 343. The suit may be brought in the United States courts by a citizen of a foreign state; 2 How. 497. Assumpsit lies against a corporation aggregate on an express or implied promise, in the same manner as against an individual; 3 Halst. 182; 3 S. & R. 117; 4 *id.* 16; 12 Johns. 231; 44 *id.* 118; 7 Cra. 297; 2 Bay, 109; 10 Mass. 397; 1 Aik. 180; 9 Pet. 541; 3 Dall. 496; 1 Pick. 215; 2 Conn. 260; 5 Q. B. 547.

Executors and *administrators* of a deceased contractor or the survivor of several point contractors may be sued; Hamm. Part. 156; but not if any of the original contractors survive; 6 S. & R. 272; 2 Wheat. 344.

The liability does not commence till probate of the will; 2 Sneed, 58. The executor or administrator *de bonis non* of a deceased person is the proper defendant; Broom, Part. 197.

The liability is limited by the amount of assets, and does not arise on subsequent breach of a covenant which could be performed only by the covenantor; Broom, Part. 118. They, or real representatives, may be parties, at election of the plaintiff, where both are equally liable; 1 Lev. 189, 303.

Foreign governments cannot be sued to enforce a remedy, but may be made defendants to give an opportunity to appear; 14 How. Pr. 517. A foreign sovereign cannot be sued for any act done by him in the character of a sovereign prince; 2 H. L. C. 1; 17 Q. B. 171; it would appear most probably that he can in no case be made defendant in an action; Dicey, Part. *5; but see 10 Q. B. 656.

Heirs may be liable to suit under the ancestor's covenant, if expressly named, to the extent of the assets received; Broom, Part. 118; Platt, Cov. 449.

Husband may be sued alone for breach of joint covenant of himself and wife; 15 Johns. 483; 17 How. 609, and *must* be on a mere personal contract of the wife made during coverture; Comyns, Dig. *Pleader* (2 A 2); 3 W. Raym. 6; 1 Lev. 25; 8 Term, 545; 2 B. & P. 105; 1 Taunt. 217; 4 Price, 48; 16 Johns. 281; even if made to procure necessaries when living apart; 6 W. & S. 346; *may* be on a new promise for which the consideration is a debt due by the wife before marriage; Al. 72; 7 Term, 348; but such promise must be express; Broom, Part. 174; and have some additional considerations, as forbearance, etc.; 1 Show. 183; 11 Ad. & E. 438, 451; on lease to both made during coverture; Comyns, Dig. *Baron & F.* (2 B); on lease to wife *dum sola*, for rent accruing during coverture, or to wife as executrix; Broom, Part. 178; Comyns, Dig. *Baron & F.* (T); 1 Rolle, Abr. 149; not on wife's contracts *dum sola* after her death; 3 Mod. 186; Rep. *temp.* Talb. 173; 3 P. Wms. 410; except as administrator; 7 Term, 350; Cro. Jac. 257; 1 Campb. 189, n.

He is liable, after the death of the wife, in cases where he might have been sued alone during her lifetime.

Idiots, *lunatics*, and *non compotes mentis*, generally, may be sued on contracts for necessaries; 2 M. & W. 2. See APPEARANCE.

Infants may be sued on their contracts for necessaries; 10 M. & W. 195; Macph. Inf. 447. Ratification in due form; 11 Ad. & E. 934; after arriving at full age, renders them liable to suit on contracts made before.

Partner is not liable to suit by his co-partners. A sole ostensible partner, the others being dormant, may be sued alone by one contracting with him; Broom, Part. 172.

Survivor of two or more joint contractors must be sued alone; 1 Saund. 291, n. 2; 2 Burr. 1196. A sole surviving partner may be

sued alone; Chitty, Pl. 152, note d; 1 B. & Ald. 29.

In actions ex delicto.
Plaintiff's.

The plaintiff must have a legal right in the property affected, whether real; 2 Term, 684; 7 *id.* 50; Broom, Part. 202; Co. Litt. 240 *b;* 2 Bla. Com. 185; or personal; 11 Cush. 55; though a mere possession is sufficient for trespass, and trespass *quare clausum;* Cro. Jac. 122; 11 East, 65; 4 B. & C. 591; 2 Bingh. N. C. 98; 1 Ad. & E. 44; and the possession may be constructive in case of trespass for injury to *personal* property; 1 Term, 450; 6 Q. B. 606; 5 B. & Ald. 603; 1 Hill, N. Y. 311. The property of the plaintiff may be absolute; 3 Campb. 187; 5 Bingh. 305; 1 Taunt. 190; 1 C. B 672; or special. See 7 Term, 9; 4 B. & C. 941; 3 Scott, N. S. 358.

Agents who have a qualified property in goods may maintain an action of tort in their own names for injury to the goods.

A principal may sue in the name of his agent for a false representation to the agent; 12 Wend. 176.

Assignees of property may sue in their own names for tortious injuries committed after the assignment; 4 Bingh. 106; 3 Maule & S. 7; 5 *id.* 105; 1 Ad. & E. 580; although it has never been in their possession; 9 Wend. 80; 2 N. Y. 293; 1 E. D. Smith, 522; 8 B. & C. 270; 5 B. & Ald. 604; Wms. Saund. 252 *a*, n. (7).

Otherwise of the assignee of a mere right of action; 12 N. Y. 322; 18 Barb. 500; 7 How. 492. See 15 N. Y. 432. Assignees in insolvency may sue for torts to the property; 6 Binn. 186; 8 S. & R. 124; but not to the person of the assignee; W. Jones, 215.

Executors and *administrators* cannot, in general, sue in actions *ex delicto*, as such actions are said to die with the plaintiff; Broom, Part. 212; 13 N. Y. 322. See PERSONAL ACTION. They may sue in their own names for torts subsequent to the death of the deceased; 11 Rich. 363.

Heirs and *devisors* have no claim for torts committed during the lifetime of the ancestor or devisor; 2 Inst. 305.

Husband must sue alone for all injuries to his own property and person; 3 Bla. Com. 143; 2 Ld. Raym. 1208; Cro. Jac. 473; 1 Lev. 3; 2 *id.* 20; including personalty of the wife which becomes his upon marriage; 1 Salk. 141; 6 Call, 55; 13 N. H. 283; Cro. Eliz. 133; 6 Ad. & E. 259; 27 Vt. 17; Hempst. 64; and including the continuance of injuries to such property commenced before marriage; 1 Salk. 141; 6 Call, 55; 1 Selw. N. P. 656; in replevin for timber cut on land belonging to both; 8 Watts, 412; for personal injuries to the wife for the damages which he sustains; 3 Bla. Com. 140; Chitty, Pl. 718, n.; 4 B. & Ald. 523; 4 Iowa, 420; as in battery; 2 Ld. Raym. 1208; 8 Mod. 342; 2 Brev. 170; slander, where words are not actionable *per se;* 1 Lev. 140; 3 Mod. 120; 4 B. & Ad. 514; 22 Barb. 396; 2 Hill, N. Y. 309; or for special damages; 4 B. & Ad. 514.

He *may* sue alone, also, for injuries to personalty commenced before marriage and consummated afterwards; 2 Lev. 107; Ventr. 260; 2 B. & P. 407; and the right survives to him after death of the wife in all cases where he can sue alone; 1 Chitty, Pl. 75; Viner, Abr. *Baron & F.* (G); for cutting trees on land held by both in right of the wife; 16 Pick. 235; 1 Rop. Husb. & W. 215; and generally, for injury to real estate of the wife during coverture; 18 Pick. 110; 20 Conn. 296: 2 Wils. 414; although her interests be reversionary only; 5 M. & W. Exch. 142.

Infants may sue by guardian for torts; Broom, Part. 238.

Lessors and *reversioners*, generally, may have an action for injury to their reversions; Broom, Part. 214. Damage necessarily to the reversion must be alleged and shown; 1 Maule & S. 234; 11 Ad. & E. 40; 5 Bingh. 153; 10 B. & C. 145.

Lessees and *tenants*, generally, may sue for injuries to their possession; 4 Burr. 2141; 3 Lev. 209; Selw. N. P. 1417; Woodf. Landl. & T. 661.

Married woman must sue alone for injury to her separate property; 29 Barb. 512; especially after her husband's death; 87 N. H. 355.

The restrictions on her power to sue are the same as in actions *ex contractu;* Broom, Part. 233. Actions in which she might or must have joined her husband survive to her. Rolle, Abr. 349 (A).

Master has an action in tort for enticing away an apprentice; 3 Bla. Com. 342; 3 Burr. 1345; 3 Maule & S. 191; and, upon the same principle, a parent for a child; 1 Halst. 322; 4 B. & C. 660; 4 Litt. 25; and for personal injury to his servant, for loss of time, expenses, etc.; 3 Bla. Com. 342.

For seduction or debauchery, a master; Broom, Part. 227; 4 Cow. 422; and if any service be shown, a parent; 2 M. & W. 542; 6 *id.* 56; 2 Term, 166; has his action.

Survivor, whether sole or several, must sue for a tortious injury, the rule being that the remedy, and not the right, survives; Broom, Part. 212; 1 Show. 188; 2 Maule & S. 225.

Tenants in common must sue strangers separately to recover land; 15 Johns. 479; 1 Wend. 380.

A tenant in common may sue his co-tenant, where there has been actual ouster, in ejectment; Littleton, § 322; 1 Campb. 173; 11 East, 49; Cowp. 217; or trespass *quare clausum;* 7 Penn. 397; and trespass for mesne profits after recovery; 3 Wils. Ch. 118. Where there is a total destruction or conversion of the property, one tenant in common may sue his co-tenant in trespass; Co. Litt. 200 *a*, *b*; Cro. Eliz. 157; 8 B. &

C. 257; or in trover; Selw. N. P. 1366; 1 Term, 658; 2 Ga. 73; 2 Johns. 468; 3 *id.* 175; 9 Wend. 338; 21 *id.* 72; 6 Ired. 388. For a misfeasance, waste, or case in the nature of waste, may be brought.

Defendants.

The party committing the tortious act or asserting the adverse title is to be made defendant: as, the wrongful occupant of land, in ejectment; 7 Term, 327; 1 B. & P. 573; the party converting, in trover; Broom, Part. 246; making fraudulent representations; 3 Term, 56; 5 Bingh. N. C. 97; 3 M. & W. 532; 4 *id.* 337. The act may, however, have been done by the defendant's agent; 2 M. & W. 650; his mischievous animal; 12 Q. B. 29; or by the plaintiff himself, if acting with due care and suffering from the defendant's negligence; 1 Q. B. 29; 1 Ld. Raym. 738; 10 Ill. 425.

Agents and *principals;* Story, Ag. § 625; Paley, Ag. 294; are both liable for tortious act or negligence of the agent under the direction; 1 Sharsw. Bla. Com. 431, n.; or in the regular course of employment, of the principal; 10 Ill. 425; 1 Metc. Mass. 550. See 2 Denio, 115; 5 *id.* 639. As to the agent of a corporation acting erroneously without malice, see 1 East, 555.

Subsequent ratification is equivalent to prior authority; Broom, Part. 259.

Agents are liable to their principals for conversion; 14 Johns. 128; 8 Penn. 442.

Assignees are liable only for torts committed by them: as, where one takes property from another who has possession unlawfully; Bacon, Abr. *Actions* (B.); or continues a nuisance; 2 Salk. 460; 1 B. & P. 409.

Bankrupts; 3 B. & Ald. 408; 2 Denio, 73; and *insolvents;* Broom, Part. 284; 2 Chitty, Bail. 222; 2 B. & Ald. 407; 9 Johns. 161; 10 *id.* 289; 14 *id.* 128; are liable even after a discharge, for torts committed previously.

Corporations are liable for torts committed by their agents; 7 Cow. 485; 2 Wend. 452; 17 Mass. 503; 4 S. & R. 16; 9 *id.* 94; 2 Ark. 255; 4 Ohio, 500; 4 Wash. C. C. 106; 5 Ind. 252; but not, it seems, at common law, in replevin; Kyd, Corp. 205; or trespass *quare clausum;* 9 Ohio, 31.

Death of a tort-feasor, at common law, takes away all cause of action for torts disconnected with contract; 5 Term, 651; 1 Saund. 291 *e.* But actions against the personal representatives are provided for by statute in most of the states, and in England by stat. 3 & 4 Will. IV. c. 42, § 2.

Executors and *administrators*, at common law, are liable for the continuance of torts first committed by the deceased; W. Jones, 173; 5 Dana, 34; see 28 Ala. N. S. 360; but such continuance must be laid to be, as it really is, the act of the executor; 1 Cowp. 373; Will. Exec. 1358; 13 Penn. 54; 1 Harr. Mich. 7.

Husband must be sued alone for his torts, and in detinue for goods delivered to himself and wife; 2 Bulstr. 308; 1 Leon. 312.

He may be sued alone for a conversion by the wife during coverture; 2 Rop. Husb. & W. 127.

Idiots and *lunatics* are liable, civilly, for torts committed; Hob. 134; Bacon, Abr. *Trespass* (G); though they may be capable of design; Broom, Part. 281. But if the lunatic is under control of chancery, proceedings must be in that court, or it will constitute a contempt; 3 Paige, Ch. 199.

Infants may be sued in actions *ex delicto*, whether founded on positive wrongs or constructive torts; Broom, Part. 280; Co. Litt. 180 *b*, n. 4; as, in detinue for goods delivered for a specific purpose; 4 B. & P. 140, for tortiously converting or fraudulently obtaining goods; 3 Pick. 492; 5 Hill, N. Y. 391; 4 M'Cord, 387; for uttering slander; 8 Term, 337; but only if the act be wholly tortious and disconnected from contract; 8 Term, 35; 6 Watts, 1; 6 Cra. 226.

Lessor and *lessee* are respectively liable for their part of the tort in case of a wrong commenced by one and continued by the other: as, for example, a nuisance; 2 Salk. 460; Broom, Part. 253; Woodf. Landl. & T. 671.

Master is liable for a negligent tortious act or default of his servant while acting within the scope of his employment; 6 Cow. 189; 1 Pick. 465; 2 Gray, 181; 23 N. H. 157; 16 Me. 241; 5 Rich. 44; 18 Mo. 362; although not in his immediate employ; 5 B. & C. 554; 8 Ad. & E. 109; see 3 Gray, 349; for the direct effect of such negligence; 17 Mass. 132; but not to one servant for the neglect of another engaged in the same general business; 36 Eng. L. & Eq. 486; 3 Cush. 270; 23 Penn. 384; 15 Barb. 574; 6 Ind. 205; 22 Ala. N. S. 294; 23 Me. 269; 4 Sneed, 36; see 5 Du. N. Y. 39; 37 E. L. & E. 281; if the servant injured be not unnecessarily exposed; 28 Vt. 59; 6 Cal. 209; 4 Sneed, 36.

And the servant is also liable; 1 Sharsw. Bla. Com. 431, n. For wilful acts; 9 C. & P. 607; 3 Barb. 42; for those not committed while in the master's service; 26 Penn. 482; or not within the scope of his employment, he alone is liable.

Partners may be sued separately for acts of the firm, its agents or servants; 4 Gill, 406; 1 C. & M. 93; 17 Mass. 182; 1 Metc. Mass. 560; 11 Wend. 571; 18 *id.* 175.

PARTITION. The division which is made between several persons of lands, tenements, or hereditaments, or of goods and chattels which belong to them as co-proprietors. The term is more technically applied to the division of real estate made between co-parceners, tenants in common, or joint tenants.

Voluntary partition is that made by the owners by mutual consent. It is effected by mutual conveyances or releases to each person of the share which he is to hold, executed by the other owners. Cruise, Dig. tit. 32, c. 6, § 14.

Compulsory partition is that which takes

place without regard to the wishes of one or more of the owners.

At common law the right of compulsory partition existed only in cases of co-parcenary; Litt. § 264. By statutes of 31 Henry VIII. c. 1 and 32 *id.* c. 2, the right was extended to joint tenants and tenants in common. These statutes have been generally re-enacted or adopted in the United States, and usually with increased facilities for partition; 4 Kent, 362, etc.; Co. Litt. 175 *a;* 2 Bla. Com. 185, note c; 16 Vin. Abr. 217; Allnatt, Part. Partition at common law is effected by a judgment of the court and delivering up possession in pursuance of it, which concludes all the parties to it. In England the writ of partition has been abolished by stat. 3 & 4 Wm. IV. c. 27, § 36.

Courts of equity also exercise jurisdiction in cases of partition where no adequate remedy could be had at law, as where the titles to the estates in question are such as are cognizable only in equity or where it is necessary to award owelty of partition. This jurisdiction was first settled in Elizabeth's time, and has increased largely on account of the peculiar advantages of the chancery proceeding; 1 Spence, Eq. 654. Nor have the increased facilities grafted by statute upon the common law proceeding ousted the jurisdiction; 1 Story, Eq. § 646, *et seq.*; 1 Fonbl. Eq. book 1, c. 1, § 3, note (b).

Partition in equity is effected by first ascertaining the rights of the several parties interested; and then issuing a commission to make the partition required; and finally on return of the commissioners and confirmation thereof by decreeing mutual conveyances between the parties; Mitf. Eq. Pl. 120; 2 Sc. & L. 371. For an abstract of the laws of the several states on this subject, see 1 Hill. R. P. c. 55.

PARTNERS. Members of a partnership.

Ostensible partners are those whose names appear to the world as partners, and who in reality are such.

Nominal partners are those who are held out as partners but who have no interest in the firm or business.

Dormant partners are those whose names and transactions as partners are professedly concealed from the world.

Special partners are those whose liabilities are limited by statute to the amount of their respective contributions. Ordinarily a special partner is associated with at least one general partner by whom the business is managed, but in the "partnerships limited" organized under recent statutes, all the parties have a limited liability.

Who may be.

General rule. Persons who have the legal capacity to make other contracts may enter into that of partnership; Lind. Part. *77; 1 Col. Part. § 11.

Aliens. An alien friend may be a partner; Lind. Part. *78; Co. Litt. 129 b. An alien enemy cannot enter into any commercial contract; 1 Kent, *66-69; 8 Term, 548; 16 Johns. 438; 7 Pet. 586.

Corporations. There is no general principle of law which prevents a corporation from being a partner with another corporation, or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution; Lind. Part. *86; 46 Conn. 136; Grant, Corp. 5; 5 Gray, 58.

Firms. Two firms may be partners in one joint firm; 1 Ab. Pr. 243; 1 Fed. Rep. 800.

Infants. An infant may contract the relation of partner, as he may make any trading contract which is likely to prove for his advantage; 17 Gratt. 503; 8 Taunt. 35; 5 B. & Ald. 147. Such a contract made by a person during infancy is voidable and may be affirmed or disaffirmed by him at majority; Story, Part. § 7; 42 Mich. 134; but whether he may disaffirm before majority is doubtful; 31 Mich. 182; Ewell's Lead. Cas. 92, 96; Lind. Part. *80 n., and *83; unless he gives notice of disaffirmance, or in some manner repudiates this contract within a reasonable time after becoming of age, he will be presumed to have ratified it; 8 Taunt. 35; Story, Part. § 7; 9 Vt. 368; and his liability relates back to firm contracts made during his minority; 2 Hill, S. C. 479; 21 Mich. 304. As to what amounts to a ratification, see 2 Hill, S. C. 479; 123 Mass. 88. The person with whom the minor contracts will be bound by all the consequences; 2 Stra. 937; 2 Maule & S. 205; 1 Watts, 412; 3 Green, N. J. 343.

Lunatics. A lunatic is probably not absolutely incapable of being a partner; Lind. Part. *84; since the insanity of a partner does not *per se dissolve* the firm, but simply amounts to a sufficient cause for a court of equity to decree a dissolution; 1 Cox, Ch. 107; 2 M. & K. 125; 15 Johns. 57. Whether a contract by a lunatic to become a partner can in all cases be avoided by him, is, perhaps, unsettled; Story, Part. § 7, n. 1.

Married women. Married women, at common law, are incapable of becoming partners, since they are generally unable to contract or engage in trade; Story, Part. § 10; 3 De G. M. & G. *18; Lind. Part. *84. But where a married woman is authorized by custom, statute, or otherwise (*e. g.* because her husband is an alien, or on account of a divorce a *mensa et thoro*) to trade as a *feme sole*, she may probably be a partner; 52 Miss. 402; Story, Part. § 10; Pars. Part. 25. The mere consent of her husband to her trading as a *feme sole* does not necessarily permit her to become a partner; Story, Part. § 12. In some states a married woman may be a partner as to her separate estate; 74 Penn. 448. In 10 Paige, Ch. 82, it was held that a married woman, by acting as partner and continuing the business after her husband's death, created a partnership from the beginning.

Number of persons. Generally speak-

ing, the common law imposes no restriction as to the number of persons who may carry on trade as partners; 1 Col. Part. § 10; 27 Ind. 399. But a partnership cannot consist of but one person; 46 Mich. 449.

Who are partners.

See PARTNERSHIP; 15 Am. L. Rev. 785.

Powers of partners.

General rule. It has been customary to derive the authority of a partner from an assumed relation of mutual agency between the members of the firm, and it is true that the firm is responsible for whatever is done by any of the partners while acting for it within the limits of the authority conferred by the nature of the business carried on; 6 Bing. 792; 8 H. L. C. 268; Lind. Part. *236; Poth. Part. c. 5, n. 90; 4 Exch. 623; 36 Penn. 498; 58 Mo. 532; 45 Miss. 499; 59 Ala. 386. It is perhaps more accurate to trace a partner's power to his standing as a co-principal, and to consider his agency an incident of this relation; 5 Ch. Div. 458; L. R. 7 Ex. 218. Whatever the source of a partner's power, it is as a rule limited to acts incident to carrying on, in the usual way, the particular business in which the firm is engaged, and each partner has the power to manage the ordinary business of the firm, and, consequently, to bind his co-partners, whether they be ostensible, dormant, actual, or nominal; 7 East, 210; 2 B. & Ald. 673; 1 Cr. & J. 316; by whatever he may do, in the course of such management, as entirely as to bind himself. But the acts of a partner wholly unconnected with the business of the partnership do not bind the firm; 4 Exch. 623; 2 B. & Ald. 678; 8 Me. 320; 15 Pick. 290; 3 Johns. Ch. 23; Story, Part. § 112–113 and n.

In special cases.

Accounts. One partner can bind his firm by rendering an account relating to a partnership transaction; 8 Cl. & F. 121; Lind. Part. *264.

Actions. One partner can bring an action on firm account in his own and his co-partners' names without their consent, but they are entitled to indemnity if he sues against their will; Lind. Part. *473; 2 Cr. & M. 318; 67 Mo. 568. This power of a partner survives the dissolution of the firm; 1 E. D. Sm. 423. One partner cannot, as a rule, sue in his own name for a firm debt; the suit must be in the names of all; Penn. N. J. 711.

Appearance, entering an. In an action against partners, one may enter an appearance for the rest, or authorize an attorney to do so; 7 Term, 207; 17 Vt. 531; 4 Kan. 240. But not after dissolution of the firm; 2 McCord, 311. Nor can one partner bind his co-partners personally and individually by entering an appearance for them when they are not within the jurisdiction, nor served with process; 9 Cush. 390; 11 How. 165.

Arbitration. As a general rule one partner cannot bind the firm by submitting any of its affairs to arbitration, whether by deed or parol; 3 Kent, 49; 3 Bingh. 101; 1 Cr. M. & R. 681; 3 C. & B. 742; 35 Mich. 5; 40 Vt. 460; 19 Johns. 137; 1 Pet. 221. The reason given being that such a power is unnecessary for carrying on the business in the ordinary way; Lind. Part. *266.

This rule has not been universally adopted, and in Pennsylvania, Kentucky, and Illinois one partner may bind the firm by submission to arbitration, by an agreement not under seal; 89 Penn. 453; 3 T. B. Monr. 435; 25 Ill. 48; and see Wright, Ohio, 420.

Assignments. The right of a partner to dispose of the property of the firm extends to the assignment of at least a portion of it as security for antecedent debts, as well as for debts thereafter to be contracted on account of the firm; Story, Part. § 101; 5 Cra. 289; 58 Mo. 532; 17 Vt. 394. The assignment may be for the benefit of one or of several creditors; 4 Day, 428; 6 Pick. 360; 5 Watts, 22. Although the authorities differ, the better opinion seems to be that one partner cannot, without the knowledge or consent of his co-partners, assign all the property of the firm to a trustee for the benefit of creditors; 13 Minn. 43; 34 Mo. 329; 50 Ala. 251; 29 Ohio St. 441; 32 Wisc. 444; 17 Vt. 390; Lind. Part. *266 n.

Bills of exchange and promissory notes. A partner may draw, accept, and indorse bills and notes in the name, and for the use of the firm, for purposes within the scope of the partnership business; Story, Part. § 102; 7 Term, 210; 20 Miss. 226; 119 Mass. 215; 78 Ill. 234. A restriction of this power by agreement between the partners does not affect third persons unless they have notice of it; 27 La. An. 352; 44 Miss. 283. This power cannot be exercised after dissolution of the firm; 42 Mich. 110; 51 Cal. 531; unless such dissolution be without proper notice; 130 Mass. 591. A bill or note made by one partner in the name of the firm is *prima facie* evidence that it was executed for partnership purposes; 31 Mich. 373; 34 Penn. 344; 16 Wend. 505; 44 Miss. 283.

A partner has no implied authority to indorse a note made payable to a co-partner, although for firm account; 64 Ga. 221; nor to bind the firm as a party to a bill or note for the accommodation of or as a mere surety for another; 2 Cush. 300; 19 Johns. 154; 5 Conn. 574; 21 Miss. 122; 31 Me. 452; 3 Humph. 597; unless by special authority implied from the nature of the business or previous course of dealing; 3 Kent, 46; 3 Humph. 597; 4 Hill, N. Y. 261; and the burden is on the holder of the instrument to show such authority; 19 Johns. 154; 2 Cush. 314, 315; 2 Penn. 177; 21 Miss. 122; 22 Me. 188, 189. Direct or positive proof is not necessary; the authority or ratification may be inferred from circumstances; 2 Cush. 309; 22 Me. 188, 189; 14 Wend. 133; 2 Litt. 41; 10 Vt. 268.

Borrowing money. One partner may borrow money on the credit of the firm, when it is necessary for the transaction of the partnership business in the ordinary way; Lind. Part. *269; 8 Ves. 540; 115 Mass. 388; 62 Penn. 393; 75 Ill. 629; 61 Ala. 143.

Checks. One partner has the implied power to bind the firm by checks drawn on its bankers in the partnership name; 3 C. B. N. S. 442; Pars. Part. §§ 102–102 *a*. Such checks must not be post-dated; L. R. 6 Q. B. 209.

Compromise. A partner may compromise with the debtors or creditors of the firm; Story, Part. § 115; 30 Conn. 1; 7 Gill, 49; and see 10 Conn. 269.

Confession of judgment. One partner cannot, by confessing a voluntary judgment against the firm, bind his co-partners, unless actually brought into court by service of process against him and his co-partners. But a judgment so confessed will bind the partner who confessed it; 3 C. B. 742; Lind. Part. *474, notes; 36 Penn. 458; 13 Iowa, 496; 32 Vt. 709; 30 La. An. 692; but see 13 Ab. Pl. 192; 22 How. 209; and 32 La. An. 607; where it was held that a "commercial partner" has a right to confess judgment on behalf of the firm.

Contracts. A partner has the power to bind the firm by simple contracts within the scope of the partnership business; 15 Mass. 75; 5 Pet. 529; Lind. Part. *275 n.

It has been held, however, that a partner, without authority express or implied from circumstances, cannot bind the firm by a contract to convey the partnership real estate unless the contract is subsequently ratified; 5 Hill, N. Y. 107.

Debts. One partner may receive debts due the firm, and payment to him by the debtor extinguishes the claim; 12 Mod. 446; 1 Wash. Va. 77; 2 Blackf. 371; 14 La. An. 681; 4 Binn. 375; even after dissolution; 15 Ves. 198. A partner may also bind the firm by assenting to the transfer of a debt due to it, as the transfer of the firm's account from one banker to another; 2 H. & N. 326. But a partner cannot employ the partnership funds to pay his own pre-existing debt, without the express or implied consent of his co-partners; 18 Conn. 294; 12 Pet. 221; Lind. Part. *277 n. (2); 31 Ala. 532; 28 Ohio St. 55; 94 Penn. 31.

Deeds. One partner has no implied authority to bind his co-partners by a deed, even for a debt or obligation contracted in the ordinary course of commercial dealings within the scope of the partnership business; Story, Part. § 117; 7 Term, 207; 3 Kent, 47; 11 Ohio St. 223; 26 Vt. 154. Such an instrument binds the maker only; 62 Penn. 393; 7 Ohio St. 463. But a deed made by one partner in the name and for the use of the firm will bind the others if they assent to it, or subsequently adopt it; and this consent or adoption may be by parol; 26 Vt. 154; 11 Pick. 400. One partner may convey by deed property of the firm which he might have conveyed without deed. The seal in such a case would be surplusage; 2 Ohio St. 478; 5 Hill, N. Y. 107; 7 Metc. 244; 8 Leigh, 415; Lind. Part. 279 n.

Distress. Where a lease has been granted by the firm, any partner may distrain or appoint a bailiff to do so; 4 Bing. 562, and cases there cited.

Firm property. Each partner has the power to dispose of the entire right of his co-partners in the partnership effects, for the purposes of the partnership business and in the name of the firm; Story, Part. § 9. This power is held not to extend to real estate, which a single partner cannot transfer without special authority; Story, Part. § 101; 1 Brock. 456; 3 McLean, 27. Since the power to transfer the firm property must be exercised for the ordinary purposes of the partnership business, it is held that a partner's employment of firm capital in a new partnership, which he forms for his firm with third persons, charges him for a conversion of the fund to his own use; 25 Ohio St. 180.

Guarantees. A partner derives no authority from the mere relation of partnership to bind the firm as guarantor of the debt of another; 5 Q. B. 833; 4 Exch. 623; Lind. Part. *281; 31 Me. 454; 21 Miss. 122; 35 Penn. 517. If the contract of guaranty is strictly within the scope of the firm business, one partner may bind the firm by it; 41 Iowa, 518.

Insurance. One partner may effect an insurance of the partnership goods; 4 Camp. 66; 1 M. & G. 130. The assignment of a partner's interest in the firm stock without the insurer's consent, does not violate a policy of insurance upon it; 27 Ohio St. 1.

Leases. Inasmuch as a lease is under seal the rule is that a partner has no power to contract on behalf of the firm for a lease of a building for partnership purposes; Lind. Part. *284; 22 Beav. 606. But it is held that a partner may bind the firm for the rent of premises necessary for partnership purposes, and so used; 47 Conn. 26; 21 La. An. 21.

Majority, power of. The weight of authority seems to be in favor of the power of a majority of the firm, acting in good faith, to bind the minority in the ordinary transactions of the partnership business; 3 Kent, 45, and note; Story, Part. § 123, and notes; T. & R. 496; 33 Beav. 595; 4 Johns. Ch. 473; 46 Penn. 434, 27 Ala. 245; 49 Ga. 417. But see 6 Ves. 773; 16 Vin. Abr. 244; 1 Y. & J. 227; 57 Penn. 365. It is said by a learned writer that, in the absence of an express stipulation, a majority must decide as to the disposal of the partnership property; 3 Chitty, Com. Law, 234; but the power of the majority must be confined to the ordinary business of the partnership; 9 Hare, 326; 3 De G. & J. 123; 4 K. & J. 733; 2 Phill. 740; 14 Beav. 367; 2 De G. M. & G. 49; 3 Sm. & G. 176; it does not extend to the right to change any

of the articles therein; Story, Part. § 125; 4 Johns. Ch. 573; 32 N. H. 9; nor to engage the partnership in transactions for which it was never intended; 3 Maule & S. 488; 1 Taunt. 241; 1 S. & S. 31. Where a majority is authorized to act, it must be fairly constituted and must proceed with the most entire good faith; T. & R. 525; 10 Hare, 493; 5 De G. & S. 310.

Mortgages. A partner has no implied power to make a legal mortgage of partnership real estate; Lind. Part. *284; 2 Humph. 534. But one party may execute a valid chattel mortgage of firm property, without the consent of his co-partners; 47 Wisc. 261; 18 Minn. 232; and see 116 Mass. 289. It has been held that a partner's mortgage of his separate estate to the firm is valid; 30 La. An. 869; also that where there are firm improvements on a partner's land, his mortgage of the land carries the improvements with it to the mortgagee without notice; 7 Barb. 263.

Pledges of firm property. As a natural consequence of a partner's power to borrow money for the firm, he may pledge its personal property for that purpose; 3 Kent, 46; 10 Hare, 453; 7 M. & G. 607; 3 Bradw. 261. It is thought that a partner's equitable mortgage of firm real estate, by depositing deeds of partnership property as a pledge, would be valid; Lind. Part. *285.

Purchases. A partner may bind the firm by purchasing on credit such goods as are necessary for carrying on the business in the usual way; 2 C. & K. 828; 5 W. & S. 564; 19 Ga. 520; 76 N. C. 139.

Receipts. The power of a partner to receipt for the firm is incident to his power to receive money for it; see *debts;* Story, Part. § 115.

Relative extent of each partner's power. In all ordinary matters relating to the partnership, the powers of the partners are coextensive, and neither has a right to exclude another from an equal share in the management of the concern or from the possession of the partnership effects; 2 Paige, Ch. 310; 16 Ves. 61; 2 J. & W. 558; Lind. Part. *540.

Releases. This rule that one partner cannot bind his co-partners by deed does not extend to releases; 10 Moore, 393; 2 Co. 68; 3 Johns. 68; 4 Gill & J. 310; 3 Kent, 48. As a release by one partner is a release by all; Lind. Part. *293; 2 Rolle, Abr. *Release,* 410 D; 21 Ill. 604; 37 Vt. 573; so a release to one partner is a release to all; 5 Gill & J. 314; 23 Pick. 444.

Sales. A partner has power to sell any of the partnership goods; Cowp. 445; 3 Kent, 44; see 2 Stark. 287; even the entire stock if the sale be free from fraud on the part of the purchaser; and such sale dissolves the firm, although the term for which it was formed has not expired; Lind. Part. *295, n.; 24 Pick. 89; 5 Watts, 22; 59 Ala. 338. See, *contra,* 8 Bosw. 495. A sale by one partner of his share of the stock dissolves the firm and gives the purchaser the right to an account; 50 Cal. 615. A bona fide sale of all the partnership effects by one partner to another is valid, and the property becomes separate estate of the purchaser, although the firm and both partners are at the time insolvent; 9 Cush. 553; 21 Conn. 130; 21 N. H. 462.

Servants. One partner has the implied power to hire servants for partnership purposes; 9 M. & W. 79; 74 Penn. 166; and probably to discharge them, though not against the will of his co-partner; Lind. Part. *296.

Specialties. As a rule, the relation of partnership gives a partner no authority to bind his co-partners by specialty; Story, Part. § 117; and see *Deeds* and *Mortgages.* But it has been held that a partner may bind his firm by an executed contract under seal, because the firm is really bound by the act, and the seal is merely evidence; 38 Penn. 231; and as stated above, a partner may bind his firm by a release under seal. A lender may diregard a specialty executed by one partner, for a loan, and recover from the firm in assumpsit; 98 Ill. 27.

Warranties. It is laid down as a general rule that a partner has no implied authority to bind the firm by a warranty; Parsons, Part. *217. But the question is always open to evidence, and a warranty by one partner is held to bind the firm, when it is shown to be incident to the business; 2 B. & Ald. 679.

Liabilities.

General rule. If an act is done by one partner on behalf of the firm, and it can be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *primâ facie* be liable, although in point of fact the act was not authorized by the other partners; but if the act cannot be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *primâ facie* not be liable; 10 B. & C. 128; 14 M. & W. 11; Lind. Part. *237. As to reason for such liability, see *Powers, supra.*

Concerning matters relating to admissions. It is laid down as a general rule that partners are bound by the admissions, representations, and acknowledgments of one of their number, concerning partnership transactions; Story, Part. § 107; Parsons, Part. 201; 1 Harr. N. J. 41. A better rule seems to be that the admissions of one partner with reference to a partnership transaction are evidence against the firm; Lind. Part. *264; 2 C. & P. 232; 1 Stark. 81; but not necessarily conclusive evidence; Lind. Part. *264; 2 K. & J. 491; 5 Stew. N. J. 828. It is held that the admission of one partner in *legal* proceedings is the admission of all; Story, Part. § 107; 1 Maule & S. 259; 1 Camp. 82; 40 Md. 499; 68 Ind. 110; 47 Mo. 346; 4 Conn. 326; 15 Mass. 44; 2 Wash. C. C. 388.

Agreements inter se. No arrangement between the partners themselves can limit or prevent their ordinary responsibilities to third

persons, unless the latter assent to such arrangement; 2 B. & Ald. 679; 3 Kent, 41; 5 Mas. 187, 188; 5 Pet. 129; 3 B. & C. 427. But where the creditor has express notice of a private arrangement between the partners, by which either the power of one to bind the firm or his liability on partnership contracts is qualified or defeated, such creditor will be bound by the arrangement; 12 N. H. 275; 4 Ired. 129; 38 N. H. 287; 6 Pick. 372; 4 Johns. 251; 5 Conn. 597, 598; 1 Campb. 404; 5 Bro. P. C. 489.

Attachment. A partner's interest in a firm is liable to attachment by his creditors; Pars. Part. 382; 7 C. B. 229; 2 Johns. Ch. 548; 8 N. H. 252.

Contracts. See *Powers, supra.*

Contribution. A partner's contribution to the capital of his firm is a partnership debt for the repayment of which each partner is liable; 119 Mass. 38. Failure of a partner to pay his contribution in full does not entitle his co-partner to exclude him from the business without a dissolution; 3 C. E. Green, 385.

Debts. Each partner is liable to pay the whole partnership debts. In what proportion the partners shall contribute is a matter merely among themselves; *Lord Mansfield*, 5 Burr. 2613. Universally, whatever agreement may exist among the partners themselves, stipulating for a restricted responsibility, and however limited may be the extent of his own separate beneficial interest in, and however numerous the members of, the partnership, each individual member is liable for the joint debt to the whole extent of his property; 5 Burr. 2611; 9 East, 516; 1 V. & B. 157; 2 Des. 148; 6 S. & R. 333; 34 Ohio St. 187. In Louisiana, ordinary partners are bound *in solido* for the debts of the partnership; La. Civ. Code, art. 2843; each partner is bound for his share of the partnership debts, calculating such share in proportion to the number of partners, without attention to the proportion of the stock or profits each is entitled to; *Id.* art. 2844.

An incoming partner is not liable for the debts of the firm incurred before he became a member, unless he assumes them by agreement; 58 Penn. 179; 27 La. An. 352; 73 Ill. 381; 6 Munf. 118. But a retiring partner remains liable for the outstanding debts of the firm; 1 Taunt. 104; 4 Russ. 430.

Dormant partners. Dormant partners are, when discovered, equally liable with those who are held out to the world as partners, upon contracts made during the time they participate in the profits of the business; 1 Cr. & J. 316; 5 Mas. 176; 9 Pick. 272; 5 Pet. 529; 2 Harr. & G. 159; 5 Watts, 454; 1 Dougl. 371; 1 H. Blackst. 37; 3 Price, 538; 21 Miss. 656; 25 Ill. 359. This liability is said to be founded on their participation in the profits; 1 Stor. 371, 376; 5 Mas. 187, 188; 5 Pet. 574; 10 Vt. 170; 16 Johns. 40; 1 H. Blackst. 31; 2 *id.* 247. Another reason given for holding them liable is that they might otherwise receive usurious interest without any risk; *Lord Mansfield*, 1 Dougl. 371; 4 B. & Ald. 663; 3 C. B. 641, 650; 10 Johns. 226. But inasmuch as a dormant partner differs from an ostensible partner only in being unknown as such, the liability of each must be owing to the same cause, viz.: that they are principals in the business, the dormant partner being undisclosed; L. R. 7 Ex. 218. Sharing profits is simply evidence of this relation; 5 Ch. Div. 458; and the usurious interest theory is so palpably illogical that it has never been accepted to any extent; 2 W. Blackst. 997.

Dower. It has been held that a partner's widow is entitled to dower in firm lands subject to the equities of the parties; 3 Stew. (N. J.) 415. But see 1 Ohio St. 535. Firm debts are a lien on partnership lands paramount to a widow's right of dower; 8 Ohio St. 328.

Firm funds. A partner who withdraws firm funds from the business, thereby diminishing the stock, and applies them to his own use, is liable to the others for the injury; 1 J. J. Marsh. 507; 3 Stor. 101; and funds so used by a partner may be followed into his investments; 1 Stew. (N. J.) 595.

Fraud. One partner will be bound by the fraud of his co-partner in contracts relating to the affairs of the partnership, made with innocent third persons; 2 B. & Ald. 795; 1 Metc. Mass. 563; 6 Cow. 497; 2 Cl. & F. 250; 7 T. B. Monr. 617; 7 Ired. 4; 15 Mass. 75, 81, 331; 56 Ind. 406; 73 Ill. 381; Lind. Part. *314. This doctrine proceeds upon the ground that where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or the occasion of the confidence and credit reposed in such third person; 1 Metc. Mass. 562, 563. The liability, therefore, does not arise when there is collusion between the fraudulent partner and the party with whom he deals; 1 East, 48, 53; or the latter has reason to suppose that the partner is acting on his own account; Peake, 80, 81; 2 C. B. 821; 10 B. & C. 298.

Not only gross frauds, but intrigues for private benefit, are clearly offences against the partnership at large, and, as such, are relievable in a court of equity; 15 Ves. 227; 3 Kent, 51, 52; 1 Sim. 52, 89; 17 Ves. 298.

Insolvency. It has been held that the discharge of the partners in insolvency, as individuals, does not relieve them from liability for the firm debts; 56 Cal. 631.

Judgments. The rule is that a judgment obtained against one partner on a firm liability is a bar to an action against his co-partners on the same obligation; Lind. Part. *451; 3 De G. & J. 33; 4 McLean, 51; 11 Gill & J. 11; see *contra*, 14 Bush, 777; except when they are abroad and cannot be sued with effect; Ewell's Lind. Part. *451; 4 De G. & S. 199. But in Pennsylvania and other states this rule is changed by statute. Where one partner is sued and judgment is given *for him*, the credi-

tor may still have recourse to the others; 2 H. & C. 717.

Mismanagement. As a rule, a partner is not liable to the firm for the mismanagement of its business; Penn. N. J. 717. Because it is unreasonable to hold a partner, who acts fairly and for the best interests of the firm according to his judgment, liable for a loss thus unwittingly occasioned; 3 Wash. C. C. 224.

Notice. A retiring ostensible partner remains liable to old customers of the firm who have no notice of his retirement; 51 Ala. 126; 57 Ind. 284; 83 Penn. 148. Actual notice is not necessary to escape liability to new customers; Wade, Notice, 226; even though the business is continued in the same firm name; 36 Ohio St. 135. As a general rule, notice to one partner of any matters relating to the business of the firm is notice to all; 40 Mich. 546; 5 Bosw. 319; Lind. Part. *287; 40 N. H. 267; 6 La. An. 684; 20 Johns. 176.

Surviving partner. The surviving partner stands chargeable with the whole of the partnership debts, he takes the partnership property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts paid; 3 Kent, 37; 5 Metc. Mass. 576, 585; 10 Gill & J. 404; 30 Me. 386; 3 Paige, Ch. 527; 13 Miss. 44; 18 Conn. 294. See 1 Exch. 164; Year B. 38 Edw. III. f. 7, t. *Accompt.* The debts of the partnership must be collected in the name of the surviving partner; 6 Cow. 441; Story, Part. § 346; 3 Kent, 37; 4 Metc. Mass. 540. In Louisiana the surviving partner does not possess the right until he is authorized by the court of probate to sue alone for or receive partnership debts; 6 La. 194.

Torts. The firm is not liable for the torts of a partner committed outside of the usual course of the partnership business, unless they are assented to or adopted by its members; 42 N. H. 25; 87 Ill. 508; 2 Iowa, 580; 4 Blatch. 129; 32 Miss. 17. Otherwise, in regard to torts committed in conducting the affairs of the partnership or those assented to by the firm; Lind. Part. *299: as, for the negligent driving of a coach by a member of a firm of coach proprietors; 4 B. & C. 223; or for the negligence of a servant employed by the firm while transacting its business; 14 Gray, 191; or for the conversion of property by a partner to be appropriated to the use of the firm; 87 Ill. 508. Demand of, and a refusal by, one partner to deliver up property is evidence of a conversion by the firm; 4 Hill, N. Y. 13; 24 Wend. 169; 4 Rawle, 120.

Rights and Duties.

General rules. Good faith, reasonable diligence and skill, and the exercise of a sound judgment and discretion, lie at the very foundation of the relation of partnership. In this respect the same general rules apply to partners which are applicable to the other fiduciary relations; Story, Part. § 169; 14 Beav. 250; 10 Hare, 532; 1 Johns. Ch. 470; 53 Mo. 122; 81 Ill. 221; 80 Penn. 234. It becomes, therefore, the implied duty of each partner to devote himself to the interests of the business, and to exercise due diligence and skill for the promotion of the common benefit of the partnership. No partner has a right to engage in any business or speculation which must necessarily deprive the partnership of a portion of his skill, industry, or capital; 3 Kent, 51, 52; 1 Johns. Ch. 305; 1 S. & S. 133; nor to place himself in a position which gives him a bias against the discharge of his duty; Story, Part. § 175; 1 S. & S. 124; 9 Sim. 607; 11 S. & R. 41, 48; 3 Kent, 61; nor to make use of the partnership stock for his own private benefit; 6 Madd. 367; 4 Beav. 534; 16 *id.* 485; 1 Macn. & G. 294; 1 Sim. 52; 3 Stew. (N. J.) 254.

Concerning matters relating to account, suit in equity for. Every partner has a right to an account from his co-partner, which may be enforced by a suit in equity, whereby a partner is enabled to secure the application of partnership assets to the payment of firm debts and the distribution of the surplus among the members of the firm; 8 Beav. 106; 5 Ves. 792; 24 Conn. 279. A silent partner may have a bill for an account; 98 Mass. 118. It has been held that a partner's bill for an account will be barred by the statute of limitations; 3 C. E. Green, 457. But not for secret profits made by one partner in transacting firm business; 3 Stew. (N. J.) 254. A partner cannot maintain account against the co-partner for the profits of an illegal traffic; 120 Mass. 285.

Accounts. In order to give the partners an opportunity of seeing that the business is being carried on for their mutual advantage, it is the duty of each to keep an accurate account ready for inspection; 2 J. & W. 556; Story, Part. § 181; and see 104 Mass. 436; 16 Fla. 99; 1 De G. & S. 692; 12 Sim. 460; 3 Y. & C. 655; 20 Beav. 219.

Actions. As a general rule an action at law does not lie by one partner against his co-partners for money paid or liabilities incurred on account of the partnership, because without an account it is impossible to tell whether a partner is a debtor or creditor of the firm; Story, Part. § 219; 33 Mo. 557; 54 Barb. 353. See, *contra*, Gow, Part. c. 2, § 3. There are, however, many circumstances under which partners may sue each other; see Story, Part. § 219, note (2).

Articles of copartnership. Partners may enter into any agreements between themselves, which are not void as against statutory provisions or general principles of law, even though they do conflict with the ordinary rules of the law of partnership, and such engagements will be enforced between the parties; Pars. Part. *232; 28 E. L. & Eq. 7. But they do not bind third persons, unless adopted by them; 2 B. & Ald. 697; 8 M. & W. 703; 1 Dall. 269; 14 Ohio St. 592; 16 Wend. 505.

Claims against the firm. A partner may be a firm creditor and is entitled to payment of his claim before judgment creditors of the individual partners; 5 C. E. Green, 288.

Compensation. As it is the duty of partners to devote themselves to the interests of the business, it follows that they are not entitled to any special compensation for so doing, although the services performed by them are very unequal in amount and value, unless there is an express stipulation for remuneration; 7 Paige, Ch. 483; 4 Gill, 338; 2 D. & B. Eq. 123; Story, Part. 182; 44 Iowa, 428; 69 Penn. 30; nor for services performed prior to the partnership, although they enure to its benefit; 124 Mass. 305. A surviving partner has been held entitled to compensation for continuing the business, in order to save the good-will; 26 Ohio St. 190. See 118 Mass. 237.

Contribution, Since partners are co-principals and all liable for the firm debts, any partner who pays its liabilities is, in absence of agreement to the contrary, entitled to contribution from his co-partners; Lind. Part. *760; 6 De G. M. & G. 572; 3 Ill. 464; 18 Penn. 351.

Dissolution. A member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any time; Lind. Part. *220; 51 Ind. 478; 76 N. Y. 373; 4 Col. 567. It will then continue only for purposes of winding up; 17 Ves. 298; 5 Leigh, 583. But a court of equity would perhaps interfere to prevent irreparable injury by an untimely dissolution; 1 Swanst. 512, note. Where there is an agreement to continue the business for a certain time, one partner has no right to have a dissolution except for special cause; 50 Barb. 169; s. c. 3 Abb. Pr. U. S. 163. In general, any circumstance which renders the continuance of the partnership, or the attainment of the end for which it was created, practically impossible, would seem sufficient to warrant a dissolution; Lind. Part. *222; 22 Beav. 471.

Exemption. The right of partners to statutory exemption out of firm property is a disputed point, and depends somewhat on the statutes of the several states. In Ohio and Pennsylvania it has been decided that they are not so entitled; 26 Ohio St. 317; 44 Penn. 442. *Contra,* 57 Ga. 229; 44 Mich. 86; 37 N. Y. 350; and see 67 N. C. 140; 101 Mass. 105; Thomps. Hom. & Ex. § 197.

Firm name, use of. It has been held that one partner has no right to use the firm name after dissolution; 7 South. 749; 7 Abb. Pr. 202; 7 Phila. 257; the reason given being that such a continued use of the firm name would impair the value of the good-will and might also subject the retired partners to additional liabilities; Lind. Part. 862. For cases *contra* see 3 Swanst. 490; 7 Sim. 421; 28 Beav. 536; 4 Denio, 559.

Firm property. Each partner has a claim, not to any specific share or interest in the property *in specie,* as a tenant in common has, but to the proportion of the residue which shall be found to be due to him upon the final balance of their accounts, after the conversion of the assets and the liquidation thereout of all claims upon the partnership; and therefore each partner has a right to have the same applied to the discharge and payment of all such claims before any one of the partners, or his personal representatives, or his individual creditors, can claim any right or title thereto; Story, Part. § 97; 7 Jarman, Conv. 68; Cowp 469; 1 Ves. Sen. 239; 4 Ves. 396; 6 *id.* 119; 17 *id.* 193.

Each partner has also a specific lien on the present and future property of the partnership, the stock brought in, and every thing coming in during the continuance and after the determination of the partnership, not only for the payment of debts due to third persons, but also for the amount of his own share of the partnership stock, and for all moneys advanced by him beyond that amount for the use of the partnership, as also for moneys abstracted by his co-partners beyond the amount of his share; Story, Part. §§ 97, 326, 441; 3 Kent, 65, 66; 8 Dana, 278; 10 Gill & J. 253; 20 Vt. 479; 9 Cush. 558; 9 Beav. 239; 20 *id.* 20; 25 *id.* 280. This lien attaches on real estate held by the partnership for partnership purposes, as well as upon the personal estate; 5 Metc. Mass. 562, 577–579, 585; and is coextensive with the transactions on joint account; 1 Dana, 58; 11 Ala. N. S. 412.

Upon a settlement of a partnership by an account, the assets are divided among the partners in proportion to their contributions; and each partner is liable for a deficit in proportion to his share of the profits; 120 Mass. 324.

Fraud. A partner has an equity to rescind the partnership and be indemnified for his co-partner's fraud in inducing him to enter the business; 126 Mass. 304; 3 De G. & J. 304; 1 Giff. 355. Where the partnership suffers from the fraud or wanton misconduct of any partner in transacting firm business, he will be responsible to his co-partners for it; Story, Part. § 169.

Interest. As a general rule partners are not entitled to interest on their respective capitals unless by special agreement, or unless it has been the custom of the firm to have such interest charged in its accounts; 3 De G. J. & S. 1; 6 Beav. 433; 89 Penn. 139; 119 Mass. 38; 20 Ala. 747; 92 Ill. 92. But a partner is entitled to interest on advances made by him to the firm; 6 Mad. 145; 4 De G. M. & G. 36; 129 Mass. 517; 14 N. J. Eq. 44; Lind. Part. *787; 17 Vt. 242; 79 N. Y. 366; and no express agreement is necessary; 1 McCart. Ch. 44. See, however, 8 Dana, 214; Pars. Part. *229, note (y); 24 Conn. 185.

Liquidating partner. It is the duty of those upon whom, by appointment or otherwise, it devolves, after the dissolution of a firm, to wind up the affairs of the partnership,

to act for the best advantage of the concern, to make no inconsistent use of the property, and to seek no private advantage in the composition of debts or in any other transaction in the performance of this business; 1 Taunt. 104; 1 Swanst. 507; 2 *id.* 627. Nor, in this case, can any partner claim any commission for getting in the debts, or, in any other particular, reward or compensation for his trouble; 1 Knapp, P. C. 312; 3 Kent, 64, note; Story, Part. § 331 and note; 17 Pick. 519; 4 Gratt. 138; but in 16 Vt. 613, a partner who performed services in settling up the affairs of a firm after dissolution was allowed compensation for them. See *Compensation, supra.*

Litigation. A partner may recover the costs of carrying on litigation for the firm—but not compensation for conducting it, unless by express agreement; 2 Stew. N. J. 504.

Profits and losses, distribution of. As between the partners, they may by agreement stipulate for equal or unequal shares in the profit and loss of the partnership; Story, Part. § 23; but in the absence of any express agreement or stipulation between them, and of all controlling evidence and circumstances, the presumption has been held to be that they are interested in equal shares; Story, Part. § 24; 1 Mood. & R. 527; 6 Wend. 263; 9 Ala. N. S. 372; 13 *id.* 752; 2 Murph. 70; 5 Dana, 211; 1 Ired. Eq. 332; 1 J. J. Marsh. 506; 20 Beav. 98; 17 Ves. Ch. 49. And the circumstance that each partner has brought an unequal amount of capital into the common stock, or that one or more have brought in the whole capital and the others have only brought industry, skill, and experience, would not seem to furnish any substantial ground of difference as to the distribution; Story, Part. § 24; 3 Kent, 28, 29; 21 Me. 117.

It has sometimes been asserted, however, that it is a matter of fact, to be settled by a jury or by a court, according to all the circumstances, what would be a reasonable apportionment, uncontrolled by any natural presumption of equality in the distribution; Story, Partn. § 24; 2 Camp. 45; 7 Bligh, 432. The opinion in England seems divided; but in America the authorities seem decidedly to favor the doctrine of a presumed equality of interest. See American cases cited above; Story, Part. §§ 24–26.

Receiver, appointment of. To authorize a partner to demand the appointment of a receiver of a subsisting partnership, he must show such a case of gross abuse and misconduct on the part of his co-partner, that a dissolution ought to be decreed and the business wound up; Story, Part. §§ 228, 231; 2 Mer. 405; 8 C. E. Green, 208, 388. After dissolution a court of equity will appoint a receiver almost as a matter of course; Lind. Part. *1008; 1 Ch. Div. 600; 65 N. C. 162; 2 C. E. Green, 343; 20 Md. 30. But see 18 Ves. 281.

Set-off. It may be stated as a general rule in law and equity that there can be no set-off of joint debts against separate debts unless under a special agreement; Story, Part. § 396. Thus, a debt due by one of the members of a firm cannot be set off against a debt due the firm; 2 C. B. 821; 8 Scott, 257; 2 Bay, 146; 4 Wend. 583. Nor can a debt owing to a partner be set off against a debt due by the firm; 9 Exch. 153; 6 C. & P. 60; Lind. Part. *506; 1 South. 220.

Torts. If the partnership suffers loss from the gross negligence, unskilfulness, fraud, or other wanton misconduct of a partner in the partnership business, or from a known deviation from the partnership articles, he is ordinarily responsible over to the other partners for all losses and damages sustained thereby; 1 Sim. 89; Pothier, Part. n. 133; 3 Kent, 52, note; Story, Part. § 173 and note.

PARTNERSHIP. A relation founded upon a contract between two or more persons to do business as individuals on joint, undivided account.

A voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, in some lawful commerce or business, under an understanding, express, or implied from the nature of the enterprise, that there shall be a communion of profit and loss between them, will constitute a partnership. Collyer, Part. § 2; 10 Me. 489; 3 Harr. N. J. 485; 5 Ark. 278.

An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature in every definition of the term. See Ewell's Lind. Part. *1, *2, *3, where many definitions are collected.

There can be no doubt whatever that persons engaged in any trade, business, or adventure, upon the terms of sharing the profits *and* losses arising therefrom, are partners in that trade, business, or adventure. This is a true partnership, both between the parties and *quoad* third persons. 2 Bingh. N. C. 108; 3 Jur. N. S. 31, in the Rolls; Bissett, Part. Eng. ed. 7.

The law of partnership, as administered in England and in the United States, rests on a foundation composed of three materials,—the common law, the law of merchants, and the Roman law. Collyer, Part. § 1.

Partnership at the Roman law (*societas*) included every associated interest in property which resulted from contract; *e. g.* where two bought a farm together. Every other associated interest was styled *communitas*, *e. g.* where a legacy was left to two; Pothier, Droit Franc. III., 444; Ewell's Lind. Part. *58, note 2; 11 La. An. 277.

Partnership at the common law is an *active* notion. The relation implies a business and a turning of capital. It is to be contrasted with ownership, which is, whatever the tenancy, a *passive* notion; 1 Johns. 106; 54 Cal. 439. But there may be at the common law a joint purchase and an individual liabili-

ty for the whole price without a partnership. In a purchase expressly by two the contract is *prima facie* joint with a consequent liability of each for the whole price. But this inference may be contradicted by circumstances known to the seller which indicate a division of title; Ewell's Lind. Part. *58 *et seq.;* 1 Wms. Saund. 291 c.; 4 Cow. 163, 282; 19 Ves. Jr. 441; 27 Iowa, 131; 9 Johns. 475; 15 Me. 17.

Partnership, in the Roman law, was in buying or selling. True partnership, at common law, is only in buying and selling. This peculiarity of the common law is due to the commercial origin of the relation and of the rules by which the relation is governed. The Roman *societas* was an outgrowth of the ancient tribal constitution. The common law partnership is an expedient of trade; 15 Wend. 187; 12 Wend. 386; 42 Ala. 179; Ewell's Lind. Part. *58 *et seq.;* 41 Me. 9; 1 Penn. 140; Camp. 793; 2 Johns. Cas. 329; 1 Johns. 106. Buying to sell again fixes the transaction as a joint one and establishes a partnership. The transaction is joint because the sale excludes the idea of division of title in the purchase. The property dealt in becomes the instrument of both parties in obtaining a totally distinct subject of distribution, *i. e.* the profit; 14 Wend. 187; 1 Hill, N. Y. 234; 3 Kent, *25. There must be an agreement, not a mere intention to sell jointly; 47 N. Y. 199.

In a partnership, the members do business in their unqualified capacity as men, without special privilege or exemption; they are treated in law as a number of individuals, occupying no different relation to the rest of the world than if each were acting singly; 7 Ves. 773; 3 V. & B. 180; Ewell's Lind. Part. *4, note. On the other hand, a corporation, though in fact but an association of individuals with special privileges and exemptions, is in contemplation of law a fictitious person distinct from the members who compose it; Ewell's Lind. Part. *4. Every unincorporated association for purposes of gain is a partnership; unless it can claim corporate privilege on the ground of a *de facto* standing; 27 Ind. 399; 66 N. Y. 425; 7 Penn. 165; Ewell's Lind. Part. *99, note; 65 Ill. 532; 4 Hun, 402. A club or association not for gain is not a partnership: it is not a commercial relation; Ewell's Lind. Part. *57; 6 Mo. App. 465; 22 Ohio St. 159; 97 Penn. 493.

Whether a partnership exists or not in a particular case is not a mere question of fact, but one mixed of law and fact. It is, nevertheless, generally to be decided by a jury. See 3 Harr. N. J. 358; 4 *id.* 190; 6 Conn. 347; 1 N. & M'C. 20; 1 Caines, 184; 2 Fla. 541; 3 C. B. N. S. 562, 563; 42 Ala. 179.

Elements of Partnership.

The elements of partnership are the contribution and a sharing in the profits. These two elements must be combined. Without contribution the alleged partner cannot be said to do business; unless he shares the profits, the business is not carried on for his account. Contribution without a share in the profits is a simple gift to the firm, by which firm creditors are enriched, not damaged. Sharing profits without contribution is a gift by the firm to the beneficiary, with which creditors may of course interfere by seizing the property and closing out the concern. In neither case, does the alleged partner enter into business relations with the customers and creditors of the firm; 3 Kent, *24, *25; 8 H. L. C. 286; 5 Ch. Div. 458; 8 Hun, 189; L. R. 7 Exch. 218.

Contribution need not be made to the firm stock; any co-operation in the business will be enough; 4 East, 144; 16 Johns. 34; Story, Part. §§ 27, 40. A contribution must be kept in the concern, and takes the risk of the business; a loan, on the other hand, is made upon the personal credit of the partners merely, and may be used by them as they please; it is to be repaid at all events. Because of this difference, sharing profits in lieu of interest upon a loan does not create a partnership. The English statute to this effect has been decided to be merely declaratory; 5 Ch. Div. 458; 7 Ch. Div. 511; 62 N. Y. 508; 6 Pick. 372.

It has sometimes been said that sharing profits is the sole criterion of partnership: but this rule has been condemned. Again, it is called *prima facie* evidence of partnership, but a contribution will have the same effect. Each is an element in a relation not complete without both. Sharing profits without losses has been said to constitute a partnership as to third persons, a *quasi*-partnership; 1 Story, 371; 58 N. Y. 272; 13 Barb. 302. The doctrines by which a *quasi*-partnership results from merely sharing profits seem to find their root in decisions of a comparatively modern date. They are certainly not very clearly defined, and sometimes lead to great apparent injustice; Ewell's Lind. Part. *34 *et seq.;* 2 W. Blackst. 998; 18 C. B. 617; 3 N. H. 287, 307; 58 N. Y. 272.

It has been held that a *quasi*-partnership subsists between merchants who divide the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other; 4 B. & Ald. 663. So between persons who agree to share the profits of a single isolated adventure; 9 C. B. 431; 1 Rose, 297; 4 East, 144; and between persons one of whom is in the position of a servant to the others, but is paid a share of the profits instead of a salary; 1 Deac. 341; 1 Rose, 92; and between persons one of whom is paid an annuity out of the profits made by the others; 17 Ves. 412; 8 Bingh. 469; or an annuity in lieu of any share in those profits; 2 W. Blackst. 999. So between the vendor and purchaser of a business,

if the former guarantees a clear profit of so much a year, and is to have all profits beyond the amount guaranteed; 3 C. B. 641. The character in which a portion of the profits is received does not affect the result; see 1 Maule & S. 412; 10 Ves. 119; 21 Beav. 164; 5 Ad. & E. 28; 11 C. B. 406. Persons who share profits are *quasi*-partners although their community of interest may be confined to the profits; 2 B. & C. 401.

An agreement to share losses is not essential; that follows as an incident to the relation. Indeed all liability *inter se* may be guarded against by contract and a partnership may nevertheless subsist; 1 H. Blackst. 49; 3 M. & W. 357; 6 *id.* 119; 2 Bligh, 270; 3 C. B. 32, 39; Ewell's Lind. Part. *22; 7 Ala. 761; 5 La. An. 44. Partnership is a question of intention, and the intention which makes a partnership is to contribute to the business and share the profits. In this way, the parties became co-principals in a business carried on for their account. The law then creates a liability even against the express stipulations of the parties; L. R. 7 Exch. 218; 5 Ch. Div. 458; 8 H. L. C. 268. The question of intention is to be decided by a consideration of the whole agreement into which the parties have entered, and ought not to be made to turn upon a consideration of only a part of its provisions; 15 M. & W. 292; 2 B. & C. 401; 1 Stor. 371; 3 Kent, 27; 3 C. B. 250; Ewell's Lind. Part. *19.

An agreement to share profits, nothing being said about the losses, amounts *primâ facie* to an agreement to share losses also: so that an agreement to share profits is *primâ facie* an agreement for a partnership; and, accordingly, it is held that, unless an agreement to the contrary is shown, persons engaged in any business or adventure, and sharing the profits derived from it, are partners as regards that business or adventure. Still, it cannot be said that persons who share profits are necessarily and inevitably partners in the proper sense of the word; 1 Camp. 330; Ewell's Lind. Part. *19 note; 28 Ohio St. 319; 54 Mo. 325; 5 Gray, 59, 60; 12 Conn. 69; 12 N. H. 185; 15 Me. 294; 3 C. B. N. S. 562, 563. See 18 Johns. 34; 18 Wend. 175; 6 Conn. 347. Although a presumption of partnership would seem to arise in such a case; Collyer, Part. § 85; still, the particular circumstances of the case may be such as to repel this presumption. It may appear that the share of the profits taken was merely a compensation to one party for labor and service, or for furnishing the raw materials, or a mill-privilege, or a factory, or the like, from which the other is to earn profits; Story, Part. § 36; 5 Gray, 60; 8 Cush. 556, 562; 3 Kent, 33; 6 Halst. 181; 2 M'Cord, 421; but see 38 N. H. 289. Originally it was immaterial whether the profits were shared as gross or net; but the later cases have established a distinction. A division of gross returns is thought to be identical with a purchase for the purpose of division; the price represents the thing. There is no unity of interest; 1 Camp. 329; Story, Part. § 34; 3 Kent, 25, note; 3 M. & W. 357, 360, 361; 3 C. B. N. S. 544, 562; 4 Maule & S. 240; 5 N. Y. 186; 5 Denio, 68; Ewell's Lind. Part. *15 *et seq.* But the distinction is not absolutely decisive on the question of partnership; see 1 Camp. 330; 6 Vt. 119; 10 *id.* 170; 6 Pick. 335; 14 *id.* 193; 6 Metc. 91; 4 Me. 264; 12 Conn. 69; 38 N. H. 287, 304; *Abbott*, C. J., 4 B. & Ald. 663. The officers and crews of whaling and other fishing vessels, who are to receive certain proportions of the produce of the voyage in lieu of wages; 4 Esp. 182; 17 Mass. 206; 3 Pick. 435; 4 *id.* 234; 23 *id.* 495; 3 Stor. 112; 2 Y. & C. 61; captains of merchant-ships who, instead of wages, receive shares in the profits of the adventures on which they sail; 4 Maule & S. 240; or who take vessels under an agreement with the owners to pay certain charges and receive a share of the earnings; 6 Pick. 335; 16 Mass. 336; 7 Me. 261; persons making shipments on half-profits, and the like; 17 Mass. 206; 14 Pick. 195; have generally been held not to be partners with the owners. A clerk, of course, co-operates in the business; but his services are rendered to his employer and in the capacity of a subordinate. So long as his special function remains unchanged, the business may assume any complexion the employer pleases to give it. Hence sharing profits in lieu of wages is not a partnership. There is no true contribution; Ewell's Lind. Part. *20 *et seq.*; 69 Ill. 237; 16 Kan. 209; 118 Mass. 443; 34 Md. 49; 29 N. J. L. 270; 76 N. Y. 55; 14 Cal. 73; 43 Mo. 538; 44 Ga. 228. A factor, simple or del credere, may receive a portion of the profits in lieu of commissions without becoming a partner. His services are not contributed to the business as a whole, they are not co-ordinate with the investment of the consignor in the goods. The factor is agent for selling merely; 62 Penn. 374; 24 L. J. Ch. 58; 3 C. B. 32.

Where a business is assigned to trustees who are to manage it and pay creditors out of the profits, the creditors are not partners; they made no original contribution, and they do not strictly participate in the gain. The distribution of so-called profit is really the payment of a debt; 8 H. L. C. 268; but creditors who set up their insolvent debtor in business and share the profits with him, forbearing meanwhile to press their claims, are partners; 8 Hun, 189.

A distinction is made between a share in the profits and a commission equal to a certain per cent. on the profits. In the latter case there is no partnership, because no sharing in the profits as such. The rule is based upon authority, but is acknowledged to have no foundation in common sense. It is an attempt to escape from the rigidity of the supposition that a share in the profits must in all cases make a man a partner; L. R. 4 P. C. App. 419; 62 Penn. 374; 17 Ves. 404, 419; 18 Ves. 300; 12 Conn. 69; 6 Metc. 82; 5

Denio, 180; 3 Kent, 34; Ewell's Lind. Part. *37; 74 N. Y. 30.

In other cases, it is held that in order to render a man liable as partner he must have a specific interest in the profits as a *principal trader;* Collyer, Part. § 25; 12 Conn. 77, 78; 1 Denio, 337; 15 Conn. 73; 10 Metc. 303; 28 Ohio St. 319. But in reference to these positions the questions arise, When may a party be said to have a specific interest in the profits, *as profits?* when, as a principal trader?—questions in themselves very nice, and difficult to determine. See 6 Metc. 82; 12 Conn. 77.

Sometimes the partnership relation has been made dependent on the power to control the business. In strictness the only control necessary is the power to control the application of the contribution. A partner may have no power *inter se* to manage the business; 4 Sandf. 311; 1 Hem. & M. 85.

Again, partnership has been said to require that a partner have an initiative in the conduct of the business; but the proposition seems to lose sight of dormant partners; L. R. 4 P. C. 419.

Again, partnership has been made to depend on what is termed the legal title to the business: A was not a partner, though he shared in the profits of a business created solely by his contribution but assigned to B for A's protection; L. R. 1 C. P. 86. There are other cases in which considerable stress is laid on the right to an account of profits, as furnishing a rule of liability; 3 Kent, 25, note; 18 Wend. 184, 185; 3 C. B. N. S. 544, 561; Story, Partn. § 49. But, although it is true that every partner must have a right to an account, it seems not to be equally true that every party who has a right to an account is a partner; 5 Gray, 58.

Partnership has sometimes been styled a branch of the law and relation of principal and agent. But mutual agency is not the basis, it is the incident of partnership. Partners are co-principals, and the right and power of representation springs from this circumstance. A dormant partner is not at all the agent of the firm; L. R. 7 Ex. 227. The principal distinction between a partnership and a mere agency is that a partner has a community of interest with the other partners in the business and responsibilities of the partnership,—sometimes both in the stock and profits, and sometimes only in the profits,—whereas an agent, as such, has no interest in either; Story, Part. § 1; 16 Ves. 49; 17 *id.* 404; 4 B. & C. 67; 1 Deac. 341. The authority of a partner is much more extensive than that of a mere agent; 10 N. H. 16. See PARTNERS.

The *formation* of a contract of partnership does not require any particular formality. It is, in general, sufficient that it is formed by the voluntary consent of the parties, whether that be express or implied, whether it be by written articles, tacit approbation, or by parol contract, or even by mere acts; Story, Part. § 86; 3 Kent, 27; Daveis, 320; 4 Conn. 568. As a general rule a writing is unnecessary; 2 Barb. Ch. 336; Ewell's Lind. Part. *92. Under the Statute of Frauds, where there is an agreement that a partnership shall commence at some time more than a year from the making of the agreement, a writing is necessary; 5 B. & C. 108; as to partnership in lands, see *infra*.

Where there is no written agreement, the evidence generally relied upon to prove a partnership is the conduct of the parties, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the others, dealt with other persons. This can be shown by the books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes in which facts can be established. As to the presumption arising from the joint retainer of solicitors, see 20 Beav. 98; 7 De G. M. & G. 239; 7 Hare, 159, 164. For cases in which partnership has been inferred from various circumstances, see 4 Russ. 247; 2 Bligh, N. S. 215; 3 Bro. P. C. 548; 5 *id.* 482; 1 Stark. 81; 2 Camp. 45. Though formed by deed, partnership may be dissolved by parol; Ewell's Lind. Part. *222.

Kinds. The Roman law recognized five sorts of partnership. First: *societas universorum bonoram*, a community of goods: probably a survival of the old tribal relation. Second: *societas universorum quæ ex quæstu veniunt*, or partnership in everything which comes from gain,—the usual form; Pothier, Part. nn. 29, 43. Such contracts are said to be within the scope of the common law; but they are of very rare existence; Story, Part. § 72; 5 Mas. 183. Third: *societas vectigalium*, a partnership in the collection of taxes. It was not dissolved by the death of a member; and if it was so agreed in the beginning, the heir immediately succeeded to the place of the ancestor. Fourth: *societas negotiationis alicujus, i. e.* in a given business venture. Fifth: *societas certarum rerum vel unius rei, i. e.* in the acquisition or sale of one or more specific things; Pothier, Part. *24 *et seq.*

At the French law, there are four principal classes of partnership; First: *en nom collectif*, the ordinary general partnership. Second: *en commandite*, an association corresponding to our limited partnership, composed of general and special partners in which the liability of the latter is limited to the fund invested by them. Third: *anonyme*, a joint stock company with limited liability. Fourth: *en participation*, simply a partnership with a dormant partner; Merlin, Rep. de Jur. tit. *Societé;* Mackenzie, Rom. Law, 217; Pothier, Part. *39 *et seq;* see Goiraud, Code, etc.

At the common law all partnership is for gain. *General* partnership is for a general line of business; 3 Kent, *25; Ewell's Lind. Part. *55, *56; Cowp. 814, 816. But where the parties are engaged in one branch of trade or

business only, they would be usually spoken of as engaged in a general partnership; Story, Part. § 74. Special or *particular* partnership is one confined to a particular transaction. The extent or scope of the agreement is different in the two cases, but the character of the relation is the same. A partnership may exist in a single transaction as well as in a series; Daveis, 323; 3 Kent, 30; 2 Ga. 18; 3 C. B. 641, 651; 9 *id.* 458; Ewell's Lind. Part. *36, *56; 49 Penn. 83. Special or limited partnership differs from the ordinary relation. It is composed of general partners to whom all the ordinary rules of partnership apply, and of limited partners with circumscribed power and liability limited to the amount of their contribution. The privilege is imparted by charter in England. In America it exists by statute; and unless the provisions of the act are strictly complied with, the association will be treated as a general partnership; 3 Kent, *35; 67 Penn. 330; 62 N. Y. 513; 91 Ill. 96. The special exemption of a limited partner will be recognized in other jurisdictions than the one in which the association is formed, though the firm has made the contract in the foreign jurisdiction; 69 N. Y. 24.

Another sort of association is styled "partnership limited." It is of recent, statutory origin and strongly resembles a corporation. The members incur no liability beyond the amount of their subscription; unless they violate in some manner the requirements of the statute under which they organize. It is a general requirement, that the word "limited" be in all cases added to the firm name.

There is still another class of partnerships, called "joint-stock companies." These generally embrace a large number of persons, but, except under express statute provisions, the members are liable to the same extent as in ordinary partnerships; Story, Part. § 164; 4 Metc. Mass. 535; 2 C. & P. 408, n.; 1 V. & B. 157; 63 Penn. 273; 24 Ill. 387; 37 Vt. 64.

Sub-Partnerships.

The *delectus personæ*, *q. v.*, which is inherent in the nature of partnership, precludes the introduction of a stranger into the firm without the concurrence of all the partners; 7 Pick. 235, 238; 11 Me. 488; 1 Hill, N. Y. 234; 8 W. & S. 63; 16 Ohio, 166; 2 Rose, 254. Yet no partner is precluded from entering into a *sub-partnership* with a stranger: *nam socii mei socius, meus socius non est.* Dig. lib. 17, tit. 2, s. 20; Pothier, Part. ch. 5, § ii. n. 91. In such case the stranger may share the profits of the particular partner with whom he contracts; and although it has been decided that it is not true as a general proposition that such stranger will not be liable for the debts of the general partnership; 13 Gray, 468; still, it is quite evident that a *mere* participation in profits renders one responsible only for the debts and liabilities of those with whom he participates; and, inasmuch as such stranger shares the profits only of and with *one* of the partners, he can be held only as the partner of that partner; he cannot be held as a partner in the general partnership, because he does not share or participate with the other persons who compose it. See Rose, 255; 1 Jac. 284; 3 Kent, 52; 2 S. & S. 124; 1 B. & P. 546; M. & M'A. 445; 19 Ind. 113; 3 Ired. Eq. 226; 43 N.Y. S. Ct. 238. Besides, a sub-partner does not receive a certain share of the whole profits of the firm, but only a part of a share thereof; and he does not receive this part of a share, nor is he entitled to interfere with it at all, to say whether it shall be more or less in amount, until it has actually been set out and the time has come for a division between himself and the partner with whom he contracted. He does not draw out of the general concern any of its profits; he only draws from the profits of one who has previously drawn them from the general partnership. See 6 Madd. 5; 4 Russ. 285; 3 Ross, Com. Law, 697. If this stranger has caused damage to the partnership by his default, the party who has taken him into the partnership will be liable to the other partners the same as if he had done the damage himself; Pothier, Part. n. 93.

Any number of partners less than the whole may form an independent co-partnership, which, though not strictly a sub-partnership, is entitled to a separate standing in equity. In case of insolvency the subordinate co-partnership is treated as a distinct concern, and the assets are marshalled accordingly. Consequently, although the creditors of the smaller firm are strictly separate creditors when compared with the creditors of the larger firm; yet debts owing by one firm to the other are collected on insolvency for the benefit of the creditors of the creditor firm; Ewell's Lind. Part. *655; 11 Ves. 413; 1 B. & P. 539; 1 Cox, 140. Indeed, one partner may have this independent standing if the trade is distinct; Lind. Part. 4th ed. 1229; Mont. 228. But the debts must arise in the ordinary course of trade; Lind. Part. 4th ed. 1229; 3 M. D. & D. 433.

Quasi-Partnership.

This is simply the case of a man who without having any interest in or connection with the business holds himself out or suffers himself to be held out as a partner; he is estopped to deny his liability as a partner; 14 Vt. 540; 3 Kent, 32, 33; 27 N. H. 252; 2 Campb. 802; 2 McLean, 347; 10 B. & C. 140; 19 Ves. 459; 17 Vt. 449; 6 Ad. & E. 469. This rule of law arises not upon the ground of the real transaction between the partners, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without others they would have lent nothing; 2 H. Blackst. 235; 3 Kent, 32, 33; 6 S. & R. 259, 333; 16 Johns. 40; 2 Des. 148: 2

N. & M'C. 427; Ewell's Lind. Part. *47 *et seq.*

The term "holding one's self out as partner" imports, at least, the voluntary act of the party holding himself out; 3 Conn. 324; 2 Camp. 617; but no particular mode of holding himself out is requisite to charge a party. It may be express and either by direct assertion or by authority to a partner to use the stranger's name. It may result from negligence, as a failure to forbid the use of one's name by the firm; 2 Zab. 372; 61 N. Y. 456; 41 Penn. 30; Ewell's Lind. Part. *47, and note; 64 Ind. 545; 53 Ga. 98; 30 Md. 1; 32 Ark. 733; 53 Ga. 98.

Holding out is a question of fact; Ewell's Lind. Part. *53; 25 Mo. 341; 10 Ind. 475. The usual evidence to charge a party in such cases is that he has suffered the use of his name over the shop-door, in printed notices, bills of parcels, and advertisements, or that he has done other acts, or suffered his agents to do acts; 37 N. H. 9; no matter of what kind, sufficient to induce others to believe him to be a partner; 3 McLean, 364, 549; 3 Camp. 310; 1 Ball & B. 9; 4 M. & P. 713; 20 N. H. 453, 454; 39 Me. 157; 55 Ga. 116. A person is not relieved from liability though he was induced by the *fraud* of others to hold himself out as a partner with them. See 5 Bingh. 521; 1 Rose, 69. The holding out must have been before the contract with the third person was entered into, and must have been the inducement to it; 7 B. & C. 409; 10 *id.* 140; 1 F. & F. 344; 6 Bing. 776; 3 C. B. 32; 2 Camp. 617; 8 Ala. 560; 67 Ill. 161; 37 Me. 252.

It is not necessary that the creditor have personal knowlege of the individual whose name is used; 61 N. Y. 456; see 1 Sm. Lead. Cas. Engl. ed. 507; 10 B. & C. 140; 2 McLean, 347; 1 B. & Ald. 11; 8 Ala. N. S. 560; 7 B. Monr. 456. A person does not become liable as partner because he represents that he is willing or intends to become one; 9 B. & C. 632; 15 M. & W. 517.

One who holds himself out as a partner is responsible as such to strangers even though they know his true relation and that by agreement with the partners he is to share no loss; Ewell's Lind. Part. *48; *contra*, Camp. 404, note; 5 Bro. P. C. 489. How knowledge of the terms of the agreement under which parties are associated will affect third persons, see 6 Metc. 93, 94; 6 Pick. 372; 15 Mass. 339; 4 Johns. 251; 5 Cow. 489; 28 Vt. 108.

The Domain.

A partnership is primarily a commercial relation. The notion has, however, been gradually extended to include other associations than those for trade merely: *e. g.* partnerships between two attorneys at law; 6 Penn. 360; 8 Wend. 665; 13 Ark. 173. It is said by Mr. Collyer that "perhaps it may be laid down generally that a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced." Collyer, Part. § 56.

The early law did not recognize partnerships for trading in land, because the land was all held by the barons who did not engage in trade. But in modern times, and especially in America, where the social conditions are different, land is largely held by speculators whose operations as partners the law must recognize; 21 Me. 421, 422; 7 Penn. 165; 10 Cush. 458; 4 Conn. 568; 4 Ohio St. 1; 54 N. Y. 1. In transferring title to and from the firm the ordinary rules of conveyancing must be observed. When the title is in all the partners, all must join in the deed; if in the name of one, he alone need execute; Story, Part. § 92, note; 15 Johns. 158; 15 Gratt. 11; 16 B. Monr. 631; 2 Nev. 234.

Building operations are now upon the same footing as land speculations; 4 Cow. 282. But the tradition has been too strong to be impaired as yet in landlord and tenant cases. Farming on shares is no partnership. The owner of land may either receive a share in the produce as rent, or give such a portion to a laborer in lieu of wages; Lind. Part. Am. ed. *651, *652; 58 Ind. 379. But there may be a partnership in the development of land owned by one; 59 Ala. 587.

Firm Property.

Partners have, presumptively, the same interest in the stock that they have in the profits; 16 Hun, 163. Their shares are presumed to be equal both in capital and profits; Ewell's Lind. Part. *676, 795; 23 Cal. 427; 16 Hun, 163; 23 Cal. 427. But a joint stock is not essential to a partnership. The partner without capital is then interested, not in the fund, but in the adventure; 2 Bingh. 170; 7 Hun, 425; Ewell's Lind. Part. *648.

Sometimes a partnership exists between parties merely as the managers and disposers of the goods of others; 4 B. & Ald. 663; 15 Johns. 409, 422. So, it seems, two persons may be owners in common of property, and also partners in the working and management of it for their common benefit; 2 C. B. N. S. 357, 363; 8 C. & P. 345; 16 M. & W. 503; 3 Ross, Lead. Cas. 529.

Whether a partnership includes the capital stock, or is limited to the profit and loss, must be determined from the agreement and intention of the parties; 21 Me. 120. See 5 Taunt. 74; 4 B. & C. 867; Story, Part. § 26.

A partner may contribute but the use of his capital, retaining full control of the principal; and he may charge interest for the use whether profits are earned or not; Ewell's Lind. Part. *786. If, however, the firm funds are expended in repairing and improving the property thus placed at their disposal, it becomes partnership stock; Ewell's Lind. Part. *652, note; 49 Me. 252; 23 N. J. Eq. 247; 72 Penn. 142.

The partnership property consists of the original stock and the additions made to it in

the course of trade. All real estate purchased for the partnership, paid for out of the funds thereof, and devoted to partnership uses and trusts, whether the legal title is in one or all of the partners, is treated in equity in the same manner as other partnership property until the partnership account is settled and the partnership debts are paid; Story, Part. § 98; 5 Ves. 189; 3 Swanst. 489; 10 Cush. 458; 4 Metc. Mass. 527; 5 *id.* 562; 3 Kent, 37; 27 N. H. 37; Ewell's Lind. Part. *642. Leases of real estate taken by one partner for partnership purposes, mines, and trade-marks are held to be partnership property; 17 Ves. 298; 1 Taunt. 250; 5 Ves. 308; Story, Part. § 98. The good-will of a business is an asset of the firm. It does not always have a salable value, however; Ewell's Lind. Part. *860; 9 Neb. 258; 4 Sandf. Ch. 405; 1 Hoff. Ch. 68; 3 Mer. 452, 455; 5 Ves. 539. But Chancellor Kent says, "the good-will of a trade is not partnership stock." 3 Kent, 64. The good-will of a professional partnership belongs, in the absence of express stipulations, exclusively to the survivors; Bissett, Part. 64; 3 Madd. 64; Collyer, Part. § 163. See GOOD-WILL. A ship, as well as any other chattel, may be held in strict partnership; 3 Kent, 154; 12 Mass. 54; 6 Me. 77; 15 *id.* 427. But ships are generally owned by parties as tenants in common; and they are not in consequence of such ownership to be considered as partners; 6 Me. 77; 6 Pick. 120; 24 *id.* 19; 14 Conn. 404; 14 Penn. 34, 38; 8 Gill, 92; 47 N. Y. 462. The same is true of any other species of property in which the parties have only a community of interest; Ewell's Lind. Part. *66 *et seq.*, and note; 8 Exch. 825; 21 Beav. 536; 24 *id.* 283; 2 C. B. N. S. 357.

Partners hold land by a peculiar title. In one respect it most resembles an ancient joint tenancy. Neither partner can convey title to a moiety of the goods his assignee takes subject to claim of other partner to have firm debts paid out of that fund; he therefore can assign only his interest, *i. e.*, a moiety of what is left after firm debts paid. Upon this principle depends also the special right of survivorship for the purposes of liquidation. With these qualifications the partner's title at law differs but slightly from a tenancy in common; Story, Part. §§ 90, 91, 97; 9 Me. 28; 5 Johns. Ch. 417.

A partner has the same title to the stationary capital of the firm that he has to its product in his hands for sale, but his power over it is less extensive. He can not sell the permanent capital stock. The power of a partner to sell results not from the title, but from the general partnership relation; 37 Penn. 217.

Partners may of course hold land as part of the firm assets. It has been held that in order to make the land really firm assets the title should be in the partners as a firm, otherwise, the partners would be mere tenants in common, and the land, as to purchasers and creditors, would be the individual estate of the partners, regardless of the funds by which it was purchased and the uses to which it was put; 81 Penn. 377; but as to the partners and their representatives, the land would belong to the firm, in such case; 5 Metc. Mass. 582; 89 Penn. 203. The rule is applied to cases of equitable, as well as legal, estates; 70 Penn. 79. In other cases it has been held that where land has been bought with firm money and is used for firm purposes, or where it has been dedicated to the firm, it must be regarded as partnership property without considering the record title; 64 N. Y. 479; 5 Metc. Mass. 562, 582; 55 Ill. 416; 14 Fla. 565; 17 Cal. 262. It has been thought necessary to resort to an equitable conversion of firm land into personalty in order to subject it to the rules governing partnership property; 7 J. Baxter, 212; 15 Gratt. 11; 74 Penn. 391. But this fiction seems unnecessary; see 25 Ala. 625; 3 Stew. (N. J.) 415; 2 Edw. Ch. 28; 11 Barb. 43. After liquidation, the lands or their surplus proceeds pass as real estate; 3 Stew. (N. J.) 415; 7 J. Baxt. 212; 11 Barb. 43; 74 Penn. 391; 6 Yerg. 20. If one partner buys land with firm money and takes title in his own name, a resulting trust arises to the firm; 21 Penn. 257; 39 *id.* 535; Ewell's Lind. Partn. *643.

Marshalling Assets.

The firm is not a corporation, and hence firm creditors are in theory separate creditors as well. But in administering bankrupt estates equity has established the "rule of convenience" that firm and separate creditors shall have priority upon, and be confined to, the firm and separate funds respectively. A surplus upon a separate fund is divided among firm creditors *pro rata;* a surplus upon a firm fund is divided among the separate creditors of the various partners in proportion to the shares of the partners therein; Ewell's Lind. Part. *655, *1053, *1054 and notes; Story, Part. § 376, note; Pars. Part. *480; 67 Ind. 485; 50 Miss. 300; 44 Penn. 503; 13 N. J. Eq. 126; 41 N. H. 12; 35 Vt. 44; 94 Ill. 271; 28 Ga. 371; 29 Ala. 172. If there is no firm fund, the firm creditors come in on an equal footing with separate creditors against the separate estate; Story, Part. § 380; Lind. Part. 4th ed. 1234; 10 Cush. 592; *contra*, 15 Ind. 124; 46 N. H. 188. A very slight firm fund over and above costs will suffice to exclude firm creditors from the separate estate; five shillings has been said to be enough; 7 Am. L. Reg. 499; one dollar and a quarter was considered too little; Pars. Part. *483, note; Lind. Part. 4th ed. 1235. A solvent partner, if living, is equivalent to a firm fund; 8 Conn. 584; Story, Part. § 380; Lind. Part. 4th ed. 1234.

But though there is no separate estate, separate creditors can not come against the joint estate; Lind. Part. 4th ed. 1224. Various explanations have been offered for this rule. Sometimes it is called a "rule of convenience:" sometimes a fundamental prin-

ciple of equity; Ewell's Lind. Part. *655, *1053; 22 Pick. 450; 5 Johns. Ch. 60; Story, Part. § 377; 5 S. & R. 78; 44 Penn. 503. Sometimes it is said to depend on the principle of destination; the partners by gathering together a firm fund have dedicated it to the firm creditors. Upon this theory, the partnership stock becomes a trust fund. The firm creditors occupy a commanding position and restrain even the partners in dealing with the property; Ewell's Lind. Part. *655, note; 3 Biss. 122; 41 Barb. 307; 52 N. Y. 146; 5 How. Pr. 35. Usually it is declared to be the outgrowth of the partner's equity, *i. e.* his right to have firm funds applied first to the payment of firm debts; Ewell's Lind. Part. *655, note; 7 Md. 398; 32 Gratt. 481; 4 Bush, 25; 4 R. I. 173; 7 B. Monr. 210. Consequently where the partner gives up this right, the firm creditor loses his priority; Ewell's Lind. Part. *655; 3 Ired. L. 213; 59 Tenn. 167; 2 Disn. 286; 1 Woods, 127; 32 Gratt, 481. If insolvent partners divide the firm fund among their separate creditors in proportion to the interest of each in the partnership, firm creditors can not object; 39 Penn. 369; 77 N. Y. 195. If insolvent partners assign away firm funds for the benefit of the separate creditors of one only, firm creditors may object, at least to the action of the other partner; 20 N. H. 462; 20 How. Pr. 121. As a general rule, insolvency fixes the position of the different funds. A debt to a partner by the firm can not be collected for the benefit of separate creditors; a debt of a partner to the firm can not be collected for the benefit of firm creditors; because a man can not prove against his own creditors; 3 P. Wms. 180; 4 H. & McH. 167; Lind. Part. 4th ed. 1236 *et seq.* What one partner owes his co-partner independently of the firm can be collected from the separate estate of the debtor for the benefit of the separate estate of the creditor: but this will not be allowed unless the situation is such that the firm creditors can derive no benefit even indirectly from the enforcement of the claim, *i. e.* there must be no surplus to go to them; Lind. Part. 4th ed. 1244; 4 De G. J. & S. 551. *Contra*, where both partners owe the firm one-half of the excess of one debt over the other it is payable to the firm creditors out of the estate of the greater debtor; 55 Penn. 252. Partners, before insolvency, may, by an executed agreement, change firm into separate property. Firm creditors have no lien to prevent the alteration; *e. g.* where one partner sells out to the others the fund becomes primarily liable to the claims of the creditors of the new firm; 20 N. J. Eq. 13; 6 Bosw. 533; 19 Ga. 190; 9 Cush. 553; 35 Iowa, 323; 21 Penn. 77; 6 Ves. 119.

Equity will not interfere to embarrass a vested legal right. Therefore if a firm creditor levies on separate estate, his execution has priority over the subsequent execution of a separate creditor; 24 Ga. 625; 22 Pick. 450; 9 N. J. Eq. 353; 17 N. Y. 300. If a separate creditor levies on firm property, his levy is subject to the paramount right of the co-partner, and he sells nothing but his debtor's interest. An execution against the firm, though subsequent in time, has priority, because it attaches this paramount right of the co-partner. But a firm creditor, without a legal lien has, in such case, no standing; 22 Cal. 194; 17 N. J. Eq. 259; 5 Johns. Ch. 417; 9 Me. 28. But where there is an execution against each partner and a subsequent execution against the firm, and the sheriff seizes and sells firm goods under the three, the proceeds are given first to the joint creditor, and the remainder to the separate creditors in proportion to partner's interest; 29 Penn. 90. So in the case of judgments against real estate. A separate judgment is no lien on the firm real estate but only on the partner's interest. But a firm judgment is a lien on partner's separate real estate, and takes priority over a subsequent separate judgment; Ewell's Lind. Part. *1054 and note; 17 N. Y. 300; 46 Iowa, 461.

Duration. *Prima facie* every partnership is determinable at will. But it may be entered into for a definite term by agreement express or implied; Ewell's Lind. Part. *218.

A partnership at will is presumed to continue so long as the parties are in life and of capacity to continue it; 1 Greenl. Ev. § 42; Story, Part. § 271; 9 Humphr. 750. A partnership for a term is presumed to continue during the term, provided the parties are in life and of legal capacity to continue it. See 7 Mo. 29; Collyer, Part. § 105. If a partnership be continued by express or tacit consent after the expiration of the prescribed period, it will be presumed to continue upon the old terms, but as a partnership at will; Ewell's Lind. Part. *219; 17 S. & R. 165. But in no case will the law presume a partnership to exist beyond the life of the parties; 1 Swanst. 521; 1 Wils. Ch. 181. When a partnership has been entered into for a definite term, it is nevertheless dissolved by death within the term; Story, Part. § 195; Ewell's Lind. Part. *832. The *delectus personæ* is so essentially necessary to the constitution of a partnership that even the executors or other representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners; 7 Pick. 237, 238; 3 Kent, 55, 56; 42 Ill. 342; 46 Mo. 197. The civilians carried this doctrine so far as not to permit it to be *stipulated* that the heirs or executors of partners should themselves be partners; Domat, lib. 1, tit. 8, s. 2; Pothier, Part. n. 145; though Pothier thinks it binding.

At the common law, the representatives of a deceased partner may be made partners in his stead either by original agreement or by testamentary direction; Ewell's Lind. Part. *231; 47 Tex. 481; 8 Am. L. Rec. 641. Clauses providing for the admission into the firm of a deceased partner's representatives

will, in general, be construed as giving them an option to become partners, and not as constituting them partners absolutely; 7 Jarm. Conv. 120; 1 McCl. & Y. 569; 2 Russ. 62. In any event it must be a new partnership; Pars. Part. *439; *contra*, 46 Conn. 136.

Only the fund already invested or directed to be invested by the testator is subject to the claims of new creditors; 15 Gratt. 11; 10 Ves. 110, 121, 122; 47 Tex. 481; the direction to charge the general assets must be clear and unambiguous; 2 How. 577; 8 Am. L. Rec. 641; 48 Penn. 275.

The rule in England is clear that when an executor undertakes to participate in the business, whether in consequence of a testamentary direction or otherwise, he becomes personally liable to creditors as a partner, in addition to the liability of the estate. The common law relation of partnership will not admit of a qualified liability; Ewell's Lind. Part. *1060, note; 10 Ves. 119; 11 Moo. P. C. 198. But simply taking profits will not charge the executor; L. R. 7 Ex. 218. But in America, some authorities have declared that the executor is not personally liable when the testator has directed him to continue the business, but only when he does so of his own motion; 4 Ala. 588; 33 Md. 382; 39 How. Pr. 82; 48 Penn. 275; *contra*, for personal liability of executor; 8 Conn. 584. A simple direction to allow a fund to remain in a partnership may be construed as a loan to the survivors; Ewell's Lind. Part. *1064; 9 Hare, 141.

Dissolution. A partnership may be dissolved:—

First, by the act of the parties: as, by their mutual consent; Story, Part. § 268; 3 Kent, 54; Pothier, Part. n. 149; and where no specified period is limited for the continuance of the partnership, either party may dissolve it at any time; 4 Russ. 260; 1 Swanst. 508; 3 Kent, 53, 54; Story, Part. §§ 84, 272, 273. See 5 Ark. 280; Ewell's Lind. Part. *220, note. Whether a partnership for a certain time can be dissolved by one partner at his mere will and pleasure before the term has expired, seems not to be absolutely and definitively settled; Story, Part. § 275. In favor of the right of one partner in such cases, see 3 Kent, 55; 17 Johns. 525; 19 *id.* 538; 1 Hoffm. Ch. 534; 3 Bland, Ch. 674. Against it, see Story, Part. §§ 275, 276; 5 Ark. 281; 4 Wash. C. C. 234; Pothier, Part. 152; Ewell's Lind. Part. *222, note; 20 N. J. Eq. 172. See, also, 15 Me. 180; 1 Swanst. 495; 16 Ves. 56. As against third persons, a partner may certainly withdraw from a partnership at his pleasure; 3 C. B. N. S. 561.

Second, by the act of God: as, by the death of one of the partners; and this operates from the time of the death; 3 Mer. 610; 6 Cow. 441; 6 Conn. 184; 2 How. 560; 7 Ala. N. S. 19; 3 Kent, 55, 56; Story, Part. §§ 317, 319; 7 Pet. 594; 17 Pick. 519; 5 Gill, 1; 40 Mich. 343; unless there be an express stipulation to the contrary; 3 Madd. 251; 2 How. 560; Ewell's Lind. Part. *231, note; 42 Ill. 342.

A partnership dissolved by the death of one of the partners is dissolved as *to the whole firm;* 7 Pet. 586, 594; and the reason given for this rule is applicable not only to dissolution by death, but to every species of dissolution; Story, Part. §§ 317, 318; Ewell's Lind. Part. *231.

Third, by the act of law: as, by the bankruptcy of one of the partners; 4 Burr. 2174; Cowp. 448; 6 Ves. 126; 5 Maule & S. 340; Ewell's Lind. Part. *224; 45 Miss. 703; 59 Ala. 597.

Fourth, by a valid assignment of all the partnership effects for the benefit of creditors, either under insolvent acts; Collyer, Part. § 112; or otherwise; 41 Me. 373; but this is only *prima facie* evidence of dissolution which other circumstances may rebut; 1 Dall. 380; by a sale of the partnership effects under a separate execution against one partner; Cowp. 445; 2 V. & B. 300; 3 Kent, 59. But the mere insolvency of one or all of the members of a partnership, without a suspension or judicial process, etc., does not of itself operate a dissolution; 24 Pick. 89. See 1 Bland, Ch. 408; 2 Ashm. 305; Ewell's Lind. Part. *223; 28 Penn. 279.

Fifth, by the civil death of one of the partners; Pothier, Part. n. 147. But the absconding of a party from the state does not of itself operate a dissolution; 24 Pick. 89. See Story, Part. § 298.

Sixth, by the breaking out of war between two states in which the partners are domiciled and carrying on trade; 16 Johns. 438; 3 Kent, 62; 3 Bland, Ch. 674; 50 N. Y. 166.

Seventh, by the marriage of a feme sole partner; 4 Russ. 260; 3 Kent, 55; Ewell's Lind. Part. *230.

Eighth, by the extinction of the subject-matter of the joint business or undertaking; 16 Johns. 401, 402; Pothier, Part. nn. 5, 140–143; and by the completion of the business or adventure for which the partnership was formed; Story, Part. § 280.

Ninth, by the termination of the period for which a partnership for a certain time was formed; Collyer, Part. § 119.

Tenth, by the assignment of the whole of one partner's interest either to his co-partner or to a stranger; 3 Kent, 59; Story, Part. §§ 307, 308; 4 B. & Ad. 175; 17 Johns. 525; 1 Freem. Ch. 231; 8 W. & S. 262; where it does not appear that the assignee acts in the concern after the assignment; 17 Johns. 525; 8 Wend. 442; 5 Dana, 213; 1 Whart. 381; 2 Dev. Eq. 481. But in England this can occur only in partnerships at will. In partnerships for a term, assignment is a ground for dissolution by remaining co-partners, but probably not by the transferee. In America, the transferee always has a right to an account; Ewell's Lind. Part. *230;

60 Ala. 226; 50 Cal. 615. But see 14 Pick. 322, where it was held that such an assignment would not *ipso facto* work a dissolution.

Eleventh, by the award of arbitrators appointed under a clause in the partnership articles to that effect; see 1 W. Blackst. 475; 4 B. & Ad. 172.

A partnership for a term may be dissolved before the expiration of the term, by the decree of a court of equity founded on the wilful fraud or other gross misconduct of one of the partners; Collyer, Part. § 296; 4 Beav. 502; 21 *id.* 482; 2 V. & B. 299; 5 Ark. 270; so on his gross carelessness and waste in the administration of the partnership, and his exclusion of the other partners from their just share of the management; 1 J. & W. 592; 2 *id.* 206; 5 Ark. 278; 2 Ashm. 309, 310; 3 Ves. 74; so on the existence of violent and lasting dissensions between the partners; 1 Iowa, 537; Collyer, Part. § 297; see 4 Sim. 11; Story, Part. § 288; 4 Beav. 503; 14 Ohio, 315; 52 How. Pr. 41; where these are of such a character as to prevent the business from being conducted upon the stipulated terms; 3 Kent, 60, 61; Collyer, Part. § 297; and to destroy the mutual confidence of the partners in each other; 4 Beav. 502; 21 *id.* 482; 20 N. J. Eq. 172. But a partner cannot, by misconducting himself and rendering it impossible for his co-partners to act in harmony with him, obtain a dissolution on the ground of the impossibility so created by himself; 21 Beav. 493, 494; 3 Hare, 387; 84 Ill. 121. A partnership may be dissolved by decree when its business is in a hopeless state, its continuance impracticable, and its property liable to be wasted and lost; 3 Kent, 60; 1 Cox, 212; 2 V. & B. 290; 16 Johns. 491; 3 K. & J. 78; 13 Sim. 495; 8 Oreg. 84.

The confirmed lunacy of an active partner is sufficient to induce a court of equity to decree a dissolution, not only for the purpose of protecting the lunatic, but also to relieve his co-partners from the difficult position in which the lunacy places them; see 1 Cox, Ch. 107; 1 Swanst. 514, note; 2 My. & K. 125; 6 Beav. 324; 2 Kay & J. 441; 3 Kent, 58; 3 Y. & C. 184. The same may be said of every other inveterate infirmity, such as palsy, or the like, which has seized upon one of the partners and rendered him incompetent to act where his personal labor and skill were contracted for; Pothier, Part. n. 152; 3 Kent, 62. But lunacy does not itself dissolve the firm, nor do other infirmities; 3 Kent, 58; Story, Part. § 295; 3 Jur. 358. It is, however, contended by Mr. Justice Story and by Parker, C. J., that a clear case of insanity ought to effect that result; Story, Part. § 295; 10 N. H. 101. An inquisition of lunacy found against a member dissolves the firm; 6 Humph. 85. The court does not decree a dissolution on the ground of lunacy except upon clear evidence that the malady exists and is incurable; 3 Y. & C. 184; 2 K. & J. 441. A temporary illness is not sufficient; 2 Ves. Sen. 34; 1 Cox, 107. A dissolution by the court on the ground of insanity dates from the decree and not from a prior day; 1 Phill. 172; 2 Coll. 276; 1 K. & J. 765.

Actual notice of dissolution must be brought home to persons who have been in the habit of dealing with the firm; but as to all persons who have had no previous dealings with the firm, notice fairly given in the public newspapers is deemed sufficient; Collyer, Part. §§ 532–534. This notice is necessary to terminate the agency of each partner, and, consequently, his powers and liabilities as a member; 68 N. Y. 314; 25 Gratt. 321; 47 Wisc. 261; 67 Ill. 106; 83 Penn. 148; 7 Price, 193; 1 Camp. 402.

It is not necessary to give notice of the retirement of a dormant partner from the firm, if the fact of his being a partner be unknown to all the creditors of the firm; if it be known to some, notice to those must be given, but that will be sufficient; 1 Mete. Mass. 19; 1 B. & Ad. 11; 4 *id.* 179; 5 B. Monr. 170; 36 Penn. 325; 37 Ill. 76; see 35 Ala. 242; 87 Ill. 281; 3 N. Y. 168.

Notice of the dissolution is not necessary, in case of the death of one of the partners, to free the estate of the deceased partner from further liability; 3 Kent, 63; 3 Mer. 614; 17 Pick. 519; Ewell's Lind. Part. *404; 25 Gratt. 321; nor is notice, in fact, necessary in any case where the dissolution takes place by operation of law; 3 Kent, 63, 67; 15 Johns. 57; 16 *id.* 494; Ewell's Lind. Part. *405; Cowp. 445; 9 Exch. 145.

Effect of dissolution. The effect of dissolution, as between the partners, is to terminate all transactions between them as partners, except for the purpose of taking a general account and winding up the concern; 1 Penn. 274; 3 Kent, 62 *et seq.* As to third persons, the effect of a dissolution is to absolve the partners from all liability for future transactions, but not for past transactions of the firm; 53 Miss. 280; 51 Cal. 530; 61 Ind. 225; 57 Ill. 215; 3 Kent, 62 *et seq.*; 2 Cush. 175; 3 M'Cord, 378; 4 Munf. 215; 5 Mas. 56; Harp. 470; 4 Johns. 224; 41 Me. 376.

It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business; 11 Ves. 5; 15 *id.* 227; 16 *id.* 57; 2 Russ. 242; Ewell's Lind. Part. *411. The power of the partners subsists for many purposes after dissolution: among these are—*first*, the completion of all the unfinished engagements of the partnership; *second*, the conversion of all the property, means, and assets of the partnership existing at the time of the dissolution, for the benefit of those who were partners, according to their respective shares; *third*, the application of the partnership funds to the payment of the partnership debts; Story, Part. § 326; 3 Kent, 57; 17 Pick. 519. But although, for the purposes of winding up the concern and fulfilling engagements that could not be fulfilled during its existence, the power of the partners certainly subsists

even after dissolution, yet, legally and strictly speaking, it subsists for those purposes only; 15 Ves. 227; 5 M. & G. 504; 4 M. & W. 461, 462; 10 Hare, 453; 4 De G. M. & G. 542; 61 N. Y. 222; 49 Iowa, 177; 45 Penn. 49.

Whether a dissolution of a partnership is *per se* a breach of a contract by the firm to employ a person in their service is questionable; 3 H. & N. 931.

PARTURITION. The act of giving birth to a child. See BIRTH.

PARTUS (Lat.). The child just before it is born, or immediately after its birth.

Offspring. See MAXIMS, *Partus sequitur, etc.*

PARTY. See PARTIES.

PARTY-JURY. A jury *de medietate linguæ*, which title see.

PARTY-WALL. A wall erected on the line between two adjoining estates, belonging to different persons, for the use of both estates. 2 Bouvier, Inst. n. 1615.

The phrase ordinarily means a wall of which the two adjoining owners are tenants in common. Emden, Building Leases, etc., 285.

There can be no available objection to the principle upon which a law of party-walls is based. It has constituted a part of the law of France for ages. The principle is no invasion of the absolute right of property, for that absolute implies a relative, etc. *Per* Lowrie, J., in 23 Penn. 36.

"The words *party wall* appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, which is the most common and the primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the building acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety." 14 Ch. Div. 192.

Party-walls are generally regulated by acts of the local legislatures. The principles of these acts generally are that the wall shall be built equally on the lands of the adjoining owners, at their joint expense, but when only one owner wishes to use such wall it is built at his expense, and when the other wishes to make use of it he pays one-half of its value. Each owner has a right to place his joists in it and use it for the support of his roof. See 4 Sandf. 480; 24 Mo. 69; 12 La. An. 785. When the party-wall has been built, and the adjoining owner is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbor; and, having done so, he is not answerable for any consequential damages which may ensue; 17 Johns. 92; 12 Mass. 220; 2 N. H. 534. See 1 Dall. 346; 5 S. & R. 1.

When such a wall exists between two buildings, belonging to different persons, and one of them takes it down with his buildings, he is required to erect another in its place in a reasonable time and with the least inconvenience; the other owner must contribute to the expense, if the wall required repairs, but such expense will be limited to the costs of the old wall; 3 Kent, 436; 6 Denio, 717. When the wall is taken down, it must be done with care; but it is not the duty of the person taking it down to shore up or prop the house of his neighbor to prevent it from falling. If, however, the work be done with negligence, by which injury accrues to the neighboring house, an action will lie; 1 M. & M. 362; 15 N. Y. 601. If one tenant in common of a party-wall excludes the other from the use of it by placing obstacles in it, the only remedy is to remove the obstruction; 14 Ch. Div. 192.

Where the owner of two contiguous lots erects a brick messuage, with a division wall, and sells to different purchasers, the wall is not a party-wall; 2 Miles, 247. The right to use a party-wall is not lost by lapse of time, even seventy-five years; 1 Phila. 366. A party-wall must be built without openings; 61 Penn. 118; 51 Tex. 480; s. c. 32 Am. Rep. 627. A party-wall can only be built for mutual support; painting a sign on it is unlawful; 2 W. N. C. 333. The principle of party-walls is based upon mutual benefit, and does not extend to the interior of lots where the adjoining owner cannot be expected to build; 2 Pears. 324. Where one built a party-wall, which was defective and fell over, injuring the adjoining premises, he was held liable to the owner of the premises; 125 Mass. 232; s. c. 28 Am. Rep. 224. Where a building having a party-wall is destroyed by fire, leaving the wall standing, the easement in the wall ceases; 57 Miss. 746.

Consult Washb. Easem. 2 Washb. R. P.; 4 C. & P. 161; 9 B. & C. 725; 3 B. & Ad. 874; 2 Ad. & E. 493; 1 Cr. & J. 20; 4 Paige, Ch. 169; 1 Pick. 434; 12 Mass. 220.

PARVUM CAPE. See PETIT CAPE.

PASS. A certificate given to a slave, by his master or mistress, in which it is stated that he is permitted to leave his home with their authority. The paper on which such certificate is written.

In Practice. To be given or entered: as, let the judgment pass for the plaintiff.

To become transferred: thus, the title to goods passes by the sale whenever the parties have agreed upon the sale and the price, and nothing remains to be done to complete the agreement; 1 Bouvier, Inst. n. 939.

To decide upon. When a jury decide upon the rights of the parties, which are in issue, they are said to pass upon them.

PASS-BOOK. In Mercantile Law. A book used by merchants with their customers, in which an entry of goods sold and delivered to a customer is made.

It is kept by the buyer, and sent to the merchant whenever he wishes to purchase any article. It ought to be a counterpart of the merchant's books, as far as regards the customer's account.

Among English bankers, the term pass-book is given to a small book made up from time to time from the banker's ledger and forwarded to the customer: this is not considered as a statement of account between the parties: yet when the customer neglects for a long time to make any objection to the correctness of the entries, he will be bound by them; 2 Atk. 252; 2 D. & C. 534; 2 M. & W. 2.

PASSAGE-MONEY. The sum claimable for the conveyance of a person, with or without luggage, on the water.

The difference between *freight* and *passage-money* is this, that the former is claimable for the carriage of goods, and the latter for the carriage of the person. The same rules which govern the claim for freight affect that for passage-money; 3 Chitty, Com. Law, 424; 1 Pet. Adm. 126; 3 Johns. 335. See COMMON CARRIERS OF PASSENGERS.

PASSENGER. One who has taken a place in a public conveyance for the purpose of being transported from one place to another. One who is so conveyed from one place to another.

Any one may become a passenger by applying for transportation to a carrier of passengers. Every one holding himself out as a carrier of passengers must receive and carry such persons, unless he can show legal excuse for not so doing. Drunkenness, refusal to pay fare, the fact that there is no room in the conveyance, or that the person wishing a passage is affected with a contagious disease, or is fleeing from justice, or enters the carrier's conveyance with the intention of committing a crime, have all been held sufficient to excuse a carrier from receiving a person as a passenger; 11 Allen, 304; 4 Dill. 321; Thomp. Carr. of Pass. 29; 1 Blatchf. 569.

The relation of carrier and passenger can be created by the exhibition of a *bona fide* intention on the part of the passenger. Thus going into the depot of a railroad company and waiting for the train has been held sufficient to make a person a passenger, and to make the company responsible for his treatment as such; 40 Barb. 546.

The carrier may make reasonable rules for the conduct of passengers, and all such rules the passengers are bound to obey; 5 Mich. 520; Thomp. Carr. of Pass. 306.

Carriers of passengers are not like carriers of goods, liable for all injuries except those arising from act of God or the public enemy. They are not responsible for injuries happening to the person of a passenger by mere accident, as by fire or robbery, without fault on their part. They are liable only for want of due care or skill; 10 N. H. 481. But in the matter of care and foresight the law holds them to a strict account, and makes them responsible for every slight neglect; 11 Minn. 296; 23 Ill. 357; 36 N. Y. 378; 13 Conn. 319. In regard to the personal baggage of passengers, carriers of passengers are held to the same strict liability as carriers of goods; 19 Wend. 234.

See NEGLIGENCE; BAGGAGE; TICKET.

Full provisions for the health and safety of passengers by sea have been made by the United States laws. See Act of Congr. May 17, 1848, 11 U. S. Stat. at Large, 127; March 2, 1847, 11 *id.* 149; January 31, 1848, 11 *id.* 210. See Gilp. 334.

PASSIVE. All the sums of which one is a debtor.

It is used in contradistinction to active. By active debts are understood those which may be employed in furnishing assets to a merchant to pay those which he owes, which are called passive debts.

PASSPORT (Fr. *passer*, to pass, *port*, harbor or gate). **In Maritime Law.** A paper containing a permission from the neutral state to the captain or master of a ship or vessel to proceed on the voyage proposed. It usually contains his name and residence, the name, property, description, tonnage, and destination of the ship, the nature and quantity of the cargo, the place from whence it comes, and its destination, with such other matters as the practice of the place requires.

It is also called a *sea-brief*, or *sea-letter*. But Marshall distinguishes sea-letter from passport, which latter, he says, is pretended to protect the ship, while the former relates to the cargo, destination, etc. See Jacobs. Sea-Laws, 66, note.

This document is indispensably necessary in time of war for the safety of every neutral vessel; Marsh. Ins. b. 1, c. 9, s. 6, 317, 406 *b*.

A Mediterranean pass, or protection against the Barbary powers. Jacobs. Sea-Laws, 66, note; Act of Congr. 1796.

A document granted in time of war to protect persons or property from the general operation of hostilities. Wheat. Int. Law, 475; 1 Kent, 161; 6 Wheat. 3.

In most countries of continental Europe passports are given to travellers. These are intended to protect them on their journey from all molestation while they are obedient to the laws. The secretary of state may issue, or cause to be issued in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the president may prescribe, passports, but only to citizens of the United States; R. S. §§ 4075–4076. See 1 Kent, 162, 182; 9 Pet. 692; Merlin, Répert.

PASTURES. Lands upon which beasts feed themselves. By a grant of pastures the land itself passes. 1 Thomas, Co. Litt. 202.

PATENT. A grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals. Phillips, Pat. 1.

As the term was originally used in England, it signified certain written instruments emanating from the king and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises; they were called letters patent, from being delivered open, and by way of contradistinction from instruments like the French *lettres de cachet*, which went out sealed.

In the United States, the word patent is sometimes understood to mean the title-deed by which a government, either state or federal, conveys its lands. But in its more usual acceptation it is understood as referring to those instruments by which the United States secures to inventors for a limited time the exclusive use of their own inventions.

The granting of exclusive privileges by means of letters patent was a power which for a long time was greatly abused by the sovereigns of England. The sole right of dealing in certain commodities was in that manner conferred upon particular individuals, either as a matter of royal favor or as a means of replenishing the royal treasury. These exclusive privileges, which were termed monopolies, became extremely odious, and, at an early date, met with the most determined resistance. One of the provisions of Magna Charta was intended to prevent the granting of monopolies of this character; and subsequent prohibitions and restrictions were enacted by parliament even under the most energetic and absolute of their monarchs. See Hallam, Const. Hist., Harp. ed. 153, 205; 7 Lingard, Hist. Eng. Dolman's ed. 247, 380; 9 *id.* 182.

Still, the unregulated and despotic power of the crown proved, in many instances, superior to the law, until the reign of James I., when an act was passed, in the twenty-first year of his reign, known as the Statute of Monopolies, which entirely prohibited all grants of that nature, so far as the traffic in commodities already known was concerned. But the king was permitted to secure by letters patent, to the inventor of any new manufacture, the sole right to make and vend the same for a term not exceeding fourteen years. Since that time the power of the monarch has been so far controlled by the law that the prohibition contained in the Statute of Monopolies has been fully observed, and under that statute has grown up the present system of British patent law, from which ours has to a great extent been derived.

The constitution of the United States confers upon congress the power to pass laws "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right of their respective writings or discoveries." U. S. Const. art. i. s. 6, cl. 8. This right can, accordingly, be conferred only upon the *authors* and *inventors* themselves; but it rests in the sound discretion of congress to determine the length of time during which it shall continue. Congress at an early day availed itself of the power.

The first act passed was that which established the patent office, on the 10th of April, 1790. There were several supplements and modifications to this law, namely, the acts passed February 7, 1793, June 7, 1794, April 17, 1800, July 3, 1832, July 13, 1832. These were all repealed, by an act passed July 4, 1836, and a new system was established. Subsequently other changes were made by the acts of March 3, 1837, March 3, 1839, August 29, 1842, May 27, 1848, March 3, 1849, February 18, 1861, March 2, 1861, July 16, 1862, March 3, 1863, June 25, 1864, and March 3, 1865. The act of July 8, 1870, entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights" repealed all existing acts.

The present law does not, indeed, furnish any guarantee of the validity of the title conferred upon the patentee. The patent is, nevertheless, *prima facie* evidence of its own validity; 1 Stor. 336; 3 *id.* 172; 1 Mas. 153; 14 Pet. 458; 2 Blatchf. 229; 1 McAll. 171; as well for a defendant in an action as for a plaintiff; 15 How. 252. No provision is made by statute for setting it aside directly, however invalid it may prove, except in the special case of interference between two patents or an application and a patent. But, throughout its whole term of existence, whenever an action is brought against any one for having infringed it, he is permitted to show its original invalidity in his defence. The supreme court, however, while deciding that an individual cannot maintain a suit in equity in his own name to repeal a patent, except in interference cases, have more recently intimated that the proper remedy is in the name of the attorney-general, or of the United States; 14 Wall. 434; *on the relation* of the party interested; Curt. Pat. § 503. The exclusive right of the patentee did not exist at common law; it is created by acts of congress; and no rights can be acquired unless authorized by the statute and in the manner it prescribes; 10 How. 494; 19 *id.* 195; 3 N. Y. 9; 8 Pet. 658. The power granted by the patent is domestic in its character, and confined within the limits of the United States; consequently it does not extend to a foreign vessel lawfully entering one of our ports, where the patented improvement was placed upon her in a foreign port and authorized by the laws of the country to which she belongs; 19 How. 183.

We will now proceed to treat of some of the details of our present law on this subject.

Of the subject-matter of a patent. The act of July 8, 1870, sec. 24, provides for the granting of a patent to the first inventor or discoverer of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned. The distinction between a process and a machine is discussed in 15 How. 252. There are with us, according to the phraseology of the statute, four classes of inventions which may be the subjects of patents: *first*, an art; *second*, a machine; *third*, a manufacture; and, *fourth*, a composition of matter. In Great Britain, as we have seen, letters patent granting exclusive privileges can be issued only to the inventors of a "new manufacture." But the courts in defining the meaning of the term, have construed the word "manufacture" to be coextensive in signification with the whole of the four classes of inventions thus recognized by our law. An art or process, a machine, and a composition of matter are all regarded there as manufactures. The field of invention in Great Britain is, therefore, coin-

cident with that provided by our law, and the legal subject-matter of patents is the same in each country; 2 B. & Ald. 349; 8 Term, 99; 2 H. Blackst. 492; 2 M. & W. 544; Webst. Pat. Cas. 237, 393, 459.

But, inasmuch as we have three other classes of inventions, the term "manufacture" has a more limited signification here than it receives in Great Britain. In this country it is understood to mean a new article of merchandise which has required the exercise of something more than ordinary mechanical skill and ingenuity in its contrivance; no new principle or combination of parts is necessary to render a patent of this kind valid. All that is requisite is that a substantially new commodity shall have been produced for the public use and convenience. A mere change in the form of a well-known article may sometimes justify the granting of a patent for the same, where such change adapts it to an essentially new use, and where something beyond the range of ordinary skill and ingenuity must have been called into exercise in its contrivance. See 11 How. 248.

The general rule, then, is that wherever *invention* has been exercised, there will be found the subject-matter of a patent; 1 McAll. 48; 5 Blatch. 46. And as the law looks to the fact, and not to the result by which it was accomplished, it is immaterial what amount of thought was involved in making the invention; 4 Mas. 6.

Although the word "discovery" is used in our statute as entitling the discoverer to a patent, still, every discovery is not a patentable invention. The discoverer of a mere philosophical principle, or abstract theory, or elementary truth of science, cannot obtain a patent for the same, unless he applies it to some directly useful purpose. The patent can only be for such a principle, theory, or truth reduced to practice and embodied in a particular structure or combination of parts; 1 Stor. 285; 1 Mas. 187; 4 *id.* 1; 1 Pet. C. C. 342; nor can there be a patent for a function or for an effect only, but for an effect produced in a given manner or by given means; 1 Holmes, 20; 2 Fisher, 229; 4 *id.* 275; or by a particular operation; 1 Gall. 480; 1 Mas. 476; 1 Stor. 270; 2 *id.* 164; 1 Pet. C. C. 394; 5 McLean, 76; 15 How. 62; 4 Fisher, 468; 11 Off. Gaz. 153. An idea is not patentable; a patent is valid only for the practical application of an idea; 3 Blatch. 535; 20 Wall. 498.

An invention, to be patentable, must not only be *new*, but must also be *useful*. But by this it is not meant that it must be more useful than any thing of the kind previously known, but that it is capable of use for a beneficial purpose. The word "useful" is also to be understood in contradistinction to "pernicious," or "frivolous." A contrivance directly and mainly calculated to aid the counterfeiter, the pickpocket, or the assassin, or which would in any way be directly calculated to be injurious to the morals, the health, or the good order of society, would not be patentable. Neither would a new contrivance which was of too trivial a character to be worthy of serious consideration; 1 Mas. 186, 303; 4 Wash. C. C. 9; 1 Paine, 203; 1 Blatch. 372, 488; 2 *id.* 132; 1 W. & M. 290; 2 McLean, 35; Baldw. 303; 13 N. H. 311; 5 Fisher, 396; 1 Biss. 362; 3 Fisher, 218, 536.

The patent itself is *primâ facie* evidence of utility; 9 Blatch. 77; s. c. 5 Fish. 48; 1 Bond, 212; and its use by the defendant and others is evidence of utility; 1 Holmes, 340.

In the trial of an action for infringement, evidence of the comparative utility of the plaintiff's machine and the defendant's is inadmissible, except for the purpose of showing a substantial difference between the two machines; 1 Stor. 336.

A mere application of an old device or process to the manufacture of an article is held to constitute only a double use, and not to be patentable. There must be some new process or machinery used to produce the effect; 2 Stor. 190, 408; Gilp. 489; 3 Wash. C. C. 443; 1 W. & M. 290; 2 McLean, 35; 4 *id.* 456; 2 Curt. 340; 2 Robb, 133; 12 Blatch. 101; 91 U. S. 37, 150. But where the new use is not analogous to the old and would not be suggested by it,—where invention is necessary in order to conceive of the new application, and experiment is required to test its success, and the result is a new or superior result,—there a patent may be obtained.

No patent can be granted in the United States for the mere importation of an invention brought from abroad; although it is otherwise in England. The constitution, as we have seen, only authorizes congress to grant these exclusive privileges to the inventors themselves. The mere fact of an inventor having obtained a patent for a device in a foreign country will not prevent his obtaining a patent for the same thing here, provided it shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term. In no case shall such patent be in force more than seventeen years; sec. 25, Act of 1870.

Of caveats. Section 40 of the act of 1870 authorizes the inventor of anything patentable—provided he be a citizen, or an alien who has resided within the United States for one year next preceding his application and has made oath of his intention to become a citizen—to file a caveat in the patent office for his own security. This caveat consists in a simple statement of his invention, in any language which will render it intelligible. It is always well to attach a drawing to the description, in order that it may be more easily and thoroughly understood; but this is not indispensable.

The right acquired by the caveator in this manner is that of preventing the grant of any

interfering patent, on any application filed within one year from the day when the caveat was lodged in the patent office, without his being notified of the application and having an opportunity of contesting the priority of invention of the applicant, by means of an "interference," which will be treated of hereafter. In this way an inventor can obtain a year to perfect his invention, without the risk of having the patent to which he is entitled granted to another in the mean time.

Upon application within one year by any other person for a patent that interferes in any way, it is the duty of the commissioner of patents to give notice of such application to the person filing the caveat, who shall within three months file his description, etc. The caveat is filed in the confidential archives of the office, and preserved in secrecy. See 1 Bond, 212; 1 Fisher, 479, 372; s. c. 4 Blatch. 362.

Of the application for a patent. When the invention is complete, and the inventor desires to apply for a patent, he causes a specification to be prepared, setting forth in clear and intelligible terms the exact nature of his invention, describing its different parts and the principle and mode in which they operate, and stating precisely what he claims as new, in contradistinction from those parts and combinations which were previously in use. This should be accompanied by a petition to the commissioner of patents, stating the general nature of his invention and the object of his application. One copy of drawings should be attached to the specification, where the nature of the case admits of drawings; and, where the invention is for a composition of matter, specimens of the ingredients and of the composition of matter should be furnished. The specification, as well as the drawings, must be signed by the applicant and attested by two witnesses; the drawings may be signed by an attorney in fact; and appended to the specification must be an affidavit of the applicant, stating that he verily believes himself to be the original and first inventor of that for which he asks a patent, and that he does not know and does not believe that the same was ever before known or used, and, also, of what country he is a citizen. The whole is then filed in the patent office. As to furnishing a model, see MODEL. R. S. §§ 4889, 4891.

Of the examination. As has been already observed, the act (sec. 31) provides for an examination whenever an application is completed in the prescribed manner. And if on such examination it appears that the claim of the applicant is invalid and would not be sustained by the courts, the application is rejected. In cases of doubt, however, the approved practice of the patent office is to grant the patent, and thus give the party an opportunity to sustain it in the courts if he can.

As a general rule, an invention is considered patentable whenever the applicant is shown to be the original and first inventor; and his own affidavit appended to the application is sufficient to raise a presumption that he is the first inventor, until the contrary is shown. But if it is ascertained by the office that the same thing had been invented by any other person in this country, or that it had been patented or described in any printed publication in this or any foreign country, prior to its invention by the applicant, a patent will be denied him. But a mere prior invention of the same thing in a foreign country, if not patented or described in some printed publication, will not affect his right to a patent here.

The rule that the applicant is entitled to a patent whenever he is shown to be the original and first inventor is subject to one important exception. If he has, either actually or constructively, abandoned his invention to the public, he can never afterwards recall it and resume his right of ownership; 4 Mas 111; 4 Wash. C. C. 544; 2 Pet. 16; 6 *id.* 248; 7 *id.* 313; 1 How. 202; 5 Fisher, 189; 2 *id.* 531; 94 U. S. 92; 3 Fisher, 595; 3 Biss. 321; 1 Fisher, 252; 14 Off. Gaz. 308; 14 Blatch. 94.

Where an invention has been in public use or on sale for more than two years before the date of the application, a patent cannot be granted. See 97 U. S. 126; 94 *id.* 92; 12 Blatch. 149; 6 Fisher, 343; s. c. 3 Cliff. 563; 7 Wall. 583; 9 Reporter, 337; 1 Holmes, 503. (Under the earlier acts, such use, etc., did not prejudice an inventor's rights unless it occurred with the consent and allowance of the applicant.)

If the application for a patent is rejected, the specification may be amended and a second examination requested. If again rejected, an appeal may be taken, upon the payment of $10, to the examiners-in-chief. If rejected by them, an appeal lies to the commissioner in person, on payment of a fee of $20; and if rejected by him, an appeal may be taken to the supreme court of the District of Columbia, sitting in banc, upon notice to the commissioner, and filing the reasons of appeal in writing. If all this proves ineffectual, the applicant may still file a bill in equity in the circuit court to compel the allowance of his patent; §§ 46–52, act of 1870.

All the proceedings before the patent office connected with the application for a patent are *ex parte*, and are kept secret, except in cases of conflicting claims, which will be referred to below.

Of the date of the patent. The patent usually takes date on the day it issues; every patent shall bear date as of a day not later than six months from its allowance and notice to the applicant; sec. 23.

The obtaining of foreign letters patent by an inventor entitled to obtain a patent in this country does not prevent the granting of a patent here. In such case the patent here expires with the foreign patent, or if more than one, with the one first expiring, but in no case can the patent here continue more than seventeen years.

Of interferences. The forty-second section of the act of 1870 provides that when an application is made which interferes with another pending application or with an unexpired patent, a trial shall be allowed for the purpose of determining who was the prior inventor, and a patent is directed to be issued or not accordingly.

Whenever there are interfering patents, any person interested in any one of such patents may have relief against the interfering patent by suit in equity against its owners; the court may thereupon adjudge either patent void in whole or in part, etc., but such judgment shall affect none but parties to the suit and those deriving title under them subsequently to the judgment; sec 58, act of 1870.

Of the specification. The specification is required, by the act of 1870, § 26, to describe the invention in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it relates to make, construct, or use it. In the trial of an action for infringement, it is a question of fact for the jury whether this requirement has been complied with; 2 Brock. 298; 1 Mas. 182; 2 Stor. 432; 3 *id.* 122; 1 W. & M. 53. At the same time, the interpretation of the specification, and the ascertainment of the subject-matter of the invention from the language of the specification and from the drawings, is, as appears from the authorities just referred to, as well as from others, a matter of law exclusively for the court; 5 How. 1; 3 McLean, 250, 432; 2 Cliff. 507; 2 Fisher, 62; 4 Blatch. 61; 1 Fisher, 44; 289, 351. The specification will be liberally construed by the court, in order to sustain the invention; 1 Sumn. 482; 3 *id.* 514, 535; 1 Stor. 270; 5 McLean, 44; 5 Fisher, 153; 2 Bond, 189; 15 How. 341; 4 Blatch. 238; 14 *id.* 152; 2 Sawy. 461; s. c. 6 Fisher, 469; 1 Wall. 491. See 7 Off. Gaz. 385; but it must, nevertheless, identify with reasonable clearness and accuracy the invention claimed, and describe the manner of its construction and use so that the public from the specification alone may be enabled to practise it; and if the court cannot satisfactorily ascertain the meaning of the patent from its face, it will be void for ambiguity; 2 Blatch. 1; 2 Brock. 303; 1 Sumn. 482; 1 Mas. 182, 447. It will be construed in view of the state of the art; 2 Fisher, 477; 14 Blatch. 79; 1 Holmes, 445; 1 Biss. 87.

It is required to distinguish between what is new and what is old, and not mix them up together without disclosing distinctly that for which the patent is granted; 4 Wash. C. C. 68; 2 Brock. 298; 1 Stor. 273; 1 Mas. 188, 475; 1 Gall. 438, 478; 2 *id.* 51; 1 Sumn. 482; 3 Wheat. 534; 7 *id.* 356. If the invention consists of an improvement, the patent should be confined thereto, and should clearly distinguish the improvement from the prior machine, so as to show that the former only is claimed; 1 Gall. 438, 478; 2 *id.* 51; 1 Mas. 447; 3 McLean, 250. Ambiguous terms should be avoided; nothing material to the use of the invention should be omitted; and the necessity of trials and experiments should not be thrown upon the public.

Of re-issues. It often happens that errors, defects, and mistakes occur in the specification of a patent, by which it is rendered wholly or partially inoperative or perhaps invalid. To furnish a remedy in such cases, § 53 of the act of 1870 provides that when such errors or defects are the result of inadvertency, accident, or mistake, without any fraudulent or deceptive intention, the patent may be surrendered by the patentee, his executors, administrators, or assigns, and a new patent issued in proper shape to secure the real invention intended to have been patented originally. The identity between the invention described in the re-issued and that in the original patent is a question of fact for the jury; 4 How. 380; 27 Penn. 517; 1 Wall. 531.

A re-issued patent has the same effect and operation in law, on the trial of all actions *for causes subsequently accruing*, as though the patent had been originally issued in such corrected form. From this it appears that after a re-issue no action can be brought for a past infringement of the patent. But, as the bare use of a patented machine is (if unauthorized) an infringement of the rights of the patentee, a machine constructed and lawfully used prior to the re-issue may be an infringement of the patent if used afterwards. The re-issued patent will expire when the original patent would have expired.

For the principles applicable to a surrender and re-issue, and the extent to which the action of the commissioner of patents is conclusive, see 2 McLean, 35; 2 Stor. 432; 3 *id.* 749; 4 How. 380, 646; 15 *id.* 112; 17 *id.* 74; 6 Pet. 218; 7 *id.* 202; 1 W. & M. 248; 2 *id.* 121. All matters of fact relating to a re-issue are finally settled by the decision of the commissioner, granting the re-issue; but it may be shown that the commissioner has exceeded his authority in granting a re-issue for an invention different from the one embraced in the original patent; 11 Wall. 516; 9 *id.* 796; 8 Blatch. 513; s. c. 4 Fisher, 324; *id.* 468; Curt. Pat. § 282, *b*. The late case of Miller *v.* Bridgeport Brass Co., 21 O. G. 201; 3 Morr. Transcr. 419, indicates some departure from the accepted rules on the subject. It was there said by Bradley, J., that where the only mistake suggested is that the claim is not so broad as it might have been, the mistake was apparent on the first inspection of the patent, and any correction desired should have been applied for immediately, and that the right to a correction may be lost by unreasonable delay. Further, that the claim of a specific device, and the omission to claim other devices apparent on the face of the patent, are in law a dedication to the public of that which was not claimed, and the legal effect of the patent cannot be revoked unless the patentee surrenders it and proves

that the specification was so framed by real inadvertence, accident, or mistake, and this should be done with due diligence (and before adverse rights have accrued; 3 Morr. Transcr. 455). It was not the special purpose of the legislation upon re-issues to authorize re-issues with broader claims, though such a re-issue may be made, when it clearly appears that there has been a *bona fide* mistake such as chancery in cases within its ordinary jurisdiction would correct. The subject is discussed in 15 Am. L. Rev. 731; 16 *id.* 57, 296; Howson, Re-issued Patents. See, also, 1 Wall. 577. The re-issued patent is not a new patent; and an existing contract concerning the patent before its surrender applies equally to it after the surrender and re-issue; 11 Cush. 569.

Under the act of 1870, the application for a re-issue must be sworn to by the inventor, if living—and not by the assignee, if any, but this does not apply to patents issued and assigned prior to July 8, 1870; act of March 3, 1871. R. S. § 4895.

Of patents for designs. The act of 1870 permits any person to obtain a patent for a design, which shall continue in force for three and a half, seven, or fourteen years, at the option of the applicant, upon the payment of a fee of ten, fifteen, or thirty dollars, according to the duration of the patent obtained. These patents are granted wherever the applicant, by his own industry, genius, efforts, and expense, has invented or produced any new and original design for a manufacture, alto relievo, or bas-relief, or any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture, or any new and original shape or configuration of any article of manufacture, not known or used by others before his invention or production thereof, or patented or described in any printed publication.

The general method of making the application is the same as has been hereinbefore described, and the patent issues in a similar form.

Of disclaimers. Section 54, of the act of 1870, provides "that whenever a patentee has, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented, and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the duty required by law (ten dollars), make disclaimer of such parts of the thing patented as he shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent; said disclaimer shall be in writing, attested by one or more witnesses, and recorded in the patent office, and shall thereafter be considered as part of the original specification, to the extent of the interest possessed by the claimant, and by those claiming under him, after the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it."

To understand the object and purpose of some of these provisions, it must be known that by the fifteenth section of the act of 1836 it was provided that it should be a good defence to an action for infringement that the specification was too broad; and although this was modified by the ninth section of the act of 1837 so as to permit a patentee who, by mistake, accident, or inadvertence, and without any wilful intent, had claimed some things of which he was not the first inventor, to recover damages for the infringement of what was really his invention, where the parts invented could be clearly separated from the parts improperly claimed, yet in such cases the plaintiff was not entitled to recover costs unless previous to the commencement of the suit he had entered a disclaimer for that which was not his invention. But no person can avail himself of the benefits of this provision who has unreasonably neglected or delayed to enter his disclaimer. The act of 1870 follows substantially the act of 1837 in this respect. The provisions authorizing disclaimers, and their effect upon the question of costs, are discussed in 1 Stor. 273, 590; 1 Blatchf. 244, 445; 2 *id.* 194; 15 How. 121; 19 *id.* 96; 20 *id.* 378; 21 Wall. 112; 6 Blatchf. 96; 2 Fisher, 477; 3 N. Y. 9; 5 Denio, 314; a disclaimer by one owner will not affect the interest of any other owner.

Of the extension of a patent. Patents were formerly granted for fourteen years, the commissioner of patents being authorized in special cases to extend the same for seven years longer. But by the act of 1861 the length of time for the patent to run was extended to seventeen years, and the right to an extension on such patents was denied. Therefore no extensions hereafter will be granted, except by congress, of patents issued before March 2, 1861. R. S. § 4924.

Applications for extension were required to be filed with the commissioner, not more than six months, or less than ninety days before the expiration of the patent; no extension was granted after the expiration of the original term.

Notice of the application was required to be given through newspapers published in Washington, and in the section of the country interested adversely to the extension, for sixty days before the day set for the hearing. After paying a fee of fifty dollars, he was required, in accordance with the act of congress and the rules of the office, to file a sworn statement of the ascertained value of his invention or discovery, and of his receipts and expenditures, sufficiently in detail to exhibit

a true and faithful account of loss and profit in any manner accruing to him by reason of said invention. Act of 1870, §§ 63-4-5-6.

Any person might appear and show cause against the extension of the patent. But if, after all was done, the commissioner was fully satisfied that, having due regard to the public interest, it was just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, it was his duty to grant the extension as prayed for. And thereupon the patent, as extended, had the same effect in law as though it had been originally granted for the term of twenty-one years. The extension enured only to the benefit of the patentee, and not of his assignees, unless he had contracted to convey to them an interest or right therein. But the assignee had a right to continue the use by himself of the patented machine which he was using at the time of the renewal; 4 How. 646, 709, 712; 19 *id.* 211; 3 McLean, 250; 4 *id.* 526; 1 Blatch. 167, 258; 2 *id.* 471; 3 Stor. 122, 171; and a purchaser might repair his own machine, when necessary, though the repair consisted in the replacement of an essential part of the combination patented; 9 How. 109.

The act of the commissioner in granting the extension was conclusive, in the absence of fraud or excess of jurisdiction; 2 Curt. C. C. 506; see 8 Blatch. 513; s. c. 4 Fisher, 324. As to the effect of an extension, see 3 Blatch. 48; 6 *id.* 165; 10 Wall. 367; 98 U. S. 596.

Of the assignment of patents. By § 36 of the act of 1870, every patent or an interest therein is assignable in law, by an instrument in writing; such assignments, etc., are void as against any purchaser or mortgagee for a valuable consideration, without notice, unless recorded in the patent office within three months. See PATENT OFFICE.

Strictly speaking, the word "assignment" applies to the transfer of the entire interests of the inventor, or of a fraction of that entire interest running throughout the whole United States. A conveyance of an exclusive interest within and throughout any specified part or portion of the United States is more properly denominated a grant. A mere authority or permission to use, sell, or manufacture the thing patented, either in the whole United States or in any specific portion thereof, is known as a license. But all three are sometimes included under the general term of an assignment. As to the distinction between an assignment and license, see 4 Fisher, 221; 21 Wall. 205; 1 Holmes, 149; 10 How. 447. Where the assignment, however, is not of the patent itself, or of any undivided part thereof, or of any right therein limited to a particular locality, but constitutes merely a license or authority from the pantentee, not exclusive and not transferring any interest in the patent itself, it has been held that it need not be recorded; 2 Stor. 541. Acts *in pais* will sometimes justify the presumption of a license; 1 How. 202; 17 Pet. 228; 3 Stor. 402. As to a verbal license, see 1 Bond, 194; s. c. 1 Fisher, 380. As to the rights of licensees, see 12 Blatch. 202.

An assignment may be made prior to the granting of a patent. And when duly made and recorded, the patent may be issued to the assignee. See act of 1870, § 33. This, however, only applies to cases of assignments proper, as contradistinguished from grants or licenses. The application must, however, in such cases be made and the specification sworn to by the inventor. See 5 McLean, 131; 4 Wash. C. C. 71; 4 Mas. 15; 1 Blatch. 506. The assignment transfers the right to the assignee, although the patent should be afterwards issued to the assignor; 10 How. 477. See 1 Wash. C. C. 168; 4 Mas. 15.

Of joint inventors. The patent must in all cases issue to the inventor, if alive and if he has not assigned his interest. And if the invention is made jointly by two inventors, the patent must issue to them both. This is equally the case where one makes a portion of the invention at one time and another at another time. A failure to observe this rule may prove fatal to the validity of the patent; see 1 Mas. 447.

Of executors and administrators. The thirty-fourth section of the act of 1870 provides that, where an inventor dies before obtaining a patent, his executor or administrator may apply for and obtain such patent, holding it in trust for the heirs at law or devisees, accordingly as the inventor died intestate or testate. Nothing is said as to its being appropriated to the payment of debts; but, having once gone into the hands of the executors or administrators, it would perhaps become assets, and be used like other personal property. In England, a patent will pass as assets to assignees in bankruptcy; 3 B. & P. 565.

The right to make a surrender and receive a re-issue of a patent also vests by law in the executor or administrator. See act of 1870, § 53. The law further provides that the executor or administrator may make the oath necessary to obtain the patent,—differing in this respect from the case of an assignment, where, although the patent issues to the assignee, the inventor must make the oath.

The liability of a patent to be levied upon for debt. The better opinion is that letters patent cannot be levied upon and sold by a common law execution. The grant of privilege to the patentee would, from its incorporeal nature, seem to be incapable of manual seizure and of sale. Even if such a sale were made, there does not appear to be any provision in the acts of congress which contemplates the recording of a sheriff's deed; and without a valid record the patentee might nevertheless make a subsequent trans-

fer to a *bonâ fide* purchaser without notice, which would be valid.

But this peculiar species of property may be subjected to the payment of debts through the instrumentality of a bill in equity. The chancellor can act upon the person. He can direct the patent to be sold, and by attachment can compel the patentee to execute a conveyance to the purchaser. It was so ruled in 23 Alb. L. J. 332 (S. C. of Dist. of Col.), which case was affirmed by the supreme court; 14 Cent. L. J. 326; 21 Am. L. Reg. N. S. 469 (see 14 How. 528; 1 Paige, 637; 1 Gall. 485); where it was further held that the court might compel the holder of the patent to assign it, or appoint a trustee for that purpose. The right of a patentee will pass to his assignees in bankruptcy; 3 B. & P. 777; but not to a trustee in insolvency, in Massachusetts; 1 Holmes, 152.

How far a patent is retroactive. By the earlier law on this subject in the United States, a patent, when granted, operated retroactively: so that a machine covered by the terms of the patent, though constructed previously to the date of that instrument, could not be used after the issuing of the patent without subjecting the party so using it to an action for infringement. Of course the use of the machine previously to the date of the patent was not unlawful.

The 37th section of the act of 1870, following substantially the act of 1837, provides "that every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly-invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor."

At present, therefore, property rightfully acquired in a specific machine, etc., cannot be affected by a patent subsequently applied for by the patentee. It has been held, however, that, under the general grant contained in the constitution, congress has power to pass a special act which shall operate retrospectively so as to give a patent for an invention already in public use; 3 Wheat. 454; 2 Stor. 164; 3 Sumn. 535. The infringement must be subsequent to the date of the patent; but on the question of novelty the patent will be considered as relating back to the original discovery; 4 Wash. C. C. 68, 703.

Marking patented articles. The thirty-eighth section of the act of 1870 declares that in all cases where an article is made or vended by any person under the protection of letters patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word "patented," together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label containing a like notice; on failure of which, in any suit for the infringement of letters patent by the party failing so to mark, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice, to make, use, or vend the article patented.

Penalties provided in certain cases. The thirty-ninth section of the act of 1870 provides a penalty of not less than $100 and costs for every person who shall mark, etc., any article for which he has not obtained a patent, with the name in imitation of the name of any person who has a patent thereupon, without his consent, etc., or who shall so mark the word "patent" or any word of similar import with intent to counterfeit the mark or device of the patentee, without consent; or who shall in any manner mark upon an unpatented article the word "patent," etc., for the purpose of deceiving the people. This penalty may be recovered in the district court where the offence was committed; one half goes to the person who sues for the penalty and the other to the United States.

A similar statute—that of 5 & 6 Will. IV. c. 83—exists in England, for observations upon which see Hindm. Pat. 366. It has been decided under that statute that where there has been an unauthorized use of the word "patent," it must be proved that the word was used with a view of imitating or counterfeiting the stamp of the patentee, and that it is no defence that the patented article imitated was not a new manufacture, the grant of the patent being conclusive on the defendant; 3 H. & N. 802. See 1 Fisher, 647; 2 Bond, 23; S. C. 3 Fisher, 72; *id.* 374; 5 *id.* 384; 5 Blatch. 494; 6 *id.* 33.

Of infringements. The criterion of infringement is substantial identity of construction or operation. Mere changes of form, proportion, or position, or substitution of mechanical equivalents, will not be infringements, unless they involve a substantial difference of construction, operation, or effect; 3 McLean, 250, 432; 1 Wash. C. C. 108; 15 How. 62; 1 Curt. 279; 1 McAll. 48. As a general rule, whenever the defendant has incorporated in his structure the substance of what the plaintiff has invented and properly claimed, he is responsible to the latter; 1 Wall. 531.

Where the patent is for a new combination of machines to produce certain effects, it is no infringement to use any of the machines separately, if the whole combination is not used; 1 Mas. 447; 2 *id.* 112; 1 Pet. C. C. 322; 1 Stor. 568; 2 *id.* 190; 16 Pet. 336; 3 McLean, 427; 4 *id.* 70; 6 *id.* 539; 14 How. 219; 24 Vt. 66; 1 Black, 427; 1 Wall. 78. But it is an infringement to use one of several improvements claimed, or to use a substantial part of the invention, although with some modification or even improvement of form or apparatus; 2 Mas.

112; 1 Stor. 273. Where the patent describes and claims a machine, it cannot be construed to be for a process or function, so as to make all other machines infringements which perform the same function; and no infringement will in such case take place where the practical manner of giving effect to the principle is by a different mechanical structure and mechanical action; 15 How. 252. If the patentee is the inventor of a device, he may treat as infringers all who make a similar device operating on the same principle and performing the same functions by analogous means or equivalent combinations, although the infringing machine may be an improvement of the original and patentable as such. But if the invention claimed is itself but an improvement on a known machine, by a mere change of form or combination of parts, it will not be an infringement to improve the original machine by the use of a different form or combination of parts performing the same functions. The doctrine of equivalents does not in such case apply, unless the subsequent improvements are mere colorable invasions of the first; 20 How. 405.

A sale of the thing patented to an agent of the patentee, employed by him to make the purchase on account of the patentee, is not *per se* an infringement, although, accompanied by other circumstances, it may be evidence of infringement; 1 Curt. 260.

The making of a patented machine for philosophical experiment only, and not for use or sale, has been held to be no infringement; 1 Gall. 429, 485; but a use with a view to an experiment to test its value is an infringement; 4 Wash. 580. The sale of the articles produced by a patented machine or process is not an infringement; 3 McLean, 295; 4 How. 709; 94 U. S. 568; nor is the *bonâ fide* purchase of patented articles from an infringing manufacturer; 10 Wheat. 359; nor a sale of materials by a sheriff; 1 Gall. 485; 1 Robb, 47. Selling the parts of a patented machine may be an infringement; 1 Holmes, 88. As to infringement by a railroad corporation, where its road was worked and its stock owned by a connecting road, see 17 How. 30. Ignorance by the infringer of the existence of the patent infringed is no defence, but may mitigate damages; 11 How. 587.

Of damages for infringements. The act of 1870, § 59, provides that damages may be recovered in any circuit court of U. S. etc., in the name of the party interested either as patentee, assignee, or grantee, and that in case of verdict for the plaintiff the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with costs.

By § 55 of same act, a court of equity may award damages for infringement and increase the same in a similar manner. See MEASURE OF DAMAGES.

The actual damage is all that can be allowed by a jury, as contradistinguished from exemplary, vindictive, and punitive damages. The amount of defendant's profits from the unlawful user is, in general, the measure of the plaintiff's damages; and this may be determined by the plaintiff's price for a license; 11 How. 607; 15 *id.* 546; 16 *id.* 480; 20 *id.* 198; 1 Gall. 476; 1 Blatch. 244, 405; 2 *id.* 132, 194, 229, 476. The rule of damages is different where a patent is only for an improvement on a machine and where it is for an entire machine; 16 How. 480. If there be a mere making and no user proved, the damages should be nominal; 1 Gall. 476.

Jurisdiction of cases under the patent laws. The act of 1870, § 55, gives original jurisdiction to the circuit courts of the United States and to the supreme court of the District of Columbia, or of any territory, in all cases arising under the laws of the United States granting exclusive privileges to inventors. This jurisdiction extends both to law and equity, and is irrespective of the citizenship of the parties or the amount in controversy. The jurisdiction of the federal courts is exclusive of that of the state courts; 3 N. Y. 9; 40 Me. 430. But this is to be understood of cases arising directly under the acts of congress, and not of those where the patent comes collaterally in question: as, for instance, where it is the subject-matter of a contract or the consideration of a promissory note; 3 McLean, 525; 1 W. & M. 34; 16 Conn. 409. Hence, a bill to enforce the specific performance of a contract for the sale of a patent-right is not such a case arising under the patent laws as gives jurisdiction to the federal courts; 10 How. 477. By the same act, § 56, a writ of error or an appeal lies to the supreme court of the United States from all judgments or decrees of any circuit court, etc., in any suit under the patent law, without regard to the sum or value in controversy. See COURTS OF THE UNITED STATES.

Patent-right, note given for a. In many of the states, laws have been passed making void all notes given in consideration of a patent-right unless the words "given for a patent-right" are prominently written on the face of the note. These laws have been decided in Michigan, 16 Alb. L. J. 330; Illinois, 70 Ill. 109; Indiana, 2 Bissell, 311; Minnesota, 9 Chic. Leg. News, 112; to be unconstitutional and void. The property in inventions exists by virtue of the laws of congress, and no state has a right to interfere with its enjoyment or annex conditions to the grant; 2 Biss. 314; 4 Bush, 311. In Pennsylvania, however, a distinction has been made, the statute of April 12, 1872, requiring the insertion of the words "given for a patent-right," merely having the effect of making the note or instrument in the hands of a purchaser subject to the same defence as if in the hands of the original owner or holder. By necessary implication, notes without such words inserted in them remain on the same footing as before the act, and innocent hold-

ers, who take such notes without notice, take them clear of all equities existing between the original parties.

As between the original parties to a note given for a patent-right, it is well settled that it is a good defence to show that the alleged patent was void, and therefore there was no consideration; 18 Penn. 465. All who take with notice of the consideration, take subject to the same defence; *id.* Sharswood, J., holds that there is nothing in this view which interferes with any just right of the holder of a valid patent under the acts of congress, nor in permitting the maker to show against a holder with such notice that the note was obtained by fraudulent misrepresentation; 86 Penn. 173.

To secure the insertion of the words, the act makes it a misdemeanor punishable by fine or imprisonment, or both, for any person "knowing the consideration of a note" to be the sale of a patent-right, to sell or transfer it without the words "given for a patent-right" inserted, as provided by the act; 26 Am. Rep. 514 and note, citing 43 Ind. 167; 23 Minn. 24; 53 Ind. 454; 54 *id.* 270.

See ABANDONMENT OF INVENTION; CAVEAT; COMMISSIONER OF PATENTS; EXTENSION OF PATENTS; INFRINGEMENT; INTERFERENCE; INVENTION; MACHINE; MANUFACTURE; MEASURE OF DAMAGES; MODEL; PATENT OFFICE; PATENT OFFICE, EXAMINERS IN; PROCESS; UTILITY; WITHDRAWAL.

PATENT OFFICE. The office through which applications for patents are made, and from which those patents emanate.

Some provision for the purpose of issuing patents is, of course, found in every country where the system of granting patents for inventions prevails; but nowhere else is there an establishment which is organized in all respects on the same scale as the United States Patent Office.

By the act of 1790, the duty of transacting this business was devolved upon the secretary of state, the secretary of war, and the attorney-general. In the provision for a board for this purpose found in the act of 1793, the secretary of war is omitted. From that time during a period of more than forty years all the business connected with the granting of patents was transacted by a clerk in the office of the secretary of state,—the duties of the secretary in this respect being little more than nominal, and the attorney-general acting only as a legal adviser.

The act of July 4, 1836, reorganized the office and gave it a new and higher position. A commissioner of patents was constituted. Provision was made for a library, which has since become one of the finest of the kind in the country.

The patent office is an office of record, in which assignments of patents are recordable, and the record is notice to all the world of the facts to be found on record. Under section four of the act of 1793, an assignment was not valid unless recorded in the office of the secretary of state; 4 Blackf. 183. The law on the subject of recording is thus stated in Curt. Pat. § 183: As against the patentee himself, an assignment vests a good title in the assignee, from the time of its execution, and recording within three months is not necessary to its validity. But as respects subsequent purchasers without notice and for a valuable consideration the prior assignment must be recorded within the three months. As against third persons, a suit may be maintained, in law or equity, by an assignee, provided he records his assignment at any time before the trial or hearing. See 1 Story, 273; 2 *id.* 609; 7 Blatch. 195.

Three cases only are said to be provided for by statute: *first*, an assignment of the whole patent; *second*, an assignment of an undivided part thereof; and, *third*, a grant or conveyance of an exclusive right under the patent within a specified part or portion of the United States; 2 Stor. 542; 2 Blatch. 148; 9 Vt. 177. A question may arise whether the act of 1860, in prescribing a tariff of fees for recording other papers, as agreements, etc., has not recognized the usage of the office in recording them as within the meaning of the acts of congress, and rendered them recordable. See, as to recording contracts relating to patents, Curt. Pat. § 183, n.

PATENT OFFICE, EXAMINERS IN. Upon the reorganization of the patent office, in 1836, under the act of July 4 of that year, a new and important principle was introduced. Prior to that date, any one was at liberty to take out his patent for almost any contrivance, if he was willing to pay the fees. At least, this was the practical operation of the system; for although a patent was not granted until it was allowed by certain heads of departments, still, as the examination in such cases went no further than merely to ascertain whether the contrivance was of sufficient importance to be worthy of a patent, without any inquiry as to who was the first inventor thereof, the allowance of the patent was rather a matter of course in almost every case. The applicant, at his own peril, decided for himself whether the subject-matter of the patent was new. If it was not so, the patent would be of no value, as it could never be enforced. The question of novelty could be raised whenever an action for infringement was brought; or a proceeding might be directly instituted to test the validity of the patent, and to annul it if the patentee was found not to be the orignal and first inventor. The law in these respects was like that of England and most other European countries.

But the act of 1836 provided for a thorough examination of every application, with a view of ascertaining whether the contrivance thus shown was novel as well as useful: so that no patent should issue which would not be sustained by the courts. In theory, this was to be done by the commissioner of patents; but the amount of business on his hands was such, even then, as to render it impossible for him to perform all that labor in person; and provision was accordingly made by law for an examining clerk to assist him in these exam-

inations. Under the act of 1870 there are now, besides the commissioner and assistant commissioner, three examiners-in-chief, a chief clerk, an examiner in charge of interferences, twenty-two principal examiners, twenty-two first and twenty-two second assistant examiners.

The duty of these examiners is to determine whether the subject-matter of the respective patents which are applied for had been invented or discovered by any other person in this country, or had been patented or described in any printed publication in this or any foreign country, prior to the alleged invention thereof by the applicant. If not, and the invention is deemed useful within the meaning of the patent law, a patent is allowed, unless it clearly appears that the invention has been abandoned to the public. If the invention has been in public use more than two years with or without the consent of the inventor, that single circumstance amounts to a statutory abandonment of the invention; although it may be abandoned in various other methods. But, unless the fact of abandonment is very clear, the office does not assume to decide against the applicant, but leaves the matter to a court and jury. See PATENTS; PATENT OFFICE.

PATENT-ROLLS. Registers in which are recorded all letters patent granted since 1516; 2 Sharsw. Bla. Com. 346; App. to First Rep. of Select Commit. on Pub. Rec. pp. 53, 84.

PATENT WRIT. A writ not closed or sealed up. Jacob, Law Dict.; Co. Litt. 289; 2 *id.* 39; 7 Co. 20.

PATENTEE. He to whom a patent has been granted. The term is usually applied to one who has obtained letters patent for a new invention.

PATER (Lat.). Father. The Latin term is considerably used in genealogical tables.

PATER-FAMILIAS (Lat.). **In Civil Law.** One who was *sui juris*, and not subject to the paternal power.

In order to give a correct idea of what was understood in the Roman law by this term, it is proper to refer briefly to the artificial organization of the Roman family,—the greatest moral phenomenon in the history of the human race. The comprehensive term *familia* embraced both persons and property: money, lands, houses, slaves, children, all constituted part of this artificial family, this juridical entity, this legal patrimony, the title to which was exclusively vested in the chief or *pater-familias*, who alone was *capax dominii*, and who belonged to himself, *sui juris*.

The word *pater-familias* is by no means equivalent to the modern expression father of a family, but means proprietor in the strongest sense of that term; it is he *qui in domo dominium habet*, in whom were centred all property, all power, all authority: he was, in a word, the lord and master, whose authority was unlimited. No one but he who was *sui juris*, who was *pater-familias*, was capable of exercising any right of property, or wielding any superiority or power over any thing; for nothing could belong to him who was himself *alieni juris*. Hence the children of the *filii-familias*, as well as those of slaves, belonged to the *pater-familias*. In the same manner, every thing that was acquired by the sons or slaves formed a part of the *familia*, and, consequently, belonged to its chief. This absolute property and power of the *pater-familias* only ceased with his life, unless he voluntarily parted with them by a sale; for the alienation by sale is invariably the symbol resorted to for the purpose of dissolving the stern dominion of the *pater-familias* over those belonging to the *familia*. Thus, both emancipation and adoption are the results of imaginary sales,—*per imaginarias venditiones*. As the daughter remained in the family of her father, grandfather, or great-grandfather, as the case might be, notwithstanding her marriage, it followed as a necessary consequence that the child never belonged to the same family as its mother: there is no civil relationship between them; they are natural relations,—*cognati*,—but they are not legally related to each other,—*agnati*; and therefore the child never inherits from its mother, nor the mother from her child. There was, however, a means by which the wife might enter into the family and subject herself to the power of her husband, *in manu mariti*, and thereby establish a legal relationship between herself and her husband. This marital power of the husband over the wife was generally acquired either *coemptione*, by the purchase of the wife by the husband from the *pater-familias*, or *usu*, by the prescription based on the possession of one year,—the same by which the title to movable property was acquired according to the principles governing the *usucapio* (*usu capere*, to obtain by use). Another mode of obtaining the same end was the *confarreatio*, a sacred ceremony performed by the breaking and eating of a small cake, *farreum*, by the married couple. It was supposed that by an observance of this ceremony the marital power was produced by the intervention of the gods. This solemn mode of celebrating marriages was peculiar to the patrician families. By means of these fictions and ceremonies the wife became in the eye of the law the daughter of her husband, and the sister of the children to whom she gave birth, who would otherwise have been strangers to her. Well might Gaius say, *Fere nulli alii sunt homines qui talem in liberos habeant potestatem, qualem nos habemus*.

There is some similarity between the *agnatio*, or civil relationship, of the Romans, and the transmission of the name of the father, under the modern law, to all his descendants in the male line. The Roman law says of the children, *patris, non matris, familiam sequuntur*; we say, *patris, non matris, nomen sequuntur*. All the members of the family who, with us, bear the same name, were under that law *agnates*, or constituted the *agnatio*, or civil family. Those children only belonged to the family, and were subject to the paternal power, who had been conceived in *justis nuptiis*, or been adopted. *Nuptiæ*, or *matrimonium*, was a marriage celebrated in conformity with the peculiar rules of the civil law. There existed a second kind of marriage, call *concubinatus*,—a valid union and a real marriage,—which has been often improperly confounded, even by high authority, with concubinage. This confusion of ideas is attributable to a superficial examination of the subject; for the illicit intercourse between a man and a woman which we call concubinage was stigmatized by the opprobrious term *stuprum* by the Romans, and is spoken of in the strongest terms of reprobation. The *concubinatus* was the natural marriage, and the only one which those who did not enjoy the *jus connubii* were permit-

ted to contract. The Roman law recognized two species of marriage, the one civil, and the other natural, in the same manner as there were two kinds of relationship, the *agnatio* and *cognatio*. The *justæ nuptiæ* or *justum matrimonium*, or civil marriage, could only be contracted by Roman citizens and by those to whom the *jus connubii* had been conceded: this kind of marriage alone produced the paternal power, the right of inheritance, etc.

But the rapid rise and extraordinary greatness of the city attracted immense crowds of strangers, who, not possessing the *jus connubii*, could form no other union than that of the *concubinatus*, which, though authorized by law, did not give rise to those legal effects which flowed from the *justæ nuptiæ*. By adoption, the person adopted was transferred from one family to another; he passed from the paternal power of one *pater-familias* to that of another: consequently, no one who was *sui juris* could be adopted in the strict sense of that word. But there was another species of adoption, called *adrogatio*, by which a person *sui juris* entered into another family, and subjected himself to the paternal power of its chief. The effect of the adrogation was not confined to the person adrogated alone, but extended over his family and property. 1 Marcadé, 75 *et seq.*

This extraordinary organization of the Roman family, and the unlimited powers and authority vested in the *pater-familias*, continued until the reign of Justinian, who, by his 118th Novel, enacted on the 9th of August, 544, abolished the distinction between the *agnatio* and *cognatio*, and established the order of inheritance which, with some modifications, continues to exist at the present day in all countries whose jurisprudence is based on the civil law. See PATRIA POTESTAS.

PATERNA PATERNIS (Lat. the father's to the father's). **In French Law.** An expression used to signify that, in a succession, the property coming from the father of the deceased descends to his paternal relations.

PATERNAL. That which belongs to the father or comes from him: as paternal power, paternal relation, paternal estate, paternal line. See LINE.

PATERNAL POWER. The authority lawfully exercised by parents over their children. See FATHER.

PATERNAL PROPERTY. That which descends or comes from the father and other ascendants or collaterals of the paternal stock. Domat, Liv. Prél. tit. 3, s. 2, n. 11.

PATERNITY. The state or condition of a father.

The husband is *primâ facie* presumed to be the father of his wife's children born during coverture or within a competent time afterwards: *pater is est quem nuptiæ demonstrant;* 7 Mart. La. N. S. 553. So if the child is *en ventre sa mere* at time of marriage; Co. Litt. 123; 8 East, 192. In civil law the presumption holds in case of a child born before marriage as well as after; 1 Bla. Com. 446, 454; Fleta, lib. 1, c. 6. In cases of marriage of a widow within ten months after decease of husband, the paternity is to be decided by circumstances; Hargrave, note to Co. Litt. § 188, n. 190. Marriage within ten months after decease of husband was forbidden by Roman, Danish, and Saxon law, and English law before the Conquest; 1 Beck, Med. Jur. 481; Brooke, Abr. *Bastardy*, pl. 18; Palm. 10; 1 Bla. Com. 456.

The presumption of paternity may always be rebutted by showing circumstances which render it impossible that the husband can be the father; 6 Binn. 283; 1 P. A. Browne, Appx. xlvii.; Hard. 479; 8 East, 193; Stra. 51, 940; 4 Term, 356; 2 Myl. & K. 349; 3 Paige, Ch. 139; 1 S. & S. 150; T. & R. 138; 1 Bouvier, Inst. n. 302 *et seq.*

The declarations of one or both of the spouses, however, cannot affect the condition of a child born during the marriage; 7 Mart. La. N. S. 553; 3 Paige, Ch. 139. See BASTARD; BASTARDY; LEGITIMACY; MATERNITY; PREGNANCY.

PATHOLOGY. In Medical Jurisprudence. The science or doctrine of diseases. In cases of homicides, abortions, and the like, it is of great consequence to the legal practitioner to be acquainted in some degree with pathology. 2 Chitty, Pr. 42, n.

PATRIA (Lat.). The country; the men of the neighborhood competent to serve on a jury; a jury. This word is nearly synonymous with *pais*, which see.

PATRIA POTESTAS (Lat.). **In Civil Law.** The paternal power; the authority which the law vests in the father over the persons and property of his legitimate children.

One of the effects of marriage is the paternal authority over the children born in wedlock. In the early period of the Roman history, the paternal authority was unlimited: the father had the absolute control over his children, and might even, as the domestic magistrate of his family, condemn them to death. They could acquire nothing except for the benefit of the *pater-familias* (which see); and they were even liable to be sold and reduced to slavery by the author of their existence. But in the progress of civilization this stern rule was gradually relaxed; the voice of nature and humanity was listened to on behalf of the oppressed children of a cruel and heartless father. A passage in the 37th book, t. 12, § 5, of the Pandects, informs us that, in the year 870 of Rome, the emperor Trajan compelled a father to release his son from the paternal authority, on account of cruel treatment. The same emperor sentenced a father to transportation because he had killed his son in a hunting-party, although the son had been guilty of adultery with his stepmother; for, says Marcianus, who reports the case, *patria potestas in pietate debet, non in atrocitate, consistere.* Ulpianus says that a father is not permitted to kill his son without a judgment from the prefect or the president of the province. In the year 981 of Rome, the emperor Alexander Severus addressed a constitution to a father, which is found in the 8th book, t. 47, § 3, of the Justinian Code, in which he says, "Your paternal authority authorizes you to chastise your son; and if he persists in his misconduct, you may bring him before the president of the province, who will sentence him to such punishment as you may desire." In the same book and title of the Code we find a constitution of the emperor Constantine, dated in

the year of Rome 1065, which inflicts the punishment denounced against parricide on the father who shall be convicted of having killed his son. The power of selling the child, which at first was unlimited, was also much restricted, and finally altogether abolished, by subsequent legislation, especially during the empire. Paulus, who wrote about the middle of the tenth century of Rome, informs us that the father could only sell his child in case of extreme poverty: *contemplatione extremæ necessitatis aut alimentarum gratia.* In 1039 of Rome, Diocletian and Maximian declare in a rescript that it is beyond doubt (*manifestissimi juris*) that a father can neither sell nor pledge nor donate his children. Constantine, in 1059, permitted the sale by the father of his child, at its birth and when forced to do so by abject poverty; *propter nimiam paupertatem egestatemque victus;* and the same law is re-enacted in the Code of Justinian. C. 4. 43, t. 2, 3.

The father, being bound to indemnify the party who had been injured by the offences of his child, could release himself from this responsibility by an abandonment of the offender, in the same manner as the master could abandon his slave for a similar purpose,—*noxali causa mancipare.* This power of abandonment continued to exist, with regard to male children, up to the time of Gaius, in the year 925 of Rome. But by the Institutes of Justinian it is forbidden. Inst. 4. 8. 7.

With regard to the rights of the father to the property the child might acquire, it was originally as extensive and absolute as if it had been acquired by a slave: the child could possess nothing nor acquire any thing that did not belong to the father. It is true, the child might possess a *peculium;* but of this he had only a precarious enjoyment, subject to the will and pleasure of the father. Under the first emperors a distinction was made in favor of the son as to such property as had been acquired by him in the army, which was called *castrense peculium*, to which the son acquired a title in himself. Constantine extended this rule by applying it to such property as the child had acquired by services in offices held in the state or by following a liberal profession: this was denominated *quasi-castrense peculium.* He also created the *peculium adventitium*, which was composed of all property inherited by the son from his mother, whether by will or *ab intestat;* but the father had the usufruct of this *peculium.* Arcadius and Honorius extended it to every thing the son acquired by succession or donations from his grandfather or mother or other ascendants in the maternal line. Theodosius and Valentinian embraced in it whatever was given by one of the spouses to the other; and Justinian included in it every thing acquired by the son, except such as was produced by property belonging to the father himself. It is thus seen that, by the legislation of Justinian and his predecessors, the paternal power with regard to property was almost entirely destroyed.

The *pater-familias* had not only under his paternal power his own children, but also the children of his sons and grandsons,—in fact, all his descendants in the male line; and this authority continued in full force and vigor no matter what might be the age of those subject to it. The highest offices in the government did not release the incumbent from the paternal authority. The victorious general or consul to whom the honors of a triumph were decreed by the senate was subject to the paternal power in the same manner and to the same extent as the humblest citizen. It is to be observed, however, that the domestic subjection did not interfere with the capacity of exercising the highest public functions in the state. The children of the daughter were not subject to the paternal authority of her father: they entered into the family of her husband. Women could never exercise the paternal power. And even when a woman was herself *sui juris*, she could not exercise the paternal power. It is for this reason, Ulpian observes, that the family of which a woman, *sui juris*, was the head, *mater-familias*, commenced and ended with her: *mulier autem familiæ suæ et caput et finis est.* 1 Ortolan, 191 *et seq.*

The modern civil law has hardly preserved any features of the old Roman jurisprudence concerning the paternal power. Article 233 of the Louisiana Code provides, it is true, that a child, whatever be its age, owes honor and respect to its father and mother; and the next article adds that the child remains under the authority of the father and mother until his majority or emancipation, and that in case of a difference of opinion between the parents the authority of the father shall prevail. In the succeeding article obedience is enjoined on the child to the orders of the parents as long as he remains subject to the paternal authority. But article 236 renders the foregoing rules in a great measure nugatory, by declaring that "a child under the age of puberty cannot quit the paternal house without the permission of his father and mother, who have a right to correct him, provided it be done in a reasonable manner." So that the power of correction ceases with the age of fourteen for boys and twelve for girls: nay, at these ages the children may leave the paternal roof in opposition to the will of their parents. It is seen that, by the modern law, the paternal authority is vested in both parents, but practically it is generally exercised by the father alone; for wherever there is a difference of opinion his will prevails. The great object to be attained by the exercise of the paternal power is the education of the children to prepare them for the battle of life, to make them useful citizens and respectable members of society. During the marriage, the parents are entitled to the enjoyment of the property of their minor children, subject to the obligation of supporting and educating them, and of paying the taxes, making the necessary repairs, etc. Donations made to minors are accepted by their parents or other ascendants. The father has under his control all actions which it may be necessary to bring for his minor children during the marriage. When the marriage is dissolved by the death of one of the spouses, the paternal power ceases, and the tutorship is opened: but the surviving parent is the natural tutor, and can at his death appoint a testamentary tutor to his minor children. See PATER FAMILIAS.

PATRICIDE. One guilty of killing his father. See PARRICIDE.

PATRIMONIAL. A thing which comes from the father, and, by extension, from the mother or other ancestor.

PATRIMONIUM. In Civil Law. That which is capable of being inherited.

Things capable of being possessed by a single person exclusively of all others are, in the Roman or civil law, said to be *in patrimonio;* when incapable of being so possessed, they are *extra patrimonium.*

Most things may be inherited; but there are some which are said to be *extra patrimonium*, or which are not in commerce. These are such as

are *common*, as the light of heaven, the air, the sea, and the like; things *public*, as rivers, harbors, roads, creeks, ports, arms of the sea, the sea-shore, highways, bridges, and the like; things *which belong to cities and municipal corporations*, as public squares, streets, market-houses, and the like. See 1 Bouvier, Inst. nn. 421–446.

PATRIMONY. Any kind of property. Such estate as has descended in the same family; estates which have descended or been devised in a direct line from the father, and, by extension, from the mother or other ancestor.

The father's duty to take care of his children. Swinb. Wills, 235.

PATRINUS (Lat.). A godfather.

PATRON. In Ecclesiastical Law. He who has the disposition and gift of an ecclesiastical benefice.

In Roman Law. The former master of a freedman. Dig. 2. 4. 8. 1.

PATRONAGE. The right of appointing to office; as, the patronage of the president of the United States, if abused, may endanger the liberties of the people.

In Ecclesiastical Law. The right of presentation to a church or ecclesiastical benefice. 2 Bla. Com. 21.

PATRONUS (Lat.). **In Roman Law.** A modification of the Latin word *pater*, father. A denomination applied by Romulus to the first senators of Rome, and which they always afterwards bore.

Romulus at first appointed a hundred of them. Seven years afterward, in consequence of the association of Tatius to the Romans, a hundred more were appointed, chosen from the Sabines. Tarquinius Priscus increased the number to three hundred. Those appointed by Romulus and Tatius were called *patres majorum gentium*, and the others were called *patres minorum gentium*. These and their descendants constituted the nobility of Rome. The rest of the people were called plebians, every one of whom was obliged to choose one of these fathers as his *patron*. The relation thus constituted involved important consequences. The plebeian, who was called *cliens* (a client), was obliged to furnish the means of maintenance to his chosen patron, to furnish a portion for his patron's daughters, to ransom him and his sons if captured by an enemy, and pay all sums recovered against him by judgment of the courts. The patron, on the other hand, was obliged to watch over the interests of his client, whether present or absent, to protect his person and property, and especially to defend him in all actions brought against him for any cause. Neither could accuse or bear testimony against the other, or give contrary votes, etc. The contract was of a sacred nature: the violation of it was a sort of treason, and punishable as such. According to Cicero (De Repub. ii. 9), this relation formed an integral part of the governmental system, *Et habuit plebem in clientelas principum descriptum*, which he affirms was eminently useful. Blackstone traces the system of vassalage to this ancient relation of patron and client. It was, in fact, of the same nature as the feudal institutions of the middle ages, designed to maintain order in a rising state by a combination of the opposing interests of the aristocracy and of the common people, upon the principle of reciprocal bonds for mutual interests. Dumazeau, Barreau Romain, § iii. Ultimately, by force of radical changes in the institution, the word *patronus* came to signify nothing more than an advocate. *Id.* iv.

PATROON. In New York. The lord of a manor. See MANOR.

PATRUELIS (Lat.). **In Civil Law.** A cousin-german by the father's side; the son or daughter of a father's brother. Dig. 38. 10. 1.

PATRUUS (Lat.). **In Civil Law.** An uncle by the father's side; a father's brother. Dig. 38. 10. 10. *Patruus magnus* is a grandfather's brother, grand-uncle. *Patruus major* is a great-grandfather's brother. *Patruus maximus* is a great-grandfather's father's brother.

PAUPER (Lat. poor). One so poor that he must be supported at the public expense.

The statutes of the several states make ample provisions for the support of the poor. It is not within the plan of this work even to give an abstract of such extensive legislation. See 16 Viner, Abr. 259; Botts, Poor-Laws; Woodf. Landl. & T. 201.

PAUPERIES (Lat.). **In Civil Law.** Poverty. In a technical sense, *damnum absque injuria: i. e.* a damage done without wrong on the part of the doer: *e. g.* damage done by an irrational being, as an animal. L. 1, § 3, D. *si quod paup. fec.*; Vicat. Voc. Jur.; Calvinus, Lex.

PAVIAGE. A contribution or tax for paving streets or highways.

PAWN. A pledge. A pledge includes, in Louisiana, a *pawn* and an *antichresis*; but sometimes pawn is used as the general word, including pledge and antichresis. La. Civ. Code, art. 3101; Hennen, Dig. *Pledge*. See PLEDGE.

PAWNBROKER. One whose business it is to lend money, usually in small sums, upon pawn or pledge.

PAWNEE. He who receives a pawn or pledge. See PLEDGE.

PAWNOR. One who, being liable to an engagement, gives to the person to whom he is liable a thing to be held as a security for the payment of his debt or the fulfilment of his liability. See PLEDGE.

PAX REGIS (Lat.). The peace of the king. That peace or security for life and goods which the king promises to all persons under his protection. Bracton, lib. 3, c. 11; 6 Ric. II. stat. 1, c. 13.

In ancient times there were certain limits which were known by this name. The *pax regis*, or verge of the court, as it was afterwards called, extended from the palace-gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barleycorns, Crabb, C. L. 41; or from the four sides of the king's residence, four miles, three furlongs, nine acres in breadth, nine feet, nine barleycorns, etc. LL. Edw. Conf. c. 12, et LL. Hen. I.

PAYEE. The person in whose favor a bill of exchange is made payable. See BILLS OF EXCHANGE.

PAYMENT. The fulfilment of a promise, or the performance of an agreement.

The discharge in money of a sum due.

The word payment is not a technical term : it has been imported into law proceedings from the exchange, and not from law treatises. When payment is pleaded as a defence, the defendant must prove the payment of money, or something accepted in its stead, made to the plaintiff or to some person authorized in his behalf to receive it; 2 Greenl. Ev. 509.

Payment, in its most general acceptation, is the accomplishment of every obligation, whether it consists in giving or in doing: *Solutio est præstatio ejus quod in obligatione est.*

It follows, therefore, that every act which, while it extinguishes the obligation, has also for its object the release of the debtor and his exemption from liability, is not payment. Payment is doing precisely what the payer has agreed to do. *Solvere dicitur cum qui fecit quod facere promisit.*

However, practically, the name of payment is often given to methods of release which are not accompanied by the performance of the thing promised. *Restrinximus solutiones ad compensationem, ad novationem, ad delegationem, et ad numerationem.*

In a more restricted sense, payment is the discharge in money of a sum due. *Numeratio est nummariæ solutio.* 5 Massé, Droit commerciel, 229. That a payment may extinguish a debt, it must be made by a person who has a right to make it, to a person who is entitled to receive it, in something proper to be received both as to kind and quality, and at the appointed place and time.

In the civil law, it is said, where payment is something to be done, it must be done by the debtor himself. If I hire a skilful mechanic to build a steam-engine for me, he cannot against my will substitute in his stead another workman. Where it is something to be given, the general rule is that it can be paid by any one, whether a co-obliger, or surety, or even a third person who has no interest; except that in this last case subrogation will prevent the extinction of the debt as to the debtor, unless the payer at the time of payment act in the name of the debtor, or in his own name to release the debtor. See SUBROGATION.

What constitutes payment.

According to Comyns, payment by merchants must be made in money or by bill; Comyns, Dig. *Merchant* (F).

It is now the law for all classes of citizens that payment must be made by money, unless the obligation is, by the terms of the instrument creating it, to be discharged by other means. In the United States, congress has, by the constitution, power to decide what shall be a legal tender; that is, in what form the creditor may demand his payment or must receive it if offered; and congress has determined this by statutes. The same power is exercised by the governments of all civilized countries. As to the medium of payment in the United States, see LEGAL TENDER.

In England, Bank-of-England notes are legal tender. But the creditor may waive this right, and anything which he has accepted as satisfaction for the debt will be considered as payment.

Upon a plea of payment, the defendant may prove a discharge in bank-notes, negotiable notes of individuals, or a debt already due from the payee, delivered and accepted or discounted as payment; Phill. Ev. Cowen & H. ed. n. 387. Bank-notes, in conformity to usage and common understanding, are regarded as cash; 1 Burr. 452; 3 *id.* 1516; 9 Johns. 120; 6 Md. 37; unless objected to; 1 Metc. Mass. 356; 8 Ohio, 169; 10 Me. 475; 2 Cr. & J. 16, n.; 5 Yerg. 199; 3 Humphr. 162; 6 Ala. N. S. 226. Treasury notes are not cash; 3 Conn. 534. Giving a check is not considered as payment; but the holder may treat it as a nullity if he derives no benefit from it, provided he has not yet been guilty of negligence so as to cause injury to the drawer; 2 Campb. 515; 8 Term, 451; 2 B. & P. 518; 4 Ad. & E. 952; 4 Johns. 296; 30 N. H. 256. But see 14 How. 240.

Payment in forged bills is generally a nullity, both in England and this country; 10 Wheat. 333; 2 Johns. 455; 6 Hill, N. Y. 340; 7 Leigh, 617; 3 Hawks, 568; 2 Harr. & J. 368; 4 Gill & J. 463; 4 Ill. 392; 11 *id.* 137; 3 Penn. 330; 5 Conn. 71. So also of counterfeit coin; but an agreement to sell goods and accept specific money is good, and payment in these coins is valid even though they be counterfeit; 1 Term, 225; 14 S. & R. 51. And the forged notes must be returned in a reasonable time, to throw the loss upon the debtor; 7 Leigh, 617; 11 Ill. 137. Payment to a bank in its own notes which are received and afterwards discovered to be forged is a good payment; 1 Parsons, Contr. 220. A forged check received as cash and passed to the credit of the customer is good payment; 4 Dall. 234; S. C. 1 Binn. 27; 10 Vt. 141. Payment in bills of an insolvent bank, where both parties were innocent, has been held no payment; 7 Term, 64; 13 Wend. N. Y. 101; 11 Vt. 576; 9 N. H. 365; 22 Me. 85. On the other hand, it has been held good payment in 1 W. & S. 92; 6 Mass. 185; 12 Ala. 280; 8 Yerg. 175. The point is still unsettled, and it is said to be a question of intention rather than of law; Story, Pr. Notes, 125*, 477*, 641.

If a bill of exchange or promissory note be given to a creditor and accepted as payment, it shall be a good payment; Comyns, Dig. *Merchant* (F); 30 N. H. 540; 27 Ala. N. S. 254; 16 Ill. 161; 2 Du. N. Y. 133; 14 Ark. 267; 4 Rich. 600; 34 Me. 324. But regularly a bill of exchange or note given to a creditor shall not be a discharge of the debt till payment of the bill, unless so accepted; Skinn. 410; 1 Salk. 124.

If the debtor gives his own promissory note, it is held in England and the United States generally not to be payment, unless it be shown that it was so intended; 10 Pet. 567;

4 Mas. 336; 27 N. H. 244; 15 Johns. 247; 3 Wend. 66; 9 Conn. 23; 2 N. H. 525; 26 E. L. & E. 56.

And if payment be made in the note of a factor or agent employed to purchase goods, or intrusted with the money to be paid for them, if the note be received as payment it will be good in favor of the principal; 1 B. & Ald. 14; 7 B. & C. 17; but not if received conditionally; and this is a question of fact for the jury; 6 Cow. 181; 10 Wend. 271.

It is said that an agreement to receive the debtor's own note in payment must be expressed; 1 Cow. 359; 1 Wash. C. C. 328; and when so expressed it extinguishes the debt; 5 Wend. 85. Whether there was such an agreement is a question for the jury; 9 Johns. 310.

A bill of exchange drawn on a third person and accepted discharges the debt as to the drawer; 10 Mod. 37; and in an action to recover the price of goods, in England, payment by a bill not dishonored has been held a good defence; 4 Esp. Cas. 46; 3 Campb. 411; 1 M. & M. 28; 4 Bingh. 454; 5 Maule & S. 62.

Retaining a draft on a third party an unreasonable length of time will operate as payment if loss be occasioned thereby; 3 Wils. 553; 13 S. & R. 318; 2 Wash. C. C. 191.

In the sale of a chattel, if the note of a third person be accepted for the price, it is good payment; 3 Cow. 272; 1 D. & B. 291. Not so, however, if the note be the promise of one of the partners in payment of a partnership debt; 4 Dev 91, 460.

In Maine and Massachusetts, the presumption where a negotiable note is taken, whether it be the debtor's promise or that of a third person, is that it is intended as payment; 6 Mass. 143; 12 Pick. 268; 2 Metc. Mass. 168; 8 Me. 298; 18 *id.* 249; 37 *id.* 419. The fact that a note was usurious and void was allowed to overcome this presumption; 11 Mass. 361. Generally, the question will depend upon the fact whether the payment was to have been made in notes or the receiving them was a mere accommodation to the purchaser; 17 Mass. 1. And the presumption never attaches where non-negotiable notes are given; 11 Me. 381; 15 *id.* 340.

Payment may be made through the intervention of a third party who acts as the agent of both parties: as, for example, a stake-holder. If the money be deposited with him to abide the event of a legal wager, neither party can claim it until the wager is determined, and then he is bound to pay it to the winner; 4 Campb. 37. If the wager is illegal, the depositor may reclaim the money at any time before it is paid over; 4 Taunt. 474; 5 Term, 405; 8 B. & C. 221; 29 E. L. & E. 424; 31 *id.* 452. And at any time after notice given in such case he may hold the stake-holder responsible, even though he may have paid it over; see 2 Pars. Contr. 138.

An auctioneer is often a stake-holder, as in case of money deposited to be made over to the vendor if a good title is made out. In such case the purchaser cannot reclaim except on default in giving a clear title. But if the contract has been rescinded by the parties there need be no notice to the stake-holder in case of a failure to perform the condition; 2 M. & W. 244; 1 M. & R. 614.

A transfer of funds, called by the civil-law phrase a payment by delegation, is payment only when completely effected; 2 Pars. Contr. 137; and an actual transfer of claim or credit assented to by all the parties is a good payment; 4 Bingh. 112; 2 B. & Ald. 39; 5 *id.* 228; 7 N. H. 345, 397; 17 Mass. 400. This seems to be very similar to payment by drawing and acceptance of a bill of exchange.

Foreclosure of a mortgage given to secure a debt operates as payment made when the foreclosure is complete; but if the property mortgaged is not equal in value to the amount of the debt then due, it is payment *pro tanto* only; 2 Greenl. Ev. § 324; 3 Mass. 562; 2 Gall. 152; 3 Mas. 474; 10 Pick. 396; 11 Wend. 106. A *legacy* also is payment, if the intention of the testator that it should be so considered can be shown, and if the debt was liquidated at the death of the testator; 1 Esp. 187; 12 Mass. 391; 5 Cow. 368. See LEGACY.

When money is sent by letter, even though the money is lost, it is good payment, and the debtor is discharged, if he was expressly authorized or directed by the creditor so to send it, or if such authority can be presumed from the course of trade; Peake, 67; 11 M. & W. 233. But, even if the authority be given or inferred, at least ordinary diligence must be used by the debtor to have the money safely conveyed. See 3 Mass. 249; Ry. & M. 149; 1 Exch. 477; Peake, 186. Payment must be of the whole sum; and even where a receipt in full has been given for a payment of part of an ascertained sum, it has been held not to be an extinction of the debt; 5 Co. 117; 2 B. & C. 477; 3 N. H. 518; 11 Vt. 60; 26 Me. 88; 37 *id.* 361; 10 Ad. & E. 121; 4 Gill. & J. 305; 9 Johns. 333; 17 *id.* 169; 11 How. 100.

But payment of part may be left to the jury as evidence that the whole has been paid; 5 Cra. 11; 3 N. H. 518; and payment of a part at a different time; 2 Metc. Mass. 283; or place; 3 Hawks, 580; or in any way more beneficial to the creditor than that prescribed by the contract, is good; 15 M. & W. 23. Giving a chattel, though of less value than the debt, is a discharge; Dy. 75 *a*; 2 Litt. 49; 3 Barb. Ch. 621; or rendering certain services, with the consent of the creditor; 5 Day, 359; or assigning certain property; 5 Johns. 386; 13 Mass. 424. So if a stranger pay a part, or give his note for a part, and this is accepted, it is a good payment of the debt; 11 East, 390; 4 B. & C. 500; 13 Ala. N. S. 353; 14 Wend. 116; 2 Metc. Mass. 283. And where a creditor by process of law compels the payment of a part of his

claim, by a suit for that part only, this is generally a discharge of the whole; 11 S. & R. 78; see 16 Johns. 121.

The payment must have been accepted knowingly. Many instances are given in the older writers to illustrate acceptance: thus, if the money is counted out, and the payee takes a part and puts it in a bag, this is a good payment, and if any be lost it is the payee's loss; 5 Mod. 398. Where A paid B £100 in redemption of a mortgage, and B bade C put it in his closet, and C did so, and A demanded his papers, which B refused to deliver, and A demanded back his money, and B directed C to give it to him, and C did, it was held to be a payment of the mortgage; Viner, Abr. *Payment* (E).

Generally, there can be but little doubt as to acceptance or non-acceptance, and the question is one of fact for the jury to determine under the circumstances of each particular case. Of course where notes or bank-bills are given in payment of a debt, the evidence that they were so given is to be the same as evidence of any other fact relating to payment.

Evidence of payment. Evidence that any thing has been done and accepted as payment is evidence of payment.

A *receipt* is *prima facie* evidence of payment: but a receipt acknowledging the reception of ten dollars and acquitting and releasing from all obligations would be a receipt for ten dollars only; 2 Ves. 310; 5 B. & Ald. 606; 18 Pick. 325; 1 Edw. Ch. 341. And a receipt is only *prima facie* evidence of payment; 2 Taunt. 241; 7 Cow. 334; 4 Ohio, 346. For cases explaining this rule, see, also, 2 Mas. 141; 11 Mass. 27; 9 Johns. 310; 4 H. & M'H. 219; 3 Caines, 14. And it may be shown that the particular sum stated in the receipt was not paid, and, also, that no payment has been made; 2 Term, 366; 26 N. H. 12; 9 Conn. 401; 2 N. J. 59; 10 Humphr. 188; 13 Penn. 46.

Payment may be presumed by the jury in the absence of direct evidence: thus, possession by the debtor of a security after the day of payment, which security is usually given upon payment of the debt, is *prima facie* evidence of payment by the debtor; 1 Stark. 374; 9 S. & R. 385.

If an acceptor produce a bill of exchange, this is said to afford in England no presumption of payment unless it is shown to have been in circulation after he accepted it; 2 Campb. 439. See, also, 14 M. & W. Exch. 379. But in the United States such possession is *prima facie* evidence of payment; 7 S. & R. 116; 4 Johns. 296; 2 Pick. 204. Payment is conclusively presumed from lapse of time. After twenty years' non-demand, unexplained, the court will presume a payment without the aid of a jury; 1 Campb. 27; 14 S. & R. 15; 6 Cow. 401; 2 Cra. 180. Facts which destroy the reason of this rule may rebut the presumption; 1 Pick. 60; 2 La. 481. And a jury may infer payment from a shorter lapse of time, especially if there be attendant circumstances favoring the presumption; 7 S. & R. 410. As to presumptions against the existence of the debt, see 5 Barb. 63.

A presumption may arise from the course of dealing between the parties, or the regular course of trade: thus, after two years it was presumed that a workman had been paid, as it was shown that the employer paid his workmen every Saturday night, and this man had been seen waiting among others; 1 Esp. 296. See, also, 3 Campb. 10.

A receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of all the rents previously due; 2 Pick. 204. If the last instalment on a bond is paid in due form, it is evidence that the others have been paid; if paid in a different form, that the parties are acting under a new agreement.

Where receipts had been regularly given for the same amount, but for a sum smaller than was due by the agreement, it was held evidence of full payment; 4 Mart. La. 698.

Who may make payment. Payment may be made by the primary debtor, and by other persons from whom the creditor has a right to demand it.

An agent may make payment for his principal.

An attorney may discharge the debt against his client; 5 Bingh. 506. One of any number of joint and several obligors, or one of several joint obligors, may discharge the debt; Viner, Abr. *Payment* (B). Payment may be made by a third person, a stranger to the contract.

It may be stated, generally, that any act done by any person in discharge of the debt, if accepted by the creditor, will operate as payment. In the civil law there are many exceptions to this rule, introduced by the operation of the principle of subrogation. Most of these have no application in the common law, but have been adopted, in some instances, as a part of the law merchant. See SUBROGATION; CONTRIBUTION.

To whom payment may be made. Payment is to be made to the creditor. But it may be made to an authorized agent. And if made in the ordinary course of business, without notice requiring the payment to be made to himself, it is binding upon the principal; 11 East, 36; 6 M. & G. 166; Cowp. 257; 4 B. & Ald. 395; 3 Stark. Cas. 16; 1 Campb. 477. Payment to a third person by appointment of the principal will be substantially payment to the principal; 1 Phill. Ev. 200. Payment to an agent who made the contract with the payee (without prohibition) is payment to the principal; 1 Campb. 339; 16 Johns. 86; 2 Gall. 565; 10 B. & C. 755. But payment may be made to the principal after authority given to an agent to receive; 6 Maule & S. 156. Payment to a broker or factor who sells for a principal not named is good; 11 East, 36. Payment to an agent when he is known to be such will be good if

made upon the terms authorized; 11 East, 36; if there be no notice not to pay to him; 3 B. & P. 485; 15 East, 65; and even after notice, if the factor had a lien on the money when paid; 5 B. & Ald. 27. If the broker sell goods as his own, payment is good though the mode varies from that agreed on; 11 East, 36; 1 Maule & S. 147; 2 C. & P. 49.

Payment to an attorney is as effectual as payment to the principal himself; 1 W. Blackst. 8; 1 Wash. C. C. 9; 1 Call, 147. So, also, to a solicitor in chancery after a decree; 2 Ch. Cas. 38. The attorney of record may give a receipt and discharge the judgment; 1 Call, 147; 1 Coxe, 214; 1 Pick. 347; 10 Johns. 220; 2 Bibb, 382; if made within one year; 1 Me. 257. Not so of an agent appointed by the attorney to collect the debt; 2 Dougl. 623. Payment by an officer to an attorney whose power had been revoked before he received the execution did not discharge the officer; 13 Mass. 465; 3 Yeates, 7. See, also, 1 Des. Ch. 461. Payment to one of two co-partners discharges the debt; 8 Wend. 542; 15 Ves. 198; 2 Blackf. 371; 1 Ill. 107; 6 Maule & S. 156; 1 Wash. C. C. 77; even after dissolution; 4 C. & P. 108. And see 7 N. H. 568. So payment to one of two joint creditors is good, though they are not partners; 4 J. J. Marsh. 367. But payment by a banker to one of several joint depositors without the assent of the others was held a void payment; 1 M. & R. 145; Ry. & M. 364; 4 E. L. & E. 342.

Payment to the wife of the creditor is not a discharge of the debt, unless she is expressly or impliedly his agent; 2 Scott, N. R. 372; 1 Add. 316; 2 Freem. 178; 22 Me. 335. An auctioneer employed to sell real estate has no authority to receive the purchase-money by virtue of that appointment merely; 1 M. & R. 326. Usually, the terms of sale authorize him to receive the purchase-money; 5 M. & W. 645. Payment was made to a person sitting in the creditor's counting-room and apparently doing his business, and it was held good; 1 M. & M. 200; 5 Taunt. 307; but payment to an apprentice so situated was held not to be good; 2 Cr. & M. 304. Generally, payment to the agent must be made in money, to bind the principal; 11 Mod. 71; 10 B. & C. 760. Power to receive money does not authorize an agent to commute; 1 Wash. C. C. 454; 1 Pick. 347; nor to submit to arbitration; 5 How. 891. See, also, Story, Ag. § 99.

An agent authorized to receive money cannot bind his principal by receiving goods; 4 C. & P. 501; or a note; 1 Salk. 442; 2 Ld. Raym. 928; 5 M. & W. 645; but a subsequent ratification would remedy any such departure from authority; and it is said that slight acts of acquiescence will be deemed ratification. Payment to one of several joint creditors of his part will not alter the nature of the debt so as to enable the others to sue separately; 4 Tyrwh. 488. Payment to one of several executors has been held sufficient; 3 Atk. 695. Payment to a trustee generally concludes the *cestui que trust* in law; 5 B. & Ad. 96. Payment of a debt to a marshal or sheriff having custody of the person of the debtor does not satisfy the plaintiff; 2 Show. 129; 14 East, 418; 4 B. & C. 32. Interest may be paid to a scrivener holding the mortgage-deed or bond, and also the principal, if he deliver up the bond; otherwise of a mortgage-deed as to the principal, for there must be a re-conveyance; 1 Salk. 157. It would seem, then, that in those states where no re-conveyance is needed, a payment of the principal to a person holding the security would be good, at least *primâ facie*.

Subsequent ratification of the agent's acts is equivalent to precedent authority to receive money; Pothier, Obl. n. 528.

When to be made. Payment must be made at the exact time agreed upon. This rule is held very strictly in law; but in equity payment will be allowed at a time subsequent, generally when damages can be estimated and allowed by way of interest; 8 East, 208; 3 Pick. 414; 5 *id.* 106, 187. Where payment is to be made at a future day, of course nothing can be demanded till the time of payment, and, if there be a condition precedent to the liability, not until the condition has been performed. And where goods had been sold "at six or nine months' credit," the debtor was allowed the option; 5 Taunt. 338.

Where no time of payment is specified, the money is to be paid immediately on demand; Viner, Abr. *Payment* (H); 1 Pet. 455; 4 Rand. 346. When payment is to be made at a certain time, it may be made at a different time if the plaintiff will accept; Viner, Abr. *Payment* (H); and it seems that the debtor cannot compel the creditor to receive payment before the debt is due.

Where to be made. Payment must be made at the place agreed upon, unless both the parties consent to a change. If no place of payment is mentioned, the payer must seek out the payee; Moore, P. C. 274; Shepp. Touchst. 378; 2 Br. & B. 165; 2 Maule & S. 120; 2 M. & W. 223; 20 E. L. & E. 498.

So, too, the creditor is entitled to call for payment of the whole of his claim at one time, unless the parties have stipulated for payment in parcels.

Questions often arise in regard to the payment of debts and legacies by executors and administrators. These questions are generally settled by statute regulations. See DISTRIBUTIONS; EXECUTOR; ADMINISTRATOR.

As a general rule, debts are to be paid first, then specific legacies. The personal property is made liable for the testator's debts, and, after that is exhausted, the real estate, under restrictions varying in the different states.

In the payment of mortgages, if the mortgage was made by the deceased, the personal estate is liable to discharge the mortgage debts; 2 Cruise, Dig. 147. But where the

deceased acquired the land subject to the mortgage, his real estate must pay the debt; 3 Will. Exec. 1699; 3 Johns. Ch. 252; 2 P. Wms. 664, n. 1; 2 Bro. C. C. 57; 5 Ves. 534; 24 Penn. 203. See MORTGAGE.

Effect of payment. The effect of payment is—*first*, to discharge the obligation; and it may happen that one payment will discharge several obligations by means of a transfer of the evidences of obligation; Pothier, Obl. 554, n. *Second*, payment does not prevent a recovery when made under a mistake of fact. The general rule is that mistake or ignorance of law furnishes no ground to reclaim money paid voluntarily under a claim of right; 2 Kent, 491; 2 Greenl. Ev. § 123. But acts done under a mistake or ignorance of an essential fact are voidable and relievable both in law and equity. Laws of a foreign country are matters of fact; Story, Const. §§ 407, 411; 9 Pick. 112; and the several United States are foreign to each other in this respect. See CONFLICT OF LAWS; FOREIGN LAWS. In Kentucky and Connecticut there is a power of recovery equally in cases of mistake of law and of fact; 19 Conn. 548; 3 B. Monr. 510; 4 *id.* 190. In Ohio it may be remedied in equity; 11 Ohio, 223. In New York a distinction is taken between ignorance of law and mistake of law, giving relief in the latter case; 18 Wend. 422; 2 Barb. Ch. 508. In England, money paid under a mistake of law cannot be recovered back; 4 Ad. & E. 858.

Third, part payment of a note will have the effect of waiver of notice as to the whole sum. *Fourth*, payment of part of the debt will bar the application of the Statute of Limitations as to the residue; 22 N. H. 219; 6 Md. 201; 8 Mass. 134; 28 E. L. & E. 454; even though made in goods and chattels; 2 Cr. M. & R. 337; 4 Ad. & E. 71; 4 Scott, N. R. 119. But it must be shown conclusively that the payment was made as part of a larger debt; 1 Cr. M. & R. 252; 2 Bingh. N. C. 241; 6 M. & W. 824; 20 Miss. 663; 24 *id.* 92; 9 Ark. 455; 11 Barb. 554; 24 Vt. 216. See, also, 2 Pars. Contr. 353–359.

In Pleading. The name of a plea by which the defendant alleges that he has paid the debt claimed in the declaration: this plea must conclude to the country. See Chitty, Plead.

See, also, generally, Parsons, Story, Leake, and Chitty, on Contracts; Greenleaf, Phillipps, and Starkie, on Evidence; Story, Parsons, and Byles, on Bills and Notes; Greenleaf's Cruise, on Real Property; Daniel, Neg. Inst.; Kent, vol. iii.; Massé, Droit, commerciel, vol. v. p. 229 *et seq.*; Domat, Civil Law; Pothier, on Obligation; Guyot, Répertoire Universelle, *Payment;* Comyns; Viner, Burn, and Dane, Abridgment, *Payment.*

PAYMENT INTO COURT. In Practice. Depositing a sum of money with the proper officer of the court by the defendant in a suit, for the benefit of the plaintiff and in answer to his claim.

It may be made in some states under statutory provisions; 18 Ala. 293; 7 Ill. 671; 1 Barb. 21; 5 Harr. Del. 17; 24 Ga. 211; 16 Tex. 461; 11 Ind. 532; and see 3 E. L. & E. 185; 7 *id.* 152; and in most by a rule of court granted for the purpose; 2 Bail. 28; 7 Ired. 201; 1 Swan, 92; in which case notice of an intention to apply must, in general, have been previously given.

The *effect* is to divest the defendant of all right to withdraw the money; 1 Wend. N. Y. 191; 1 E. D. Smith, 398; 3 Watts, 248; except by leave of court; 1 Coxe, 298; and to admit conclusively every fact which the plaintiff would be obliged to prove in order to recover the money; 1 B. & C. 3; 6 M. & W. 9; 2 Scott, N. S. 56; 9 Dowl. 21; 1 Dougl. Mich. 330; 24 Vt. 140; and see 7 Cush. 556; as, that the amount tendered is *due;* 1 Campb. 558; 2 *id.* 341; 5 Mass. 365; 2 Wend. 431; 7 Johns. 315; for the cause laid in the declaration; 5 Bingh. 28, 32; 2 B. & P. 550; 5 Pick. 285; 6 *id.* 340; to the plaintiff in the character in which he sues; 2 Campb. 441; the jurisdiction of the court; 5 Esp. 19; that the *contract* was made; 3 Campb. 52; 3 Taunt. 95; and broken as alleged; 1 B. & C. 3; but only in reference to the amount paid in; 7 Johns. 315; 3 E. L. & E. 548; and nothing beyond such facts; 1 Greenl. Ev. § 206. And see 2 M. & G. 208, 233; 5 C. & P. 247.

Generally, it relieves the defendant from the payment of costs until judgment is recovered for a sum larger than that paid in; 1 Wash. 10; 3 Cow. 36; 3 Wend. 326; 2 Miles, 65; 2 Rich. 64; 24 Vt. 140. As to the capacity in which the officer receiving the money acts, see 1 Coxe, 298; 2 Bail. 28; 17 Ala. 293.

PAYS. Country. Trial *per pays*, trial by jury (the country). See PAIS.

PEACE. The concord or final agreement in a fine of lands; 18 Edw. I. *modus levandi finis.*

The tranquillity enjoyed by a political society, internally by the good order which reigns among its members, and externally by the good understanding it has with all other nations. Applied to the internal regulations of a nation, peace imports, in a technical sense, not merely a state of repose and security as opposed to one of violence or warfare, but likewise a state of public order and decorum; Hamm. N. P. 139; 12 Mod. 566. See, generally, Bacon, Abr. *Prerogative* (D 4); Hale, Hist. Comm. Pleas, 160; 3 Taunt. 14; 1 B. & Ald. 227; Peake, 89; 1 Esp. 294; Harrison, Dig. *Officer* (V 4); 2 Benth. Ev. 319, note; GOOD BEHAVIOR; SURETY OF THE PEACE.

PEACE OF GOD. The words, "in the peace of God and the said commonwealth, then and there being," as used in indictments

for homicide and in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war, provided such killing occur in the actual exercise of war; Whart. Cr. Law, § 310; 13 Minn. 341.

PEACE OF GOD AND THE CHURCH. The freedom from suits at law between the terms. Spelman, Gloss.; Jacob, Law Dict.

PECK. A measure of capacity, equal to two gallons. See MEASURE.

PECULATION. In Civil Law. The unlawful appropriation by a depositary of public funds, of the property of the government intrusted to his care, to his own use or that of others. Domat, Suppl. au Droit Public, 1. 3, tit. 5.

PECULIAR. In Ecclesiastical Law. A parish or church in England which has jurisdiction of ecclesiastical matters within itself and independent of the ordinary.

They may be either—

Royal, which includes the sovereign's free chapels;

Of the archbishops, excluding the jurisdiction of the bishops and archdeacons;

Of the bishops, excluding the jurisdiction of the bishop of the diocese in which they are situated;

Of the bishops in their own diocese, excluding archdiaconal jurisdiction;

Of deans, deans and chapters, prebendaries, and the like, excluding the bishop's jurisdiction in consequence of ancient compositions.

The court of peculiars has jurisdiction of causes arising in such of these peculiars as are subject to the metropolitan of Canterbury. In other peculiars the jurisdiction is exercised by commissaries. 1 Phill. Eccl. 202, n. 245; Skinn. 589; 3 Bla. Com. 65.

PECULIUM (Lat.). **In Civil Law.** The most ancient kind of *peculium* was the *peculium profectitium* of the Roman law, which signified that portion of the property acquired by a son or slave which the father or master allowed him, to be managed as he saw fit. In modern civil law there are other kinds of *peculium*, viz.: *peculium castrense*, which includes all movables given to a son by relatives and friends on his going on a campaign, all the presents of comrades, and his military pay and the things bought with it: *peculium quasi-castrense*, which includes all acquired by a son by performing the duties of a public or spiritual office or of an advocate, and also gifts from the reigning prince; *peculium adventitium*, which includes the property of a son's mother and relatives on that side of the house, and all which comes to him on a second marriage of his parents, and, in general, all his acquisitions which do not come from his father's property and do not come under *castrense* or *quasi-castrense peculium*.

The *peculium profectitium* remains the property of the father. The *peculium castrense* and *quasi-castrense* are entirely the property of the son. The *peculium adventitium* belongs to the son; but he cannot alien it nor dispose of it by will; nor can the father, unless under peculiar circumstances, alien it without consent of the son. Mackeldey, Civ. Law, §§ 557–559; Vicat, Voc. Jur.; Inst. 2. 9. 1; Dig. 15. 1. 5. 3; Pothier, ad Pand. lib. 50, tit. 17, c. 2, art. 3.

A master is not entitled to the extraordinary earnings of his apprentices which do not interfere with his services so as to affect the master's profits. An apprentice was therefore decreed to be entitled to salvage, in opposition to his master's claim for it. 2 Cra. 270.

PECUNIA (Lat.). **In Civil Law.** Property, real or personal, corporeal or incorporeal. Things in general (*omnes res*). So the law of the Twelve Tables said, *uti quisque pater familias legasset super pecuniâ tutelare rei suæ, ita jus esto:* in whatever manner a father of a family may have disposed of his *property* or of the tutorship of his things, let this disposition be law. 1 Leçons Elém. du Dr. Civ. Rom. 288. But Paulus, in l. 5, D. *de verb. signif.*, gives it a narrower sense than *res*, which he says means what is not included within patrimony, *pecunia* what is. Vicat, Voc. Jur. In a still narrower sense, it means those things only which have measure, weight, and number, and most usually strictly money. *Id.* The general sense of property occurs, also, in the old English law. Leg. Edw. Confess. c. 10.

Flocks were the first riches of the ancients; and it is from *pecus* that the words *pecunia, peculium, peculatus*, are derived. In old English law *pecunia* often retains the force of *pecus*. So often in Domesday: *pastura ibidem pecuniæ villæ, i. e.* pasture for *cattle* of the village. So *vivæ pecuniæ*, live stock. Leg. Edw. Confess. c. 10; Emendat. Willielmi Primi ad Leges Edw. Confess.; Cowel.

PECUNIA NUMERATA (Lat.). Money given in payment of a debt. Properly used of the creditor, who is properly said to *number*, *i. e.* count out, the money to the debtor which he must pay, and improperly of the debtor, who is said to number or count out the money to the creditor, *i. e.* to pay it. Vicat, Voc. Jur.; Calvinus, Lex.

PECUNIA NON-NUMERATA (Lat.). Money not paid or numbered. The *exceptio non-numeratæ pecuniæ* (plea of money not paid) is allowed to the principal or surety by the creditor. Calvinus, Lex.

PECUNIA TRAJECTITIA (Lat.). A loan of money which, either itself or in the shape of goods bought with it, is to be carried over the sea, the lender to take the risk from the commencement of voyage till arrival at port of destination, and on that account to have higher interest; which interest is not essential to the contract, but, if reserved, is called *fœnus nauticum*. Mackeldey, Civ. Law, § 398 *b*. The term *fœnus nauticum* is sometimes applied to the transaction as well as the interest, making it coextensive with *pecunia trajectitia*.

PECUNIARY. That which relates to money.

PECUNIARY CAUSES. Causes in ecclesiastical courts where satisfaction is sought for withholding ecclesiastical dues or the doing or neglecting some act connected with the church. 3 Bla. Com. 88. For what causes are ecclesiastical, see 2 Burn, Eccl. Law, 39.

PEDAGIUM (Lat. *pes*, foot). Money paid for passing by foot or horse through any forest or country. *Pupilla oculi*, p. 9, c. 7; Cassan de Coutum. Burgund. p. 118; Rot. Vasc. 22 Edw. III. m. 34.

PEDAULUS (Lat. *pes*, foot). **In Civil Law.** A judge who sat at the foot of the tribunal, *i. e.* on the lowest seats, ready to try matters of little moment at command of prætor. Calvinus, Lex.; Vicat. Voc. Jur.

PEDIGREE. A succession of degrees from the origin: it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths. This term is applied to persons or families who trace their origin or descent.

On account of the difficulty of proving in the ordinary manner, by living witnesses, facts which occurred in remote times, *hearsay evidence* has been admitted to prove a pedigree. See DECLARATION; HEARSAY.

PEDIS POSITIO (Lat. a planting or placing of the foot). A term used to denote an actual corporal possession. *Possessio est quasi pedis positio:* possession is as it were a planting of the foot. 3 Co. 42; 8 Johns. per *Kent*, C. J.; 5 Penn. 303; 2 N. & McC. 343. See PEDIS POSSESSIO.

PEDIS POSSESSIO (Lat.). A foothold; an actual possession. To constitute adverse possession, there must be *pedis possessio*, or a substantial inclosure. 2 Bouvier, Inst. n. 2193; 2 N. & M'C. 343.

PEDLARS. Persons who travel about the country with merchandise for the purpose of selling it.

Persons, except those peddling newspapers, Bibles, or religious tracts, who sell, or offer to sell, at retail, goods, wares, or other commodities, travelling from place to place, in the street, or through different parts of the country. Act of Congr. July 1, 1862.

They are obliged, under the laws of perhaps all the states, and of the United States, to take out licenses, and to conform to the regulations which those laws establish.

If the provisions of a state license and tax act are designed by the legislature to discriminate against non-resident merchants, and against goods sold from other states, in favor of resident merchants, and goods held in the state for sale, and if such discrimination be the practical effect of the law, it is unconstitutional, null and void. But the payment of taxes in the same state of a merchant does not of itself entitle him to sell his goods in all other states free of taxation. Each state may determine its own policy as to the levying of license taxes, and its laws are valid so long as they do not discriminate against citizens of other states; 12 Fed. Rep. 538, note; 12 Wall. 430; 8 *id.* 123; 100 U. S. 134; 102 U. S. 123; 33 Gratt. 898. See COMMERCE; 12 Report. 650.

PEERS (Lat. *pares*). The vassals of a lord; the freeholders of a neighborhood, before whom livery of seisin was to be made, and before whom, as the jury of the county, trials were had. 2 Bla. Com. 316. Trial by a man's peers or equals is one of the rights reserved by Magna Charta. 4 Bla. Com. 349. These vassals were called *pares curiæ*, which title see. 1 Washb. R. P. 23.

The nobility of England, who, though of different ranks, viz., dukes, marquises, earls, viscounts, and barons, yet are equal in their privileges of sitting and voting in the house of lords: hence they are called peers of the realm.

They are created by writ summoning them to attend the house of lords by the title intended to be given, or by letters patent directly conferring the dignity. The former is the more ancient way; but the grant by patent is more certain. See Sullivan, Lect. 19 *a*; 1 Woodd. Lect. 37.

Peers are tried by other peers in cases of treason, felony, and misprision of the same. In cases of treason, felony, and breach of the peace, they have no privilege from arrest. 1 Sharsw. Bla. Com. 401*, n. 11.

Bishops who sit in parliament are peers; but the word spiritual is generally added; *e. g.* "lords temporal and spiritual." 1 Sharsw. Bla. Com. 401*, n. 12.

Peerage may be for life, which does not make the peer a lord of parliament, *i. e.* entitle him to a seat in the house of lords; 1 Sharsw. Bla. Com. 401*, n. 10. A peerage is not transferable, except with consent of parliament; *Id.* A peerage is lost by attainder; 1 Bla. Com. 412*.

PEINE FORTE ET DURE (L. Fr.). **In English Law.** A punishment formerly inflicted in England on a person who, being arraigned of felony, refused to plead and put himself on his trial, and stubbornly stood mute. He was to be laid down, naked, on his back, on the ground, his feet and head and loins covered, his arms and legs drawn apart by cords, and as much weight of iron or stone as he could bear placed on his chest. He was to have the next day three morsels of barley bread, without drink; the next, three draughts, as much each time as he could drink, of the nearest stagnant water to the prison, without bread; and such was to be his diet on alternate days, till he died. This punishment was vulgarly called *pressing to death;* 2 Reeve, Hist. Eng. Law, 134; 4 Bla. Com. 324; Cowel; Britton, c. 4. fol. 11*. This punishment was introduced between 31 Edw. III. and 8 Hen. IV; 4 Bla. Com. 324; Year B. 8 Hen. IV. 1. Standing mute is now, by statute, in England, equivalent to a confession or verdict of guilty; 12 Geo. III. c. 20. See MUTE.

The only instance in which this punish-

ment has ever been inflicted in this country is that of Giles Cory, of Salem, who refused to plead when arraigned as a witch; Washb. Jud. Hist. 142; 1 Chandl. Cr. Tr. 122.

PELT WOOL. The wool pulled off the skin or pelt of a dead ram.

PENAL ACTION. An action for recovery of statute penalty. 3 Steph. Com. 535. See Hawk. Pl. Cr. *Informatio.* It is distinguished from a popular or *qui tam* action, in which the action is brought by the informer, to whom part of the penalty goes. A penal action or information is brought by an officer, and the penalty goes to the king; 1 Chitty, Gen. Pr. 25, note; 2 Archb. Pr. 188.

PENAL BILL. The old name for a bond with condition by which a person is bound to pay a certain sum of money or do a certain act, or, in default thereof, pay a certain sum of money by way of penalty. Jacob, Law Dict. *Bill.*

PENAL STATUTES. Those which inflict a penalty for the violation of some of their provisions.

It is a rule of law that such statutes must be construed strictly; 1 Bla. Com. 88; Espinasse, Pen. Actions, 1; Boscawen, Conv.; Cro. Jac. 415; 1 Comyns, Dig. 444; 5 *id.* 360; 1 Kent, 467. They cannot, therefore, be extended by their spirit or equity to other offences than those clearly described and provided for; 1 Paine, 32; 6 Cra. 171.

PENALTY. A clause in an agreement, by which the obligor agrees to pay a certain sum of money if he shall fail to fulfil the contract contained in another clause of the same agreement.

A penal obligation differs from an alternative obligation, for this is but one in its essence; while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place, the obligor has his option to require the fulfilment of the first obligation, or the payment of the penalty, in those cases which cannot be relieved in equity, when the penalty is considered as liquidated damages. Dalloz, Dict. *Obligation avec Clause penale.*

A distinction is made in courts of equity between penalties and forfeitures. In cases of forfeiture for the breach of any covenant other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, when the breach is capable of compensation; Eden, Inj. 22; 3 Ves. 692; 16 *id.* 403; 18 *id.* 58; 4 Bouvier, Inst. n. 3915.

For the distinction between a penalty and liquidated damages, see LIQUIDATED DAMAGES.

The penalty remains unaffected although the condition may have been partially performed: as, in a case where the penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars, which had been paid for ten years, the penalty was still valid; 5 Vt. 355.

The punishment inflicted by a law for its violation. The term is mostly applied to a pecuniary punishment. See 6 Pet. 404; 7 Wheat. 13; 10 *id.* 246; 1 Wash. C. C. 1; 2 *id.* 323; 1 Paine, 661; 1 Gall. 26; 2 *id.* 515; 1 Mas. 243; 7 Johns. 72; 1 Pick. 451; 4 Mass. 433; 15 *id.* 488; 8 Comyns, Dig. 846; 16 Viner, Abr. 301; 1 Vern. 83, n.; 1 Saund. 58, n.; 1 Swanst. 318.

PENANCE. In Ecclesiastical Law. An ecclesiastical punishment inflicted by an ecclesiastical court for some spiritual offence. Ayliffe, Parerg. 420.

PENCIL. An instrument made of plumbago, red chalk, or other suitable substance, for writing without ink.

It has been holden that a will written with a pencil could not on this account be annulled. 1 Phill. Eccl. 1; 2 *id.* 173. See WILL.

PENDENTE LITE (Lat.). Pending the continuance of an action; while litigation continues.

An administrator is appointed *pendente lite*, when a will is contested. 2 Bouvier, Inst. n. 1557. See ADMINISTRATOR; LIS PENDENS.

PENDENTES (Lat.). **In Civil Law.** The fruits of the earth not yet separated from the ground; the fruits hanging by the roots. Erskine, Inst. b. 2, lit. 2, s. 4.

PENETRATION. The act of inserting the penis into the female organs of generation. 9 C. & P. 118. See 5 C. & P. 321; 8 *id.* 614; 9 *id.* 31. It was once held that in order to commit the crime of rape it is requisite that the penetration should be such as to rupture the hymen; 5 C. & P. 321. But this case has since been expressly overruled; 2 Mood. Cr. Cas. 90; 9 C. & P. 752.

This has been denied to be sufficient to constitute a rape without emission. The statute 9 Geo. IV. c. 31, § 18, enacts that the carnal knowledge shall be deemed complete upon proof of penetration only. Statutes to the same effect have been passed in some of the United States; but these statutes have been thought to be merely declaratory of the common law; 3 Greenl. Ev. § 210. See, on this subject, 1 Hale, Pl. Cr. 628; 1 East, Pl. Cr. 437; 1 Chitty, Med. Jur. 386–395; 1 Russ. Cr. Law, 860; RAPE.

PENITENTIARY. A prison for the punishment of convicts.

There are two systems of penitentiaries in the United States, each of which is claimed to be the best by its partisans,—the Pennsylvania system and the New York system. By the former, convicts are lodged in separate, well-lighted, and well-ventilated cells, where they are required to work during stated hours. During the whole time of their confinement they are never permitted to see or speak with each other. Their usual employments are shoemaking, weaving, winding yarn, picking wool, and such like business. The only punishments to which convicts are subject are the privation of food for short periods, and confinement *without labor* in dark but well-aired cells: this discipline has been found sufficient to keep perfect order; the whip and all other corporeal punishments are prohibited. The advantages of the plan are numerous. Men cannot long remain in solitude without labor; convicts, when deprived of it, ask it as a favor, and, in order to retain it, use generally,

their best exertions to do their work well; being entirely secluded, they are of course unknown to their fellow-prisoners, and can form no combination to escape while in prison, or associations to prey upon society when they are out; being treated with kindness, and afforded books for their instruction and amusement, they become satisfied that society does not make war upon them, and more disposed to return to it, which they are not prevented from doing by the exposure of their fellow-prisoners when in a strange place; the labor of the convicts tends greatly to defray the expenses of the prison. The disadvantages which were anticipated have been found to be groundless. Among these were that the prisoners would be unhealthy; experience has proved the contrary: that they would become insane; this has also been found to be otherwise: that solitude is incompatible with the performance of business: that obedience to the discipline of the prison could not be enforced. These, and all other objections to this system, are by its friends believed to be without force.

The New York system, adopted at Auburn, which was probably copied from the penitentiary at Ghent, in the Netherlands, called La Maison de Force, is founded on the system of isolation and separation, as well as that of Pennsylvania, but with this difference, that in the former the prisoners are confined to their separate cells during the night only; during the working-hours in the daytime they labor together in workshops appropriated to their use. They eat their meals together, but in such a manner as not to be able to speak with each other. Silence is also imposed upon them at their labor. They perform the labor of carpenters, blacksmiths, weavers, shoemakers, tailors, coopers, gardeners, woodsawyers, etc. The discipline of the prison is enforced by stripes, inflicted by the assistant keepers, on the backs of the prisoners; though this punishment is rarely exercised. The advantages of this plan are that the convicts are in solitary confinement during the night; that their labor, by being joint, is more productive; that, inasmuch as a clergyman is employed to preach to the prisoners, the system affords an opportunity for mental and moral improvements. Among the objections made to it are that the prisoners have opportunities of communicating with each other and of forming plans of escape, and, when they are out of prison, of associating together in consequence of their previous acquaintance, to the detriment of those who wish to return to virtue, and to the danger of the public; that the discipline is degrading, and that it engenders bitter resentment in the mind of the convict.

See, generally, on the subject of penitentiaries, Report of the Commissioners (Messrs. King, Shaler, and Wharton) on the Penal Code of Pennsylvania; De Beaumont and De Tocqueville, on the Penitentiary System of the United States; Mease on the Penitentiary System of Pennsylvania; Carey on ditto; Reports of the Boston Prison Discipline Society; Livingston's excellent Introductory Report to the Code of Reform and Prison Discipline, prepared for the state of Louisiana; Encycl. Americ. *Prison Discipline;* De l'Etat actuel des Prisons en France, par L. M. Moreau Christophe; Dalloz, Dict. *Peine,* § 1, n. 3, and Supplem. *Prisons et Bagnes.*

PENNSYLVANIA. One of the thirteen original states of the United States of America.

It received its name from a royal charter granted March 4, 1681, by Charles II. to William Penn. By that charter, Penn was constituted the proprietary and governor of the province, and vested with power to enact laws, with the consent of the freemen, to execute said laws, to appoint judges and other officers, incorporate towns, establish ports, levy customs, import and export goods, sell lands creating a tenure, levy troops, make war, and exercise other attributes of sovereign power. Appeals in judicial matters lay to the crown, and all laws were liable to be avoided by the crown.

The first frame of government was adopted and promulgated on April 25, 1682. The government was to be by the governor and freemen in a provincial council and general assembly. Both of the latter were chosen annually by the people. All laws were to originate with the council. A governor, judges, and other officers were to be appointed, during good behavior, by the governor from a double list presented by the council or assembly.

On April 2, 1683, a new frame was adopted, reducing the numbers both of the council and assembly. In 1693 the proprietary was deprived of his government and the province placed under the government of New York. But in 1694 Penn was duly reinstated.

A new frame of government adopted on October 26, 1696, made some material alterations in the existing order of things. The power of originating laws was thereby first conferred on the assembly.

The charter of privileges granted by the proprietary and accepted by the assembly on October 28, 1701, confirming the foregoing provisions and making numerous others, continued the supreme law of the province during the residue of the proprietary government.

In 1776, after the declaration of American independence, a constitution was formed adapted to the altered circumstances of the country, which continued in force until 1790, when a new one was substituted. This was amended in 1838 by the introduction of some very radical changes. Other amendments were made in 1850, in 1857, and in 1864. In 1874 a new constitution was adopted, which remains still in force.

The form of government established is republican. Legislative, executive, and judicial powers are committed to three distinct departments, neither of which can exercise the powers of any other department.

The legislative power is vested in a general assembly, consisting of a senate and house of representatives, who sit in regular session every two years, beginning the first Tuesday of January, and at such other times as they are convened by the governor.

The supreme executive power is vested in a governor.

All judicial power is vested in a supreme court, in courts of oyer and terminer and general jail delivery, in courts of common pleas, orphans' courts, courts of quarter sessions of the peace, magistrate's courts, and in such other courts as the legislature may from time to time establish.

The members of the senate and house of representatives, the governor, and all judicial officers, are elected by the people, and hold their offices during limited periods. All elections by the citizens are made by ballot. Every male citizen twenty-one years of age, who shall have been a citizen of the United States at least one month, and who shall have resided in the state one year, and in the election district where he offers to vote two months immediately preceding the election, and who shall have within two years paid a state or county tax assessed at least two months, and paid at least one month, before the election, is entitled to the rights of an elector; and a citizen of the United States, who had pre-

viously been a qualified voter, or native born citizen, of the state, and removed therefrom and returned, is entitled to vote after a new residence within the state for six months, if he has resided in the election district and paid taxes as aforesaid. Citizens of the United States, between the ages of twenty-one and twenty-two, are entitled to vote without the payment of taxes, subject to the restrictions respecting residence already mentioned. For the purpose of voting, no person is deemed to have gained or lost a residence by reason of military or naval service, nor while a student in any institution of learning, nor while confined in any prison or other institution maintained at the puble expense. Qualified electors in actual military service of the United States or of the state, under a requisition from the president of the United States, or under authority of the commonwealth, are also entitled to vote, under regulations prescribed by law, without being present at their usual place of election.

The general election is held on the Tuesday next following the first Monday of November in every year, but this date is liable to be changed by legislative enactment. Elections for municipal, ward, borough, and township officers for regular terms of service are held on the third Tuesday of February. All laws regarding elections are uniform throughout the state. Election districts are formed and divided as necessity may arise by the courts of quarter sessions of the respective counties.

Bribery on the part of a candidate is punished by incapacity to hold offices of trust or profit and on the part of all concerned by a deprivation of the right of suffrage for a limited time.

Election officers are elected annually by the citizens of each district. No person is eligible who is in the service of the United States, or in that of the state, or any county thereof, except certain subordinate officers. Overseers of elections for each district may be appointed by the court of common pleas. All contested elections of public officers are tried by the courts of law.

The members of the general assembly are chosen every second year, and whenever a vacancy occurs in either house the presiding officer thereof issues his writ to fill such vacancy for the residue of the terms. No person is competent to serve who has been convicted of an infamous crime, or who is in the service of the United States, or of the commonwealth. Members of the senate must be at least twenty-five years old, and representatives twenty-one. They must have been citizens and inhabitants of the state four years, and inhabitants of their respective districts one year next before their election (unless absent on public business of the United States or of the state), and must reside in their respective districts during continuance in office. They are paid a fixed salary which can neither be increased nor diminished during their term of office.

The members of the house of representatives are apportioned and distributed every tenth year among the various counties throughout the state in proportion to the population, on a ratio obtained by dividing the total population of the state by two hundred. Every county is entitled to at least one representative, and every city containing one ratio or more, is entitled to elect separately its representatives.

Every city entitled to more than four representatives, or county containing over one hundred thousand inhabitants, is divided into districts which elect representatives according to their population, but no district is entitled to elect more than four representatives.

The term of office of a member of the house of representatives is two years.

The state is divided into fifty senatorial districts equal in population, each of which is entitled to elect one senator. Each county containing one or more senatorial ratios of population (such ratios to be estimated by dividing the total population of the state by fifty) is entitled to one senator for each ratio, and to an additional senator for a surplus of population exceeding three-fifths of a ratio. No county, however, forms a separate district unless it contains four-fifths of a ratio, except where adjoining counties are entitled to one or more senators, when such county is entitled to a senator on exceeding one-half a ratio. No county is divided unless entitled to two or more senators. No ward, borough, or township is divided in the formation of districts, nor is any city or county entitled to more than one-sixth of the total number of senators. The term of office of senators is four years.

The powers and privileges of the legislature do not differ materially from those which belong to the legislatures of the other states of the United States. The constitution imposes numerous restrictions upon the general power to legislate, notably prohibiting special legislation in many instances and putting bounds to the power of appropriating the public moneys to charitable objects. All laws relating to taxation and courts of justice are general and uniform in their operation throughout the state. Restrictions are laid upon the right of the state or of any municipality therein to contract debts. Most of the essential provisions of Magna Charta are embodied in the Declaration of Rights.

The supreme executive power of the state is vested in a governor, who is chosen by the electors qualified to elect members of the legislature. His term of office is four years from the third Tuesday of January next ensuing his election, and he is incapable of re-election to office for the next succeeding term. He must be at least thirty years of age; and he must have been a citizen and an inhabitant of the state seven years next before his election, unless he shall have been absent on the public business of the United States or of the state. No member of congress or person holding any office under the United States or of the state can exercise the office of governor.

The governor is ex officio commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they are called into the actual service of the United States. It is his duty to see that the laws of the commonwealth are executed. With the advice and consent of two thirds of the senate he appoints a secretary of the commonwealth and an attorney general during pleasure, and a superintendent of public instruction for four years. If vacancies in these offices occur during a recess of the senate, he may grant commissions to fill them to expire at the close of the next session. In cases of vacancies in the offices of auditor general, state treasurer, secretary of internal affairs, superintendent of public instruction, in a judicial office, or any other elective office he may be authorized to fill, he has power to fill the vacancy (the consent of the senate being necessary if in session) until the next general election, unless the vacancy occurs within three months before such election, in which case his nominee remains in office until the second succeeding general election. All commissions must be in the name and by authority of the commonwealth, and be sealed with the state seal and signed by the governor. The governor has also power to

remit fines and forfeitures, and grant reprieves, commutations of sentence, and pardons, on recommendation of three or more of a board of pardons consisting of the lieutenant-governor, secretary of the commonwealth, attorney-general, and secretary of internal affairs. He may convene the legislature on extraordinary occasions, or the senate for the transaction of executive business, and in case of disagreement between the two houses with respect to the time of adjournment, he may adjourn them to such time as he may think proper, not more remote than four months. He may require from the various heads of executive departments information as regards the duties of their respective offices, and it is made his duty to communicate to the legislature from time to time information of the state of the commonwealth, and recommend to their consideration such measures as he may deem expedient. He has a veto power over every bill passed by the legislature; but if, notwithstanding his objection, two-thirds of both houses agree to the bill after reconsideration, it becomes a law.

In case of the death or resignation of the governor, his removal from office, or other disability, the office devolves upon the lieutenant-governor, and in case of a vacancy in that office, on the president pro tem. of the senate.

Contested elections for governor or lieutenant-governor are decided by a committee from both houses of the assembly. The chief justice presides. In such cases the next preceding officers continue in office until their successors are duly qualified.

The other officers in the executive department consist of the lieutenant-governor, a secretary of internal affairs, each elected for four years, secretary of the commonwealth, attorney-general and superintendent of public instruction appointed as above stated, auditor-general elected for three years, and state treasurer elected for two years. No persons elected to the last two offices may hold the same office for two consecutive terms. The governor and all civil officers are liable to impeachment by the house of representatives. The senate have the exclusive right to try all impeachments. No person can be convicted without the concurrence of two-thirds of that body, nor can the judgment extend beyond removal from office and incapacity to hold offices of trust or profit under the state.

All appointed officers except judges and the superintendent of public instruction may be removed by the power who appointed them, and all officers elected by the people, except governor, lieutenant-governor, members of the assembly, and judges of the courts, may be removed by the governor on reasonable cause on address of two-thirds of the senate.

The supreme court is the highest judicial tribunal of the state. It is composed of seven judges elected by the qualified electors of the state at large. They hold their offices for the term of twenty-one years if they so long behave themselves well, but are not again eligible. They must during their term of office reside within the commonwealth. The jurisdiction of the court extends over the state, and the judges are, ex-officio, justices of oyer and terminer and general jail delivery in the several counties. The court is principally a court of errors and appeals, and its writs run to all other courts in the state. It has original jurisdiction only in cases of injunction where a party corporation is defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto to officers whose jurisdiction extends over the whole state. In all cases of felonious homicide, and in such other criminal cases as are provided by law, the accused is entitled of right to remove the proceedings to this court for review. It holds its sessions once in each year at least, in Philadelphia, Pittsburg, and Harrisburg, for the adjudication of writs of error, appeals, etc. etc., and certiorari.

For the courts of common pleas, the state is divided into forty-four districts; these districts are subject to change by the legislature, but no more than four counties can at any time be included in one judicial district. Most civil issues are tried by the courts of common pleas, but their decisions are reviewable by the supreme court. All judges of these and every other court (except those of the supreme court) required to be learned in the law, are elected by the qualified electors of the district in which they are to preside, and hold office for ten years if they so long behave themselves well. They must reside within their respective districts during their terms of office, and are liable on sufficient cause to be removed by the governor on address of two-thirds of each house of the assembly. Every district is entitled to one court of common pleas, and one president judge learned in the law, and such additional judges as the general assembly may provide. In every county constituting a separate judicial district such associate judges must be learned in the law.

In Philadelphia there are four, and in Allegheny county two courts of common pleas of co-ordinate powers, but more may be created by the legislature. In each county the judges of the courts of common pleas are ex-officio justices of oyer and terminer, quarter sessions of the peace, and general gaol delivery, and of the orphans' court, and within their respective districts are justices of the peace as to criminal matters.

In Philadelphia and Allegheny counties the judges of the common pleas serve in rotation as judges of quarter sessions and oyer and terminer.

In counties exceeding in population one hundred and fifty thousand, separate orphans' courts may be established, to consist of one or more judges learned in the law. Only three such are now established, viz.: in Philadelphia, Allegheny, and Luzerne counties. The orphans' courts have general jurisdiction over the settlement of decedents' estates, and the accounts of executors, administrators, and guardians, subject, however, to an appellate jurisdiction in the supreme court. No new courts can be created to exercise the powers now vested in the courts of common pleas and orphans' courts. All judges are paid by fixed salaries, and can be called upon only to discharge judicial duties. Aldermen, justices of the peace, and magistrates are elected in the various counties for terms of five years. A register's office for the probate of wills and granting letters of administration, and also an office for recording deeds, are maintained in each county.

Civil writs issue, generally, from the offices of the prothonotaries or clerks of the courts in each county; and the style of all process is required to be "The Commonwealth of Pennsylvania."

PENNY. The name of an English coin, of the value of one-twelfth part of a shilling.

While the United States were colonies, each adopted a monetary system composed of pounds, shillings, and pence. The penny varied in value in the different colonies.

PENNYWEIGHT. A troy weight which weighs twenty-four grains, or one-twentieth part of an ounce. See WEIGHTS.

PENSION. A stated and certain allowance granted by the government to an individual, or those who represent him, for valuable services performed by him for the country. The government of the United States has, by general laws, granted pensions; (1) to any officer of the army, including regulars, volunteers, and militia, or any officer in the navy or marine corps, or any enlisted man however employed, in the military or naval service of the United States, whether regularly mustered or not, disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States—and in the line of duty; (2) any master serving on a gunboat, or any pilot, engineer, sailor, or other person not regularly mustered, serving upon any gunboat or war vessel of the United States, disabled by any wound or injury received so as to be incapacitated for procuring subsistence by manual labor; (3) any volunteer, or person not an enlisted soldier, who was incapacitated while rendering service in any engagement under the order of an officer of the United States; (4) any acting assistant, or contract surgeon disabled by any wound or disease contracted in the line of duty; (5) any provost-marshal, deputy provost-marshal, or enrolling officer disabled in the line of his duty; R. S. § 4692. Provision is also made for the payment of pensions to the survivors of the wars of the revolution, of 1812, and with Mexico; to the widows and children of those who served in these wars; and also to those who served in the civil war and to their widows and children under specified conditions; R. S. 4692–4791. By the act of Jan. 25, 1879, ch. 23, it is provided that all pensions which have been or may hereafter be granted for a cause which originated in the service since March 4, 1861, shall commence from the death or discharge of the person on whose account the claim has been granted, if the disability occurred prior to the discharge, and if the disability occurred after the discharge, then from the date of actual disability; R. S. Supp. p. 468.

PENSIONER. One who is supported by an allowance at the will of another. It is more usually applied to him who receives an annuity or pension from the government.

PEONIA. In Spanish Law. A portion of land which was formerly given to a simple soldier on the conquest of a country. It is now a quantity of land of different size in different provinces. In the Spanish possessions in America it measured fifty feet front and one hundred feet deep. 2 White, Rec. 49; 12 Pet. 444, notes.

PEOPLE. A state: as, the people of the state of New York. A nation in its collective and political capacity. 4 Term, 783. See 6 Pet. 467.

When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. Thus, the people elect delegates to a constitutional convention; the people choose the officers under the constitution, and so on. For these and similar purposes, the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected. Cooley, Const. 267.

The word people occurs in a policy of insurance. The insurer insures against "detainments of all kings, princes, and people." He is not by this understood to insure against any promiscuous or lawless rabble which may be guilty of attacking or detaining a ship; 2 Marsh. Ins. 508. See BODY POLITIC; NATION.

PER. By. When a writ of entry is sued out against the alienee, or descendant of the original disseisor, it is then said to be brought in the *per*, because the writ states that the tenant had not the entry but *by* the original wrong-doer. 3 Bla. Com. 181. See ENTRY, WRIT OF.

PER ÆS ET LIBRAM (Lat. *æs*, brass, *libram*, scale). **In Civil Law.** A sale was said to be made *per æs et libram* when one called *libripens* held a scale (*libra*), which the one buying struck with a brazen coin (*æs*), and said, "I say, by the right of a Roman, this thing is mine," and gave the coin to the vendor, in presence of at least three witnesses. This kind of sale was used in the emancipation of a son or slave, and in making a will. Calvinus, Lex. *Mancipatio;* Vicat, Voc. Jur. *Mancipatio.*

PER ALLUVIONEM (Lat.). **In Civil Law.** By alluvion, or the gradual and imperceptible increase arising from deposit by water. Vocab. Jur. Utr. *Alluvio;* Angell & A. Waterc. 53–57.

PER ANNULUM ET BACULUM (Lat.). **In Ecclesiastical Law.** The symbolical investiture of an ecclesiastical dignity was *per annulum et baculum*, *i. e.* by staff and crosier. 1 Bla. Com. 378, 379; 1 Burn, Eccl. Law, 209.

PER AVERSIONEM (Lat.). **In Civil Law.** By turning away. Applied to a sale not by measure or weight, but for a single price for the whole in gross: *e. g.* a sale of all the wine of a vineyard for a certain price. Vocab. Jur. Utr. *Aversio.* Some derive the meaning of the phrase from a *turning away* of the risk of a deficiency in the quantity from the seller to the buyer; others, from *turning away* the head, *i. e.* negligence in the sale; others think *aversio* is for *adversio.* Calvinus, Lex.; 2 Kent, 640; 4 *id.* 517.

PER CAPITA (Lat. by the head or polls). When descendants take as individuals, and not by right of representation (*per stirpes*), they are said to take *per capita.* For example, if a legacy be given to the issue of A

B, and A B at the time of his death shall have two children and two grandchildren, his estate shall be divided into four parts, and the children and grandchildren shall each have one of them. 3 Ves. 257; 13 *id.* 344; 2 Bla. Com. 218; 6 Cush. 158, 162; 2 Jarm. Wills, Perkins' Notes, 47; 3 Beav. 451; 4 *id.* 239; 2 Steph. Com. 253; 3 *id.* 197; 2 Woodd. Lect. 114.

PER AND CUI. When a writ of entry is brought against a second alienee or descendant from the disseisor, it is said to be in the *per* and *cui*, because the form of the writ is that the tenant had not entry but *by* and *under* a prior allienee, *to* whom the intruder himself demised it; 3 Bla. Com. 181. See ENTRY, WRIT OF.

PER CURIAM (Lat. by the court). A phrase which occurs constantly in the reports. It distinguishes the opinion or decision of the court from that of a single judge; Abb. Law Dic. 353. It designates, in Pennsylvania, opinions written by the presiding justice.

PER FORMAM DONI (Lat. by the form of the gift). According to the line of descent prescribed in the conveyance of the ancestor or donor of estate-tail; 2 Bla. Com. 113*; 3 Harr. & J. 323; 1 Washb. R. P. 74, 81.

PER FRAUDEM (Lat.). A replication to a plea where something has been pleaded which would be a discharge if it had been honestly pleaded that such a thing has been obtained by fraud: for example, where, on debt on a statute, the defendant pleads a prior action depending, if such action has been commenced by fraud the plaintiff may reply *per fraudem*; 2 Chitty, Pl. *675.

PER INFORTUNIUM (Lat. by misadventure). **In Criminal Law.** Homicide *per infortunium*, or by misadventure, is said to take place when a man in doing a lawful act, without any intent to hurt, unfortunately kills another; Hawk. Pl. Cr. b. 1, c. 11; Fost. Cr. Law, 258, 259; Co. 3d Inst. 56.

PER MINAS (Lat. by threats). When a man is compelled to enter into a contract by threats or menaces, either for fear of loss of life or mayhem, he may avoid it afterwards; 1 Bla. Com. 131; Bacon, Abr. *Duress*, *Murder* (A). See DURESS.

PER MY ET PER TOUT (Law Fr. by the moiety, or half, and by the whole). The mode in which joint tenants hold the joint estate, the effect of which, technically considered, is that for purposes of tenure and survivorship each is the holder of the whole, but for purposes of alienation each has only his own share, which is presumed in law to be equal; 1 Washb. R. P. 406; 2 Bla. Com. 182.

PER QUOD CONSORTIUM AMISIT (Lat. by which he lost her company). If a man's wife is so badly beaten or ill used that thereby he loses her company and assistance for any time, he has a separate remedy by an action of trespass (in the nature of an action on the case) *per quod consortium amisit*, in which he shall recover satisfaction in damages; 3 Bla. Com. 140; Cro. Jac. 501, 538; 1 Chitty, Gen. Pr. 59.

PER QUOD SERVITIUM AMISIT (Lat. by which he lost her or his service). Where a servant has been so beaten or injured that his or her services are lost to the master, the master has an action of trespass *vi et armis*, *per quod servitium amisit*, in which he must allege and prove the special damage he has sustained; 3 Bla. Com. 142. This action is commonly brought by the father for the seduction of his daughter, in which case very slight evidence of the relation of master and servant is necessary; but still some loss of service, or some expense, must be shown; 5 East, 45; 6 *id.* 391; 11 *id.* 23; T. Raym. 459; 2 Term, 4; 5 B. & P. 466; 1 Stark. 287; 2 *id.* 493; 5 Price, 641; 11 Ga. 603; 15 Barb. 279; 18 *id.* 212; 8 N. Y. 191; 11 *id.* 343; 14 *id.* 413; 20 Penn. 354; 5 Md. 211; 1 Wisc. 209; 3 Sneed, 29.

PER STIRPES (Lat. *stirps*, trunk or root of a tree or race). By or according to stocks or roots; by right of reprensentation. Mass. Gen. Stat. 1860, c. 9, § 12; 6 Cush. 158, 162; 2 Bla. Com. 217, 218; 2 Steph. 253; 2 Woodd. Lect. 114, 115; 2 Kent, 425.

PER TOUT ET NON PER MY (Law Fr. by the whole and not by the moiety). Where an estate in fee is given to a man and his wife, they cannot take the estate by moieties, but both are seized of the entirety, *per tout et non per my*. 2 Bla. Com. 182. The late married woman's acts have been held to abolish estates by entireties; 76 Ill. 57; 56 N. H. 105; 76 N. Y. 262; *contra*, 57 Ind. 412; s. c. 26 Am. Rep. 64, and n.; 25 Mich. 350; 56 Penn. 106. See 20 Alb. L. J. 346.

PER UNIVERSITATEM (Lat. by the whole). Used of the acquisition of any property as a whole, in opposition to an acquisition by parts: *e. g.* the acquisition of an inheritance, or of the separate property of the son (*peculium*), etc. Calvinus, Lex. *Universitas*.

PERAMBULATIONE FACIENDA, WRIT DE. In English Law. The name of a writ which is sued by consent of *both* parties when they are in doubt as to the bounds of their respective estates: it is directed to the sheriff to make perambulation, and to set the bounds and limits between them in certainty. Fitzh. N. B. 309.

"The writ *de perambulatione faciendâ* is not known to have been adopted in practice in the United States," says Professor Greenleaf, Ev. § 146, n.; "but in several of the states remedies somewhat similar in principle have been provided by statutes."

PERCEPTION (From *per* and *capere*). The taking possession of. For example, a

lessee or tenant before perception of the crops, *i. e.* before harvesting them, has a right to offset any loss which may happen to them, against the rent; but after the perception they are entirely at his risk. Mackeldey, Civil Law, § 378. Used of money, it means the counting out and payment of a debt. Also used for food due to soldiers. Vicat, Voc. Jur.

PERCH. The length of sixteen feet and a half; a pole or rod of that length. Forty perches in length and four in breadth make an acre of land.

PERCOLATION. See SUBTERRANEAN WATERS.

PERDONATIO UTLAGARIÆ (Lat.). **In English Law.** A pardon for a man who, for contempt in not yielding obedience to the process of the king's courts, is outlawed, and afterwards, of his own accord, surrenders.

PERDUELLIO (Lat.). **In Civil Law.** At first, an honorable enmity to the republic; afterwards, a traitorous enmity of a citizen; consisting in being of a hostile disposition towards the republic, *e. g.* treason aiming at the supreme power, violating the privileges of a Roman citizen by beating him, etc., attempting any thing against the person of the emperor, and, in general, any open hostility to the republic. Sometimes used for the enemy or traitor himself. *Perduellio* was distinguished from *crimen imminutæ majestatis*, as being an attempt against the whole republic, punishable in *comitia centuriata*, by crucifixion and by infamy after death. Calvinus, Lex.; Vicat, Voc. Jur.

PEREGRINI (Lat.). **In Civil Law.** Under the denomination of *peregrini* were comprehended all who did not enjoy any capacity of the law, namely, slaves, alien enemies, and such foreigners as belonged to nations with which the Romans had not established relations. Savigny, Dr. Rom. § 66.

PEREMPTORIUS (Lat. from *perimere*, to destroy). **In Civil Law.** That which takes away or destroys forever: hence, *exceptio peremptoria*, a plea which is a perpetual bar. See PEREMTORY. Bracton, lib. 4, c. 20; Fleta, lib. 6, c. 36, § 3; Calvinus, Lex.

PEREMPTORY. Absolute; positive. A final determination to act, without hope of renewing or altering. Joined to a substantive, this word is frequently used in law: as, peremptory action; Fitzh. N. B. 35, 38, 104, 108; peremptory nonsuit; *id.* 5, 11; peremptory exception; Bracton, lib. 4, c. 20; peremptory undertaking; 3 Chitty, Pract. 112, 793; peremptory challenge of jurors; Inst. 4. 13. 9; Code, 7. 50. 2; 8. 36. 8; Dig. 5. 1. 70. 73.

PEREMPTORY CHALLENGE. A challenge without cause given, allowed to prisoner's counsel in criminal cases, up to a certain number of jurors. 11 Chitty, Stat. 59, 689; 2 Hargr. St. Tr. 808; 4 *id.* 1; Fost. Cr. Law, 42; 4 Bla. Com. 353*.

PEREMPTORY DEFENCE. A defence which insists that the plaintiff never had the right to institute the suit, or that, if he had, the original right is extinguished or determined. 4 Bouvier, Inst. n. 4206.

PEREMPTORY EXCEPTION. Any defence which denies entirely the ground of action; 1 White, Rec. 283. So of a demurrer; 1 Tex. 364.

PEREMPTORY MANDAMUS. A mandamus requiring a thing to be done absolutely. It is usually granted after failure to show satisfactory cause on an alternative mandamus. No other return will be permitted but absolute obedience; 3 Bla. Com. *110; Tapp. Mand. 400 *et seq.* See MANDAMUS.

PEREMPTORY PLEA. A plea which goes to destroy the right of action itself; a plea in bar or to the action; 3 Steph. Com. 576; 3 Woodd. Lect. 57; 2 Saunders, Pl. & Ev. 645; 3 Bouvier, Inst. n. 2891.

PERFECT. Complete.

This term is applied to obligations in order to distinguish those which may be enforced by law, which are called *perfect*, from those which cannot be so enforced, which are said to be *imperfect*.

PERFIDY. The act of one who has engaged his faith to do a thing, and does not do it, but does the contrary. Wolff, § 390.

PERFORMANCE. The act of doing something. The thing done is also called a performance: as, Paul is exonerated from the obligation of his contract by its performance.

When a contract has been made by parol, which under the Statute of Frauds and Perjuries could not be enforced, because it was not in writing, and the party seeking to avoid it has received the whole or a part performance of such agreement, he cannot afterwards avoid it; 14 Johns. 15; 1 Johns. Ch. 273; and such part performance will enable the other party to prove it *aliunde;* 1 Pet. C. C. 380; 1 Rand. 165; 1 Blackf. 58; 2 Day, 255; 5 *id.* 67; 1 Des. 350; 1 Binn. 218; 1 Johns. Ch. 131, 146; 3 Paige, Ch. 545.

PERIL. The accident by which a thing is lost. Leçons Elém. Dr. Rom. § 911.

In Insurance. The risk, contingency, or cause of loss insured against, in a policy of insurance. See RISK; INSURANCE.

PERILS OF THE SEA. A phrase contained in bills of lading, and a class of dangers to goods carried, the effects of which the carriers do not undertake to insure against in virtue of their general undertaking.

Bills of lading generally contain an exception that the carrier shall not be liable for "perils of the sea." What is the precise import of this phrase is not, perhaps, very exactly settled. In a strict sense, the words perils of the sea denote the natural accidents peculiar to the sea; but in more than one instance they have been held to extend to events not attributable to natural causes. For in-

stance, they have been held to include a capture by pirates on the high sea, and a case of loss by collision of two ships, where no blame is imputable to the injured ship; Ab. Shipp. pt. 3, c. 4, §§ 1–6; Park. Ins. c. 3; Marsh, Ins. b. 1, c. 7, p. 214; 1 Bell, Com. 579; 3 Kent, 299–307; 3 Esp. 67.

The burden of proof is upon the ship-owner to show that an injury was occasioned by one of the excepted perils; 28 Am. L. Reg. 310.

It has indeed been said that by perils of the sea are properly meant no other than inevitable perils or accidents upon the sea, and that by such perils or accidents common carriers are *prima facie* excused, whether there be a bill of lading containing the 'expression of "peril of the sea" or not; 1 Conn. 487.

It seems that the phrase *perils of the sea*, on the western waters of the United States, signifies and includes *perils of the river;* 8 Ala. 176.

If the law be so, then the decisions upon the meaning of these words become important in a practical view in all cases of maritime or water carriage.

It seems that a loss occasioned by leakage which is caused by rats gnawing a hole in the bottom of the vessel is not, in the English law, deemed a loss by peril of the sea or by inevitable casualty; 1 Wils. 281; 4 Campb. 203. But if the master had used all reasonable precautions to prevent such loss, as by having a cat on board, it seems agreed it would be a peril of the sea or inevitable accident; Abb. Shipp. pt. 3, c. 3, § 9. But see 3 Kent, 299–301. In conformity to this rule, the destruction of goods at sea by rats has, in Pennsylvania, been held a peril of the sea, where there has been no default in the carrier; 1 Binn. 592. But see 6 Cow. 266; 3 Kent, 248, n. *c*. On the other hand, the destruction of a ship's bottom by worms in the course of a voyage has, both in America and England, been deemed not to be a peril of the sea, upon the ground, it would seem, that it is a loss by ordinary wear and decay; Park, Ins. c. 3; 1 Esp. 444; 2 Mass. 429. But see 2 Caines, 85. See, generally, ACT OF GOD; FORTUITOUS EVENT; Marsh. Ins. ch. 7, ch. 12, § 1; Phill. Ins.; Pars. Marit. Law.

PERIPHRASIS. Circumlocution; the use of other words to express the sense of one.

Some words are so technical to their meaning that in charging offences in indictments they must be used or the indictment will not be sustained: for example, an indictment for treason must contain the word *traitorously;* an indictment for burglary, *burglariously;* and *feloniously* must be introduced into every indictment for felony; 1 Chitty, Cr. Law, 242; Co. 3d Inst. 15; Carth. 319; 2 Hale, Pl. Cr. 172, 184: 4 Bla. Com. 307; Hawk. Pl. Cr. b. 2, c. 25, s. 55; 1 East, Pl. Cr. 115; Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 6); Cro. Car. c. 37

PERISH. To come to an end; to cease to be; to die.

What has never existed cannot said to have perished.

When two or more persons die by the same accident, as a shipwreck, no presumption arises that one perished before the other.

PERISHABLE GOODS. Goods which are lessened in value and become worse by being kept.

Losses due to the natural decay, deterioration, and waste of perishable goods in the hands of a carrier are excusable. Reference must always be had, however, to the nature and inherent qualities of the articles in question, their unavoidable exposure at the time and place, and under the general circumstances, while in the charge of a carrier of ordinary prudence, and their condition when entrusted to him; Shoul. Bail. 397; 31 Am. Rep. 567.

PERJURY. In Criminal Law. The wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. 2 Whart. Cr. Law, § 1244.

The wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry. 2 Bish. Cr. Law, § 1015.

The intention must be wilful. The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made; for if it has arisen in consequence of inadvertency, surprise, or mistake of the import of the question, there was no corrupt motive; Hawk. Pl. Cr. b. 1, c. 69, s. 2; Cro. Eliz. 492; 2 Show. 165; 4 McLean, 113; 3 Dev. 114; 7 Dowl. & R. 665; 5 B. & C. 346; 7 C. & P. 17; 11 Q. B. 1028; 1 Rob. Va. 729; 3 Ala. N. S. 602. But one who swears wilfully and deliberately to a matter which he rashly believes, which is false, and which he had no probable cause for believing, is guilty of perjury; 6 Binn. 249. See Baldw. 370; 1 Bail. 50; 4 McLean, 113.

The oath must be false. The party must believe that what he is swearing is fictitious; and if, intending to deceive, he asserts that which may happen to be done without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him; Co. 3d Inst. 166; Hawk. Pl. Cr. b. 1, c. 69, s. 6. See 4 Mo. 47; 4 Zabr. 455: 9 Barb. 567; 1 C. & K. 519. As, if a man swears that C D revoked his will in his presence, if he really had revoked it, but it was unknown to the witness that he had done so, it is perjury; Hetl. 97.

The party must be lawfully sworn. The person by whom the oath is administered must have competent authority to receive it;

an oath, therefore, taken before a private person, or before an officer having no jurisdiction, will not amount to perjury. "For where the court hath no authority to hold plea of the cause, but it is *coram non judice*, there perjury cannot be committed;" 1 Ind. 232; 1 Johns. 498; 9 Cow. 30; 3 M'Cord, 308; 4 *id.* 165; 3 C. & P. 419; 4 Hawks, 182; 1 N. & M'C. 546; 3 M'Cord, 308; 2 Hayw. 56; 8 Pick. 453; 12 Q. B. 1026; Dearsl. C. C. 251; 2 Russ. Cr. 520; Co. 3d Inst. 166.

The proceedings must be judicial; 5 Mo. 21; 1 Bail. 595; 11 Metc. 406; 5 Humphr. 83; 1 Johns. 49; Wright, Ohio, 173; R. & R. 459; 24 Alb. L. J. 312. Proceedings before those who are in any way intrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose; 2 Russ. Cr. 518; Hawk. Pl. Cr. b. 1, c. 69, s. 3. See 9 Pet. 238; 2 Conn. 40; 11 *id.* 408; 4 M'Cord, 165. Perjury cannot be committed where the matter is not regularly before the court; 4 Hawks, 182; 2 Hayw. 56; 3 M'Cord, 308; 8 Pick. 453; 1 N. & M'C. 546; 9 Mo. 824; 18 Barb. 407; 10 Johns. 167; 26 Me. 33; 7 Blackf. 25; 5 B. & Ald. 634; 1 C. & P. 258; 9 *id.* 513.

The assertion must be absolute. If a man, however, swears that he *believes* that to be true which he knows to be false, it will be perjury; 10 Q. B. 670; 3 Wils. 427; 2 W. Blackst. 881; 1 Leach, 232; 6 Binn. 249; Gilbert, Ev. Lofft ed. 662. It is immaterial whether the testimony is given in answer to a question or voluntarily; 3 Zabr. 49; 12 Metc. 225. Perjury cannot be assigned upon the valuation, under oath, of a jewel or other thing the value of which consists in estimation; Sid. 146; 1 Kebl. 510. But in some cases a false statement of opinion may become perjury; 10 Q. B. 670; 15 Ill. 357; 3 Ala. N. S. 602; 3 Strobh. 147; 1 Leach, C. C. 325.

The oath must be material to the question depending; 1 Term, 63; 12 Mass. 274; 3 Murph. 123; 4 Mo. 47; 2 Ill. 80; 9 Miss. 149; 6 Penn. 170; 2 Cush. 212. Where the facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to a legal perjury; 2 Russ. Cr. 521; Co. 3d Inst. 167; 8 Ves. 35; 2 Rolle, 41, 42, 369; 1 Hawk. Pl. Cr. b. 1, c. 69, s. 8; Bacon, Abr. *Perjury* (A); 2 N. & M'C. 18; 2 Mo. 158. But every question in cross-examination which goes to the credit of a witness, as, whether he has been before convicted of felony, is material; 3 C. & K. 26; 2 Mood. C. C. 263; 1 C. & M. 655. And see 1 Ld. Raym. 257; 10 Mod. 195; 8 Rich. 456; 9 Mo. 824; 12 Metc. 225. False evidence, whereby, on the trial of a cause, the judge is induced to admit other material evidence, even though the latter evidence is afterwards withdrawn by counsel, or though it was not legally receivable, is indictable as perjury; 2 Den. C. C. 302; 3 C. & K. 302.

It is not within the plan of this work to cite all the statutes passed by the general government or the several states on the subject of perjury. It is proper, however, here to transcribe a part of the thirteenth section of the act of congress of March 3, 1825, which provides as follows: "If any person in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence. And if any person or persons shall knowingly or willingly procure any such perjury to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence;" R. S. § 5392. See 4 Blackf. 146; 15 N. H. 83; 9 Pet. 238; 2 McLean, 135; 1 Wash. C. C. 84; 2 Mas. 69.

In general, it may be observed that a perjury is committed as well by making a false affirmation as a false oath. See, generally, 16 Viner, Abr. 307; Bacon, Abr.; Comyns, Dig. *Justices of the Peace* (B 102–106); 4 Bla. Com. 137–139; Co. 3d Inst. 163–168; Hawk. Pl. Cr. b. 1, c. 69; Russ. Cr. b. 5, c. 1; Whart. Cr. L.; Bish. Cr. Law; 2 Chitty, Cr. Law, c. 9; Rosc. Cr. Ev.; Burn, Just.; Williams, Just.

PERMANENT TRESPASS. A trespass consisting of trespasses of one and the same kind, committed on several days, which are in their nature capable of renewal or continuation, and are actually renewed or continued from day to day, so that the particular injury done on each particular day cannot be distinguished from what was done on another day. In declaring for such trespasses, they may be laid with a continuando; 3 Bla. Com. 212; Bacon, Abr. *Trespass* (B 2, I 2); 1 Saund. 24, n. 1. See CONTINUANDO; TRESPASS.

PERMISSION. A license to do a thing; an authority to do an act which without such authority would have been unlawful. A permission differs from a law: it is a check upon the operations of the law.

Express permissions derogate from something which before was forbidden, and may operate in favor of one or more persons, or for the performance of one or more acts, or for a longer or shorter time.

Implied permissions are those which arise from the fact that the law has not forbidden the act to be done.

PERMISSIVE. Allowed; that which may be done: as, permissive waste, which is the permitting real estate to go to waste. When a tenant is bound to repair, he is punishable for permissive waste; 2 Bouvier, Inst. n. 2400. See WASTE.

PERMIT. A license or warrant to do something not forbidden by law: as, to land goods imported into the United States, after the duties have been paid or secured to be paid. Act of Congr. March 2, 1799, s. 49, cl. 2. See form of such a permit, Gordon, Dig. App. II. 46.

PERMUTATION. In Civil Law. Exchange; barter.

This contract is formed by the consent of the parties; but delivery is indispensable, for without it it is a mere agreement. Dig. 31. 77. 4; Code, 4. 64. 3.

Permutation differs from sale in this, that in the former a delivery of the articles sold must be made, while in the latter it is unnecessary. It agrees with the contract of sale, however, in the following particulars: that he to whom the delivery is made acquires the right or faculty of prescribing; Dig. 41. 3. 4. 17; that the contracting parties are bound to guarantee to each other the title of the things delivered; Code, 4. 64. 1; and that they are bound to take back the things delivered when they have latent defects which they have concealed; Dig. 21. 1. 63. See Aso & M. Inst. b. 2, t. 16, c. 1; MUTATION; TRANSFER.

PERNANCY (from Fr. *prendre*, to take). A taking or receiving.

PERNOR OF PROFITS. He who receives the profits of lands, etc. A *cestui qui use*, who is legally entitled and actually does receive the profits, is the pernor of profits.

PERPETUAL. That which is to last without limitation as to time: as, a perpetual statute, which is one without limit as to time, although not expressed to be so.

PERPETUAL CURACY. The office of a curate in a parish where there is no spiritual rector or vicar, but where the curate is appointed to officiate for the time by the impropriator. 2 Burn, Eccl. Law, 55.

The church of which the curate is perpetual. 2 Ves. Sen. 425, 429. See 2 Steph. Com. 76; 2 Burn, Eccl. Law, 55; 9 Ad. & E. 556. As to whether such curate may be removed, see 2 Burn, Eccl. Law, 55.

PERPETUATING TESTIMONY. The act by which testimony is reduced to writing as prescribed by law, so that the same shall be read in evidence in some suit or legal proceedings to be thereafter instituted.

The origin of this practice may be traced to the cannon law, cap. 5, X *ut lite non contestata*, etc. Bockmer, n. 4; 8 Toullier, n. 22. Statutes exist in most of the states for this purpose. Equity also furnishes means, to a limited extent, for the same purpose.

PERPETUITY. Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation. Randell, Perp. 48. Such a limitation of property as renders it unalienable beyond the period allowed by law. Gilbert, Uses, Sugd. ed. 260, n.

Mr. Justice Powell, in Scattergood *vs.* Edge, 12 Mod. 278, distinguished perpetuities into two sorts, absolute and qualified; meaning thereby, as it is apprehended, a distinction between a plain, direct, and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate nevertheless, from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law. But this distinction would not now lead to a better understanding or explanation of the subject; for whether an estate be so limited that it cannot take effect until a period too much protracted, or whether on a contingency which may happen within a moderate compass of time, it equally falls within the line of perpetuity, and the limitation is therefore void; for it is not sufficient that an estate may vest within the time allowed, but the rule requires that it must. Randell, Perp. 49. See Cruise, Dig. tit. 32, c. 23; 1 Belt, Suppl. to Ves. Jr. 406; 2 Ves. 357; 3 Saund. 388; Comyns, Dig. *Chancery* (4 G 1); 3 Ch. Cas. 1; 2 Bouvier, Inst. n. 1890.

PERQUISITES. In its most extensive sense, perquisites signifies any thing gotten by industry or purchased with money, different from that which descends from a father or ancestor. Bracton, l. 2, c. 30, n. 3; l. 4, c. 22. In a more limited sense, it means something gained by a place or office beyond the regular salary or fee.

PERSON. A man considered according to the rank he holds in society, with all the right to which the place he holds entitles him, and the duties which it imposes. 1 Bouvier, Inst. n. 137.

A corporation, which is an artificial person. 1 Bla. Com. 123; 4 Bingh. 669; Woodd. Lect. 116; 1 Mod. 164.

The term, as is seen, is more extensive than man,—including artificial beings, as corporations, as well as natural beings. But when the word "persons" is spoken of in legislative acts, natural persons will be intended, unless something appear in the context to show that it applies to artificial persons; 2 Ill. 178.

Natural persons are divided into males, or men, and females, or women. Men are capable of all kinds of engagements and functions, unless by reasons applying to particular individuals. Women cannot be appointed to any public office, nor perform any civil functions, except those which the law specially declares them capable of exercising; La. Civ. Code, art. 25.

They are also sometimes divided into free persons and slaves. Freemen are those who have preserved their natural liberty, that is to say, who have the right of doing what is not forbidden by the law. A slave is one who is in the power of a master to whom he belongs. Slaves are sometimes ranked not with persons, but things. But sometimes they are considered as persons: for example, while African slavery existed in the United States, a negro was in contemplation of law a person, so as to be capable of committing a riot in conjunction with white men; 1 Bay, 358. See MAN.

Persons are also divided into citizens and aliens, when viewed with regard to their politi-

cal rights. When they are considered in relation to their civil rights, they are living or civilly dead, see CIVIL DEATH; outlaws; and infamous persons.

Persons are divided into legitimates and bastards, when examined as to their rights by birth.

When viewed in their domestic relations, they are divided into parents and children; husbands and wives; guardians and wards; and masters and servants.

For the derivation of the word person, as it is understood in law, see 1 Toullier, n. 168; 1 Bouvier, Inst. n. 1890, note.

In Criminal Law. The question has arisen in a number of cases how far a court may go in compelling a prisoner in a criminal action to expose his person or a portion of it as to exhibit his personal peculiarities, *e. g.* the length of his foot, or marks on his body, in order to prove his identity. The better opinion is that such action is not permissible, as it in a manner compels the prisoner to testify against himself. This view is held in 45 How. Pr. 216; 3 Cr. L. Mag. 393; and in 22 Alb. L. J. 144, it is said that on principle a prisoner cannot be compelled to say anything, nor do anything, nor submit to any act addressed to his actual person, which may tend to criminate him. But see, *contra*, 71 N. C. 85; 25 La. An. 523; 14 Nev. 79; s. c. 33 Am. Rep. 540, n.; 74 N. C. 646; 5 Baxt. 619; 5 Jones, 259; 63 Ga. 667. The subject is treated in 15 Cent. L. J. 2.

PERSONA (Lat.). **In Civil Law.** Character, in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus, one man may unite many characters (*personæ*): as, for example, the characters of father and son, of master and servant. Mackeldey, Civ. Law, § 117.

In its original signification, a mask; afterwards, a man in reference to his condition or character (*status*). Vicat, Voc. Jur. It is used metaphorically of things, among which are counted slaves. It is often opposed to *res:* as, *actio in personam* and *actio in rem.*

Power and right belonging to a person in a certain character (*pro jure et potestate personæ competente*). Vicat, Voc. Jur. Its use is not confined to the living, but is extended to the dead and to angels. *Id.* A statue in a fountain whence water gushes.

PERSONAL. Belonging to the person.

This adjective is frequently employed in connection with substantives, things, goods, chattels, actions, right, duties, and the like: as, personal estate, put in opposition to real estate; personal actions, in contradistinction to real actions. Personal rights are those which belong to the person; personal duties are those which are to be performed in person.

PERSONAL ACTION. In Practice. In the Civil Law. An action in which one person (the *actor*) sues another (the *reus*) in respect of some obligation which he is under to the actor either *ex contractu* or *ex delicto*. It will be seen that this includes all actions against a person, without reference to the nature of the property involved. In a limited sense of the word action in the civil law, it includes only personal action, all others being called petitions. See REAL ACTION.

At the Common Law. An action brought for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property. Such arise either upon contracts, as account, assumpsit, covenant, debt, and detinue (see these words), or for wrongs, injuries, or torts, as trespass, trespass on the case, replevin, trover (see these words). Other divisions of personal actions are made in the various states; and in Vermont and Connecticut an action is in use called the action of book debt.

PERSONAL CHATTELS. Strictly, and properly speaking, things movable, which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another; 2 Bla. Com. 388.

PERSONAL CONTRACT. A contract as to personal property. A covenant (or contract) personal relates only to matters personal as distinguished from real, and is binding on the covenantor (contractor) during his life, and on his personal representatives after his decease, in respect of assets; 3 Coke, 22 *a*.

PERSONAL COVENANT. A covenant which binds only the covenantor and his personal representatives in respect to assets, and can be taken advantage of only by the covenantee.

A covenant which must be performed by the covenantor in person. Fitzh. N. B. 340.

All covenants are either personal or real; but some confusion exists in regard to the division between them. Thus, a covenant may be personal as regards the covenantor, and real as regards the covenantee; and different definitions have been given, according to whether the rights and liabilities of the covenantor or the covenantee have been in consideration. It is apprehended, however, that the prevalent modern usage is to hold a covenant real, if it is real,—that is, runs with the land so as to apply to an assignee, either as regards the covenantor or the covenantee. See Platt, Cov. 61; 4 Bla. Com. 304, n., 305, n.; 3 N. J. 260; 7 Gray, 83.

PERSONAL LIBERTY. See LIBERTY.

PERSONAL PROPERTY. The right or interest which a man has in things personal.

The right or interest less than a freehold which a man has in realty, or any right or interest which he has in things movable.

Personal property is to be distinguished from things personal. There may be, for example, a personal estate in realty, as chattels real; but the only property which a man can have in things personal must be a personal property. The essential idea of personal property is that of property in a thing movable or separable from the realty, or of perishability or possibility of brief duration of interest as compared with the owner's life in a thing real, without any action on the part of

the owner. See 2 Bla. Com. 14 and notes, 384 and notes.

A crop growing in the ground is personal property so far as not to be considered an interest in land, under the Statute of Frauds; 11 East, 362; 12 Me. 337; 5 B. & C. 829; 9 *id.* 561; 10 Ad. & E. 753.

It is a general principle of American law that stock held in corporations is to be considered as personal property; Walker, Am. Law, 211; 4 Dane, Abr. 670; Sullivan, Land Tit. 71; 1 Hill. R. P. 18; though it was held that such stock was real estate; 2 Conn. 567; but the rule was then changed by the legislature.

Title to personal property is acquired—*first*, by original acquisition by occupancy: as, by capture in war, by finding a lost thing; *second*, by original acquisition by accession; *third*, by original acquisition by intellectual labor: as, copyrights and patents for inventions; *fourth*, by transfer, which is by act of law, by forfeiture, by judgment, by insolvency, by intestacy; *fifth*, by transfer by act of the party, by gift, by sale. See, generally, 16 Viner, Abr. 335; 8 Comyns, Dig. 474, 562; 1 Belt, Suppl. Ves. 49, 121, 160, 198, 255, 368, 369, 399, 412, 478; 2 *id.* 10, 40, 129, 290, 291, 341; 1 Vern. 3, 170, 412; 2 Salk. 449; 2 Ves. 59, 176, 261, 271, 336, 683; 7 *id.* 453; Wms. Pers. Prop. See PEW; PROPERTY; REAL PROPERTY.

PERSONAL REPRESENTATIVES. The *executors* or *administrators* of the person deceased. 6 Mod. 155; 5 Ves. 402; 1 Madd. 108; 118 Mass. 198.

In wills, these words are sometimes construed to mean *next of kin;* 3 Bro. C. C. 224; 2 Jarm. Wills, 112; 1 Beav. 46; 1 R. & M. 587; that is, those who would take the personal estate under the Statute of Distributions. They have been held to mean *descendants;* 19 Beav. 448.

PERSONAL SECURITY. The legal and uninterrupted enjoyment by a man of his life, his body, his health, and his reputation. 1 Bouvier, Inst. n. 202.

PERSONAL STATUTE. A law whose principal, direct, and immediate object is to regulate the condition of persons.

The term is not properly in use in the common law, although Lord Mansfield, in 2 W. Blackst. 234, applied it to those legislative acts which respect personal transitory contracts, but it is occasionally used in the sense given to it in civil law and which is adopted as its definition. It is a law, ordinance, regulation, or custom, the disposition of which affects the person and clothes him with a capacity or incapacity which he does not change with his abode. See 2 Kent, 613.

PERSONALTY. That which is movable; that which is the subject of personal property and not of a real property.

PERSONATE. In Criminal Law. To assume the character of another without lawful authority, and, in such character, do something to his prejudice, or to the prejudice of another, without his will or consent.

The bare fact of personating another for the purpose of fraud is no more than a cheat or misdemeanor at common law, and punishable as such; 2 East, Pl. Cr. 1010; 2 Russ. Cr. 479.

By statute punishment is inflicted in the United States courts for false personating of any person under the naturalization laws, and of any person holding a claim or debt against the government; R. S. §§ 5424, 5436. See, generally, 2 Johns. Cas. 293; 16 Viner, Abr. 336; Comyns, Dig. *Action on the Case for a Deceit* (A 3).

PERSUADE, PERSUADING. To persuade is to induce to act. Persuading is inducing others to act. Inst. 4. 6. 23; Dig. 11. 3. 1. 5.

In the act of the legislature which declared that "if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, etc., by *persuading* others to enlist for that purpose, etc., he shall be adjudged guilty of high treason," the word persuading thus used means to succeed; and there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause; 1 Dall. 39; 4 C. & P. 369; 9 *id.* 79; ADMINISTERING. See 2 Ld. Raym. 889. The attempt to persuade a servant to steal his master's goods, or other person to undertake a larceny or other crime, is an indictable misdemeanor, although the person approached declines the persuasion; 1 Bish. Cr. L. § 767.

If one counsels another to suicide, and it is done in his presence, the adviser is as guilty as the principal. Accordingly, where two persons, agreeing to commit suicide together, employ means which take effect in one only, the survivor is a principal in the murder of the other; 8 C. & P. 418; 1 Bish. Cr. L. § 652.

PERSUASION. The act of influencing by expostulation or request. While the persuasion is confined within those limits which leave the mind free, it may be used to induce another to make his will, or even to make it in his own favor. But if such persuasion should so far operate on the mind of the testator that he would be deprived of a perfectly free will, it would vitiate the instrument; 3 S. & R. 269; 5 *id.* 207; 13 *id.* 323.

PERTINENT (from Lat. *pertineo*, belong to). Which tends to prove or disprove the allegations of the parties. Willes, 319. Matters which have no such tendency are called impertinent; 8 Toullier, n. 22.

PERTURBATION. This is a technical word which signifies disturbance or infringement of a right. It is usually applied to the disturbance of pews or seats in a church. In the ecclesiastical courts, actions for these disturbances are technically called "suits for perturbation of seat." 1 Phill. Eccl. 323. See PEW.

PERVISE, PARVISE. The palace yard at Westminster.

A place where counsel used to advise with their clients.

An afternoon exercise or moot for the instruction of students. Cowel; Blount.

PESAGE. In England, a toll charged for weighing avoirdupois goods other than wool. 2 Chitty, Com. Law, 16.

PETIT (sometimes corrupted into *petty*). A French word signifying little, small. It is frequently used: as, petit larceny, petit jury, petit treason.

PETIT CAPE. When the tenant is summoned on a plea of land, and comes on the summons and his appearance is recorded, if at the day given him he prays the view, and, having it given him, makes default, then shall this writ issue from the king. Old N. B. 162; Reg. Jud. fol. 2; Fleta, lib. 2, c. 44. See GRAND CAPE.

PETIT, PETIT JURY. The ordinary jury of twelve, as opposed to the grand jury, which was of a larger number and whose duty it was to find bills for the petit jury to try; 3 Bla. Com. 351.

PETIT, PETTY LARCENY. Larceny to the amount of twelve pence or less; 4 Bla. Com. *229. See 1 Bish. Cr. Law, §§ 378, 379. See LARCENY.

PETIT SERJEANTY. A tenure by which lands are held of the crown by the service of rendering yearly some small implement of war, as a lance, an arrow, etc. 2 Bla. Com. 82. Though the stat. 12 Car. II. took away the incidents of *livery* and *primer seisin*, this tenure still remains a dignified branch of socage tenure, from which it only differs in name on account of its reference to war. Such is the tenure of the grants to the dukes of Marlborough and Wellington.

PETIT TREASON. In English Law. The killing of a master by his servant, a husband by his wife, a superior by a secular or religious man. In the United States, this is like any other murder. See HIGH TREASON; TREASON.

PETITE ASSIZE. Used in contradistinction from the *grand assize*, which was a jury to decide on questions of property. *Petite assize*, a jury to decide on questions of possession. Britton, c. 42; Glanville, lib. 2, c. 6, 7, *Horne*, Mirror, lib. 2, c. *de Novel Disseisin*.

PETITION. An instrument of writing or printing, containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented, for the redress of some wrong or the grant of some favor which the latter has the right to give.

By the constitution of the United States, the right "to petition the government for a redress of grievances" is secured to the people. Amend. art. 1.

Petitions are frequently presented to the courts in order to bring some matters before them. It is a general rule in such cases that an affidavit should be made that the facts therein contained are true as far as known to the petitioner, and that those facts which he states as knowing from others he believes to be true.

PETITION OF RIGHT. In English Law. A proceeding in chancery by which a subject may recover property in the possession of the king.

This is in the nature of an action against a subject, in which the petitioner sets out his right to that which is demanded by him, and prays the king to do him right and justice; and, upon a due and lawful trial of the right, to make him restitution. It is called a petition of right because the king is bound of right to answer it and let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. The petition is presented to the king, who subscribes it with these words, *soit droit fait al partie*, and thereupon it is delivered to the chancellor to be executed according to law. Co. 4th Inst. 419, 422 *b*; Mitf. Eq. Pl. 30, 31; Cooper, Eq. Pl. 22, 23.

The modern practice is regulated by statute 23 and 24 Vict. c. 34, which provides that the petition shall be left with the home secretary for Her Majesty's consideration, who, if she shall think fit, may grant her fiat that right be done, whereupon the fiat having been served on the solicitor of the treasury, an answer, plea, or demurrer shall be made in behalf of the crown, and the subsequent pleadings be assimulated as far as practicable to the course of an ordinary action; Mozl. & W.

The stat. 3 Car. I., being a parliamentary declaration of the liberties of the people. 1 Bla. Com. 128.

PETITORY. That which demands or petitions; that which has the quality of a prayer or petition; a right to demand.

A petitory suit or action is understood to be one in which the mere title to property is to be enforced by means of a demand, petition, or other legal proceeding, as distinguished from a suit where only the right of possession and not the mere right of property is in controversy. 1 Kent, 371; 7 How. 846; 10 *id.* 257. Admiralty suits touching property in ships are either *petitory*, in which the mere title to the property is litigated, or *possessory*, to restore the possession to the party entitled thereto.

The American courts of admiralty exercised unquestioned jurisdiction in petitory as well as possessory actions; but in England the courts of law, some time after the restoration in 1660, claimed exclusive cognizance of mere questions of title, until the statute of 3 & 4 Vict. c. 65. By that statute the court of admiralty was authorized to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry in any cause of possession, salvage, damage, wages, or bottomry, instituted in such court after the passing of that act; Ware, 232; 18 How. 267; 2 Curt. C. C. 426.

In Scotch Law. Actions in which damages are sought.

This class embraces such actions as assumpsit, debt, covenant, and detinue, at common law. Sea Patterson, Comp. 1058, n.

PETTY AVERAGE (called, also, customary average). Several petty charges which are borne partly by the ship and partly by the cargo, such as the expense of tonnage, beaconage, etc. Abbott, Shipp. 7th ed. 404; 2 Pars. Mar. Law, 312; 1 Bell, Com. 567; 2 Magens, 277; Gourlie, Gen. Av.

PETTY BAG OFFICE. In English Law. An office in the court of chancery, appropriated for suits against attorneys and officers of the court, and for process and proceedings by extent on statutes, recognizances *ad quod damnum*, and the like. Termes de la Ley.

PETTY CONSTABLE. The ordinary constable, as distinguished from the high constable of the hundred. 1 Bla. Com. 355; Bacon, Law Tr. 181, *Office of Constable;* Willcock, Cons. c. 1, § 1. For duties of constable in America, see NEW ENGLAND SHERIFF; Crocker, Sheriffs; Marsh, Const. Guide.

PETTIFOGGER. One who pretends to be a lawyer, but possesses neither knowledge of the law nor conscience.

An unprincipled practitioner of law, whose business is confined to petty cases.

PEW. A seat in a church, separated from all others, with a convenient place to stand therein.

It is an incorporeal interest in the real property. And although a man has the exclusive right to it, yet it seems he cannot maintain trespass against a person entering it; 1 Term, 430; but case is the proper remedy; 3 B. & Ald. 361; 8 B. & C. 294. In 3 Paige, Ch. 296, it was held that the owner of a pew can, if disturbed in its use, maintain trespass, case, or ejectment, according to the circumstances.

The right to pews is limited and usufructuary, and does not interfere with the right of the parish or congregation to pull down and rebuild the church; 4 Ohio, 541; 5 Cow. 496; 17 Mass. 435; 109 *id.* 21; 1 Pick. 102; 3 *id.* 344; 6 S. & R. 508; 9 Wheat. 445; 9 Cra. 52; 6 Johns. 41; 4 Johns. Ch. 596; 6 Term, 396; 3 How. 74; indemnifying those whose pews are destroyed; 17 Mass. 435. See Powell, Mortg. Index; 2 Bla. Com. 429; 1 Chitty, Pr. 208, 210; 1 Powell, Mortg. 17, n; 19 Am. L. Reg. N. S. 1; 9 Am. Dec. 161; 24 *id.* 230; Baum.

A pew may be used only for divine service and for meetings of the congregation held for temporal purposes. The pew-owner must preserve order while enjoying his pew; 34 N. Y. 149. The owner of a pew does not own the soil under it, nor the space above it; 17 Mass. 435.

In Connecticut, Maine, and Louisiana, pews are considered real estate. In Massachusetts and New Hampshire, they are personal property; Mass. Gen. Stat. c. 30, § 38; 1 Smith, St. 145. The precise nature of such property does not appear to be well settled in New York; 15 Wend. 218; 16 *id.* 28; 5 Cow. 494. See 10 Mass. 323; 17 *id.* 438; 33 La. An. 9; 7 Pick. 138; 4 N. H. 180; 4 Ohio, 515; 4 H. & M'H. 279; Best, Pres. 111; Crabb, R. P. §§ 481–497; Washb. Easem.

PHOTOGRAPH. See PRESS COPY.

PHYSICIAN. A person who has received the degree of doctor of medicine from an incorporated institution.

One lawfully engaged in the practice of medicine.

As used in a policy of life insurance, the term "family physician" has been held to mean the physician who usually attends, and is consulted by the members of a family, in the capacity of a physician, whether or not he usually attended on or was consulted by the insured himself; 17 Minn. 497; s. c. 10 Am. Rep. 166.

Although the physician is civilly and criminally responsible for his conduct while discharging the duties of his profession, he is in no sense a warrantor or insurer of a favorable result, without an express contract to that effect; Elwell, Malp. 20; 7 C. & P. 81.

Every person who offers his services to the public generally impliedly contracts with the employer that he is in possession of the necessary ordinary skill and experience which are possessed by those who practise or profess to understand the art or science, and which are generally regarded by those most conversant with the profession as necessary to qualify one to engage in such business successfully. This ordinary skill may differ according to locality and the means of information; Elwell, Malp. 22–24, 201; Story, Bailm. 433; 3 C. & P. 629; 8 *id.* 475; 34 Iowa, 286; s. c. 11 Am. Rep. 141 n.; 34 Iowa, 300; 82 Ill. 379; s. c. 25 Am. Rep. 328.

The physician's responsibility is the same when he is negligent as when he lacks ordinary skill, although the measure of indemnity and punishment may be different; Elwell, Malp. 27; Archb. Cr. Pl. 411; 2 Ld. Raym. 1583; 3 Maule & S. 14, 15; 5 *id.* 198; 1 Lew. C. C. 169; 2 Stark. Ev. 526; Broom, Leg. Max. 168, 169; 4 Denio, 464; 19 Wend. 345, 346.

In *England*, at common law, a physician could not maintain an action for his fees for any thing done as physician either while attending to or prescribing for a patient; but a distinction was taken when he acted as a surgeon or in any other capacity than that of physician, and in such cases an action for fees would be sustained; 1 C. & M. 227, 370; 3 G. & D. 198; 4 Term, 317; 3 Q. B. 928. But now by the act of 21 & 22 Vict. c. 90, a physician who is registered under the act may bring an action for his fees, if not precluded by any by-law of the college of physicians; 2 H. & C. 92.

In this country, the various states have statutory enactments regulating the collection

of fees and the practice of medicine. In *Georgia*, a physician cannot recover for his services unless he shows that he is licensed as required by the act of 1839, or unless he is within the proviso in favor of physicians who were in practice before its passage; 8 Ga. 74. In *New York*, prior to the act repealing all former acts prohibiting unlicensed physicians from recovering a compensation for their services (Stat. of 1844, p. 406), an unlicensed physician could not maintain an action for medical attendance and medicines; 4 Denio, 60. Under the *Maine* statute of 1838, c. 53, a person who is not allowed by law to collect his dues for medical or surgical services as a regular practitioner cannot recover compensation for such services unless previous to their performance he obtained a certificate of good moral character in manner prescribed by that statute, nor can he recover payment for such services under the provision of the Revised Statute, c. 22, by having obtained a medical degree, in manner prescribed by that statute, after the performance of the service, though prior to the suit; 25 Me. 104.

In *Alabama* and *Missouri*, a non-licensed physician cannot recover for professional services; 21 Ala. N. S. 680; 15 Mo. 407. When A, the plantation physician of a planter, found a surgical operation necessary on one of the negroes, and requested the overseer to send for B, another physician, who came and performed the operation without any assistance from A, it was held that B could not maintain an action against A to recover for his service; 1 Strobh. 171. In *Vermont*, the employment of a physician, and a promise to pay him for his services, made on the Sabbath-day, is not prohibited by statute; 14 Vt. 332. In *Massachusetts*, an unlicensed physician or surgeon may maintain an action for professional service; 1 Metc. Mass. 154. See 2 Pars. Contr. *56 note.

Where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation on her for the cure of the disease, soon after which she died, it was held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if, in his judgment, it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant; 19 Pick. 333. Where one who has received personal injury through the negligence of another uses reasonable and ordinary care in the selection of a physician, the damages awarded him will not be reduced because the more skilful medical aid was not secured; 32 Iowa, 324; s. c. 7 Am. Rep. 200. In assumpsit by a physician for his services, the defendant cannot prove the professional character of the plaintiff; 3 Hawks, 105. Physicians can recover for the services of their students in attendance upon their patients; 4 Wend. 200. Partners in the practice of medicine are within the law merchant, which excludes the *jus accrescendi* between traders; 9 Cow. 631. An agreement between physicians whereby for a money consideration one promises to use his influence with his patrons to obtain their patronage for the other is lawful and not contrary to public policy; 39 Conn. 326; s. c. 12 Am. Rep. 390. If a physician carries contagious disease into a family, on a suit for services this may be shown to reduce such claim; 12 B. Monr. 465. See CONFIDENTIAL COMMUNICATIONS.

PICKERY. In Scotch Law. Stealing of trifles, punishable arbitrarily. Bell, Dict.; Tait, Inst. *Theft.*

PICKPOCKET. A thief; one who in a crowd or in other places steals from the pockets or person of another without putting him in fear. This is generally punished as simple larceny.

PIGNORATIO (Lat. from *pignorare*, to pledge). **In Civil Law.** The obligation of a pledge. L. 9. D. *de pignor.* Sealing up (*obsignatio*). A shutting up of an animal caught in one's field and keeping it till the expenses and damage have been paid by its master. New Decis. 1. 34. 13.

PIGNORATIVE CONTRACT. In Civil Law. A contract by which the owner of an estate engages it to another for a sum of money and grants to him and his successors the right to enjoy it until he shall be reimbursed, voluntarily, that sum of money. Pothier, Obl.

PIGNORIS CAPTIO (Lat.). **In Roman Law.** The name given to one of the *legis actiones* of the Roman law. It consisted chiefly in the taking of a pledge, and was, in fact, a mode of execution. It was confined to special cases determined by positive law or by custom, such as taxes, duties, rents, etc., and is comparable in some respects to distresses at common law. The proceeding took place in the presence of a prætor.

PIGNUS (Lat.). **In Civil Law.** Pledge, or pawn. The contract of pledge. The right in the thing pledged.

"It is derived," says Gaius, "from *pugnum*, the fist, because what is delivered in pledge is delivered in hand." Dig. 50. 16. 238. 2. This is one of several instances of the failure of the Roman jurists when they attempted etymological explanations of words. The elements of *pignus* (*pig*) are contained in the word *pan*(*g*)-*o* and its cognate forms. See Smith, Dict. Gr. & Rom. Antiq.

Though pledge is distinguished from mortgage (*hypotheca*), as being something delivered in hand, while mortgage is good without possession, yet a pledge (*pignus*) may also be

good without possession. Domat, Civ. Law, b. iii. tit. 1, § 5; Calvinus, Lex. *Pignus* is properly applied to movables, *hypotheca* to immovables; but the distinction is not always preserved. *Id.*

PILLAGE. The taking by violence of private property by a victorious army from the citizens or subjects of the enemy. This in modern times is seldom allowed, and then only when authorized by the commanding or chief officer at the place where the pillage is committed. The property thus violently taken belongs, in general, to the common soldiers. See Dalloz, Dict. *Propriété*, art. 3, § 5; Wolff, § 1201; BOOTY; PRIZE.

PILLORY. A wooden machine, in which the neck of the culprit is inserted.

This punishment has in most of the states been superseded by the adoption of the penitentiary system. See 1 Chitty, Cr. Law, 797. The punishment of standing in the pillory, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 27, 1839, s. 5. See Barrington, Stat. 48, note.

PILOT. An officer serving on board of a ship during the course of a voyage, and having charge of the helm and of the ship's route. An officer authorized by law who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into port.

Pilots of the second description are established by legislative enactments at the principal seaports in this country, and have rights, and are bound to perform duties, agreeably to the provisions of the several laws establishing them.

Pilots have been established in all maritime countries. After due trial and experience of their qualifications, they are licensed to offer themselves as guides in difficult navigation; and they are usually, on the other hand, bound to obey the call of a ship-master to exercise their functions; Abbott, Shipp. 180; 1 Johns. 305; 4 Dall. 205; 5 B. & P. 82; 5 Rob. Adm. 308; 6 *id.* 316; Laws of Oleron, art. 23; Molloy, b. 2, c. 9, ss. 3, 7; Weskett, Ins. 395; Act of Congr. of August 7, 1789, s. 4; Merlin, Répert.; Pardessus, n. 637.

The master of a vessel may decline the services of a pilot, but in that event he must pay the legal fees; 1 Cliff. 492. A pilot who first offers his services, if rejected, is entitled to his fee; 2 Am. Law Rev. 458; Desty, Shipp. § 349.

PILOTAGE. The compensation given to a pilot for conducting a vessel in or out of port. Pothier, *Des Avaries*, n. 147.

Pilotage is a lien on the ship, when the contract has been made by the master or quasi-master of the ship or some other person lawfully authorized to make it; 1 Mas. 508; and the admiralty court has jurisdiction when services have been performed at sea; *Id.*; 10 Wheat. 428; 6 Pet. 682; 10 *id.* 108; 10 Fed. Rep. 135; 3 Morr. Transcr. 438. And see 1 Pet. Adm. Dec. 227. The statutes of the several states regulating the subject of pilotage are, in view of the numerous acts of congress recognizing and adopting them, to be regarded as constitutionally made, until congress by its own acts supersedes them; 12 How. 312; 13 Wall. 236.

PIN-MONEY. Money allowed by a man to his wife to spend for her own personal comforts.

It has been conjectured that the term *pin-money* has been applied to signify the provision for a married woman, because anciently there was a tax laid for providing the English queen with pins; Barrington, Stat. 181.

When pin-money is given to but not spent by the wife, on the husband's death it belongs to his estate; 4 Viner, Abr. 133, *Baron & Feme* (E a. 8); 2 Eq. Cas. Abr. 156; 2 P. Will. 341; 3 *id.* 353; 1 Ves. 267; 2 *id.* 190; 1 Madd. 489, 490.

In England it was once adjudged that a promise to a wife, by the purchaser, that if she would not hinder the bargain for the sale of the husband's lands he would give her ten pounds, was valid, and might be enforced by an action of assumpsit instituted by husband and wife; Rolle, Abr. 21, 22.

In the French law, the term *épingles*, pins, is used to designate the present which is sometimes given by the purchaser of an immovable to the wife or daughters of the seller to induce them to consent to the sale. This present is not considered as a part of the consideration, but a purely voluntary gift. Dict. de Jur. *Epingles*.

PINT. A liquid measure, containing half a quart or the eighth part of a gallon.

PIOUS USES. See CHARITABLE USES; 3 Sandf. 377.

PIPE. In English Law. The name of a roll in the exchequer, otherwise called the *Great Roll*. A measure, containing two hogsheads: one hundred and twenty-six gallons is also called a pipe.

PIRACY. In Criminal Law. A robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility. 3 Wheat. 610; 5 *id.* 153, 163; 3 Wash. C. C. 209. This is the definition of this offence by the law of nations; 1 Kent, 183.

Congress may define and punish piracies and felonies on the high seas, and offences against the law of nations. Const. U. S. art. 1, s. 7, n. 10; 3 Wheat. 336; 5 *id.* 76, 153, 184. In pursuance of the authority thus given by the constitution, it was declared by the act of congress of April 30, 1790, s. 8, 1 Story, Laws, 84, that murder or robbery committed on the high seas, or in any river, haven, or bay out of the jurisdiction of any particular state, or any offence which if committed within the body of a county would by the laws of the United States be punishable with death, should be adjudged to be piracy and felony, and punishable with death. It was

further declared that if any captain or mariner should piratically and feloniously run away with a vessel, or any goods or merchandise of the value of fifty dollars, or should yield up such vessel voluntarily to pirates, or if any seaman should forcibly endeavor to hinder his commander from defending the ship or goods committed to his trust, or should make revolt in the ship, every such offender should be adjudged a pirate and felon, and be punishable with death. Accessories before the fact are punishable as the principal; those after the fact, with fine and imprisonment.

By a subsequent act, passed March 3, 1819, 3 Story, Laws, 1739, made perpetual by the act of May 15, 1820, 1 Story, Laws, 1798, congress declared that if any person upon the high seas should commit the crime of piracy as defined by the law of nations, he should, on conviction, suffer death.

And again, by the act of May 15, 1820, s. 3, 1 Story, Laws, 1798, congress declared that if any person should upon the high seas, or in any open roadstead, or in any harbor, haven, basin, or bay, or in any river where the tide ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person should be adjudged to be a pirate, and suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, should land from such ship or vessel, and, on shore, should commit robbery, such person should be adjudged a pirate, and suffer death. Provided that the state in which the offence may have been committed should not be deprived of its jurisdiction over the same, when committed within the body of a county, and that the courts of the United States should have no jurisdiction to try such offenders after conviction or acquittal, for the same offence, in a state court. The fourth and fifth sections of the last-mentioned act declare persons engaged in the slave-trade, or in forcibly detaining a free negro or mulatto and carrying him in any ship or vessel into slavery, piracy, punishable with death; R. S. § 5368–5382. See 1 Kent, 183; Beaussant, Code Maritime, t. 1, p. 244; Dalloz, Dict. Supp.; Dougl. 613; Park, Ins. Index; Bacon, Abr.; 16 Viner, Abr. 346; Ayl. Pand. 42; 11 Wheat. 39; 1 Gall. 247, 524; 3 Wash. C. C. 209, 240; 1 Pet. C. C. 118, 121.

In Torts. By piracy is understood the plagiarism of a book, engraving, or other work for which a copyright has been taken out.

When a piracy has been made of such a work, an injunction will be granted; 4 Ves. 681; 5 *id.* 709; 12 *id.* 270. See COPYRIGHT; MEMORIZATION.

PIRATE. A sea-robber, who, to enrich himself, by subtlety or open force, setteth upon merchants and others trading by sea, despoiling them of their loading, and sometimes bereaving them of life and sinking their ships. Ridley, View, pt. 2, c. 1, s. 3. One guilty of the crime of piracy. Merlin, Répert. See, for the etymology of this word, Bacon, Abr. *Piracy*.

PIRATICALLY. In Pleading. This is a technical word, essential to charge the crime of piracy in an indictment, which cannot be supplied by another word or any circumlocution; Hawk. Pl. Cr. b. 1, c. 37, s. 15; Co. 3d Inst. 112; 1 Chitty, Cr. Law, *244.

PISCARY. The right of fishing in the waters of another. Bacon, Abr.; 5 Comyns, Dig. 366. See FISHERY.

PISTAREEN. A small Spanish coin. It is not made current by the laws of the United States. 10 Pet. 618.

PIT. A hole dug in the earth, which was filled with water, and in which women thieves were drowned, instead of being hung. The punishment of the pit was formerly common in Scotland.

PIT AND GALLOWS (Law. Lat. *fossa et furca*). **In Scotch Law.** A privilege of inflicting capital punishment for theft, given by king Malcolm, by which a woman could be drowned in a pit (*fossa*) or a man hanged on a gallows (*furca*). Bell, Dict.; Stair, Inst. 277, § 62.

PLACE. See VENUE.

PLACE OF BUSINESS. The place where a man usually transacts his affairs or business.

When a man keeps a store, shop, counting-room, or office, independently and distinctly from all other persons, that is deemed his place of business; and when he usually tranacts his business at the counting-house, office, and the like, occupied and used by another, that will also be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for such private purpose, as in an insurance-office, an exchange-room, a banking-room, a post-office, and the like, where persons generally resort, these will not be considered as the party's place of business, although he may occasionally or transiently transact business there; 1 Pet. 582; 2 *id.* 121; 10 Johns. 501; 11 *id.* 231; 16 Pick. 392.

It is a general rule that a notice of the non-acceptance or non-payment of a bill, or of the non-payment of a note, may be sent either to the domicil or place of business of the person to be affected by such notice; and the fact that one is in one town and the other in the other will make no difference, and the holder has his election to send to either. A notice to partners may be left at the place of business of the firm or of any one of the partners; Story, Pr. Notes, § 312; Dan. Neg. Instr. 503.

PLACITA COMMUNIA (Lat.). Common pleas. All civil actions between subject and subject. 3 Bla. Com. 38, 40*; Cowel, *Plea*. See PLACITUM.

PLACITA CORONÆ (Lat.). Pleas of the crown. All trials for crimes and misdemeanors, wherein the king is plaintiff, on behalf of the people. 3 Bla. Com. 40*; Cowel, *Plea*.

PLACITA JURIS (Lat.). Arbitrary rules of law. Bacon, Law Tr. 73; Bacon, Max. Reg. 12.

PLACITUM (Lat. from *placere*). In **Civil Law.** Any agreement or bargain. A law; a constitution or rescript of the emperor; the decision of a judge or award of arbitrators. Vicat, Voc. Jur.; Calvinus, Lex.; Dupin, Notions sur le Droit.

In Old English Law (Ger. *plats*, Lat. *plateis*, *i.e.* fields or streets). An assembly of all degrees of men, where the king presided and they consulted about the great affairs of the kingdom: first held, as the name would show, in the fields or street. Cowel.

So on the continent. Hinc. *de Ordine Palatii*, c. 29; Bertinian, Annals of France in the year 767: Const. Car. Mag. cap. ix.; Hinc. *Epist.* 197, 227; Laws of the Longobards, *passim*.

A lord's court. Cowel.

An ordinary court. *Placita* is the style of the English courts at the beginning of the record at nisi prius; in this sense, *placita* are divided into pleas of the crown and common pleas, which see. Cowel.

A trial or suit in court. Cowel; Jacobs.

A fine. Black Book of Exchequer, lib. 2, tit. 13; 1 Hen. I. cc. 12, 13.

A plea. This word is *nomen generalissimum*, and refers to all the pleas in the case. 1 Saund. 388, n. 6; Skinn. 554; Carth. 334; Yelv. 65. By *placitum* is also understood the subdivisions in abridgments and other works, where the point decided in a case is set down separately, and, generally, numbered. In citing, it is abbreviated as follows: Viner, Abr. *Abatement*, pl. 3.

Placitum nominatum is the day appointed for a criminal to appear and plead.

Placitum fractum. A day past or lost to the defendant. 1 Hen. I. c. 59.

PLAGIARISM. The act of appropriating the ideas and language of another and passing them for one's own.

When this amounts to piracy, the party who has been guilty of it will be enjoined when the original author has a copyright. See COPYRIGHT; PIRACY; QUOTATION; Pardessus, Dr. Com. n. 169.

PLAGIARIUS (Lat.). **In Civil Law.** He who fraudulently concealed a freeman or slave who belonged to another.

The offence itself was called *plagium*.

It differed from larceny or theft in this, that larceny always implies that the guilty party intended to make a profit, whereas the *plagiarius* did not intend to make any profit. Dig. 48. 15. 6; Code, 9. 20. 9, 15.

PLAGIUM (Lat.). Man-stealing; kidnapping. This offence is the *crimen plagii* of the Romans. Alison, Crim. Law, 280, 281.

PLAINT. In English Law. The exhibiting of any action, real or personal, in writing. The party making his plaint is called the plaintiff.

PLAINTIFF (Fr. *pleyntife*). He who complains. He who, in a personal action, seeks a remedy for an injury to his rights. 3 Bla. Com. 25; Hamm. Part.; 1 Chitty, Pl.; Chitty, Pr.; 1 Comyns, Dig. 36, 205, 308.

The legal plaintiff is he in whom the legal title or cause of action is vested.

The *equitable* plaintiff is he who, not having the legal title, yet is in equity entitled to the thing sued for. For example: when a suit is brought by Benjamin Franklin for the use of Robert Morris, Benjamin Franklin is the legal, and Robert Morris the equitable, plaintiff. This is the usual manner of bringing suits when the cause of action is not assignable at law but is so in equity. See Bouvier, Inst. Index, *Parties*.

The word plaintiff occurring alone means the plaintiff on record, not the real or equitable plaintiff. After once naming the plaintiff in pleading, he may be simply called the plaintiff. 1 Chitty, Pl. 266; 9 Paige, Ch. 226; 4 Hill, N. Y. 468; 5 *id.* 523, 548; 7 Term, 50.

PLAINTIFF IN ERROR. A party who sues out a writ of error; and this, whether in the court below he was plaintiff or defendant.

PLAN. The delineation or design of a city, a house or houses, a garden, a vessel, etc., traced on paper or other substance, representing the position and the relative proportions of the different parts.

A plan referred to in a deed describing land as bounded by a way laid down upon a plan may be used as evidence in fixing the locality of such way; 16 Gray, 374; and if a plan is referred to in the deed for description, and in it are laid down courses, distances, and other particulars, it is the same as if they were recited in the deed itself; 3 Washb. R. P. 430.

When houses are built by one person agreeably to a plan, and one of them, with windows and doors in it, is sold to a person, the owner of the others cannot shut up those windows, nor has his grantee any greater right; 1 Price, 27; 2 Ry. & M. 24; 1 Lev. 122; 2 Saund. 114, n. 4; 1 Mood. & M. 396; 9 Bingh. 305; 1 Leigh, N. P. 559. See 12 Mass. 159; Hamm. Nisi P. 202; 2 Hill. R. P. c. 12, n. 6–12; Comyns, Dig. *Action on the Case for a Nuisance* (A); ANCIENT LIGHTS; WINDOWS.

PLANTATIONS. Colonies; dependencies. 1 Bla. Com. 107.

In England, this word, as it is used in stat. 12 Car. II. c. 18, is never applied to any of the British dominions in Europe, but only to the colonies in the West Indies and America; 1 Marsh. Ins. b. 1, c. 3, § 2, p. 69.

PLAT. A map of a piece of land, on which are marked the courses and distances

of the different lines, and the quantity of land it contains.

Such a plat may be given in evidence in ascertaining the position of the land and what is included, and may serve to settle the figure of a survey and correct mistakes; 5 T. B. Monr. 160. See 17 Mass. 211; 5 Me. 219; 7 *id.* 61; 4 Wheat. 444; 14 Mass. 149.

PLEA. In Equity. A special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. Mitf. Eq. Pl. Jer. ed. 219; Coop. Eq. Pl. 223; Story, Eq. Pl. § 649.

The modes of making defence to a bill in equity are said to be by *demurrer*, which demands of the court whether from the matter apparent from the bill the defendant shall answer at all; by *plea*, which, resting on the foundation of new matter offered, demands whether the defendant shall answer further; by *answer*, which responds generally to the charges of the bill; by *disclaimer*, which denies any interest in the matters in question; Mitf. Eq. Pl. Jer. ed. 13; 2 Stor. 59; Story, Eq. Pl. § 437. Pleas are said to be *pure* which rely upon foreign matter to discharge or stay the suit, and *anomalous* or *negative* which consist mainly of denials of the substantial matters set forth in the bill; Story, Eq. Pl. §§ 651, 667; 2 Dan. Ch. Pr. 97, 110; Beames, Eq. Pl. 123; Adams, Eq. 236.

Pleas to the jurisdiction assert that the court before which the cause is brought is not the proper court to take cognizance of the matter.

Pleas to the person may be to the person of the plaintiff or defendant. Those of the former class are mainly *outlawry*, *excommunication*, *popish recusant convict*, which are never pleaded in America and very rarely now in England; *attainder*, which is now seldom pleaded; 2 Atk. 399; *alienage*, which is not a disability unless the matter respect lands, when the alien may not hold them, or he be an alien enemy not under license; 2 V. & B. 323; *infancy*, *coverture*, and *idiocy*, which are pleadable as at law (see ABATEMENT); *bankruptcy* and *insolvency*, in which case all the facts necessary to establish the plaintiff as a legally declared bankrupt must be set forth; 3 Mer. 667, though not necessarily as of the defendant's own knowledge; Younge, 331; 4 Beav. 554; 1 Y. & C. 39; *want of character in which he sues*, as that he is not an administrator; 2 Dick. 510; 1 Cox, Ch. 198; is not heir; 2 V. & B. 159; 2 Bro. C. C. 143; 3 *id.* 489; is not a creditor; 2 S. & S. 274; is not a partner; 6 Madd. 61; as he pretends to be; that the plaintiff named is a fictitious person, or was dead at the commencement of the suit; Story, Eq. Pl. § 727. Those to the person of the defendant may show that the defendant is not the person he is alleged to be, or does not sustain the character given by the bill; 6 Madd. 61; Rep. Finch, 334; or that he is bankrupt, to require the assignees to be joined; Story, Eq. Pl. § 732. These pleas to the person are pleas in abatement, or, at least, in the nature of pleas in abatement.

Pleas to the bill or the frame of the bill object to the suit as framed, or contend that it is unnecessary. These may be—the *pendency of another suit*, which is analogous to the same plea at law and is governed in most respects by the same principles; Story, Eq. Pl. § 736; 2 My. & C. 602; 1 Phill. 82; 1 Ves. 544; 4 *id.* 357; 1 S. & S. 491; Mitf. Eq. Pl. Jer. ed. 248; see LIS PENDENS; and the other suit must be in equity, and not at law; Beames, Eq. Pl. 146–148; *want of proper parties*, which goes to both discovery and relief, where both are prayed for; Story, Eq. Pl. § 745; see 3 Y. & C. 447; but not to a bill of discovery merely; 2 Paige, Ch. 280; 3 *id.* 222; 3 Cra. 220; a *multiplicity of suits;* 1 P. Wms. 428; 2 Mas. 190; *multifariousness*, which should be taken by way of demurrer, when the joining or confession of the distinct matters appears from the face of the bill, as it usually does; Story, Ex. Pl. § 271.

Pleas in bar rely upon *a bar created by statute;* as, the Statute of Limitations; 1 S. & S. 4; 2 Sim. 45; 3 Sumn. 152; which is a good plea in equity as well as at law, and with similar exceptions; Cooper, Eq. Pl. 253; see LIMITATIONS, STATUTE OF; the Statute of Frauds, where its provisions apply; 1 Johns. Ch. 425; 2 *id.* 275; 4 Ves. 24, 720; 2 Bro. C. C. 559; or some other public or private statute; 2 Story, Eq. Jur. § 768; *matter of record or as of record in some court*, as, a common recovery; 1 P. Wms. 754; 2 Freem. 180; 1 Vern. 13; a judgment at law; 1 Keen, 456; 2 My. & C. Ch. 602; Story, Eq. Pl. § 781, n.; the sentence or judgment of a foreign court or a court not of record; 12 Cl. & F. 368; 14 Sim. 265; 3 Hare, 100; 1 Y. & C. 464; especially where its jurisdiction is of a peculiar or exclusive nature; 12 Ves. 307; Ambl. 756; 2 How. 619; with limitations in case of fraud; 1 Ves. 284; Story, Eq. Pl. § 788; or a decree of the same or another court of equity; Cas. Talb. 217; 7 Johns. Ch. 1; 2 S. & S. 464; 2 Y. & C. 43; *matters purely in pais*, in which case the pleas may go to discovery, relief, or either, both, or a part of either, of which the principal (though not the only) pleas are: account, stated or settled; 2 Atk. 1; 13 Price, 767; 7 Paige, Ch. 573; 1 My. & K. 231; accord and satisfaction; 1 Hare, 564; award; 2 V. & B. 764; purchase for valuable consideration; 2 Sumn. 507; 2 Y. & C. 457; release; 3 P. Wms. 315; lapse of time, analogous to the Statute of Limitations; 1 Ves. 264; 10 *id.* 466; 1 Y. & C. 432, 453; 2 J. & W. 1; 1 Hare, 594; 1 Russ. & M. 453; 2 Y. & C. 58; 1 Johns. Ch. 46; 10 Wheat. 152; 1 Sch. & L. 721; 6 Madd. 61; 3 Paige, Ch. 273; 5 *id.* 26; 7 *id.* 62; title in the defendant; Story, Eq. Pl. § 812.

The same pleas may be made to bills seeking discovery as to those seeking relief; but matter which constitutes a good plea to a bill for relief does not necessarily to a bill for discovery merely. See Story, Eq. Pl. § 816; Mitf. Eq. Pl. Jer. ed. 281, 282. The same kind of pleas may be made to bills not original as to original bills, in many cases, according to their respective natures. Peculiar defences to each may, however, be sometimes urged by plea; Story, Eq. Pl. § 826; Mitf. Eq. Pl. Jer. ed. 288.

Effect of a plea. A plea may extend to the whole or a part, and if to a part only must express which part, and an answer overrules a plea if the two conflict; 3 Y. & C. 683; 3 Cra. 220. The plea may be accompanied by an answer fortifying it with a protest against waiver of the plea thereby; Story, Eq. Pl. § 695. A plea or argument may be allowed, in which case it is a full bar to so much of the bill as it covers, if true; Mitford, Eq. Pl. Jer. ed. 301; or the benefit of it may be saved to the hearing, which decides it valid so far as then appears, but allows matter to be disclosed in evidence to invalidate it, or it may be ordered to stand for an answer, which decides that it may be a part of a defence; 4 Paige, Ch. 124; but is not a full defence, that the matter has been improperly offered as a plea, or is not sufficiently fortified by answer, so that the truth is apparent; 3 Paige, Ch. 459. See, generally, Story, Eq. Pl.; Mitf. Eq. Pl. by Jeremy; Beames, Eq. Pl.; Cooper, Eq. Pl.; Blake, Ch. Pr.; Dan. Ch. Pr.; Barbour, Ch. Pr.; Langd. Eq. Pl.

At Law. The defendant's answer by matter of *fact* to the plaintiff's declaration, as distinguished from a demurrer, which is an answer by matter of *law*.

It includes as well the denial of the truth of the allegations on which the plaintiff relies, as the statement of facts on which the defendant relies. In an ancient use it denoted action, and is still used sometimes in that sense: as, "summoned to answer in a plea of trespass." Steph. Pl. 38, 39, n.; Warren, Law Stud. 272, note w; Oliver, Prec. 97. In a popular, and not legal, sense, the word is used to denote a forensic argument. It was strictly applicable in a kindred sense when the pleadings were conducted orally by the counsel. Steph. Pl. App. n. 1.

Pleas are either *dilatory*, which tend to defeat the particular action to which they apply on account of its being brought before the wrong court, by or against the wrong person, or in an improper form; or *peremptory*, which impugn the right of action altogether, which answer the plaintiff's allegations of right conclusively. Pleas are also said to be to the jurisdiction of the court, in suspension of the action, in abatement of the writ, in bar of the action. The first three classes are dilatory, the last peremptory. Steph. Pl. 63; 1 Chitty, Pl. 425; Lawes, Pl. 36.

Pleas are of various kinds. *In abatement.* See ABATEMENT. *In avoidance*, called, also, *confession and avoidance*, which admits, in words, or in effect, the truth of the matters contained in the declaration, and alleges some new matter to avoid the effect of it and show that the plaintiff is, notwithstanding, not entitled to his action. 1 Chitty, Pl. 540; Lawes, Pl. 122. Every allegation made in the pleadings subsequent to the declaration which does not go in denial of what is before alleged on the other side is an allegation of new matter. Gould, Pl. ch. iii. § 195.

Pleas in bar deny that the plaintiff has any cause of action. 1 Chitty, Pl. 407; Co. Lit. 303 *b*. They either conclude the plaintiff by matter of estoppel, show that he never had any cause of action, or, admitting that he had, insist that it is determined by some subsequent matter. 1 Chitty, Pl. 407; Steph. Pl. 70; Britt. 92. They either deny all or some essential part of the averments in the declaration, in which case they are said to traverse it, or, admitting them to be true, allege new facts which obviate and repel their legal effect, in which case they are said to confess and avoid. Steph. Pl. 70. The term is often used in a restricted sense to denote what are with propriety called special pleas in bar. These pleas are of two kinds; the general issue, and special pleas in bar. The general issue denies or takes issue upon all the material allegations of the declaration, thus compelling the plaintiff to prove all of them that are essential to support his action. There is, however, a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called *a special issue*, which denies only some particular *part* of the declaration which goes to the *gist* of the action. It thus, on the one hand, denies *less* than does the general issue, and, on the other hand, is distinguished from a "special plea in bar" in this,—that the latter universally advances *new matter*, upon which the defendant relies for his defence, which a special issue never does; it simply *denies*. Lawes, Pl. 110, 112, 113, 145; Co. Litt. 126 *a*; Gould, Pl. ch. ii. § 38, ch. vi. § 8. The matter which ought to be so pleaded is now very generally given in evidence under the general issue. 1 Chitty, Pl. 415.

Special pleas in bar admit the facts alleged in the declaration, but avoid the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue. 1 Chitty, Pl. 442; Ld. Raym. 88. They are very various, according to the circumstances of the defendant's case: as, in personal action the defendant may plead any special matter in denial, avoidance, discharge, excuse, or justification of the matter alleged in the declaration, which destroys or bars the plaintiff's action; or he may plead any matter which estops or precludes him from averring or insisting on any matter relied upon by the plaintiff in his declaration. The latter sort of pleas are called pleas in *estoppel*. In real actions, the tenant may plead any matter which destroys and bars the demandant's title; as, a general release. Steph. Pl. 115, 116.

The general qualities of a plea in bar are—*first*, that it be adapted to the nature and form of the action, and also conformable to the count. Co. Litt. 303 *a*; 285 *b*; Bacon, Abr. *Pleas* (I); 1 Rolle, 216. *Second*, that it answers all it assumes to answer, and no more. Co. Litt. 303 *a*; Comyns, Dig. *Pleader* (E 1, 36); 1 Saund. 28, nn. 1, 2, 3; 2 B. & P. 427; 3 *id.* 174. *Third*, in the case of a special plea, that it confess and admit the fact. 3 Term, 298; 1 Salk. 394; Carth. 380; 1 Saund. 28, n., 14, n. 3; 10 Johns. 289. *Fourth*, that it be single. Co. Litt. 307; Bacon, Abr. *Pleas* (K 1, 2); 2 Saund. 49, 50; Plowd. 150 *d*. *Fifth*, that it be certain. Comyns, Dig. *Pleader* (E 5–11, C 41). See CERTAINTY; PLEADING. *Sixth*, it must be direct, positive, and not argumentative. See 6 Cra. 126; 9 Johns. 313. *Seventh*, it must be capable of trial. *Eighth*, it must be true and capable of proof.

The parts of a plea are—*first*, the title of the court. *Second*, the title of the term. *Third*, the names of the parties in the margin. These, however, do not constitute any substantial part of the plea. The surnames only are usually inserted, and that of the defendant precedes the plaintiff's: as, "Roe *vs.* Doe." *Fourth*, the commencement, which includes the statement of the name of the defendant, the appearance, the defence, see DEFENCE, the actio non, see ACTIO NON. *Fifth*, the body, which may contain the inducement, the protestation, see PROTESTATION, ground of defence, *quæ est eadem*, the traverse. *Sixth*, the conclusion.

Dilatory pleas go to destroy the particular action, but do not affect the right of action in the plaintiff, and hence delay the decision of the cause upon its merits. Gould, Pl. ch. ii. § 33. This class includes pleas to the jurisdiction, to the disability of the parties, and all pleas in abatement. All dilatory pleas must be pleaded with the greatest certainty, must contain a distinct, clear, and positive averment of all material facts, and must, in general, enable the plaintiff to correct the deficiency or error pleaded to. 1 Chitty, Pl. 365. See ABATEMENT; JURISDICTION.

Pleas in discharge admit the demand of the plaintiff, and show that it has been discharged by some matter of fact. Such are pleas of judgment, release, and the like.

Pleas in excuse admit the demand or complaint stated in the declaration, but excuse the non-compliance with the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant's having done all in his power to satisfy the former, or not having been the culpable author of the latter. A plea of tender is an example of the former, and a plea of *son assault demesne* an instance of the latter.

Foreign pleas go to the jurisdiction; and their effect is to remove the action from the county in which the venue is originally laid. Carth. 402. Previous to the statute of Anne, an affidavit was required. 5 Mod. 335; Carth. 402; 1 Saund. Pl. 98, n. 1; Viner, Abr. *Foreign Pleas;* 1 Chitty, Pl. 382; Bacon, Abr. *Abatement* (R).

Pleas of justification, which assert that the defendant has purposely done the act of which the plaintiff complains, and in the exercise of his legal rights. 8 Term, 78; 3 Wils. 71. No person is bound to justify who is not *primâ facie* a wrong-doer. 1 Leon. 301; 2 *id.* 83; Cowp. 478; 4 Pick. 126; 13 Johns. 443, 579; 1 Chitty, Pl. 436.

Pleas puis darrein continuance, which introduce new matter of defence, which has arisen or come to the plaintiff's knowledge since the last continuance. In most of the states, the actual *continuance* of a cause from one term to another, or from one particular day in term to another day in the same term, is practically done away with, and the prescribed times for pleading are fixed without any reference to terms of court. Still, this right of a defendant to change his plea so as to avail himself of facts arising during the course of the litigation remains unimpaired; and though there be no *continuance*, the plea is still called a plea *puis darrein continuance*, —meaning, now, a plea upon facts arising since the *last stage of the suit*. They are either in bar or in abatement. Matter which arises after purchase or issue of the writ, and before issue joined, is properly pleaded in bar of the further maintenance of the suit; 4 East, 502; 3 Term, 186; 5 Pet. 224; 4 Me. 582; 12 Gill & J. 358; see 7 Mass. 325; while matter subsequent to issue joined must be pleaded *puis darrein continuance*. 1 Chitty, Pl. 569; 30 Ala. N. S. 253; Hempst. 16; 40 Me. 582; 7 Gill, 415; 10 Ohio, 300. Their object is to present matter which has arisen since issue joined, and which the defendant cannot introduce under his pleadings as they exist, for the rights of the parties were at common law to be tried as they existed at the time of bringing the suit, and matters subsequently arising come in as it were by exception and favor. See 7 Johns. 194.

Among other matters, it may be pleaded that the plaintiff has become an alien enemy; 3 Camp. 152; that an award has been made after issue joined; 2 Esp. 504; 29 Ala. N. S. 619; that there has been accord and satisfaction; 5 Johns. 392; that the plaintiff has become bankrupt; Tidd, Pr. 800; 1 Dougl. Mich. 267; that the defendant has obtained a bankrupt-certificate, even though obtained before issue joined; 9 East, 82; see 2 H. Blackst. 553; 3 B. & C. 23; 3 Denio, 269; that a feme plaintiff has taken a husband; Bull. N. P. 310; 1 Blackf. 288; that judgment has been obtained for the same cause of action; 9 Johns. 221; 5 Dowl. & R. 175; that letters testamentary or of administration have been granted; 2 Stra. 1106; 1 Saund. 265, n. 2; or revoked; Comyns, Dig. *Abatement* (I 4); that the plaintiff has released the defendant; 4 Cal. 331; 3 Sneed, 52; 17 Mo. 267. See 33 N. H. 179. But the defendant in ejectment cannot plead release from the lessor of the plaintiff; 4 Maule & S. 300; 7 Taunt. 9; and the release will

be avoided in case of fraud; 7 Taunt. 48; 4 B. & Ad. 419; 4 J. B. Moore, P. C. 192; 23 N. H. 535.

As a general rule, such matters must be pleaded at the first continuance after they happen or come to the plaintiff's knowledge; 11 Johns. 424; 1 S. & R. 146; though a discharge in insolvency or bankruptcy of the defendant; 2 E. D. Smith, 396; 2 Johns. 294; 9 *id.* 255, 392; and coverture of the plaintiff existing at the purchase of the suit, are exceptions; Bull. N. P. 310; in the discretion of the court; 10 Johns. 161; 4 S. & R. 239; 5 Dowl. & R. 521; 2 Mo. 100. *Great certainty* is required in pleas of this description; Yelv. 141; Freem. 112; Cro. Jac. 261; 2 Wils. 130; 2 Watts, 451. They must state the day of the last continuance, and of the happening of the new matter; Bull. N. P. 309; 1 Chitty, Pl. 572; 7 Ill. 252; cannot be awarded after assizes are over; 2 M'Cl. & Y. 350; Freem. 252; must be verified on oath before they are allowed; 1 Stra. 493; 1 Const. So. C. 455; and must then be received; 5 Taunt. 333; 3 Term, 554; 1 Stark. 52; 1 Marsh. 70, 280; 15 N. H. 410. They stand as a substitute for former pleas; 1 Salk. 178; Hob. 81; Hempst. 16; 4 Wisc. 159; 1 Strobh. 17; and demurrers; 32 E. L. & E. 280; may be pleaded after a plea in bar; 1 Wheat. 215; Al. 67; Freem. 252; and if decided against the defendant, the plaintiff has judgment in chief; 1 Wheat. 215; Al. 67; Freem. 252.

Sham pleas are those which are known to the pleader to be false, and are entered for the purpose of delay. There are certain pleas of this kind which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts, and, though discouraged, are tacitly allowed: as, for example, the common plea of *judgment recovered*, that is, that judgment has been already recovered by the plaintiff for the same cause of action; Steph. Pl. 444, 445; 1 Chitty, Pl. 505, 506. See 14 Barb. 393; 2 Denio, 195. The later practice of courts in regard to sham pleas is to strike them out on motion, and give final judgment for the plaintiff, or impose terms (in the discretion of the court) on the defendant, as a condition of his being let in to plead anew. The motion is made on the plea itself, or on affidavits in connection with the plea.

Pleas in suspension of the action show some ground for not proceeding in the suit at the present period, and pray that the pleading may be stayed until that ground be removed. The number of these pleas is small. Among them is that which is founded on the nonage of the parties, and termed parol demurrer. Steph. Pl. 64.

See, generally, Bacon, Abr. *Pleas* (Q); Comyns, Dig. *Abatement* (I 24, 34); Doctrina Plac. 297; Buller, Nisi P. 309; Lawes, Civ. Plead. 173; 1 Chitty, Plead. 634; Stephen, Plead. 81; Gould, Plead.; Bouvier, Inst. Index.

In ecclesiastical courts, a plea is called an allegation. See ALLEGATION.

PLEAD, TO. To answer the indictment or, in a civil action, the declaration of the plaintiff, in a formal manner. To enter the defendant's defence upon record. In a popular use, to make a forensic argument. The word is not so used by the profession. Steph. Pl. App. n. I; Story, Eq. Pl. § 4, n.

PLEADING. In Chancery Practice. Consists in making the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it, of which, when contested in matters of fact, they propose to offer proofs, and in matters of law to offer arguments to the court. Story, Eq. Pl. § 4, n. The substantial object of pleading is the same, but the forms and rules of pleading are very different, at law and in equity.

In Civil Practice. The stating in a logical and legal form the facts which constitute the plaintiff's cause of action or the defendant's ground of defence: it is the formal mode of alleging that on the record which constitutes the support or the defence of the party in evidence. 3 Term, 159; Dougl. 278; Comyns, Dig. *Pleader* (A); Bacon, Abr. *Pleas and Pleading;* Cowp. 682. Pleading is used to denote the act of making the pleadings.

The object of pleading is to secure a clear and distinct statement of the claims of each party, so that the controverted points may be exactly known, examined, and decided, and the appropriate remedy or punishment administered. See Cowp. 682; Dougl. 159. Good pleading consists in good matter pleaded in good form, in apt time and due order; Co. Litt. 303. *Good matter* includes all facts and circumstances necessary to constitute the cause of complaint or ground of defence, and no more. It does not include arguments or matters of law. But some matters of fact need not be stated, though it be necessary to establish them as facts. Such are, among others, *facts of which the courts take notice* by virtue of their office: as, the time of accession of the sovereign; 2 Ld. Raym. 794; time and place of holding parliament; 1 Saund. 131; public statutes and the facts they ascertain; 1 Term, 45; including ecclesiastical, civil, and marine laws; Ld. Raym. 338; but not private; 2 Dougl. 97; or foreign laws; 2 Carth. 273; 4 R. I. 523; common-law rights, duties, and general customs; Ld. Raym. 1542; Co. Litt. 175; Cro. Car. 561; the almanac, days of the week, public holidays, etc.; Salk. 269; 6 Mod. 81; 4 Dowl. 48; 4 Fla. 158; political divisions; Co. 2d Inst. 557; 4 B. & Ald. 242; 6 Ill. 73; the meaning of English words and terms of art in ordinary acceptation; 1 Rolle, Abr. 86, 525; their own course of proceedings; 1 Term, 118; 2 Lev. 176; 10 Pick. 470; see 16 East, 39; and that of courts of general jurisdiction; 1 Saund. 73; 5 McLean, 167; 10 Pick. 470; 3 B. & P. 183; 1 Greenl. Ev. §§ 4–6; *facts which the law presumes:* as, the innocence of

a party, illegality of an act, etc.; 4 Maule & S. 105; 1 B. & Ald. 463; 2 Wils. 147; 6 Johns. 105; 16 East, 343; 16 Tex. 335; 6 Conn. 130; *matters which the other party* should plead, as being more within his knowledge; 1 Sharsw. Bla. Com. 293, n.; 8 Term, 167; 2 H. Blackst. 530; 2 Johns. 415; 9 Cal. 286; 1 Sandf. 89; 3 Cow. 96; *mere matters of evidence of facts;* 9 Co. 96; Willes, 130; 25 Barb. 457; 7 Tex. 603; 6 Blackf. 173; 1 N. Chipm. 293; *unnecessary matter:* as, a second breach of condition, where one is sufficient; 2 Johns. 443; 1 Saund. 58, n. 1; 33 Miss. 474; 4 Ind. 409; 23 N. H. 415; 12 Barb. 27; 2 Green, N. J. 577; see DUPLICITY; or intent to defraud, when the facts alleged constitute fraud; 16 Tex. 335; see 3 Maule & S. 182; *irrelevant matter;* 1 Chitty, Pl. 209. Such matter may be rejected without damage to the plea, if wholly foreign to the case, or repugnant; 7 Johns. 462; 3 Day, 472; 2 Mass. 283; 8 S. & R. 124; 11 Ala. 145; 16 Tex. 656; 7 Cal. 348; 23 Conn. 134; 1 Du. N. Y. 242; 6 Ark. 468; 8 Ala. N. S. 320; but in many cases the matter must be proved as stated, if stated; 7 Johns. 321; 3 Day, 283; Phill. Ev. 160. The matter must be true and susceptible of proof; but legal fictions may be stated as facts; 2 Burr. 667; 4 B. & P. 140.

The form of statement should be according to the established forms; Co. Litt. 303; 6 East, 351; 8 Co. 48 *b*. This is to be considered as, in general, merely a rule of caution, though it is said the courts disapprove a departure from the well-established forms of pleading; 1 Chitty, Pl. 212. In most of the states of the United States, and in England since 1852, many radical changes have been introduced into the law of pleading: still, it is apprehended that a reasonable regard to the old forms will be profitable, although the names of things may be changed. See 3 Sharsw. Bla. Com. 301, n.; 3 Cal. 196; 28 Miss. 766; 14 B. Monr. 83. In general, it may be said that the facts should be stated logically, in their natural order, with certainty, that is, clearly and distinctly, so that the party who is to answer, the court, and the jury may readily understand what is meant; Cowp. 682; 2 B. & P. 267; Co. Litt. 303; 13 East, 107; 33 Miss. 669; Hempst. 238; with precision; 13 Johns. 437; 19 Ark. 695; 5 Du. N. Y. 689; and with brevity; 36 N. H. 458; 1 Chitty, Pl. 212. The facts stated must not be insensible or repugnant; 1 Salk. 324; 7 Co. 25; 25 Conn. 431; 5 Blackf. 339; nor ambiguous or doubtful in meaning; 5 Maule & S. 38; Yelv. 36; nor argumentative; Co. Litt. 303; 5 Blackf. 557; nor by way of recital; 2 Bulstr. 214; Ld. Raym. 1413; and should be stated according to their legal effect and operation; Steph. Pl. 378–392; 16 Mass. 443; 12 Pick. 251.

The time within which pleas must be filed is a matter of local regulation, depending upon the court in which the action is brought. *The order* of pleading different matters is of importance as affecting the defendant, who may oppose the plaintiff's suit in various ways. The order is as follows:—

First, to the jurisdiction of the court.

Second, to the disability, etc. of the person: *first*, of the plaintiff; *second*, of the defendant.

Third, to the count or declaration.

Fourth, to the writ: *first*, to the form of the writ,—*first*, matter apparent on the face of it, secondly, matters dehors; *second*, to the action of the writ.

Fifth, to the action itself in bar.

This is said to be the natural order of pleading, because each subsequent plea admits that there is no foundation for the former; 13 La. An. 147; 41 Me. 102; 7 Gray, 38; 5 R. I. 235; 2 Bosw. 267; 1 Grant, Cas. Pa. 359; 4 Jones, No. C. 241; 3 Miss. 704; 20 *id.* 656; 1 Chitty, Pl. 425. See 16 Tex. 114; 4 Iowa, 158. An exception exists where matter is pleaded *puis darrein continuance*, see PLEA; and where the subject-matter is one over which the court has no jurisdiction, a failure to plead to the puis cannot confer jurisdiction; 10 S. & R. 229; 17 Tex. 52.

The science of pleading, as it existed at common law, has been much modified by statutory changes; but, under whatever names it is done,—whether under rules of court, or of the legislative power, by the parties, the court, or the jury,—it is evident that, in the nature of things, the end of pleading must be attained, namely, the production of one or more points of issue, where a single fact is affirmed by one party and denied by the other. By pleading at the common law, this was done by the parties; in the civil law, by the court.

In England, pleadings in actions are now governed by the provisions of the Judicature Act, ord. xix. which made a number of changes in the old common law methods. See Wharton, Dict.; JUDICATURE ACTS.

In Criminal Practice the rules of pleading are the same as in civil practice. There is, however, less liberty of amendment of the indictment. The order of the defendant's pleading is as follows:—*first*, to the jurisdiction; *second*, in abatement; *third*, special pleas in bar: as, autrefois acquit, autrefois attaint, autrefois convict, pardon; *fourth*, the general issue.

See, generally, Lawes, Chitty, Stephen, Gould, Pleading; 3 Sharsw. Bla. Com. 301 *et seq.* and notes; Co. Litt. 303; Comyns, Dig. *Pleader;* Bacon, Abr. *Plea and Pleading;* Bates, Pleadings under the Code; Nash, Pl. & Pr.

PLEADING, SPECIAL. By special pleading is meant the allegation of special or new matter, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Pl. c. 1, s. 18. See SPECIAL PLEADING.

PLEADINGS. In Chancery Practice. The written allegations of the respective par-

ties in the suit. The pleadings in equity are less formal than those at common law.

The parts of the pleadings are—the *bill*, which contains the plaintiff's statement of his case, or *information*, where the suit is brought by a public officer in behalf of the sovereign; the *demurrer*, by which the defendant demands judgment of the court, whether he shall be compelled to answer the bill or not; the *plea*, whereby he shows some cause why the suit should be dismissed or barred; the *answer*, which, controverting the case stated by the bill, confesses and avoids it, or traverses and denies the material allegations in the bill, or, admitting the case made by the bill, submits to the judgment of the court upon it, or relies upon a new case or upon new matter stated in the answer, or upon both; *disclaimer*, which seeks at once a termination of the suit by the defendants, disclaiming all right and interest in the matter sought by the bill; Story, Eq. Pl. § 546; Mitf. Eq. Pl. by Jer. 13, 106; Cooper, Eq. Pl. 108; 2 Story, 59.

In Civil Practice. The statements of the parties, in legal and proper manner, of the causes of action and grounds of defence. The result of pleading. They were formerly made by the parties or their counsel, orally, in open court, under the control of the judge. They were then called the parole; 3 Bla. Com. 293; 2 Reeves, Hist. Eng. Law, 267.

The parts of the pleadings may be arranged under two heads: the regular, which occur in the ordinary course of a suit; and the irregular or collateral, which are occasioned by errors in the pleadings on the other side.

The regular parts are—the *declaration* or count; the *plea*, which is either to the jurisdiction of the court, or suspending the action, as in the case of a parol demurrer, or in abatement, or in bar of the action, or in replevin, an avowry or cognizance; the *replication*, and, in case of an evasive plea, a *new assignment*, or, in replevin, the *plea in bar* to the avowry or cognizance; the *rejoinder*, or, in replevin, the replication to the plea in bar; the *sur-rejoinder*, being in replevin the rejoinder; the *rebutter;* the *sur-rebutter;* Viner, Abr. *Pleas and Pleading* (C); Bacon, Abr. *Pleas and Pleadings* (A); pleas *puis darrein continuance*, when the matter of defence arises pending the suit.

The irregular or collateral parts of pleading are stated to be—*demurrers* to any part of the pleadings above mentioned; *demurrers to evidence* given at trials; *bills of exceptions; pleas in scire facias;* and *pleas in error*. Viner, Abr. *Pleas and Pleadings* (C); Bouvier, Inst. Index.

In Criminal Practice, the pleadings are—*first*, the *indictment; second*, the *plea;* and the other pleadings as in civil practice.

PLEAS OF THE CROWN. In English Law. A phrase now employed to signify criminal causes in which the king is a party. Formerly it signified royal causes for offences of a greater magnitude than mere misdemeanors. These were left to be tried in the courts of the barons; whereas the greater offences, or royal causes, were to be tried in the king's courts, under the appellation of pleas of the crown. 1 Robertson, Hist. Charles V. 48.

PLEAS ROLL. In English Practice. A record which contains the declaration, plea, replication, rejoinder, and other pleadings, and the issue. Eunom. Dial. 2, § 29, p. 111.

PLEBEIAN. One who is classed among the common people, as distinguished from the nobles.

PLEBISCITUM (Lat.). **In Roman Law.** A law established by the people (*plebs*), on the proposal of a popular magistrate, as a tribune. Vicat, Voc. Jur.; Calvinus, Lex.; Mackeldey, Civ. Law, §§ 27, 37.

PLEDGE, PAWN. A bailment of personal property as security for some debt or engagement.

A pledge or pawn (Lat. *pignus*), according to Story, is a bailment of personal property as security for some debt or engagement. Story, Bailm. § 286, which see for the less comprehensive definitions of Sir Wm. Jones, Lord Holt, Pothier, etc. Domat broadly defines it as an appropriation of the thing given for the security of an engagement. But the term is commonly used as Sir Wm. Jones defines it: to wit, as a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. Jones, Bailm. 117; 2 Ld. Raym. 909; Pothier, de Naut. art. prelim. 1; Code, Civ. 2071; Domat, b. 3, tit. 1, § 1, n. 1; La. Civ. Code, 3100; 6 Ired. 309. The pledgee secures his debt by the bailment, and the pledgeor obtains credit or other advantage. See 1 Pars. Contr. 591 *et seq.*

Delivery. The first essential thing to be done is a delivery to the pledgee. Without his possession of the thing, the transaction is not a pledge; 37 Me. 543. But a constructive possession is all that is required of the pledgee. Hence, goods at sea or in a warehouse pass by transfer of the muniments of title, or by symbolic delivery. Stocks and equitable interests may be pledged; and it will be sufficient if, by proper transfer, the property be put within the power and control of the pledgee; 12 Mass. 300; 20 Pick. 405; 22 N. H. 196; 2 N. Y. 403; 7 Hill, 497. Stocks are usually pledged by delivery of the company's certificate, together with a power of attorney to the pledgee to make the transfer, leaving the actual transfer to be made subsequently.

Primâ facie, if the pledgee redeliver the pledge to the pledgeor, third parties without notice might regard the debt as paid. Still, this presumption can be rebutted, in most states. In some states courts in effect hold that even in case of sale, as well as in case of pledge, possession of the vendor is fraud *per se*, and refuse to admit explanatory evidence. In such states, therefore, a vendee may always take the pledge if found in the vendor's possession; 5 N. H. 345; 14 Pick. 509; 4 Jones, No. C. 40, 43. The prevailing rule is, however, that a temporary redelivery to the pledgeor makes

him only the agent or bailee of the pledgee, and the latter does not lose his special property or even his constructive possession; 5 Bingh. N. C. 136; 11 E. L. & E. 584; 3 Whart. 531; 5 Humphr. 308; 32 Me. 211; 1 Sandf. 248.

Subject of pledge. Any tangible personal property may be pledged except for the peculiar rules of maritime law which are applicable to shipping. Hence, not only goods and chattels and money, but also negotiable paper, may be put in pledge. So may choses in action, patent rights, coupon bonds, and manuscripts of various sorts; 1 Ves. 278; 2 Taunt. 268; 15 Mass. 389, 534; 2 Blackf. 198; 7 Me. 28; 4 Denio, 227; 2 N. Y. 443; 1 Stockt. 667; Story, Bailm. § 290. So may bonds secured by a mortgage on personal property and corporate franchises; 50 N. H. 57; and chattel mortgages of every description; 36 Wisc. 35, 946, and 734. Even a lease may be taken in pledge; 8 Cal. 145; L. R. 10 Eq. 92; for leases are but chattels real; or a mortgage of real estate, which before foreclosure, is now to be ranked with personal property; 9 Bosw. 322; Schoul. Bailm. 167. Incorporeal things could be pledged immediately, probably, under the civil law, and so in the Scotch law, or, at all events, by assignment; 1 Domat, b. 3, tit. 1, § 1; Pothier, de Naut. n. 6; 2 Bell, Com. 23. The laws of France and Louisiana require a written act of pledge, duly registered and made known, in order to be made good against third parties. In the civil law, property of which the pledgeor had neither present possession nor title could be pledged,—though this was rather a contract for pledge, called a hypothecation. The pledge became complete when the property was acquired by the pledgeor. The same rule holds in our law, where a hypothecary contract gives a lien which attaches when the property is vested; 1 Hare, 549; 13 Pick. 175; 14 *id.* 497; 21 Me. 86; 16 Conn. 276; Daveis, 199. And it has been held that a pledge may be made to secure an obligation not yet risen into existence; 12 La. An. 529. In an agreement to pledge a vessel not then completed, the intent of the parties governs in determining when the property passes; 8 Pick. 236; 24 E. L. & E. 220.

A life-policy of insurance may be pledged, or a wife's life-policy. The common law does not permit the pay and emoluments of officers and soldiers to be pledged, from public policy; 1 H. Blackst. 627; 4 Term, 248. Hence, probably, a fishing-bounty could not be pledged, on the ground that government pensions and bounties to soldiers, sailors, etc., for their personal benefit, cannot be pledged. A bank can pledge the notes left with it for discount, if it is apparent on the face of the notes that the bank is their owner.

Ordinary care. The pawnee is bound to take ordinary care of his pawn, and is liable only for ordinary neglect, because the bailment is for the mutual benefit of both parties. Hence, if the pledge is lost and the pledgee has taken ordinary care, he may still recover his debt. Such losses often result from casualty, superior force, or intrinsic defect against which a man of ordinary prudence would not have effectually guarded himself. If a pledgeor find it necessary to employ an agent, and he exercise ordinary caution in his selection of the agent, he will not be liable for the latter's neglect or misconduct; 1 La. An. 344; 10 B. Monr. 239; 4 Ind. 425; 8 N. H. 66; 14 *id.* 567; 6 Cal. 643.

Loss by *theft* is *primâ facie* evidence of a want of ordinary care, and the bailee must rebut the presumption. The facts in each case regulate the liablity. Theft is only evidence, in short, and not absolute presumption, of negligence. Perhaps the only safe rule is that, where the pledgee pleads loss by theft as ground for not performing his duty, to excuse himself he must show that the theft could not have been prevented by ordinary care on his part. If the bailor should assert in his declaration that the pledge was lost by the bailee's fault, he would be compelled to prove the charge as laid.

Use. The reasonable use of a pledge is allowed to a pledgee, according to Lord Holt, Sir Wm. Jones, and Story, provided it be of no injury or peril to the bailment. The reason given by Story is precise, namely, that where use of the pledge is beneficial to it, or cannot depreciate it, the consent of the pledgeor to such use may fairly be presumed; but not otherwise. Still, the word peril is somewhat broad. If the pawn be in its nature a charge upon the pawnee,—as a horse or cow,—he may use it, moderately, by way of recompense. For any unusual care he may get compensation from the owner, if it were not contemplated by the parties or implied in the nature of the bailment; Ld. Raym. 909; 2 Salk. 522; 1 Pars. Contr. 593. The pawnee is answerable in damages for an injury happening while he is using the pawn. Still, though he use it tortiously, he is only answerable by action. His pledgee's lien is not thereby forfeited; 4 Watts, 414. A pledgee can exercise a horse, but not loan it for hire. The rule is, that if he derive any profits from the pledge they must be applied to the debt; 2 Murph. 111.

The pledgee of shares of stock, in the absence of a specific agreement to the contrary, may transfer the stock to his own name on the books of the company, and when so transferred, the particular shares become undistinguishable from the common mass, and the pledgeor is not entitled to the return of the identical shares pledged; 11 Fed. Rep. 115; s. c. 21 Am. L. Reg. N. S. 452, and note citing 69 Penn. 409; 8 Nev. 345.

Property. The pledgee has at common law a special property in the pledge, and is entitled to the exclusive possession of it during the time and for the objects for which it is pledged. If a wrong-doer take the pledge from him, he is not thereby ousted from his

right. His special property is enough for him to support replevin or trover against the wrong-doer. He has, moreover, a right to action, because he is responsible to his pledgeor for proper custody of the bailment. The pledgeor, also, may have his action against the wrong-doer, resting it on the ground of his general property. A judgment for either pledgeor or pledgee is a bar against a similar action by the other; 2 Bla. Com. 395; 6 Bligh. N. S. 127; 1 B. & Ald. 59; 5 Binn. 457; see 15 Conn. 302; 9 Gill, 7; 13 Me. 436; 13 Vt. 504.

The bailee, having a special property, recovers only the value of his special property as against the owner, but the value of the whole property as against a stranger, and the balance beyond the special property he holds for the owner; 15 Conn. 302. So if the owner brings the action and recovers the whole damages, including those for deprivation of possession, it must be with the consent of the pledgee.

A pledgee may bring replevin or trover against the pledgeor if the latter remove his pledge before paying the debt and thus injure the pledgee's rights, on the ground that the owner has parted with his absolute right of disposing of the chattel until he has redeemed it from its state of pledge; 2 Taunt. 268; 1 Sandf. 208; 22 N. H. 196; 11 N. Y. 150; 2 M'Cord, 126. Yet in trover the damages recovered cannot be greater than the amount of the debt, if the defendant derives title under the pledgeor; 4 Barb. 491; 13 Ill. 465.

Sale. If the pledgeor fail to pay the debt, the pledgee may sell the pledge. Formerly a decree of court was necessary to make the sale valid, and under the civil law it is still so in many continental countries. It is safer in a large pledge to proceed by bill in equity to foreclose; but this course is ordinarily too expensive. A demand of payment, however, must be made before sale; and if the pledgee mentions no time of sale, he may demand at once, and may sell in a reasonable time after demand; Glanville, lib. x. c. 6; 5 Bligh, N. S. 136; 9 Mod. 275; 2 Johns. Ch. 100; 1 Sandf. 351; 8 Ill. 423; 4 Denio, 227; 3 Tex. 119; 1 P. A. Browne, 176; 22 Pick. 40; 2 N. Y. 443. The pledge must be sold at public auction, and, if it be divisible, only enough must be sold to pay the debt. Even a sale at a brokers' board has been held improper; 40 Barb. 648. In general, also, the pledgee must not buy the pledge when put up at auction. Still, the purchase of the pledgee is probably not void *per se*, but voidable at the election of the pledgeor; and the latter may ratify the purchase by receiving the surplus over the debt, or avoid it by refusing to do so. The pledgee may charge the pledge with expenses rightfully incurred, as the costs of sale, etc. If the pledge when sold *bonâ fide* does not bring enough to pay the debt, the pledgee has still left a good claim against the pledgeor for the balance.

The pledgeor's bankruptcy after putting the thing in pledge will not impair the pledgee's right to make sale upon default; 95 U. S. 764.

In those states were strict foreclosure is allowed, an absolute transfer of title is made to a mortgagee, and hence there is never any inquiry into the matter of surplus after sale, because there is no right to reclaim. But in such states the mortgage law does not apply to pawns; for in pawns the surplus over the amount of debt after sale must be given back to the pledgeor. This last is also the law of mortgages in some states; but still, everywhere, pawns and mortgages of personal property are separate in law. In order to authorize any sale of a pledge without judicial proceedings, not only personal notice of the intent to redeem must be given, but also of the time, place, and manner of the intended sale; 12 Barb. 103; 4 Denio, 226; 14 N. Y. 392.

Buying and selling through a broker on deposit of a "margin" with him is held in New York to create the relation of pledgeor and pledgee; so that, on the pledgeor's failure to keep his "margin" good, the pledgee or broker cannot sell the stock, except upon the pledge formalities, for repayment of his advances and commissions; 41 N. Y. 235; 55 Barb. 59; Dos Passos, Stock-brokers, 114; Schoul. Bail. 211.

Negotiable paper. The law of pledge applies, probably, to promissory notes on demand, held in pledge. But it does not apply, in general, to other promissory notes and commercial paper pledged as collateral security. The holder of negotiable paper, even though it be accommodation paper, may pledge it for an antecedent debt, the rule governing pledges not being applicable to commercial property of this description; 3 Penn. 381; see 13 Mass. 105; 3 Cal. 151; 5 *id.* 260. Pledgees of negotiable paper have no right to sell it, but must wait until its maturity and then collect it; 25 Minn. 202; 82 Ill. 584; 22 Gratt. 262; 16 N. Y. 392.

See, upon the law of pledges in mercantile property, 28 N. H. 561; 26 Vt. 686; 13 B. Monr. 432; 1 Stockt. Ch. 667; 17 Barb. 492; 5 Du. N. Y. 29; 14 Ala. N. S. 65; 10 Md. 373; 1 N. Y. Leg. Obs. 25; 5 Tex. 318.

In most states, a pledgee cannot sell his pledge before default on the debt. And hence any pledgee who has stock put into his hands cannot sell it or operate with it as his own. If he do sell it, the pledgeor can recover of him the highest price the stock has reached at any time previous to adjudication; 2 Caines, Cas. 200; *contra*, *i. e.*, up to the expiration of a reasonable time to replace it in, after notice; 53 N. Y. 211. A pledgeor may bring trover upon the sale of a pledge, or upon a tortious repledging of it.

Other debts. A pledge cannot, in general, be held for any other debt than that which it was given to secure, except on the special agreement and consent of the parties; 7

East, 224; 6 Term, 258; 2 Ves. 372; 6 *id.* 226; 7 Port. Ala. 466; 15 Mass. 389; 2 Leigh, 493; 14 Barb. 536. The civil law and Scotch law are otherwise; 2 Bell, Com. 22.

Pledgeor's transfer. The pledgeor may sell or transfer his right to a third party, who can bring trover against the pledgee if the latter, after tender of the amount of his debt, refuse to deliver the pawn; 9 Cow. 52; 13 M. & W. 480. A creditor of the pledgeor can only take his interest, and must pay the debt before getting the pawn. And now it is settled that the pledgeor's general property in the pawn may be sold at any time on execution, and the purchaser or assignee of the pledgeor succeeds to the pledgeor's rights, and may himself redeem. At common law, a pledge could not be taken at all in execution, 1 Ves. 278; 3 Watts, 258; 17 Pick. 85; 1 Const. 20; 1 Gray, 254. On an extent the king takes a pawn on paying the pawnee's debt; 2 Chit. Prerog. 285.

Factor. A factor cannot, at common law, pledge his principal's goods; and the principal may recover them from the pledgee's hands; 2 Stra. 1178; 6 Maule & S. 1; 3 Bingh. 139, 603; 2 Br. & B. 639; 4 B. & C. 5; 1 M'Cord, 1; 6 Metc. 68; 20 Johns. 421; 4 Hen. & M. 432; 18 Mo 147, 191; 11 How. 209, 226. The question is very fully discussed in Pars. Marit. Law, 363. But statutes in England and in various states, as Maine, Massachusetts, Rhode Island, New York, Pennsylvania, Ohio, etc., give the factor a power of pledging, with various modifications; 7 B. & C. 517; 6 M. & W. 572; 2 Mood. & R. 22; 3 Denio, 472; 4 *id.* 323; 2 Sandf. 68.

Co-pledgees A pledgee may hold a pledge for another pledgee also, and it will be a good pledge to both. If the pledge be not large enough for both debts after sale, and no other arrangement be made, the prior pledgee will have the whole of his debt paid before any part of the proceeds is applied to the subsequent pledgee. If there is no priority of time, they will divide ratably. But an agreement between the parties will always determine the rights of two or more pledgees; 12 Mass. 321. Where possession is given to one of three pledgees, to hold for all three, the other two have a constructive possession, which is equally good, for the purpose of sharing, with an actual possession. Hence the mere manual possession of one pledge will not give a right to discharge the whole debt of the holder and a part only of that of his co-pledgees. So, by the rule of constructive possession, if the holder should lose the pledge by his own negligence, he would be liable to his co-bailees out of actual possession, as well as to his bailor.

There is a clear distinction between mortgages and pledges. In a pledge, the legal title remains in the pledgeor. In a mortgage, it passes to the mortgagee. In a mortgage, the mortgagee need not have possession. In a pledge, the pledgee must have possession, though it be only constructive. In a mortgage, at common law, the property on non-payment of the debt passes wholly to the mortgagee. In a pledge, the property is sold, and only so much of the proceeds as will pay his debt passes to the pledgee. A mortgage is a conditional conveyance of property, which becomes absolute unless redeemed at a specified time. A pledge is not strictly a conveyance at all, nor need any day of redemption be appointed for it. A mortgagee can sell and deliver the thing mortgaged, subject only to the right of redemption. A pledgee cannot sell and deliver his pawn until the debt is due and payment denied.

The civil law *pignus* was our pledge, and the *hypotheca* was our mortgage of chattels. In the former, possession was in the bailor; in the latter, in the bailee.

Pledge and mortgage, therefore, are diverse in law. Each of the following authorities recognizes one or another of the preceding distinctions: 3 Brown, C. C. 21; Yelv. 178; Prec. in Chanc. 419; 1 Ves. 358; 2 *id.* 372; 1 Bulstr. 29; Comyns, Dig. *Mortgage;* Ow. 123; 5 Johns. 260; 8 *id.* 97; 2 Pick. 607; 5 *id.* 60; 3 Penn. 208, 6 Mass. 425, 22 Me. 248; 6 Pet. 449; 2 Barb. 538; 4 Wash. C. C. 418, 2 Ala. N. s. 555; 9 Me. 82; 5 N. H. 545; 5 Blackf. 320; 3 Tex. 119; 1 Pars. Contr. 591; Schoul Bailm. 163; see CHATTEL MORTGAGE.

The distinction between mortgages and pawns is often observed strictly. Hence an instrument giving security upon a chattel for the future payment of a debt was held to be a mortgage and not a pledge, because it provided for the continuance of the possession of the debtor until payment, or on non-payment at the appointed day authorized the creditor to take possession; and this was held although instead of the ordinary terms of conveyance the words used were, "I hereby pledge and give a lien on," etc.; 9 Wend. 80. If a pledge is given with the understanding that if the debt be not paid within the stipulated time the pledgee shall have the pledge, the pledge does not pass to the pledgee on non-payment, unless the transaction be proved a mortgage and not a pledge; 3 Tex. 119; 2 Cow. 324. These decisions coincide, apparently, with the doctrines of the civil law and the French Code.

It has been seen that when no definite day is appointed the pledge may be redeemed at any time. Hence, if the pledgee himself do not give notice to the pledgeor to redeem, the latter has his whole lifetime in which to do so; and his right of redemption survives and goes to his representatives; 3 Mo. 316; 1 Call, 290. But for further discussion of pledge and hypothecation see 2 Ld. Raym. 982; 1 Atk. 165; 5 C. Rob. 218; 2 Curt. C. C. 404; 1 Pars. Marit. Law, 118; Schoul. Bailm. 158.

In Louisiana there are two kinds of pledges,—the pawn and the antichresis. The former relates to movable securities, and the latter to immovables. If a creditor have not a right to enter on the land and reap the fruits, the security is not an antichresis; 3 La. 157. A pledge of negotiable paper is not valid against third parties without transfer from debtor to creditor; 2 La. 387. See, in general, 13 Pet. 351; 5 Mart. La. N. s. 618; 18 La. 543; 1 La. An. 340; 2 *id.* 872.

PLEDGEE. He to whom a thing is pledged.

PLEDGEOR. The party who makes a pledge.

PLEDGES. In Pleading. Those persons who became sureties for the plaintiff's prosecution of the suit. Their names were anciently appended at the foot of the declaration. In time it became purely a formal matter, because the plaintiff was no longer liable to be amerced for a false claim, and the fictitious persons John Doe and Richard Roe became the universal pledges, or they might be omitted altogether; 1 Tidd, Pr. 455; Archb. Civ. Pl. 171; or inserted at any time before judgment; 4 Johns. 90; and are now omitted.

PLEGIIS ACQUIETANDIS, WRIT DE. The name of an ancient writ in the English law, which lies where a man becomes pledge or surety for another to pay a certain sum of money at a certain day; after the day, if the debtor does not pay the debt, and the surety be compelled to pay, he shall have this writ to compel the debtor to pay the same. Fitzh. N. B. 321.

PLENA PROBATIO. In Civil Law. A term used to signify full proof, in contradistinction to *semi-plena probatio*, which is only a presumption. Code, 4. 19. 5. etc.; 1 Greenl. Ev. § 119.

PLENARTY. In Ecclesiastical Law. Signifies that a benefice is full. See AVOIDANCE.

PLENARY. Full; complete.

In the courts of admiralty, and in the English ecclesiastical courts, causes or suits in respect of the different course of proceedings in each are termed plenary or summary. Plenary, or full and formal, suits are those in which the proceedings must be full and formal; the term summary is applied to those causes where the proceedings are more succinct and less formal. 2 Chitty, Pr. 481.

PLENE ADMINISTRAVIT (Lat. he has fully administered). **In Pleading.** A plea in bar entered by an executor or administrator, by which he affirms that he had not in his possession at the time of the commencement of the suit, nor has had any time since, any goods of the deceased to be administered; when the plaintiff replies that the defendant had goods, etc. in his possession at that time, and the parties join issue, the burden of the proof will be on the plaintiff. See 15 Johns. 323; 6 Term, 10; 1 B. & Ald. 254; 11 Viner, Abr. 349; 12 *id.* 185; 2 Phill. Ev. 295; 3 Saund. (a) 315, n. 1; 6 Comyns, Dig. 311.

PLENE ADMINISTRAVIT PRÆTER (Lat. he has fully administered except). **In Pleading.** A plea by which a defendant executor or administrator admits that there is a balance remaining in his hands unadministered.

PLENE COMPUTAVIT (Lat. he has fully accounted). **In Pleading.** A plea in an action of account render, by which the defendant avers that he has fully accounted. Bacon, Abr. *Accompt* (E). This plea does not admit the liability of the defendant to account. 15 S. & R. 153.

PLENIPOTENTIARY. Possessing full powers: as, a minister plenipotentiary is one authorized fully to settle the matters connected with his mission, subject, however, to the ratification of the government by which he is authorized. See MINISTER.

PLENUM DOMINIUM (Lat.). The unlimited right which the owner has to use his property as he deems proper, without accountability to any one.

PLIGHT. An old English word, used sometimes for the estate with the habit and quality of the land. Co. Litt. 221. It extends to a rent-charge and to a possibility of dower. *Id.*; 1 Rolle, Abr. 447; Littleton, § 289.

PLOUGH-BOTE. An allowance made to a rural tenant of wood sufficient for ploughs, harrows, carts, and other instruments of husbandry.

PLOUGH-LAND. In Old English Law. An uncertain quantity of land. According to some opinions, it contains one hundred and twenty acres. Co. Litt. 69 *a*.

PLUNDER. The capture of personal property on land by a public enemy, with a view of making it his own. The property so captured is called plunder. See BOOTY; PRIZE.

PLUNDERAGE. In Maritime Law. The embezzlement of goods on board of a ship is known by the name of plunderage.

The rule of the maritime law in such cases is that the whole crew shall be responsible for the property thus embezzled, because there must be some negligence in finding out the depredator; Abbott, Shipp. 457; 3 Johns. 17; 1 Pet. Adm. 200, 239, 243; 4 B. & P. 347.

PLURAL. A term used in grammar, which signifies more than one.

Sometimes, however, it may be so used that it means only one: as, if a man were to devise to another all he was worth if he, the testator, died without children, and he died leaving one child, the devise would not take effect. See Dig. 50. 16. 148; Shelf. Lun. 504, 518.

PLURALITY. The greatest number of votes given for any one person.

Plurality has the meaning, as used in governmental law, given above. Thus, if there are three candidates, for whom four hundred, three hundred and fifty, and two hundred and fifty votes are respectively given, the one receiving four hundred has a plurality, while five hundred and one would be a majority of the votes cast. See MAJORITY.

PLURIES (Lat. many times.) A writ issued subsequently to a first and second (alias) of the same kind, which have proved ineffectual. The name is given to it from the

word *pluries* in the Latin form of the writ: "we command you, as we have often (*pluries*) commanded you before," which distinguishes it from those which have gone before. *Pluries* is variously translated, in the modern forms of writs, by "formerly," "more than once," "often." The next writ to the pluries is called the second pluries; and so on. 3 Sharsw. Bla. Com. 283, App. 15; Natura Brev. 33.

POACHING. Unlawful entering land, in night-time, armed, with intent to destroy game. 1 Russell, Crimes, 469; 2 Stephen, Comm. 82; 2 Chitty, Stat. 221-245.

POCKET SHERIFF. In English Law. A sheriff appointed by sole authority of the crown, not being one of the three nominated by the judges in the exchequer. 1 Sharsw. Bla. Com. 342*.

POINDING. In Scotch Law. That diligence (process) affecting movable subjects by which their property is carried directly to the creditor. Poinding is real or personal. Erskine, Inst. 3. 6. 11.

POINDING, PERSONAL. Poinding of the goods belonging to the debtor, and of those goods only.

It may have for its warrant either letters of horning, containing a clause for poinding, and then it is executed by messengers; or precepts of poinding, granted by sheriffs, commissaries, etc., which are executed by their proper officers. No cattle pertaining to the plough, nor instruments of tillage, can be poinded in the time of laboring or tilling the ground, unless where the debtor has no other goods that may be poinded. Erskine, Inst. 3. 6. 11. This process is somewhat similar to distress.

POINDING, REAL. POINDING OF THE GROUND. Though it be properly a diligence, this is generally considered by lawyers as a species of real action, and is so called to distinguish it from personal poinding, which is founded merely on an obligation to pay.

Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is, therefore, competent to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened; but goods brought upon the ground by strangers are not subject to this diligence. Even the goods of a tenant cannot be poinded for more than his term's rent. Erskine, Inst. 4. 1. 3.

POINT. In Practice. A proposition or question arising in a case.

It is the duty of a judge to give an opinion on every point of law properly arising out of the issue which is propounded to him.

POINT RESERVED. A point or question of law which the court, not being fully satisfied how to decide, in the hurried trial of a cause, rules in favor of the party offering it, but subject to revision on a motion for a new trial. If, after argument, it be found to have been ruled correctly, the verdict is supported; if otherwise, it is set aside.

POINTS. Marks in writing and in print, to denote the stops that ought to be made in reading, and to point out the sense.

Points are not usually put in legislative acts or in deeds; Eunom. Dial. 2, § 33, p. 239; yet, in construing such acts or instruments, the courts must read them with such stops as will give effect to the whole; 4 Term, 65.

The points are—the comma, the semicolon, the colon, the full point, the point of interrogation, and the point of exclamation. Barrington, Stat. 294, n. See PUNCTUATION.

POISON. In Medical Jurisprudence. A substance having an inherent deleterious property which renders it, when taken into the system, capable of destroying life. Whart. & St. Med. Jur. § 493; Tayl. Poisons.

The history of poisoning, and many remarkable early instances of a wide-spread use of poisons, are recorded in works on medical jurisprudence. See these, and also, especially, Taylor, Poisons; Archbold, Crim. Pract. Waterman's ed. 940; Wharton & Stillé, Med. Jur.; 1 Beekman, Hist. Jur. 74 *et seq.* The classification proposed by Mr. Taylor is as follows:—

IRRITANTS.
- MINERAL
  - NON-METALLIC (Acids, Alkalies and their Salts. Metalloids.)
  - METALLIC (*Arsenic*).
- VEGETABLE (*Savin*).
- ANIMAL (*Cantharides*).

NARCOTICS.
- CEREBRAL (*Morphia*).
- SPINAL (*Strychnia*).
- CEREBRO-SPINAL (*Conia, Aconitina*).

GASEOUS.

Irritant poisons, when taken in ordinary doses, occasion speedily violent vomiting and purging, preceded, accompanied, or followed by intense pain in the abdomen, commencing in the region of the stomach. The corrosive poisons, as distinguished from those in a more limited sense termed irritant, generally produce their result more speedily, and give chemical indications; but every corrosive poison acts as an irritant in the sense here adopted.

Narcotic poisons act chiefly on the brain or spinal marrow. Either immediately or some time after the poison has been swallowed, the patient suffers from headache, giddiness, paralysis, stupor, delirium, insensibility, and, in some instances, convulsions.

The effects of one class are, however, sometimes produced by the other,—more commonly as secondary, but sometimes even as primary symptoms.

The evidence of poisoning as derived from *symptoms* is to be looked for chiefly in *the suddenness of their occurrence;* this is perhaps the most reliable of all evidence derived from symptoms in cases of criminal poisoning; see Taylor, Pois. 107; Christison, Pois. 42; though none of this class of evidence can be considered as furnishing any thing better than a high degree of probability: *the regularity of their increase;* this feature is not universal, and exists in many diseases; *uniformity in their nature;* this is true in the case of comparatively few poisons; *the symptoms begin soon after a meal;* but sleep, the manner of administration, or certain diseases, may affect this rule in the case of some poisons; *when several partake at the same time of the same poisoned food, all suffer from similar symptoms;*

2 Park. C. C. 235; Taylor, Pois. 118; *the symptoms first appearing while the body is in a state of perfect health;* Archb. Cr. Pl. Waterman ed. 948.

Appearances which present themselves on post-mortem examinations are of importance in regard to some classes of irritant poisons; see The Hersey Case, Mass. 1861; Palmer's case, Taylor, Poisons, 697; 17 Am. L. Reg. N. S. 145; but many poisons leave no traces which can be so discovered.

Chemical analysis often results in important evidence, by discovering the presence of poison, which must then be accounted for; but a failure to detect it by no means proves that it has not been given. Christison, Poisons, 61, 62.

The evidence derived from *circumstances* differs in nothing in principle from that in case of commission of other crimes.

Homicide by poisoning is, of course, generally either accidental, so as not to amount to murder, or deliberate: yet it has been held that there may be a verdict of murder in the second degree under an indictment for poisoning; 19 Conn. 388. The doctrine of principal and accessory is also modified to some extent in its application to cases of poisoning; 2 Mood. Cr. Cas. 120; 9 C. & P. 356; 9 Co. 81. To constitute an administering of poison, it is not necessary that there should be a delivery by hand; 4 C. & P. 356; 6 *id.* 161; 1 Bish. Cr. L. § 651.

Intent to kill need not be specifically alleged in an indictment for murder by poison; 2 Stark. Cr. Pl. prec. 18; 1 East, Pl. Cr. 346; 3 Cox, C. C. 300; 8 C. & P. 418; 2 Allen, 173.

Many of the states have statutes inflicting severe penalties upon the administering of poisons with a malicious intent; see Archb. Cr. Pr. Waterman's ed. 942; 3 N. Y. Rev. Stat. 5th ed. 941, 944, 969, 975; Mich. Rev. Stat. c. 153, § 13; Mass. Gen. Stat. c. 160, § 32; Vt. Rev. Stat. 543; Wisc. Rev. Stat. c. 133, § 44, c. 144, § 39; Iowa Code, § 2728; N. J. Rev. Stat. 268; Ohio Stat. 1854 ed. c. 33, § 34.

Consult Christison, Taylor, on Poisons; Beck, Taylor, Wharton & Stillé, Med. Jur.; Archbold, Crim. Pract. Waterman's ed.; Russell, Crimes; Wharton, Homicide.

POLE. A measure of length, equal to five yards and a half. See MEASURE.

POLICE. That species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among the citizens. The officers who are appointed for this purpose are also called the police. See 9 Cent. L. J. 353.

The word *police* has three significations. The *first* relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The *second* has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered over to the justice of the country. The *third* comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.

Police has also been divided into *administrative police*, which has for its object to maintain constantly public order in every part of the general administration; and *judiciary police*, which is intended principally to prevent crimes by punishing the criminals. Its object is to punish crimes which the administrative police has not been able to prevent.

POLICE JURY. In Louisiana. A name given to certain officers who collectively exercise jurisdiction in certain cases of police: as, levying taxes, regulating roads, etc.

POLICE POWER. The authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, everything in the nature of property, every relation in the state, in society and in private life. Cooley, Const. 227. See also, Cooley, Const. Lim. 572; 4 Bla. Com. 162.

All property is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its existence. *Per* Shaw, C. J., in 7 Cush. 84. See, also, 25 Barb. 370; 3 Bush, 597; 5 How. 583; 94 U. S. 113; 81 Penn. 80.

The exercise of this power has been left with the individual states; 11 Bush, 311; and cannot be taken from them and exercised, wholly or in part, under legislation in congress; Cooley, Const. Lim. 715; 9 Wall. 41; see, 92 U. S. 214, 542. But a state cannot, by police regulation, interfere with the control by congress over inter-state commerce; 95 U. S.

465; *id.* 485. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any power which the constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal constitution; Cooley, Const. Lim. 715; see 16 Wall. 36; 7 How. 283.

The power to establish police regulations may be conferred by the state upon municipal corporations; Cooley, Const. Lim. 148.

The rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the state with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations; but these regulations must not conflict with the charter, nor take from the corporation any of its essential rights and privileges; Cooley, Const. Lim. 718, citing 61 Mo. 24; 18 Conn. 53; 35 Wisc. 425. Thus a municipal corporation may regulate the speed of railway trains within its limits; 67 Ill. 113; 79 Penn. 33 (but only in the streets and public grounds of the municipality; 29 N. J. 170); a railroad company may be required to fence its tracks; 27 Vt. 156; a state may regulate the grade of railways and may prescribe how railways may cross each other, and apportion the expense of making the necessary crossings between the corporations owning the roads; 77 Penn. 173; 4 Allen, 198; and it may regulate the speed of trains at highway and other crossings; 72 Ill. 235; and establish regulations requiring railway companies to cause a bell to be rung or a whistle blown (67 Ind. 45) on locomotives before crossing highways at grade, and to station flagmen at dangerous crossings; 67 Ill. 37; Cooley, Const. Lim. 724; and a statute imposing a penalty on railroad conductors for failing to cause their trains to stop five minutes at every station is constitutional; 4 Tex. App. 545; s. c. 30 Am. Rep. 166; and so is a statute directing the printing upon railroad tickets of any condition limiting the liability of the railroad company, in type of a specified size, and providing for the redemption by the company of tickets sold but not used; 63 Ind. 552; s. c. 30 Am. Rep. 238.

Prohibitory liquor laws have been sustained as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime; Cooley, Const. Lim. 727, citing 13 Gray, 26; 4 Mich. 244; 26 Conn. 179; even where a statute has provided legal process for the condemnation and destruction of liquor and the seizure and condemnation of the building in which the liquor is sold; 4 Green, Iowa, 172. The dealing in liquors even for lawful purpose may be confined to persons of approved moral character; 32 Iowa, 250.

Quarantine regulations and health laws of every description are within the police power of the state, even when they go to the extent of providing for the destruction of private property when infected with disease; Cooley, Const. Lim. 729; see 5 How. 632; 15 Wend. 397. For other exercises of this power, see COMMERCE.

A state law which grants to a corporation of that state the exclusive right for a term of years to control the slaughtering of cattle in and near one of its cities, and requires that all cattle and other animals intended for sale and slaughter in that district shall be brought to the yards and slaughter houses of the corporation, and authorizes the corporation to charge certain fees for the use of its yards, and for each animal landed or slaughtered, is constitutional, as coming within the police power of the state; 16 Wall. 36.

Proper regulations for the use of public highways and for their alteration are within the police power; Cooley, Const. Lim. 734; so is a law prohibiting beasts from running at large, under a penalty of being seized and sold; 30 Ill. 459; 4 Iowa, 296; and a law requiring the owners of urban property to construct and keep in repair sidewalks in front of it; 8 Mich. 309; 19 Ohio, 418; 4 R. I. 230, 445; 36 Barb. 226; 16 Pick. 504.

The general right to control and regulate the public use of navigable waters is unquestionably in the state, subject to the power of congress to regulate commerce with foreign nations and between the states; Cooley, Const. Lim. 737.

Laws compelling the owners of large unproductive tracts of land, which are sources of danger to health, to drain them, are also within the police power; 12 Rich. 702. A state law prescribing the maximum charges of a warehouse company is constitutional; 69 Ill. 80; 94 U. S. 113.

Regulations providing for the destruction of private property to prevent the spread of a fire, etc.; forbidding the erection of wooden buildings within the built-up parts of a city; 11 Mich. 425; 7 Cow. 352; and establishing wharf lines; 7 Cush. 53; are within the police power; Cooley, Const. Lim. 746. Cemeteries within the built-up parts of a city may be closed against further use; 5 Cow. 538; 66 Penn. 411; s. c. 5 Am. Rep. 377. The keeping of gunpowder in cities or villages; 1 Gray, 27; the sale of poisonous drugs, unless labelled; allowing unmuzzled dogs to run at large; and the keeping for sale of unwholesome provisions; and carrying on offensive manufactures; 47 Barb. 64; are all subject to be forbidden under the police power; Cooley, Const. Lim. 748. But a law prohibiting the bringing of Texas cattle into a state, has been held to conflict with the power of congress to regulate commerce; 95 U. S. 585.

Regulations tending to preserve public morals, for instance, by forbidding the sale of indecent books, are within the power of a state; see 8 Gray, 488; 38 N. H. 426. The

keeping of swine within the thickly populated portions of a city; 97 Mass. 221; or of a slaughter house; 109 Mass. 315; or carrying on any other business injurious to the public; 35 Wisc. 298; may be prohibited. Markets may be regulated; weights and measures established; 13 Iowa, 210; 36 Barb. 392; and certain persons, such as auctioneers etc., may be required to take out licenses and conform to such rules and regulations as are deemed important for the public convenience and protection; 38 Wisc. 428; s. c. 20 Am. Rep. 12; Dill. Mun. Corp. §§ 291–296. Laws may be passed regulating the hours of labor of women and children in factories; 120 Mass. 383.

"Whether the prohibited act or omission shall be made a criminal offence, punishable under the general laws, or subject to punishment under municipal by-laws, or, on the other hand, the party be deprived of all remedy for any right which, but for the regulation, he might have had against other persons, are questions which the legislature must decide." Cooley, Const. Lim. 750.

Other cases may be added. A statute exempting one dog to each family and taxing all others at a fixed rate is constitutional; 3 Tex. App. 489; s. c. 30 Am. Rep. 152; a state may provide by contract that certain persons shall have exclusive privileges—as that to supply the common schools of the state with text-books of a specified character and price; 5 Sawy. 502.

This subject is treated with great learning and fulness by Judge Cooley in his admirable and learned work on Constitutional Limitation. See, also, Cooley's Constitutional Law, and an article by Mr. Wade in 6 So. L. Rev. N. S. 59.

POLICIES OF INSURANCE, COURT OF. A court established in pursuance of the statutes 43 Eliz. c. 12, and 13 & 14 Car. II. c. 23. Composed of the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants; any three of whom, one being a civilian or a barrister, could determine in a summary way causes concerning policies of assurance in London, with an appeal to chancery. No longer in existence. 3 Bla. Com. 74.

POLICY. In Insurance. The instrument whereby insurance is made by an underwriter in favor of an assured, expressed, implied, or intended, against some risk, peril, or contingency in reference to some subject. It is usually either marine, or against fire, or on a life.

It must show expressly, or by implication, in whose favor it is made. It may be upon a valuable property, interest, or contingency, or be a gaming or wagering policy on a subject in which the assured has no interest, or against risks in respect to which the assured has no interest except what arises from the contract itself. A wagering policy is valid or not, according as a wager is or is not recognized as a valid contract by the *lex loci*.

An *interest* policy is one where the insured has a real, substantial, assignable interest in the thing insured.

An *open policy* is one on which the value is to be proved by the assured. 1 Phill. Ins. §§ 4, 6, 7, 27, 439, 948, 1178. By an "open policy" is also sometimes meant, in the United States, one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time; 12 La. An. 259; 19 N. Y. 305; 6 Gray, 214.

A *valued* policy is one where a value has been set on the ships or goods insured, and this value inserted in the policy in the nature of liquidated damages. In such a policy the value of the subject is expressly agreed, or is, as between the parties, the amount insured. Under an open policy, in case of loss, the insured must prove the true value of the property, while under a valued policy, the sum agreed upon is conclusive, except in case of fraud: 3 Camp. 319; 15 Mass. 341; 48 Penn. 372; May, Ins. § 30.

A *wager policy* is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. These policies are strongly reprobated; 3 Kent, 225.

Records and documents expressly referred to in the policy are in effect, for the purpose of the reference, a part of the contract; 22 Conn. 235; 37 Me. 137; 20 Barb. 468; 23 Penn. 50; 23 E. L. & E. 514; 33 N. H. 203; 10 Cush. 337; 70 N. Y. 72; May, Ins. § 158. A policy may take effect on actual or constructive delivery; 1 Phill. Ins. ch. xi. sect. i.; 25 Ind. 537; 27 Penn. 268; 42 Me. 259; 25 Conn. 207; 5 Gray, 52; and may be retrospective, provided there is no concealment or misrepresentation by either party; Phill. Ins. § 925; 2 Dutch. 268; s. c. 3 *id.* 645.

Every policy, whether marine, against fire, or on life, specifies or imports parties, and specifies the subject or interest intended to be insured, the premium or other consideration, the amount insured, the risks and perils for which indemnity is stipulated, and the period of the risk or the terminus *a quo* and *ad quem*. The subject-matter is usually more minutely described in a separate paper—called *an application*. May, Ins. § 29.

The duration of the risk, under a marine insurance or one on inland navigation, is either from one geographical terminus to another, called a "*Voyage Policy*," or from a specified time, called a "*Time Policy*;" that of a fire-policy is for a specified time; one on life is either for life or a term of years, months, etc. It is a leading principle, as to the construction of a policy of insurance, that its distinguishing character as a contract of indemnity is to be favored; which is in conformity with the common maxim, *ut res valeat magis quam pereat;* 8 N. Y. 351; 18 *id.*

385; 8 Cush. 393; 10 *id.* 356; 17 Penn. 253; 23 *id.* 262; 32 *id.* 381; 29 E. L. & E. 111, 215; 33 *id.* 514; 2 Du. N. Y. 419, 554; 5 *id.* 517, 594; 14 Barb. 383; 20 *id.* 635; 16 Mo. 98; 22 *id.* 82; 22 Conn. 235; 13 B. Monr. 311; 16 *id.* 242; 3 Ind. 23; 11 *id.* 171; 28 N. H. 234; 29 *id.* 182; 2 Curt. C. C. 322, 610; 37 Me. 137; 4 Zabr. 447; 18 Ill. 553; 4 R. I. 159; 5 *id.* 426; see May, Ins. § 7; 94 U. S. 457.

In marine insurance the contract has necessarily more implied reference to customs and usages than most other contracts; or, in other words, a larger proportion of the stipulations are not specifically expressed in the instrument; 1 Phill. Ins. § 119; whence it has been thought to be an imperfect, obscure, confused instrument; 1 Phill. Ins. § 6, n. 3; 1 East, 579; 5 Cra. 342; 1 Burr. 347. But the difficulty in giving it a practical construction seems to arise more from the complication of the circumstances necessarily involved than from any remediable defects in its provisions and phraseology. New provisions are, however, needed, from time to time, to adapt the contract to new circumstances. A mistake in filling up a policy may be corrected by order of a court of equity; 5 B. & P. 322; 1 Wash. C. C. 415; 1 Ves. Sen. 317, 456; 2 Cra. 441; 2 Johns. 330; 1 Ark. 545; 1 Paige, Ch. 278; 2 Curt. C. C. 277. A marine policy is assignable without the consent of the insurers; May, Ins. § 377; while a fire policy is not; 16 Wend. 385; 2 Pet. 25; 4 Bro. P. C. 431; 18 Iowa, 319; 9 L. T. N. S. 688; 4 Term, 340. The better opinion seems to be that an out-standing and valid life policy is assignable without the insurer's consent, provided the sale is *bona fide* and not a device to evade the law; 17 Am. L. Reg. N. S. 83; 13 N. Y. 31; 29 Ind. 236; 98 Mass. 381; 26 Penn. 189; but see, *contra*, 41 Ind. 116.

See ABANDONMENT; AVERAGE; INSURABLE INTEREST; INSURANCE; SALVAGE; LOSS; TOTAL LOSS.

POLITICAL. Pertaining to policy, or the administration of the government. Political rights are those which may be exercised in the formation and administration of the government: they are distinguished from civil rights, which are the rights which a man enjoys as regards other individuals, and not in relation to the government. A political corporation is one which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated. 1 Bouvier, Inst. nn. 182, 197, 198.

POLL. A head. Hence poll-tax is the name of a tax imposed upon the people at so much a head.

To *poll* a jury is to require that each juror shall himself declare what is his verdict. This may be done, at the instance of either party, at any time before the verdict is recorded, according to the practice in some states. See 3 Cow. 23; 18 Johns. 188; 1 Ill. 109; 7 *id.* 342; 9 *id.* 336. In some states it lies in the discretion of the judge; 1 M'Cord, 24, 525; 22 Ga. 431.

In Conveyancing. A deed-poll, or single deed, is one made by a single party, whose edges are *polled*, or shaved even, in distinction from an *indenture*, whose sides are indented, and which is executed by more than one party. 2 Bla. Com. 296. See DEED POLL.

POLL-TAX. A capitation tax; a tax assessed on every head, *i. e.* on every male of a certain age, etc., according to statute. Mass. Gen. Stat. 74, 75; Webster, Dict.; Wharton, Dict. 2d Lond. ed.

POLLICITATION. In Civil Law. An offer not yet accepted by the person to whom it is made. Langd. Contr. § 1.

It differs from a contract, inasmuch as the latter includes a concurrence of intention in two parties, one of whom promises something to the other, who accepts, on his part, of such promise. Grotius, l. 2, c. 2: Pothier, Obl. pt. 1, c. 1, s. 1, art. 1, § 2.

POLLS. The place where electors cast in their votes.

POLYANDRY. The state of a woman who has several husbands.

Polyandry is legalized only in Thibet. It is inconsistent with the law of nature. See LAW OF NATURE.

POLYGAMY. The act or state of a person who, knowing that he has two or more wives, or that she has two or more husbands, marries another.

It differs from bigamy, which see. Comyns, Dig. *Justices* (S 5); Dict. de Jur.; Co. 3d Inst. 88.

But bigamy is now commonly used even where polygamy would be strictly correct; 1 Russ. Cr. 186, n. On the other hand, polygamy is used where bigamy would be strictly correct; Mass. Gen. Stat. 1860, p. 817.

Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years; R. S. § 5352; 103 U. S. 304.

POLYGARCHY. A term used to express a government which is shared by several persons; as, when two brothers succeed to the throne and reign jointly.

POND. A body of stagnant water; a pool. But see Call. Sew. 103.

Any one has a right to erect a fish-pond; the fish in it are considered as real estate, and pass to the heir, and not to the executor. Ow. 20. Where land bounding on a lake or pond is conveyed, the grant extends only to the water's edge if it is a natural pond (some cases say to low-water mark; 13 Pick. 261); but to the middle of the stream if it is artificial; Ang. Water Courses, § 41; see 3 Washb. R. P. 416.

PONE. (Lat. *ponere*, to put). **In English Practice.** An original writ issuing out of chancery, for the purpose of removing a

plaint from an inferior court into the superior courts at Westminster. The word signifies "put:" put by gages, etc. The writ is called from the words it contained when in Latin, *Pone per vadium et salvos plegios*, etc.: put by gage and safe pledges, etc. See Fitzh. N. B. 69, 70 *a;* Wilkinson, Repl. Index.

The writ of *certiorari* is now used in its place.

PONENDIS IN ASSISIS. An old writ directing a sheriff to empanel a jury for an assize or real action. Moz. & W. Law Dic.; Whart. Law Lex.

PONENDUM IN BALLIUM. A writ commanding that a prisoner be bailed in cases bailable; Whart. Law Lex.; Moz. & W. Law Dic.

PONENDUM SIGILLUM. A writ requiring justices to put their seals to exceptions, according to Stat. West. 2, 13 Ed. I. c. 31; Whart. Law Lex.; Moz. & W. Law Dic.

PONERE (Lat.). To put. The word is used in the old law in various connections, in all of which it can be translated by the English verb "put." See Glanville, lib. 2, c. 3.

PONIT SE (Lat. puts himself). **In English Criminal Practice.** When the defendant pleads "not guilty," his plea is recorded by the officer of the court, either by writing the words "po. se," an abbreviation of the words *ponit se super patriam* (puts himself upon his country), or, as at the central criminal court, *non cul.* 2 Den. C. C. 392. See ARRAIGNMENT.

PONTAGE. A contribution towards the maintenance, rebuilding, or repairs of a bridge. The toll taken for this purpose also bears this name. Obsolete. Fleta, lib. 4, c. 1, § 16.

PONTIBUS REPARANDIS. An old writ directed to the sheriff commanding him to charge one or more to repair a bridge. Cow. Inst.; Reg. Orig. fol. 153.

POOL. A small lake of standing water. By the grant of a pool, it is said, both the land and water will pass; Co. Litt. 5. Undoubtedly the right to fish, and probably the right to use hydraulic works, will be acquired by such grant; 2 N. H. 259; Co. Litt. 5; Bacon, Abr. *Grants* (H 3); Comyns, Dig. *Grant* (E 5); 5 Cow. 216; Cro. Jac. 150; 1 Lev. 44; Pl. 161; Vaugh. 103.

POOR DEBTORS. By the constitutions of the several states and territories, or by the laws which exist for the relief of poor debtors, it is provided in general terms that there shall be no imprisonment for debt. But this is usually qualified by provisions for the arrest of debtors in certain enumerated cases of fraud. The statutes in the different states are very similar, and as a rule, require the creditor to make affidavit that the debtor is about to remove some of his property out of the jurisdiction of the court with intent to defraud his creditors, or that, for the same reason, he is about to or has disposed of his property, or that he is fraudulently concealing it; or that the debt, concerning which suit is brought, was fraudulently contracted. Such in general is the law in the following states and territories:—

Alabama, Const. art. 1, § 21; *Arizona*, Bill of Rights, § 18, and Comp. Laws, §§ 2508–9; *Arkansas*, Const. art. 1, § 14; *California*, Codes & Stats. § 10479; *Dakota*, Rev. Code, p. 536, § 149; *Florida*, Decl. Rights, § 13; *Idaho*, 2 Sess. L. p. 93; *Illinois*, Const. art. ii. § 12; *Indiana*, Rev. Stats. 1876, pp. 636–637; *Iowa*, Const. art. 1, § 19; *Kansas*, Comp. Laws, §§ 3675–6; *Kentucky*, Code, Pr. tit. 8, ch. 1; *Maine*, Rev. Stats. p. 792, § 2; *Massachusetts*, Gen. Stats. 124, § 5; *Michigan*, Comp. Laws, § 7177; *Nebraska*, Rev. Stats. p. 417, § 418; *Nevada*, Const. art. 1, § 14; *New Hampshire*, Gen. Laws, 522–3; *New Jersey*, Rev. Stats. (1877) p. 857, § 58; *North Carolina*, Const. art. 1, § 16; *Ohio*, Rev. Stats. §§ 5491–2–3; *Oregon*, Const. art. 1, No. 19; *Pennsylvania*, Pur. Dig. p. 49, §§ 51–53; *Rhode Island*, Gen. Stats. ch. 195; *South Carolina*, Civil C. Proced. § 119; *Utah*, Comp. Laws, 582, § 75; *Vermont*, Rev. Laws, 1476–1491; *Virginia*, Code, pp. 1016–1017; *Washington*, Gen. Stats. 1877, § 116; *West Virginia*, Code, ch. 106, § 37; *Wisconsin*, Rev. Stats. ch. 122, § 2689.

It may be stated generally, that the object of such statutes as exist in the states above mentioned is to induce the defendant to pay the debt, give security, or take advantage of the insolvent laws or of some enactments made especially for the relief of poor debtors. It follows therefore that in most of the states a person under arrest for debt may obtain his release in any of these ways. A poor debtor is of course usually compelled to resort to one of the two last mentioned, and, although the proceedings differ in the different states, yet as a rule he is released upon delivering his property to a trustee or taking oath that he has not more than ten or twenty dollars above the amount exempted by statute in the particular state in which he is confined; Rev. Stat. *Illinois* (1880), p. 601, §§ 1–35; Rev. Stat. *Maine*, p. 793, § 6; Public Stats. *Massachusetts*, p. 892, § 82; Genl. Laws *New Hampshire*, ch. 241; Rev. Stats. *New Jersey*, p. 497; Genl. Laws *Oregon*, pp. 627–628; *Pennsylvania*, Pur. Dig. p. 52, § 62; Rev. Stats. *South Carolina*, p. 690, §§ 9–35; Rev. Laws *Vermont*, §§ 1514–1528; Code of *Virginia*, p. 1017; Rev. Stats. *Wisconsin*, §§ 4307–4320.

In a few states the rule that there shall be no imprisonment for an ordinary contract debt is strictly adhered to; see Genl. Laws *Colorado*, p. 506; Rev. Stats. *District Columbia*, § 791; Code of *Georgia*, § 5010; Const. *Maryland*, art. 3, § 38; Const. *Minnesota*, art. 1, § 12; Const. *Mississippi*, art. 1, § 11; Const. *Missouri*, art. 2, § 16; Const. *Ten-*

nessee, art. 1, § 18; Const. *Texas*, art. 1, § 15; Comp. Laws *Wyoming*, p. 429, § 196; and in others female debtors are not subject to arrest; see *e. g. North Carolina, Rhode Island, South Carolina, Vermont, Pennsylvania, Dakota T., New Jersey.*

POOR LAW BOARD. A government board appointed by statute 10 & 11 Vict. c. 109, to take the place of poor law commissioners, who had general management of the poor and the funds for their relief. The poor law board is now superseded by the local government board, established under 34 & 35 Vict. c. 70; 3 Steph. Com. 49; Moz. & W.

POOR RATE. A rate levied by church authorities for the relief of the poor.

POPE. The bishop of Rome and head of the Roman Catholic church. He is elected by certain officers called cardinals, and remains in power during life. In the 9th Collation of the Authentics it is declared the bishop of Rome hath the first place of sitting in all assemblies, and the bishop of Constantinople the second. Ridley, Civ. & Eccl. Law, pt. 1, c. 3, § 10.

POPULAR ACTION. An action given by statute to any one who will sue for the penalty. A qui tam action. Dig. 47. 23. 1.

POPULISCITUM (Lat.). An act of the commons; same as *plebiscitum*. Ainsworth, Dict.

A law passed by the whole people assembled in *comitia centuriata*, and at the proposal of one of the senate, instead of a tribune, as was the case with a *plebiscitum*. Taylor, Civ. Law, 178; Mackeldey, Civ. Law, §§ 26, 37.

PORT. A place to which the officers of the customs are appropriated, and which includes the privileges and guidance of all members and creeks which are allotted to them. 1 Chitty, Com. Law, 726; Postlewaith, Com. Dict. According to Dalloz, a port is a place within land, protected against the waves and winds and affording to vessels a place of safety. By the Roman law a port is defined to be *locus conclusus, quo importantur merces et unde exportantur*. Dig. 50. 16. 59. See 7 Mart. La. N. S. 81.

A port differs from a haven, and includes something more. *First*, it is a place at which vessels may arrive and discharge or take in their cargoes. *Second*, it comprehends a ville, city, or borough, called in Latin *caput corpus*, for the reception of mariners and merchants, for securing the goods and bringing them to market, and for victualling the ships. *Third*, it is impressed with its legal character by the civil authority. Hale, de Portibus Mar. c. 2; 1 Hargrave, Tracts, 46, 73; Bacon, Abr. *Prerogative* (D 5); Comyns, Dig. *Navigation* (E); Co. 4th Inst. 148; Callis, Sewers, 56; 2 Chitty, Com. Law, 2; Dig. 50. 16. 59; 43. 12. 1. 13; 47. 10. 15. 7; 39. 4. 15.

PORT OF DELIVERY. This is sometimes used to distinguish the port of unlading or destination, from any port at which the vessel touches for other purposes. 2 Mas. 319.

PORT OF DESTINATION. As used in a time policy, the phrase has been held to mean any foreign port to which the vessel may be destined during the voyage, as well as her home port, and to include any usual stopping place for lading or unlading cargoes. 12 Gray, 501.

PORT OF DISCHARGE. The place where the substantial part of the cargo is discharged has been held to be such, although done with the intent to complete the discharge at another basin. 104 Mass. 510. Some cargo must be discharged to make the port of destination the port of discharge; 5 Mas. 414. See, further, 2 Cliff. 4; 1 Sprague, 485; 18 Law Rep. 94.

PORT TOLL. The toll paid for bringing goods into a port.

PORTATICA. (L. Lat.). **In English Law.** The generic name for port duties charged to ships. Hargr. Law Tracts, 64.

PORTER. The name of an ancient English officer who bore or carried a rod before the justices. The door-keeper of the English parliament also bears this name.

One who is employed as a common carrier to carry goods from one place to another in the same town is also called a porter. Such person is, in general, answerable as a common carrier. Story, Bailm. § 496.

PORTGREVE (from Sax. *gerefa*, reeve or bailiff, and port). A chief magistrate in certain maritime towns. The chief magistrate of London was anciently so called, as appears from a charter of king William I. Instead of this portgreve of London, the succeeding king appointed two bailiffs, and afterwards a mayor. Camden, Hist. 325.

PORTION. That part of a parent's estate, or the estate of one standing *in loco parentis*, which is given to a child. 1 Vern. 204. See 8 Comyns, Dig. 539; 16 Viner, Abr. 432; 1 Belt, Suppl. Ves. 34, 58, 303, 308; 2 *id.* 46, 370, 404.

PORTORIA (Lat.). **In Civil Law.** Duties paid in ports on merchandise. Code, 4. 61. 3. Taxes levied in old times at city gates. Tolls for passing over bridges. Vicat, Voc. Jur.; Spelman, Gloss.

PORTSALES. Auctions were anciently so called, because they took place in ports.

POSITIVE. Express; absolute; not doubtful. This word is frequently used in composition.

POSITIVE CONDITION. One in which the thing which is the subject of it *must* happen: as, if I marry. It is opposed to a negative condition, which is where the thing which is the subject of it *must not* happen: as, if I do not marry.

POSITIVE EVIDENCE is that which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. It is distinguished from circumstantial evidence. 3 Bouvier, Inst. n. 3057.

POSITIVE FRAUD is the intentional and successful employment of any cunning, deception, or artifice, to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. 186; Dig. 4. 3. 1. 2; Dig. 2. 14. 7. 9. It is cited in opposition to constructive fraud.

POSITIVE LAW. Law actually ordained or established, under human sanctions, as distinguished from the law of nature or natural law, which comprises those considerations of justice, right, and universal expediency that are announced by the voice of reason or of revelation. Municipal law is chiefly, if not essentially, positive; while the law of nations has been deemed by many of the earlier writers as merely an application of the law of nature. That part of the law of nations which rests on positive law may be considered in a threefold point of view:—*first*, the *universal voluntary law*, or those rules which become law by the uniform practice of nations in general, and by the manifest utility of the rules themselves; *second*, the *customary* law, or that which, from motives of convenience, has, by tacit but implied agreement, prevailed, not necessarily among all nations, nor with so permanent a utility as to become a portion of the *universal* voluntary law, but enough to have acquired a *prescriptive* obligation among certain states so situated as to be mutually benefited by it; 1 Taunt. 241; *third*, the *conventional* law, or that which is agreed between particular states by *express treaty*, a law binding on the parties among whom such treaties are in force. 1 Chitty, Com. Law, 28.

POSSE. This word is used substantively to signify a possibility. For example, such a thing is *in posse*, that is, such a thing may possibly be. When the thing is in being, the phrase to express it is, *in esse*.

POSSE COMITATUS (Lat.). The power of the county.

The sheriff, or other peace officer, has authority by the common law, while acting under the authority of the writ of the United States, commonwealth, or people, as the case may be, and for the purpose of preserving the public peace, to call to his aid the *posse comitatus*.

But with respect to writs which issue in the first instance to arrest in civil suits, the sheriff is not bound to take the *posse comitatus* to assist him in the execution of them; though he may, if he pleases, on forcied resistance to the execution of the process; Co. 2d Inst. 193; Co. 3d Inst. 161.

Having the authority to call in the assistance of all, he may equally require that of any individual; but to this general rule there are some exceptions; persons of infirm health, or who want understanding, minors under the age of fifteen years, women, and perhaps some others, it seems, cannot be required to assist the sheriff, and are, therefore, not considered as a part of the power of the county; Viner, Abr. *Sheriff*, B.

A refusal on the part of an individual lawfully called upon to assist the officer in putting down a riot is indictable; 1 Carr. & M. 314. In this case will be found the form of an indictment for this offence.

Although the sheriff is acting without authority, yet it would seem that any person who obeys his command, unless aware of that fact, will be protected.

Whether an individual not enjoined by the sheriff to lend his aid would be protected in his interference, seems questionable. In a case where the defendant assisted sheriff's officers in executing a writ of replevin without their solicitation, the court held him justified in so doing; 2 Mod. 244. See Bacon, Abr. *Sheriff* (N); Hamm. N. P. 63; 5 Whart. 437, 440.

POSSESSED. This word is applied to the right and enjoyment of a termor, or a person having a term, who is said to be possessed, and not seized. Bac. Tr. 335; Poph. 76; Dy. 369.

POSSESSIO (Lat.). **In Civil Law.** The detention of a thing: divided into—*first*, natural, or the naked detention of a thing, without intention to acquire ownership; *second*, civil, or the detention of a thing to which one has a right, or with intention of acquiring ownership. Heineccius, Elem. Jur. Civ. § 1288; Mackeldey, Civ. Law, §§ 210, 213.

In Old English Law. Possession; seisin. Law Fr. & Lat. Dict.; 2 Bla. Com. 227; Bracton, lib. 2, c. 17; Cowel, *Possession*. But *seisina* cannot be of an estate less than freehold; *possessio* can. New England Sheriff, 141; 1 Metc. Mass. 450; 6 *id.* 439.

POSSESSIO FRATRIS (Lat. the brother's possession). A technical phrase applied in the English law relating to descents, to denote the possession by one in such privity with a person as to be considered the person's own possession.

By the common law, the ancestor from whom the inheritance was taken by descent must have had actual seisin of the lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold. But there are qualifications as to this rule, one of which arises from the doctrine of *possessio fratris*. The possession of a tenant for years, guardian, or brother, is equivalent to that of the party himself, and is termed in law *possessio fratris;* Littleton, sect. 8; Co. Litt. 15 *a;* 3 Wills. 516; 7 Term, 386.

In Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and probably in other states, the real

and personal estates of intestates are distributed among the heirs without any reference or regard to the actual seisin of the ancestor. Reeve, Desc. 377–379; 4 Mass. 467; 3 Day, 166; 2 Pet. 59. In Maryland, New Hampshire, North Carolina, and Vermont, the doctrine of *possessio fratris*, it seems, still exists; 2 Pet. 625; Reeve, Desc. 377; 4 Kent, 384, 385.

POSSESSION. The detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name.

By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. Thus, the seaman possesses his ship, but not the water in which it moves, although he makes each subserve his purpose.

Actual possession exists where the thing is in the immediate occupancy of the party. 3 Dev. 34.

Constructive possession is that which exists in contemplation of law, without actual personal occupation. 11 Vt. 129. And see 1 McLean, 214, 265; 2 Bla. Com. 116.

In order to complete a possession, two things are required: that there be an occupancy, *apprehension*, or taking; that the taking be with an intent to possess (*animus possidendi*): hence persons who have no legal wills, as children and idiots, cannot possess or acquire possession; Pothier; Etienne. See 1 Mer. 358; Abbott, Shipp. 9. But an infant of sufficient understanding may lawfully acquire the possession of a thing.

The failure to take possession is considered a badge of fraud, in the transfer of personal property. See SALE; MORTGAGE.

As to the effects of the purchaser's taking possession, see Sugd. Vend. 8, 9; 3 P. Wms. 193; 1 Ves. 226; 11 *id.* 464; 12 *id.* 27. See, generally, 1 Harr. & J. 18; 5 *id.* 230, 263; 6 *id.* 336; 1 Me. 109; 1 H. & McH. 210; 2 *id.* 60, 254, 260; 3 Bibb, 209; 4 *id.* 412; 6 Cow. 632; 9 *id.* 241; 5 Wheat. 116, 124; Cowp. 217; Code Nap. art. 2228; Code of the Two Sicilies, art. 2134; Bavarian Code, b. 2, c. 4, n. 5; Pruss. Code, art. 579; Domat, Lois Civ. liv. 3, t. 7, s. 1; Viner, Abr.; Wolff, Inst. § 200, and the note in the French translation; 2 Greenl. Ev. §§ 614, 615; Co. Litt. 57 *a*; Cro. Eliz. 777; 5 Co. 13; 7 Johns. 1.

In Louisiana. *Civil* possession exists when a person ceases to reside in a house or on the land which he occupied, or to detain the movable which he possessed, but without intending to abandon the possession. It is the detention of a thing by virtue of a just title and under the conviction of possessing as owner. La. Civ. Code, art. 3392, 3394.

Natural possession is that by which a man detains a thing corporeal: as, by occupying a house, cultivating ground, or retaining a movable in his possession. Natural possession is also defined to be the corporeal detention of a thing which we possess as belonging to us, without any title to that possession, or with a title which is void. La. Civ. Code, art. 3391, 3393.

Possession applies properly only to corporeal things, movables and immovables. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a quasi-possession, and is exercised by a species of possession of which these rights are susceptible. *Id.* art. 3395.

Possession may be enjoyed by the proprietor of the thing or by another for him: thus, the proprietor of a house possesses it by his tenant or farmer.

To acquire possession of a property, two things are requisite: the intention of possessing as owner; the corporeal possession of the thing. *Id.* art. 3399.

Possession is lost with or without the consent of the possessor. It is lost *with* his consent—when he transfers this possession to another with the intention to divest himself of it; when he does some act which manifests his intention of abandoning possession: as, when a man throws into the street furniture or clothes of which he no longer chooses to make use. *Id.* art. 3411. A possessor of an estate loses the possession *against* his consent—when another expels him from it, whether by force in driving him away, or by usurping possession during his absence, and preventing him from re-entering; when the possessor of an estate allows it to be usurped and held for a year, without during that time having done any act of possession or interfered with the usurper's possession. *Id.* art. 3412.

POSSESSION MONEY. An allowance to one put in possession of goods taken under writ of *fieri facias*. Holthouse, Dict.

POSSESSOR. He who holds, detains, or enjoys a thing, either by himself or his agent, which he claims as his own.

In general, the possessor of personal chattels is presumed to be the owner; and in case of real estate he has a right to receive the profits until a title adverse to his possession has been established, leaving him subject to an action for the mesne profits.

POSSESSORY ACTION. In Old English Law. A real action, in which the plaintiff, called the demandant, sought to recover the *possession* of land, tenements, and hereditaments. On account of the great nicety required in its management, and the introduction of more expeditious methods of trying titles by other actions, it has been laid aside. Finch, Laws, 257; 2 Bouvier, Inst. n. 2640.

In admiralty law the term is still in use; see PETITIONS.

In Louisiana. An action by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession,

when he has been divested or evicted. 2 La. 227, 254.

In Scotch Law. An action by which the possession of heritable or movable property may be recovered and tried. An action of molestation is one of them. Paterson, Comp. § 1058, n.

POSSIBILITY. An uncertain thing which may happen. Lilly, Reg. A contingent interest in real or personal estate. 1 Madd. 549.

Possibilities are near, as when an estate is limited to one after the death of another; or remote, as that one man shall be married to a woman, and then that she shall die and he be married to another. 1 Fonbl. Eq. n. *e*; Viner, Abr.; 2 Co. 51 *a*.

Possibilities are also divided into—a possibility coupled with an interest. This may, of course, be sold, assigned, transmitted, or devised. Such a possibility occurs in executory devises, and in contingent, springing, or executory uses.

A *bare* possibility, or hope of succession. This is the case of an heir apparent during the life of his ancestor. It is evident that he has no right which he can assign, devise, or even release.

A possibility or mere contingent interest: as, a devise to Paul if he survive Peter. Dane, Abr. c. 1, a 5, § 2, and the cases there cited.

POST (Lat.). After. When two or more alienations or descents have taken place between an original intruder and the tenant or defendant in a writ of entry, the writ is said to be in the *post*, because it states that the tenant had not entry unless *after* the ouster of the original intruder. 3 Bla. Com. 182. See ENTRY, WRIT OF.

POST-DATE. To date an instrument a time after that on which it is made. See DATE.

POST DIEM (Lat.). After the day; as, a plea of payment *post diem*, after the day when the money became due. Comyns, Dig. *Pleader* (2 W 29).

POST DISSEISIN. In English Law. The name of a writ which lies for him who, having recovered lands and tenements by force of a novel disseisin, is again disseised by a former disseisor. Jacob, Law Dict.

POST ENTRY. In Maritime Law. An entry made by a merchant upon the importation of goods, after the goods have been weighed, measured, or gauged, to make up the deficieney of the original or prime entry. The custom of making such entries has arisen from the fact that a merchant in making the entry at the time of importation is not or may not be able to calculate exactly the duties which he is liable to pay: he therefore makes an approximately correct entry, which he subsequently corrects by the *post entry*. See Chitty, Com. Law, 746.

POST FACTO (Lat.). After the fact. See EX POST FACTO.

POST LIMINIUM (Lat. from *post*, after, and *limen*, threshold). A fiction of civil law, by which persons or things taken by the enemy were restored to their former state on coming again under the power of the nation to which they formerly belonged. Calvinus, Lex.; 1 Kent, 108*. It is also recognized by the law of nations. But movables are not entitled to the benefit of this rule, by strict law of nations, unless promptly recaptured. The rule does not affect property which is brought into a neutral territory; 1 Kent, 108. It is so called from the return of the person or thing over the threshold or boundary of the country from which it was taken.

POST LITEM MOTAM (Lat.). After the commencement of the suit.

Declarations or acts of the parties made *post litem motam* are presumed to be made with reference to the suit then pending, and, for this reason, are not evidence in favor of the persons making them; while those made before an action has been commenced, in some cases, as when a pedigree is to be proved, may be considered as evidence; 4 Camp. 401.

POST-MARK. A stamp or mark put on letters in the post-office.

Post-marks are evidence of a letter's having passed through the post-office; 2 Camp. 620; 2 B. & P. 316; 15 East, 416; 1 Maule & S. 201; 15 Conn. 206.

POST MORTEM (Lat.). After death: as, an examination *post mortem* is an examination made of a dead body to ascertain the cause of death; an inquisition *post mortem* is one made by the coroner.

It is the duty of the coroner, after death by violence, to cause a *post mortem* examination to be made by a competent medical authority. A physician thus employed may, at common law, maintain an action against the county for trouble and labor expended in such examination; Gibson, C. J., in 4 Penn. 269.

POST-NATUS (Lat.). Literally, after born; it is used by the old law writers to designate the second son. See PUISNE; POST-NATI.

POST NOTES. A species of bank-notes payable at a distant period, and not on demand. 2 W. & S. 463. A kind of bank-notes intended to be transmitted at a distance by post. See 24 Me. 36.

POST-NUPTIAL. Something which takes place after marriage: as, a post-nuptial settlement, which is a conveyance made generally by the husband for the benefit of the wife.

A post-nuptial settlement is either with or without consideration. The former is valid even against creditors, when in other respects it is untainted with fraud; 4 Mas. 443; 2 Bail. 477. The latter, when made without consideration, if *bona fide*, and the husband be not involved at the time, and it be not disproportionate to his means, taking his debts

and situation into consideration, is valid; 4 Mas. 443. See 4 Dall. 304; SETTLEMENT; VOLUNTARY CONVEYANCE.

POST OBIT (Lat.). An agreement by which the obligor borrows a certain sum of money and promises to pay a larger sum, exceeding the lawful rate of interest, upon the death of a person from whom he has some expectation, if the obliger be then living. 7 Mass. 119; 6 Madd. 111; 5 Ves. 57; 19 *id.* 628.

Equity will, in general, relieve a party from these unequal contracts, as they are fraudulent on the ancestor. See 1 Story, Eq. Jur. § 342; 2 P. Wms. 182; 2 Sim. 183, 192; 5 *id.* 524. But relief will be granted only on equitable terms; for he who seeks equity must do equity; 1 Fonbl. Ex. b. 1, c. 2, § 13, note p.; 1 Story, Eq. Jur. § 344. It has been held that the repeal of the usury laws in England has not altered the doctrine by which the court of chancery affords relief against improvident and extravagant bargains; L. R. 8 Ch. 484. In some of the United States the usurious excess above the lawful rate alone is void; 8 Phila. 84; Bisph. Eq. § 222. See CATCHING BARGAIN; MACEDONIAN DECREE.

POST-OFFICE. An office for the receipt and delivery of the mail.

The constitution has vested in congress the power to establish post-offices and post-roads. Art. 1, § 8, n. 7. By virtue of this authority, several acts have been passed, the more important of which are those of March 3, 1825, 4 U. S. Stat. at Large, 102; July 2, 1836, 5 U. S. Stat. at Large, 84; March 3, 1851, 9 U. S. Stat. at Large, 593; March 3, 1853, 11 U. S. Stat. at Large, 255; March 3, 1863, June 8, 1872; R. S. 3829. Such existing roads as are adopted for the purpose are selected by congress as post-roads; and new ones are seldom constructed, though they have been made by express authority; Story, Const. § 1133.

POSTAGE. The money charged by law for carrying letters, packets, and documents by mail.

The rates of postage between places in the United States are fixed expressly by law; the rates of postage upon foreign letters are fixed by arrangements entered into by the postmaster-general, in pursuance of authority vested in him by congress for that purpose.

All mailable matter is divided into three classes: *letters*, embracing all correspondence wholly or partly in writing, except that mentioned in the third class; *regular printed matter*, embracing all mailable matter exclusively in print and regularly issued at stated periods, without addition by writing, mark, or sign; see 12 How. 284; 4 Opin. Atty.-Genl. 10; *miscellaneous matter*, embracing all other matter which is or may hereafter be by law declared mailable, including pamphlets, occasional publications, books, book-manuscripts, and proof-sheets, whether corrected or not, maps, prints, engravings, blanks, flexible patterns, samples and sample cards, phonographic paper, letter envelopes, postal envelopes or wrappers, cards, paper, plain or ornamental, photographic representations of different types, seeds, cuttings, bulbs, roots, and scions.

The rate of postage on all domestic mailable matter, wholly or partially in writing, or so marked as to convey any other or further intelligence or information than is conveyed in the original print, in the case of printed matter, or which is sent in violation of law or regulations of the department touching the inclosure of matter which may be sent at less than letter rates, and on all matter introduced into the mails not otherwise provided for, excepting manuscript and corrected proof passing between authors and publishers, and memorandums of the expiration of subscriptions, receipts and bills for subscription, inclosed with or printed on regular publications by the publishers, is three cents for a half-ounce or less, avoirdupois, and three cents additional for each additional half-ounce or fraction.

The postage on all letters not transmitted through the mails but delivered through the post-office or by its carriers, is two cents for a half-ounce or less, and an additional rate for each additional half-ounce or fraction thereof.

The following mailable matter is subject to the rate of one cent for every two ounces, or fractional part thereof, and one cent for each additional two ounces or fractional part thereof, to wit: Books (printed and blank), transient newspapers and periodicals, circulars, and other matter wholly in print, proof-sheets and corrected proof-sheets and manuscript copy accompanying the same, prices-current, with prices filled out in writing, printed commercial paper filled out in writing (provided such writing is not in the nature of personal correspondence), such as papers of legal procedure, deeds of all kinds, way-bills, bills of lading, invoices, insurance policies and the various documents of insurance companies, handbills, posters, chromo-lithographs, engravings, envelopes with printing thereon, heliotypes, lithographs, photographic and stereoscopic views with title written thereon, printed blanks, and printed cards.

The following mailable matter is at the rate of one cent for each ounce or fractional part thereof, to wit: Blank cards, cardboard, and other flexible material, flexible patterns, letter envelopes and letter paper without printing thereon, merchandise models, ornamented paper, sample cards, samples of ores, metals, minerals, seeds, cuttings, bulbs, roots, scions, drawings, plans, designs, original paintings in oil or water colors, and any other matter not included in the first, second, or third classes, and which is not in its form or nature liable to destroy, deface, or otherwise damage the contents of the mail-bag, or harm the person of any one engaged in the postal service. R. S. § 3896.

The postmaster-general is authorized and directed to furnish and issue to the public, with postage stamps impressed upon them, "postal-cards," which cards shall be used as a means of postal intercourse, under rules and regulations to be prescribed by the postmaster-general, and when so used shall be transmitted through the mails at a postage charge of one cent each. R. S. § 3916.

It is lawful to transmit through the mail free of postage, any letters, packages, or other matters, relating exclusively to the business of the government of the United States, provided that every such letter or package, to

entitle it to pass free, shall bear over the words "official business," an endorsement showing also the name of the department and bureau or office, as the case may be, whence transmitted; R. S. Supp. p. 288.

Senators, representatives, and delegates in congress, the secretary of the senate, and clerk of the house of representatives, may send and receive through the mail, all public documents printed by order of congress; and the name of each senator, representative, delegate, secretary of the senate, and clerk of the house shall be written thereon, with the proper designation of the office he holds, and the provisions of this act apply to each of the persons named therein until the first of December following the expiration of his term of office; R. S. Supp. p. 288.

POSTAGE-STAMPS. The act of congress approved March 3, 1847, section 11, and the act of congress of March 3, 1841, sections 3, 4, provide that, to facilitate the transportation of letters in the mail, the postmaster-general be authorized to prepare postage-stamps, which when attached to any letter or packet shall be evidence of the payment of the postage chargeable on such letter. The same sections declare that any person who shall falsely or fraudulently make, utter, or forge any post-stamp, with the intent to defraud the post-office department, shall be deemed guilty of felony, and be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment. And if any person shall use or attempt to use, in prepayment of postage, any postage-stamp which shall have been used before for like purposes, such person shall be subject to a penalty of fifty dollars for every such offence; to be recovered in the name of the United States, in any court of competent jurisdiction. See, also, Act of Mar. 3, 1851, 9 Stat. at L. 589; Act of Aug. 31, 1852, 10 Stat. at L. 141. It is made penal to sell stamps or stamped envelopes for a larger sum than that indicated on the stamp or than is charged by the department. Act of Mar. 3, 1855, 10 Stat. at L. 642; see R. S. § 5463.

POSTEA (Lat. afterwards). **In Practice.** The indorsement, on the *nisi prius* record purporting to be the return of the judge before whom a cause is tried, of what has been done in respect of such record.

It states the day of trial, before what judge, by name, the cause is tried, and also who is or was an associate of such judge; it also states the appearance of the parties by their respective attorneys, or their defaults, and the summoning and choice of the jury, whether those who were originally summoned, or those who were tales, or taken from the standers-by; it then states the finding of the jury upon oath, and, according to the description of the action, and the assessment of the damages, with the occasion thereof, together with the costs.

These are the usual matters of fact contained in the *postea;* but it varies with the description of the action. See Lee, Dict. *Postea;* 2 Lilly, Abr. 337; 16 Viner, Abr. 465; Bacon, Law Tr. 127.

When the trial is decisive, and neither the law nor the facts can afterwards be controverted, the postea is delivered by the proper officer to the attorney of the successful party, to sign his judgment; but it not unfrequently happens that after a verdict has been given there is just cause to question its validity: in such case the postea remains in the custody of the court. Eunomus, Dial. 2, § 33, p. 116.

POSTERIORES (Lat.). This term was used by the Romans to denote the descendants in a direct line beyond the sixth degree. It is still used in making genealogical tables.

POSTERIORITY. Being or coming after. It is a word of comparison, the correlative of which is *priority:* as, when a man holds lands from two landlords, he holds from his ancient landlord by priority, and from the other by posteriority. Co. 2d Inst. 392.

These terms, priority and posteriority, are also used in cases of liens: the first are prior liens, and are to be paid in the first place; the last are posterior liens, and are not entitled to payment until the former have been satisfied.

POSTERITY. All the descendants of a person in a direct line to the remotest generation. 8 Bush, 527.

POSTHUMOUS CHILD. One born after the death of its father; or, when the Cæsarean operation is performed, after that of the mother. The doctrine is universally adopted throughout the United States, that posthumous children inherit in the same manner as if born during the father's life; and this relates back to the conception of the child, if it is born alive; 3 Washb. R. P. *412; 4 Paige, 52; 30 Penn. 173. The court will allow a longer time than nine months for the birth of the child, when the opinion of physicians, or circumstances warrant it; 2 Greenl. Cruise, R. P. 140.

The issue of marriages deemed null in law or dissolved by a court, are nevertheless declared legitimate in *Arkansas*, Dig. Stat. (1858) c. 56, § 5; *California*, Wood, Dig. (1858) 424; *Missouri*, 1 Rev. Stat. (1855) c. 54, § 11; *Ohio*, Rev. Stat. (1854) c. 36, § 16; *Virginia*, Code (1849), 523. See 2 Washb. R. P. 413, 439; 4 Kent, 412; 7 Ga. 535; 12 Miss. 99.

When a father makes a will without providing for a posthumous child, the will is generally considered as revoked *pro tanto;* 2 Washb. R. P. 699, 412; 4 Kent, 412, 521, n., 525; 28 Am. Rep. 486.

POSTMAN. A senior barrister in court of exchequer, who has precedence in motions; so called from place where he sits. 2 Bla. Com. 28; Wharton, Dict. A letter-carrier. Webster, Dict.

POSTMASTER. An officer who keeps a post-office, attending to the receipt, forwarding, and delivery of letters and other matter passing through the mail.

Postmasters must reside within the delivery for which they are appointed. For those offices where the salary or compensation is less than a thousand dollars a year, the postmaster-general appoints; where it is more, the president. Postmasters are divided into five classes, exclusive of the postmaster at N. Y. city, according to the amount of salary; those of the first class receiving between three and four thousand, those of the fifth, less than two hundred; R. S. § 3852. They must give bond to the United States of America; see 19 How. 73; Gilp. 54; which remains in force, for suit upon violation during the term; 1 W. & M. 150; for three, formerly two, years after the expiration of the term of office; R. S. § 3838; 7 How. 681. See R. S. § 3836.

Where an office is designated as a money-order office, the bond of the postmaster shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business; R. S. § 3834.

Every postmaster is required to keep an office in the place for which he may be appointed; and it is his duty to receive and forward by mail, without delay, all letters, papers, and packets as directed, to receive the mails, and deliver, at all reasonable hours, all letters, papers, and packets to the persons entitled thereto.

Every person who, without authority from the postmaster-general, sets up any office bearing the title of post-office is liable to a penalty of $500 for each offence; R. S. § 3829.

Although not subject to all the responsibilities of a common carrier, yet a postmaster is liable for all losses and injuries occasioned by his own default in office; 3 Wils. 443; Cowp. 754; 5 Burr. 2709; 1 Bell, Com. 468; 2 Kent, 474; Story, Bailm. § 463.

Whether a postmaster is liable for the acts of his clerks or servants seems not to be settled; 1 Bell, Com. 468. In Pennslyvania it has been decided that he is not responsible for their secret delinquencies; though, perhaps, he is answerable for want of attention to the official conduct of his subordinates; 8 Watts, 453.

POSTMASTER-GENERAL. The chief officer of the post-office department of the executive branch of the government of the United States.

His duties, in brief, are, among other things, to establish post-offices and appoint postmasters, see POSTMASTER, at convenient places upon the post-roads established by law; to give instructions for conducting the business of the department; to provide for the carriage of the mails; to obtain from the postmasters balances due, with accounts and vouchers of expenses; to pay the expenses of the department, see 15 Pet. 377; to prosecute offences, and, generally, to superintend the business of the department in all the duties assigned to it. He is assisted by three assistants and a large corps of clerks,—the three assistants being appointed by the president. He must make ten several reports annually to congress, relating chiefly to the financial management of the department, with estimates of the expenses of the department for the ensuing year. He is a member of the cabinet; R. S. §§ 388–414.

POSTNATI (Lat.). Those born after. Applied to American and British subjects born after the separation of England and the United States; also to the subjects of Scotland born after the union of England and Scotland. Those born after an event, as opposed to *antenati*, those born before. 2 Kent, 56–59; 2 Pick. 394; 5 Day, 169*. See ANTENATI.

POSTULATIO (Lat.). **In Roman Law.** The name of the first act in a criminal proceeding.

A person who wished to accuse another of a crime appeared before the prætor and requested his authority for that purpose, designating the person intended. This act was called *postulatio*. The postulant (*calumnium jurabat*) made oath that he was not influenced by a spirit of calumny, but acted in good faith with a view to the public interest. The prætor received this declaration, at first made verbally, but afterwards in writing, and called a libel. The *postulatio* was posted up in the forum, to give public notice of the names of the accuser and the accused. A second accuser sometimes appeared and went through the same formalities.

Other persons were allowed to appear and join the postulant or principal accuser. These were said *postulare subscriptionem*, and were denominated *subscriptores*. Cic. in Cæcil. Divin. 15. But commonly such persons acted concurrently with the postulant, and inscribed their names at the time he first appeared. Only one accuser, however, was allowed to act; and if the first inscribed did not desist in favor of the second, the right was determined, after discussion, by judges appointed for the purpose. Cic. in Verr. i. 6. The preliminary proceeding was called *divinatio*, and is well explained in the oration of Cicero entitled Divinatio. See Aulus Gellius, Att. Noct. lib. ii. cap. 4.

The accuser having been determined in this manner, he appeared before the prætor, and formally charged the accused by name, specifying the crime. This was called *nominis et criminis delatio*. The magistrate reduced it to writing, which was called *inscriptio*, and the accuser and his adjuncts, if any, signed it, *subscribebant*. This proceeding corresponds to the indictment of the common law.

If the accused appeared, the accuser formally charged him with the crime. If the accused confessed it, or stood mute, he was adjudged to pay the penalty. If he denied

it, the *inscriptio* contained his answer, and he was then *in reatu* (indicted, as we should say), and was called *reus*, and a day was fixed, ordinarily after an interval of at least ten days, according to the nature of the case, for the appearance of the parties. In the case of Verres, Cicero obtained one hundred and ten days to prepare his proofs; although he accomplished it in fifty days, and renounced, as he might do, the advantage of the remainder of the time allowed him.

At the day appointed for the trial, the accuser and his adjuncts or colleagues, the accused, and the judges, were summoned by the herald of the prætor. If the accuser did not appear, the case was erased from the roll. If the accused made default, he was condemned. If both parties appeared, a jury was drawn by the prætor or *judex quæstionis*. The jury was called *jurati homines*, and the drawing of them *sortitio*, and they were taken from a general list made out for the year. Either party had a right to object to a certain extent to the persons drawn; and then there was a second drawing, called *subsortitio*, to complete the number.

In some tribunals *quæstiones* (the jury) were *editi* (produced) in equal number by the accuser and the accused, and sometimes by the accuser alone, and were objected to or challenged in different ways, according to the nature of the case. The number of the jury also varied according to the tribunal (*quæstio*): they were sworn before the trial began. Hence they were called *jurati*.

The accusers, and often the *subscriptores*, were heard, and afterwards the accused, either by himself or by his advocates, of whom he commonly had several. The witnesses, who swore by Jupiter, gave their testimony after the discussions or during the progress of the pleadings of the accuser. In some cases it was necessary to plead the cause on the third day following the first hearing, which was called *comperendinatio*.

After the pleadings were concluded, the prætor or the *judex quæstionis* distributed tablets to the jury, upon which each wrote, secretly, either the letter A. (*absolvo*), or the letter C. (*condemno*), or N. L. (*non liquet*). These tablets were deposited in an urn. The president assorted and counted the tablets. If the majority were for acquitting the accused, the magistrate declared it by the words *fecisse non videtur*, and by the words *fecisse videtur* if the majority were for a conviction. If the tablets marked N. L. were so many as to prevent an absolute majority for a conviction or acquittal, the cause was put off for more ample information, *ampliatio*, which the prætor declared by the word *amplius*. Such, in brief, was the course of proceedings before the *quæstiones perpetuæ*.

The forms observed in the *comitia centuriata* and *comitia tributa* were nearly the same, except the composition of the tribunal and the mode of declaring the vote.

POSTULATIO ACTIONIS (Lat.). **In Civil Law.** Demand of an action (*actio*) from the prætor, which some explain to be a demand of a *formula*, or form of the suit; others, a demand of leave to bring the cause before the judge. Taylor, Civ. Law, 80; Calvinus, Lex. *Actio*.

POT-DE-VIN. In French Law. A sum of money frequently paid, at the moment of entering into a contract, beyond the price agreed upon.

It differs from *arrha* in this, that it is no part of the price of the thing sold, and that the person who has received it cannot by returning double the amount, or the other party by losing what he has paid, rescind the contract. 18 Toullier, n. 52.

POTENTATE. One who has a great power over an extended country; a sovereign.

By the naturalization laws of the United States, an alien is required, before he can be naturalized, to renounce all allegiance and fidelity to any foreign prince, potentate, state, or sovereign whatever.

POTESTAS (Lat.). **In Civil Law.** Power; authority; domination; empire. *Imperium*, or the jurisdiction of magistrates. The power of the father over his children, *patria potestas*. The authority of masters over their slaves, which makes it nearly synonymous with *dominium*. See Inst. 1. 9. 12; Dig. 2. 1. 13. 1; 14. 1; 14. 4. 1. 4.

POUND. A place, enclosed by public authority, for the temporary detention of stray animals. 4 Pick. 258; 5 *id.* 514; 9 *id.* 14.

Weights. There are two kinds of weights, namely, the troy and the avoirdupois. The pound avoirdupois is greater than the troy pound in the proportion of seven thousand to five thousand seven hundred and sixty. The troy pound contains twelve ounces, that of avoirdupois sixteen ounces.

Money. The sum of twenty shillings. Previous to the establishment of the federal currency, the different states made use of the pound in computing money: it was of different value in the several states.

Pound sterling is a denomination of money of Great Britain. It is of the value of a *sovereign* (q. v.). In calculating the rates of duties, the pound sterling shall be considered and taken as of the value of four dollars and eighty-six cents and six and one half mills; R. S. § 3565.

The pound sterling of *Ireland* is to be computed, in calculating said duties, at four dollars and ten cents; *id.*

POUND-BREACH. The offence of breaking a pound in order to take out the cattle impounded. 3 Bla. Com. 146. The writ *de parco fracto*, or pound-breach, lies for recovering damages for this offence; also case. *Id.* It is also indictable.

POUNDAGE. In Practice. The amount allowed to the sheriff, or other officer, for

commissions on the money made by virtue of an execution. This allowance varies in different states and to different officers.

POURPARLER. In French Law. The conversations and negotiations which have taken place between the parties in order to make an agreement. These form no part of the agreement. Pardessus, Dr. Com. 142.

POURSUIVANT. A follower; a pursuer. In the ancient English law, it signified an officer who attended upon the king in his wars, at the council-table, exchequer, in his court, etc., to be sent as a messenger. A poursuivant was, therefore, a messenger of the king.

POWER. The right, ability, or faculty of doing something.

Technically, an authority by which one person enables another to do some act for him. 2 Lilly, Abr. 339.

DERIVATIVE POWERS are those which are received from another. This division includes all the powers technically so called. They are of the following classes:—

Coupled with an interest, being a right or authority to do some act, together with an interest in the subject on which the power is to be exercised. *Marshall*, C. J., 8 Wheat. 203.

A power of this class survives the person creating it, and, in case of an excess in execution, renders the act valid so far as the authority extends, leaving it void as to the remainder only. It includes powers of sale conferred on a mortgagee.

Naked, being a right of authority disconnected from any interest of the donee in the subject-matter. 3 Hill, N. Y. 365.

INHERENT POWERS. Those which are enjoyed by the possessors of natural right, without having been received from another. Such are the powers of a people to establish a form of government, of a father to control his children. Some of these are regulated and restricted in their exercise by law, but are not technically considered in the law as powers.

The person bestowing a power is called the *donor;* the person on whom it is bestowed is called the *donee*. See CONTRACT; AGENT; AGENCY.

Powers under the Statute of Uses. An authority enabling a person, through the medium of the Statute of Uses, to dispose of an interest in real property, vested either in himself or another person.

Methods of causing a use, with its accompanying estate, to spring up at the will of a given person. Williams, R. P. 245; 2 Washb. R. P. 300.

The right to designate the person who is to take a use. Co. Litt. 271 *b*, Butler's note, 231, § 3, pl. 4.

A right to limit a use. 4 Kent, 334.

An authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform. N. Y. Rev. Stat.

They are distinguished as—

Appendant. Those which the donee is authorized to exercise out of the estate limited to him, and which depend for their validity upon the estate which is in him. 2 Washb. R. P. 304. A life-estate limited to a man, with a power to grant leases in possession, is an example. Hardr. 416; 1 Caines, Cas. 15; Sugd. Pow. 107; Burton, R. P. § 179.

Of appointment. Those which are to create new estates. Distinguished from powers of revocation.

Collateral. Those in which the donee has no estate in the land. 2 Washb. R. P. 305.

General. Those by which the donee is at liberty to appoint to whom he pleases.

In gross. Those which give a donee, who has an estate in the land, authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. 2 Cow. 236; Tudor, Lead. Cas. 293; Watk. Conv. 260.

Of revocation. Those which are to divest or abridge an existing estate. Distinguished from those of appointment; but the distinction is of doubtful exactness, as every new appointment must divest or revoke a former use. Sanders, Uses, 154.

As to the effect of the insertion of a power of revocation, either single or in connection with one of appointment, see Styles, 389; 2 Washb. R. P. 307.

Special. Those in which the donee is restricted to an appointment to or among particular objects only. 2 Washb. R. P. 307.

The person who receives the estate by appointment is called the appointee; the donee of the power is sometimes called the appointor.

The creation of a power may be by *deed or will;* 2 Washb. R. P. 314; by *grant* to a grantee, or *reservation* to the grantor; 4 Kent, 319; and the reservation need not be in the same instrument, if made at the same time; 1 Sugd. Pow. 158; by *any form of words* indicating an intention; 2 Washb. R. P. 315. The doubt whether a power is created or an estate conveyed can, in general, exist only in cases of wills; 2 Washb. R. P. 316; and in any case is determined by the intention of the grantor or devisor, as expressed in or to be gathered from the whole will or deed; 10 Pet. 532; 8 How. 10; 3 Cow. 651; 7 *id.* 187; 6 Johns. 73; 6 Watts, 87; 4 Bibb, 307. It must be limited to be executed, and must be executed within the period fixed by the rules against perpetuities; 5 Bro. P. C. 592; 2 Ves. 368; 13 Sim. 393; Lewis, Perpet. 483–485.

The interest of the donee is not an estate; Watk. Conv. 271; 2 Prest. Abstr. 275; N. Y. Rev. Stat. art. 2, § 68; but is sufficient to enable the donee to act, if the intention of the donor be clear, without words of inheritance; 3 Ves. 467; 1 Mod. 190; 1 P. Wms.

171; 7 Johns. Ch. 34; see Co. Litt. 271 *b*, Butler's note, 231; and may coexist with the absolute fee in the donee; 10 Ves. 255–257; 4 Greenl. Cruise, Dig. 241, n. As a general rule a power to sell does not include a power to mortgage; 3 Hill, N. Y. 361; but where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, then it may be proper under the circumstances to raise the money by mortgage, and the court will support it as a conditional sale; 1 De G. M. & G. 645; 3 Jur. N. S. 1143; Sugd. Powers, 425; and sale generally means a cash sale; 4 Kent, 331; 3 Hill, N. Y. 373.

As to exercising the power: if it be simply one in which no person is interested but the donee, it is a matter of election on his part whether to exercise it or not; 1 Sugd. Pow. ed. 1856, 158; see *infra;* but if coupled with a trust in which other persons are interested, equity will compel an execution; Story, Eq. Jur. § 1062; 2 Mas. 244, 251.

The execution must be in the manner prescribed, by the proper person, see APPOINTMENT, and cannot be by an assignee; 2 Washb. R. P. 321; unless authorized by the limitation; 4 Cruise, Dig. 211; or unless an interest be coupled with the power; 2 Cow. 236; 8 Wheat. 203; nor by a successor, as on the death of an executor; 13 Metc. 220. See 1 Bail. Eq. 392; 6 Rand 593. As to whether a sale by a donee who has also an estate in the land is held to be an execution of the power, see 2 Washb. R. P. 325; Tudor, Lead. Cas. 306; 1 Atk. 440; 5 B. & C. 720; 6 Co. 18; 8 Watts, 203; 16 Penn. 25.

Where an exact execution is impossible under authority of court, it may be executed as near as may be (*cy-près*) to carrying out the donor's intention; 2 Term, 241; 4 Ves. 681; 5 Sim. 632; 3 Wash. C. C. 12.

It must be made at a proper time, and, where several powers are given over different parts of the same estate, in proper succession; 1 Co. 174; 1 W. Blackst. 281.

Equity will compel the donee to execute a power where it is coupled with a trust in which other persons are interested; Story, Eq. Jur. § 1062; and to correct a formal defect in the manner of execution; Ambl. 687; 2 P. Wms. 489, 622; 2 Mas. 251; 3 Edw. Ch. 175.

The suspension or destruction of a power may sometimes happen by a release by the donee, by an alienation of his estate, by his death, and by other circumstances.

An appendant power may be suspended by a conveyance of his interest by the donee; 4 Cruise, Dig. 221 Dougl. 477; Cro. Car. 472; 4 Bingh. N. C. 734; 2 Cow. 237; and may be extinguished by such conveyance; 2 B. & Ald. 93; 10 Ves. 246; or by a release; 1 Russ. & M. 431, 436, n.; 1 Co. 102 *b;* 2 Washb. R. P. 308.

A power in gross may be released to one having the freehold in possession, reversion, or remainder, and not by any other act of the donee; Tudor, Lead. Cas. 294; Burton, R. P. § 176; Chance, Pow. § 3172; Hardr. 416; 1 P. Wms. 777.

A collateral power cannot be suspended or destroyed by act of the donee; F. Moore, 605; 5 Mod. 457. And see 1 Russ. & M. 431; 13 Metc. 220.

Impossibility of immediate vesting in interest or possession does not suspend or extinguish a power; 2 Bingh. 144.

Consult Burton, Labor, Flintoff, Washburn, Williams, Real Property; Chance, Sugden, Powers; Fearne, Contingent Remainders; Tudor, Leading Cases; Cruise, Digest, Greenleaf's ed.; Gilbert, Sugden's ed.; Sanders, Uses; Kent, Commentaries; Watkins, Conveyancing.

For the distinction between *political* and *judicial* power, see 78 Ill. 261; 75 *id.* 152; 29 Mich. 451; 43 Iowa, 452; 114 Mass. 247; s. c. 19 Am. Rep. 341; 10 Bush, 72; Cooley, Const. Lim. 122.

POWER OF ATTORNEY. An instrument authorizing a person to act as the agent or attorney of the person granting it.

A *general* power authorizes the agent to act generally in behalf of the principal.

A *special* power is one limited to particular acts.

It may be parol or under seal; 1 Pars. Contr. 94. The attorney cannot, in general, execute a sealed instrument so as to bind his principal, unless the power be under seal; 7 Term, 259; 2 B. & P. 338; 5 B. & C. 355; 2 Me. 358. See 7 M. & W. 322, 331; 7 Cra. 299; 4 Wash. C. C. 471; 19 Johns. 60; 2 Pick. 345.

Powers of attorney are strictly construed; 6 Cush. 117; 5 Wheat. 326; 3 M. & W. 402; 8 *id.* 806; 5 Bingh. 442. General terms used with reference to a particular subject-matter are presumed to be used in subordination to that matter; 1 Taunt. 349; 7 B. & C. 278; 1 Y. & C. 394; 7 M. & W. 595; 5 Denio, 49; 7 Gray, 287. See, as to a power to collect a debt; 1 Blackf. 252; to settle a claim; 5 M. & W. 645; 8 Blackf. 291; to make an adjustment of all claims; 8 Wend. 494; 7 Watts, 716; 14 Cal. 399; 7 Ala. N. S. 800; to accept bills; 7 B. & C. 278.

Third parties dealing with an agent on the basis of a written letter of attorney are not prejudiced by any private instructions from the principal to the agent, unless such instructions are in some way referred to in the letter; 15 Johns. 44. Where an agent is acting under such a written letter, it is the duty of third persons to examine the instrument; Story, Agency, § 72. A failure to do this is negligence, and precludes a recovery unless the claim is based on fraud; 1 Pet. 264; Whart. Agency, § 227.

PRACTICE. The form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts.

In its ordinary meaning it is to be distinguished from the pleadings. The term applies to a distinct part of the proceedings of the court. 10 Jur. N. S. 457. In a popular sense, the business which an attorney or counsellor does: as, A B has a good practice.

The books on practice are very numerous: among the most popular are those of Tidd, Chitty, Archbold, Sellon, Graham, Dunlap, Caines, Troubat & Haly, Blake, Impey, Daniell, Benedict, Colby, Curtis, Hall, Law, Day, Abbott.

A settled, uniform, and long-continued practice, without objection, is evidence of what the law is; and such practice is based on principles which are founded in justice and convenience; 2 Russ. 19, 570; 2 Jac. 232; 5 Term, 380; 1 Y. & J. 167, 168; 2 C. & M. 55; Ram, Judgm. c. 7.

With respect to criminal practice, it has been forcibly remarked by a learned judge that even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principals of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament. Per *Maule*, J., Scott, N. C. 599, 600.

PRACTICE COURT. In English Law. A court attached to the court of king's bench, which heard and determined common matters of business and ordinary motions for writs of mandamus, prohibition, etc.

It was usually called the bail court. It was held by one of the puisne justices of the king's bench.

PRACTICES. A succession of acts of a similar kind or in a like employment. Webst.

PRÆCEPTORES (Lat.). Heretofore masters in chancery were so called, as having the direction of making out remedial writs. Fleta, 76; 2 Reeve. Hist. Eng. Law, 251. A species of benefice, so called from being possessed by the principal templars (*præceptores templi*), whom the chief master by his authority created. 2 Mon. Ang. 543.

PRÆCIPE, PRECIPE (Lat.). A slip of paper upon which the particulars of a writ are written. It is lodged in the office out of which the required writ is to issue. Wharton, Dict. A written order to the clerk of a court to issue a writ.

PRÆCIPE QUOD REDDAT (Lat.). Command him to return. An original writ, of which *præcipe* is the first word, commanding the person to whom it is directed to do a thing or to show cause why he has not done it. 3 Bla. Com. 274; Old N. B. 13. It is as well applied to a writ of right as to other writs of entry and possession.

PRÆDA BELLICA (Lat.). Booty. Property seized in war.

PRÆDIA (Lat.). **In Civil Law.** Lands.

Prædia urbana, those lands which have buildings upon them and are in the city.

Prædia rustica, those lands which are without buildings or in the country. Voc. Jur. Utr.

It indicates a more extensive domain than *fundus*. Calvinus, Lex.

PRÆDIAL. That which arises immediately from the ground: as, grain of all sorts, hay, wood, fruits, herbs, and the like.

PRÆDIUM DOMINANS (Lat. the ruling estate). **In Civil Law.** The name given to an estate to which a servitude is due: it is called the ruling estate.

PRÆDIUM RUSTICUM (Lat. a country estate). **In Civil Law.** By this is understood all heritages which are not destined for the use of man's habitation: such, for example, as lands, meadows, orchards, gardens, woods, even though they should be within the boundaries of a city.

PRÆDIUM SERVIENS (Lat.). **In Civil Law.** The name of an estate which suffers or yields a service to another estate.

PRÆDIUM URBANUM (Lat.). **In Civil Law.** By this term is understood buildings and edifices intended for the habitation and use of man, whether they be built in cities or whether they be constructed in the country.

PRÆFECTUS VIGILIUM (Lat.). **In Roman Law.** The chief officer of the night-watch. His jurisdiction extended to certain offences affecting the public peace, and even to larcenies. But he could inflict only slight punishments.

PRÆMUNIRE (Lat.). In order to prevent the pope from assuming the supremacy in granting ecclesiastical livings, a number of statutes were made in England, during the reigns of Edward I. and his successors, punishing certain acts of submission to the papal authority therein mentioned. In the writ for the execution of these statutes, the words *præmunire facias* (cause to be forewarned), being used to command a citation of the party, gave not only to the writ, but to the offence itself of maintaining the papal power, the name of *præmunire*. Co. Litt. 129; Jacob, Law Dict.

The penalties of præmunire were subsequently applied to other offences of various kinds. Wharton, Law Dict.

PRÆSUMPTIO JURIS (Lat.). **In Roman Law.** A deduction from the existence of one fact as to the existence of another which admits of proof to the contrary. A rebuttable presumption. An intendment of law which holds good until it is weakened by proof or a stronger presumption. Best, Presump. 29.

PRÆSUMPTIO JURIS ET DE JURE (Lat.). **In Romam Law.** A deduction drawn, by reason of some rule of law, from

the existence of one fact as to the existence of another, so conclusively that no proof can be admitted to the contrary. A conclusive presumption.

PRÆTOR. In Roman Law. A municipal officer of Rome, so called because (*præiret populo*) he went before or took precedence of the people.

The consuls were at first called *prætors*. Liv. Hist. iii. 55. He was a sort of minister of justice, invested with certain legislative powers, especially in regard to the forms or formalities of legal proceedings. Ordinarily, he did not decide causes as a judge, but prepared the grounds of decision for the judge, and sent to him the questions to be decided between the parties. The judge was always chosen by the parties, either directly, or by rejecting, under certain rules and limitations, the persons proposed to them by the *prætor*. Hence the saying of Cicero (*pro Cluentis*, 43) that no one could be judged except by a judge of his own choice. There were several kinds of officers called prætors. See Vicat, Voc.

Before entering on his functions, he published an edict announcing the system adopted by him for the application and interpretation of the laws during his magistracy. His authority extended over all jurisdictions, and was summarily expressed by the words *do*, *dico*, *addico*, i. e. *do* I give the action, *dico* I declare the law, I promulgate the edict, *addico* I invest the judge with the right of judging. There were certain cases which he was bound to decide himself, assisted by a council chosen by himself,—perhaps the *decemvirs*. But the greater part of causes brought before him he sent either to a judge, an arbitrator, or to recuperators (*recuperatores*), or to the centumvirs, as before stated. Under the empire, the powers of the prætor passed by degrees to the prefect of the *prætorium* or the prefect of the city: so that this magistrate, who at first ranked with the consuls, at last dwindled into a director or manager of the public spectacles or games.

PRAGMATIC SANCTION. In French Law. An expression used to designate those ordinances which concern the most important object of the civil or ecclesiastical administration. Merlin, Répert.; 1 Fournel, Hist. des Avocats, 24, 38, 39.

In Civil Law. The answer given by the emperors on questions of law, when consulted by a corporation or the citizens of a province or of a municipality, was called a pragmatic sanction. Leçons El. du Dr. Civ. Rom. § 53. This differed from a rescript.

PRAYER. In Equity Practice. The request in a bill that the court will grant the aid which the petitioner desires. That part of the bill which asks for relief. The word denotes, strictly, the request, but is very commonly applied to that part of the bill which contains the request.

Of Process. That part of the bill which asks that the defendant may be compelled to appear and answer the bill, and abide the determination of the court upon the subject.

It must contain the names of all the parties; 1 P. Wms. 593; 2 Dick. Ch. 707; 2 Johns. Ch. 245; Coop. Eq. Pl. 16; although they are out of the jurisdiction; 1 Beav. 106; Smith, Ch. Pr. 45; Mitf. Eq. Pl. 164. The ordinary process asked for is a writ of subpœna; Story, Eq. Pl. § 44; and in case a distringas against a corporation; Coop. Eq. Pl. 16; or an injunction; 2 S. & S. 219; 1 Sim. 50; is sought for, it should be included in the prayer.

For Relief, is *general*, which asks for such relief as the court may grant; or *special*, which states the particular form of relief desired. A special prayer is generally inserted, followed by a general prayer; 4 Madd. 408; 5 Ves. 495; 13 *id.* 119; 2 Pet. 595; 16 *id.* 195; 23 Vt. 247; 6 Gill, 105; 25 Me. 153; 10 Rich. Eq. 53; 7 Ind. 661; 15 Ark. 555. Unless the general prayer is added, if the defendant fails in his special prayer he will not be entitled to any relief; 2 Atk. 2; 1 Ves. 426; 12 *id.* 62; 3 Woodd. Lect. 55; 2 R. I. 129; 4 *id.* 173; 15 Ala. 9; except in case of charities and bills in behalf of infants; 1 Atk. 6, 355; 1 Ves. 418; 18 *id.* 325; 1 Russ. 235; 2 Paige, Ch. 396.

A general prayer is sufficient for most purposes; and the special relief desired may be prayed for at the bar; 4 Madd. 408; 2 Atk. 3, 141; 1 Edw. 26; Story, Eq. Pl. § 41; 31 N. H. 193; 2 Paine, 11; 3 Md. Ch. Dec. 140, 466; 9 How. 390; 9 Mo. 201; 9 Gill & J. 80; see 13 Penn. 67; but where a special order and provisional process are required, founded on peculiar circumstances, a special prayer therefor is generally inserted; 6 Madd. 218; Hinde, Ch. Pr. 17; 3 Ind. 419.

Such relief, and such only, will be granted, either under a special prayer, whether at bar; 3 Swanst. 208; 2 Ves. 299; 3 *id.* 416; 4 Paige, Ch. 229; 25 Me. 153; 30 Ala. N. S. 416; 32 *id.* 508; or in the bill; 16 Tex. 399; 18 Ga. 492; 21 Penn. 131; or under a general prayer, as the case as stated will justify; 7 Ired. Eq. 80; 4 Sneed, 623; 18 Ill. 142; 5 Wisc. 117, 424; 24 Mo. 31; 7 Ala. N. S. 193; 16 *id.* 793; 13 Ark. 183; 3 Barb. Ch. 613; 3 Gratt. 518; 9 How. 390; and a bill framed apparently for one purpose will not be allowed to accomplish another, to the injury of the defendant; 16 Tex. 399; 21 Penn. 131; 6 Wend. 63. See 13 Gratt. 653.

And, generally, the decree must conform to the allegations and proof; 7 Wheat. 522; 10 *id.* 181; 19 Johns. 496; 2 Harr. Ch. 401; 1 H. & G. 11; 12 Leigh, 69; 1 Ired. Eq. 83; 5 Ala. 243; 8 *id.* 211; 14 *id.* 470; 6 Ala. N. S. 518; 4 Bibb, 376; 5 Day, 223; 13 Conn. 146. But a special prayer may be disregarded, if the allegations warrant under the general prayer; 15 Ark. 555; 4 Tex. 20; 2 Cal. 269; 22 Ala. N. S. 646; 8 Humphr. 230; 1 Blackf. 305; the relief granted must be consistent with the special prayer; 27 Ala. 507; 21 Penn. 131; 1 Jones, Eq. 100; 2 Ga. 413; 14 *id.* 52; 1 Edw. Ch. 654; 9 Gill & J. 80; 4 Des. Eq. 530; 9 Yerg. 301; 1 Johns. Ch. 111; 15 Ala. 9.

PREAMBLE. An introduction prefixed to a statute, reciting the intention of the

legislature in framing it, or the evils which led to its enactment.

A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute; Co. 4th Inst. 330; 6 Pet. 301. In modern legislative practice, preambles are much less used than formerly, and in some of the United States are rarely, if ever, now inserted in statutes. In the interpretation of a statute, though resort may be had to the preamble, it cannot limit or control the express provisions of the statute; Dwarris, Stat. 504–508; Wilberforce, Stat. Law, 277. Nor can it by implication enlarge what is expressly fixed; 1 Story, Const. b. 3, c. 6; 3 M'Cord, 293; 15 Johns. 89; Busb. 131; Daveis, 38.

A recital inserted in a contract for the purpose of declaring the intention of the parties.

The facts recited in a preamble of a private statute are not evidence, as between the person for whose benefit the act passed and a third person; 3 Litt. 472; 7 Hill, 80; but the statement of legislative reasons in the preamble will not affect the validity of an act; 42 Conn. 583.

But a preamble reciting the existence of public outrages provision against which is made in the body of the act, is evidence of the facts it recites; see 4 Maule & S. 532; 1 Phill. Ev. 239; 2 Russ. Cr. 720. See, generally, Erskine, Inst. 1. 1. 18; Toullier, 1. 3, n. 318; 2 Belt, Suppl. Ves. 239; 4 La. 55; Barrington, Stat. 353, 370; Wilb. Stat.

PREBEND. In Ecclesiastical Law. The stipend granted to an ecclesiastic, in consideration of officiating in the church. It is in this distinguished from a canonicate, which is a mere title and may exist without stipend. The prebend may be a simple stipend, or a stipend with a dignity attached to it, in which case it has some jurisdiction belonging to it. 2 Burn, Eccl. Law, 88; Stra. 1082; 1 Term, 401; 2 *id.* 630; 1 Wils. 206; Dy. 273 *a*; 7 B. & C. 113; 8 Bingh. 490; 5 Taunt. 2.

PRECARIOUS RIGHT. The right which the owner of a thing transfers to another, to enjoy the same until it shall please the owner to revoke it.

If there is a time fixed during which the right may be used, it is then vested for that time, and cannot be revoked until after its expiration. Wolff, Inst. § 333.

PRECARIUM (Lat.). The name of a contract among civilians, by which the owner of a thing, at the request of another person, gives him a thing to use as long as the owner shall please. Pothier, n. 87. See Yelv. 172; Cro. Jac. 236; 9 Cow. 687; Rolle, 128; Bacon, Abr. *Bailment* (C); Erskine, Inst. 3. 1. 9; Wolff, Ins. Nat. § 333; Story, Bailm. §§ 227, 253 *b*.

A tenancy at will is a right of this kind.

PRECATORY WORDS. Expressions in a will praying or requesting that a thing shall be done.

Although recommendatory words used by a testator, of themselves, seem to leave the devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, wish, or desire that the devisee shall do certain things for the benefit of another person, yet courts of equity have construed such precatory expressions as creating a trust; 8 Ves. Ch. 380; 18 *id.* 41; Bacon, Abr. *Legacies* (B); 98 Mass. 274; 35 Vt. 173; 4 Am. L. Rev. 617. See, *contra*, 20 Penn. 268; 1 McCart. 397; 2 Story, Eq. Jur. § 1069.

But this construction will not prevail when either the objects to be benefited are imperfectly described, or the amount of property to which the trust should attach is not sufficiently defined; 1 Bro. C. C. 142; 1 Sim. 542, 556. See 2 Story, Eq. Jur. § 1070; Lewin, Trusts, 77; 4 Bouvier, Inst. n. 3953.

PRECEDENCE. The right of being first placed in a certain order,—the first rank being supposed the most honorable.

In this country no precedence is given by law to men.

Nations, in their intercourse with each other, do not admit any precedence: hence, in their treaties, in one copy one is named first, and the other in the other. In some cases of officers when one must of necessity act as the chief, the oldest in commission will have precedence: as, when the president of a court is not present, the associate who has the oldest commission will have a precedence; or if their commissions bear the same date, then the oldest man.

In the army and navy there is an order of precedence which regulates the officers in their command. See RANK.

For rules of precedence in England, see Whart. Law Dic.

PRECEDENTS. In Practice. Legal acts or instruments which are deemed worthy to serve as rules or models for subsequent cases.

The word is similarly applied in respect to political and legislative action. In the former use, precedent is the word to designate an adjudged case which is actually followed or sanctioned by *a court* in subsequent cases. An adjudged case may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption: and one which is in fact disregarded is said never to have become a precedent. In determining whether an adjudication is to be followed as a precedent, the following considerations are adverted to. First, the justice of the principle which it declares, and the reasonableness of its application. Hob. 270. If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there can be no possible correction of abuses, because the fact of their existence would render them above the law. It is always safe to rely upon principles. See 16 Viner, Abr. 499; 2 Swanst. 163; 2 J. & W. 318; 3 Ves. 527; 2 Atk. 559; 2 P. Wms. 258; 2 Bro. C. C. 86; 1 Tex. 11; 2 Evans, Poth. 377, where the author argues against the policy of making precedents binding when contrary to reason. See, also, 1 Kent, 475–477; Livermore, Syst. 104, 105; Gresl.

Eq. Ev. 300; 16 Johns. 402; 20 *id.* 722; Cro. Jac. 527; 33 Hen. VII. 41; Jones, Bailm. 46; 1 Hill, N. Y. 438; 9 Barb. 544; 50 N. Y. 451; Wells, Res. Adj. & St. Dec.; PRINCIPLE; REASON; STARE DECISIS.

According to Lord Talbot, it is "much better to stick to the known general rules than to follow any one particular precedent which may be founded on reasons unknown to us." Cas. Talb. 26. Blackstone, 1 Com. 70, says that a former decision is, in general, to be followed, unless "manifestly absurd or unjust;" and in the latter case it is declared, when overruled, not that the former sentence was *bad law*, but that it was *not* law. If an adjudication is questioned in these respects, the degree of consideration and deliberation upon which it was made; 4 Co. 94; the rank of the court, as of inferior or superior jurisdiction, which established it, and the length of time during which it has been acted on as a rule of property, are to be considered. The length of time which a decision has stood unquestioned is an important element; since where a rule declared to be law, even by an inferior tribunal, has been habitually adopted and acted upon by the community, and becomes thus imbedded in the actual affairs of men, it is frequently better to enforce it as it is, instead of allowing it to be re-examined and unsettled. It is said that in order to give precedents binding effect there must be a current of decisions; Cro. Car. 528; Cro. Jac. 386; 8 Co. 163; 10 Wisc. 370; and even then, injustice in the rule often prevails over the antiquity and frequency of its adoption, and induces the court to overrule it. But this is to be very cautiously done where it is a rule of property, or wherever a departure from it would unjustly affect vested rights; 8 Cal. 188; 47 Ind. 286; 30 Miss. 256; 23 Wend. 340.

Written forms of procedure which have been sanctioned by the courts or by long professional usage, and are commonly to be followed, are designated precedents. Steph. Pl. 392. And this term, when used as the title of a law-book, usually denotes a collection of such forms.

PRECEPT (Lat. *precipio*, to command). A writ directed to the sheriff, or other officer, commanding him to do something.

PRECINCT. The district for which a high or petty constable is appointed is, in England, called a precinct. Wilcox, Const. xii.

In daytime, all persons are bound to recognize a constable acting within his own precinct; after night, the constable is required to make himself known; and it is, indeed, proper he should do so at all times; *id.* n. 265, p. 93.

PRECIPUT. In French Law. An object which is ascertained by law or the agreement of the parties, and which is first to be taken out of property held in common by one having a right, before a partition takes place.

The preciput is an advantage or a principal part to which some one is entitled *præcipium jus*, which is the origin of the word preciput. Dalloz, Dict.; Pothier, Obl. By preciput is also understood the right to sue out the preciput.

PRECLUDI NON (Lat.). **In Pleading.** A technical allegation contained in a replication which denies or confesses and avoids the plea.

It is usually in the following form: "And the said A B, as to the plea of the said C D, by him secondly above pleaded, says that he, the said A B, by reason of any thing by the said C D in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said C D, because he says that," etc. 2 Wils. 42; 1 Chitty, Pl. 573; Steph. Pl. 398.

PRECOGNITION. In Scotch Law. The examination of witnesses who were present at the commission of a criminal act, upon the special circumstances attending it, in order to know whether there is ground for a trial, and to serve for direction to the prosecutor. But the persons examined may insist on having their declaration cancelled before they give testimony at the trial. Erskine, Inst. 4. 4. n. 49.

PRECONTRACT. An engagement entered into by a person which renders him unable to enter into another; as, a promise or covenant of marriage to be had afterwards. When made *per verba de presenti*, it is in fact a marriage, and in that case the party making it cannot marry another person; Bish. Mar. & D. § 53.

PREDECESSOR. One who has preceded another.

This term is applied in particular to corporators who are now no longer such, and whose rights have been vested in their successor; the word ancestor is more usually applicable to common persons. The predecessor in a corporation stands in the same relation to the successor that the ancestor does to the heir.

One who has filled an office or station before the present incumbent.

PRE-EMPTION. In International Law. The right of pre-emption is the right of a nation to detain the merchandise of strangers passing through her territories or seas, in order to afford to her subjects the preference of purchase. 1 Chitty, Com. Law, 103; 2 Bla. Com. 287.

This right is sometimes regulated by treaty. In the treaty made between the United States and Great Britain, bearing date the 19th day of November, 1794, ratified in 1795, it was provided, after mentioning that the usual munitions of war, and also naval materials, should be confiscated as contraband, that, "whereas the difficulty of agreeing on precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles so being contraband according to the existing laws of nations shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and com-

pletely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon, together with the freight, and also the damages incident to such detention." See Mann. Com. b. 3, c. 8.

PRE-EMPTION-RIGHT. The right given to settlers upon the public lands of the United States to purchase them at a limited price in preference to others.

It gives a right to the actual settler who is a citizen of the United States, or who has filed a declaration of intention to become such, and has entered and occupied without title, to obtain a title to a quarter-section at the minimum price fixed by law, upon entry in the proper office and payment, to the exclusion of all other persons. It is an equitable title; 15 Miss. 780; 9 Mo. 683; 15 Pet. 407; and does not become a title at law to the land till entry and payment; 2 Sandf. Ch. 78; 11 Ill. 529; 15 *id.* 131. It may be transferred by deed; 9 Ill. 454; 15 *id.* 131; and descends to the heirs of an intestate; 2 Pet. 201; 12 Ala. N. S. 322. See 2 Washb. R. P. 532; Rev. Stat. U. S.; Zab. Land Law.

PREFECT. In French Law. A chief officer invested with the superintendence of the administration of the laws in each department. Merlin, Répert.

PREFER. To bring any matter before a court: as,—A preferred a charge of assault against B.

To apply or move: thus,—"to prefer for costs." Abb. Law Dict.

PREFERENCE. The paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claim, to the exclusion of the rest. The right which a creditor has acquired over others to be paid first out of the assets of his debtor: as, when a creditor has obtained a judgment against his debtor which binds the latter's land, he has a preference.

A failing creditor may prefer any one creditor to the exclusion of others; 12 Pet. 178; 38 Penn. 446; 7 Hun, 146; 15 Mo. 378; 48 Ala. 377. In some states, assignments for creditors may create preferences in favor of certain creditors or classes of creditors.

Voluntary preferences are, however, forbidden by the insolvent laws of some of the states, and are in such cases void when made in a general assignment for the benefit of creditors; *e. g.* New Hampshire, Connecticut, New Jersey, Pennsylvania, Iowa, Ohio. See INSOLVENT; PRIORITY; Moses, Insolv. Laws; Burr. Assignments.

PREGNANCY. In Medical Jurisprudence. The state of a female who has within her ovary, or womb, a fecundated germ, which gradually becomes developed in the latter receptacle. Dunglison, Med. Dict. *Pregnancy.*

The signs of pregnancy. These acquire a great importance from their connection with the subject of *concealed*, and also of *pretended*, pregnancy. The first may occur in order to avoid disgrace, and to accomplish in a secret manner the destruction of offspring. The second may be attempted to gratify the wishes of a husband or relations, to deprive the legal successor of his just claims, to gratify avarice by extorting money, and to avoid or delay execution.

These signs and indications have a twofold division. *First*, those developed through the general system, and hence termed constitutional; *second*, those developed through the uterine system, termed local or sensible.

The first, or constitutional, indications regard—*first*, the mental phenomena, or change wrought in the temperament of the mother, evidenced by depression, despondency, rendering her peevish, irritable, capricious, and wayward; sometimes drowsiness and occasionally strange appetites and antipathies are present.

Second, the countenance exhibits languor, and what the French writers term decomposition of features,—the nose becoming sharper and more elongated, the mouth larger, the eyes sunk and surrounded with a brownish or livid areola, and having a languid expression.

Third, the vital action is increased; a feverish heat prevails, especially in those of full habit and sanguine temperament. The body, except the breasts and abdomen, sometimes exhibits emaciation. There are frequently pains in the teeth and face, heartburn, increased discharge of saliva, and costiveness.

Fourth, the mammary sympathies give enlargement and firmness to the breasts; but this may be caused by other disturbances of the uterine system. A more certain indication is found in the areola, which is the dark-colored circular disk surrounding the nipple. This, by its gradual enlargement, its constantly deepening color, its increasing organic action evidenced by its raised appearance, turgescence, and glandular follicles, is justly regarded as furnishing a very high degree of evidence.

Fifth, irritability of stomach, evidenced by sickness at the stomach, usually in the early part of the day.

Sixth, suppression of the menses, or monthly discharge arising from a secretion from the internal surface of the uterus. This suppression, however, may occur from diseases or from a vitiated action of the uterine system.

The *second*, termed *local* or *sensible* signs and indications, arise mainly from the development of the uterine system consequent upon impregnation. This has reference—

First, to the change in the uterus itself. The new principle introduced causes a determination of blood to that organ, which develops it first at its fundus, second in its body, and lastly in its cervix or neck. The

latter constantly diminishes until it has become almost wholly absorbed in the body of the uterus. The os uteri in its unimpregnated state feels firm, with well-defined lips or margins. After impregnation the latter becomes tumid, softer, and more elastic, the orifice feeling circular instead of transverse.

Second, to the state of the umbilicus, which is first depresssd, then pushed out to a level with the surrounding integuments, and at last, towards the close of the period, protruded considerably above the surface.

Third, to the enlargement of the abdomen. This commences usually by the end of the third month, and goes on increasing during the period of pregnancy. This, however, may result from morbid conditions not affecting the uterus, such as disease of the liver, spleen, ovarian tumor, or ascites.

Fourth, to quickening, as rendered evident by the fœtal motions. By the former we understand the feeling by the mother of the self-induced motion of the fœtus in utero, which occurs about the middle of the period of pregnancy. But as the testimony of the mother cannot be always relied upon, her interest being sometimes to conceal it, it is important to inquire what other means there may be of ascertaining it. These movements of the fœtus may sometimes be excited by a sudden application of the hand, having been previously rendered cold by immersion in water, on to the front of the abdomen. Another method is to apply one hand against the side of the uterine tumor, and at the same time to impress the opposite side quickly with the fingers of the other hand.

But the most reliable means consists in the application of auscultation, or the use of the stethoscope. This is resorted to for the purpose of discovering—

First, the souffle, or placental sound.

Second, the pulsations of the fœtal heart.

The first is a low, murmuring or cooing sound, accompanied by a slight rushing noise, but without any sensation of impulse. It is synchronous with the pulse of the mother, and varies not in its situation during the course of the same pregnancy. Its seat in the abdomen does vary in proportion to the progressive advance of the pregnancy, and it is liable to intermissions.

The second is quite different in its characteristics. It is marked by double pulsations, and hence very rapid, numbering from one hundred and twenty to one hundred and sixty in a minute. These pulsations are not heard until the end of the fifth month, and become more distinct as pregnancy advances. Their source being the fœtal heart, their seat will vary with the varying position of the fœtus. Auscultation, if successful, not only reveals the fact of pregnancy, but also the life of the fœtus.

There is still another indication of pregnancy; and that is a bluish tint of the vagina, extending from the os externum to the os uteri. It is a violet color, like lees of wine, and is caused by the increased vascularity of the genital system consequent upon conception. But any similar cause other than conception may produce the same appearance.

Independent of what may be found on this subject in works on medical jurisprudence and midwifery, that of Dr. Montgomery on the Signs and Indications of Pregnancy is the fullest and most reliable.

The laws relating to pregnancy concern the circumstances under and the manner in which the fact is ascertained. There are two cases where the fact whether a woman is or has been pregnant is important to ascertain. The one is when it is supposed she pretends pregnancy, and the other when she is charged with concealing it.

Pretended pregnancy may arise from two causes: the one when a widow feigns herself with child in order to produce a supposititious heir to the estate. The presumptive heir may in such case have a writ *de ventre inspiciendo*, by which the sheriff is commanded to have such made, and the fact determined whether pregnancy exists or not, by twelve matrons, in the presence of twelve knights. If the result determine the fact of pregnancy, then she is to be kept under proper guard until she is delivered. If the pregnancy be negatived, the presumptive heir is admitted to the inheritance. 1 Bla. Com. 456; Cro. Eliz. 566; 4 Bro. C. C. 90; 2 P. Wms. 591; Cox, C. C. 297. A practice quite similar prevailed in the civil law.

The second cause of pretended pregnancy occurs when a woman is under sentence of death for the commission of a crime. At common law, in case this plea be made before execution, the court must direct a jury of twelve matrons, or discreet women, to ascertain the fact, and if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed, generally till the next session of the court, and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all; 4 Bla. Com. 394, 395; 1 Bay, 497.

In Scotland, all that is necessary to be proved, to have execution delayed, is the fact of pregnancy, no difference being made whether she be quick with child or not. This is also the provision of the French penal code upon this subject. In this country, there is little doubt that clear proof that the woman was pregnant, though not quick with child, would at common law be sufficient to obtain a respite of execution until after delivery. The difficulty lies in making the proof sufficiently clear, the signs and indications being all somewhat uncertain, some of them wanting, all liable to variation, and conviction of the fact only fastening upon the mind when a number of them, inexplicable upon any other hypothesis, concur in that one result.

It has been recently held that pregnancy at the time of marriage by another than the hus-

band is sufficient ground for divorce, provided the pregnancy was unknown to the husband and there was no reasonable ground of suspicion by him; 25 Alb. L. J. 383. This can hardly be laid down as an absolute rule; Bish. Mar. & D. § 180.

Pregnancy is seldom concealed except for the criminal purpose of destroying the life of the fœtus in utero, or of the child immediately upon its birth. Infant life is easily extinguished; while proof of the unnatural crime is hard to be furnished. This has led to the passage of laws, both in England and in this country, calculated to facilitate the proof and also to punish the very act of concealment of pregnancy and death of the child when if born alive it would have been illegitimate. In England, the very stringent act of 21 Jac. I. c. 27, required that any mother of such child who had endeavored to conceal its birth should prove by at least one witness that the child was actually born dead; and for want of such proof it arrived at the forced conclusion that the mother had murdered it. This cruel law was essentially modified, in 1803, by the passage of an act declaring that women indicted for the murder of bastard children should be tried by the same rules of evidence and presumption as obtain in other trials of murder.

The early legislation of Pennsylvania was characterized by the same severity. The act of May 31, 1781, made the concealment of the death of a bastard child conclusive evidence to convict the mother of murder. This was repealed by the act of 5th April, 1790, s. 6, which declared that the constrained presumption that the child whose death is concealed was therefore murdered by the mother shall not be sufficient to convict the party indicted, without probable presumptive proof is given that the child was born alive. The law was further modified by the Act of 22d April, 1794, s. 18, which declares that the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted for the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy and take away the life of such a child. The act also punishes the concealment of the death of a bastard child by fine and imprisonment. The act of 31 March, 1860, Pur. Dig. p. 341, § 136, now governs in Pennsylvania. It makes the concealment of the death of an illegitimate child a substantive offence punishable by fine and imprisonment, and leaves the question of the murder of the child by its mother, subject to the mode of trial and punishment as ordinary cases of murder. Counts for murder and concealing the death of the child may, however, be united in the same indictment. The states of New York, Massachusetts, Vermont, Connecticut, New Jersey, New Hampshire, Georgia, Illinois, and Michigan, all have enactments on this subject,—the punishment prescribed being, generally, fine and imprisonment. For duration of pregnancy, see GESTATION.

PREGNANT. See AFFIRMATIVE PREGNANT; NEGATIVE PREGNANT.

PREJUDICE (Lat. *præ*, before, *judicare*, to judge).

A forejudgment. A leaning towards one side of a cause for some reason other than its justice.

PRELATE. The name of an ecclesiastical officer. There are two orders of prelates: the first is composed of bishops, and the second, of abbots, generals of orders, deans, etc.

PRELEVEMENT. In French Law. The portion which a partner is entitled to take out of the assets of a firm before any division shall be made of the remainder of the assets between the partners.

The partner who is entitled to a prélèvement is not a creditor of the partnership: on the contrary, he is a part-owner; for, if the assets should be deficient, a creditor has the preference over the partner; on the other hand, should the assets yield any profit, the partner is entitled to his portion of it, whereas the creditor is entitled to no part of it, but he has a right to charge interest when he is in other respects entitled to it.

PRELIMINARY. Something which precedes: as, *preliminaries of peace*, which are the first sketch of a treaty, and contain the principal articles on which both parties are desirous of concluding, and which are to serve as the basis of the treaty.

PRELIMINARY PROOF. In Insurance. Marine policies in the United States generally have a provision that a loss shall be payable in a certain time, usually sixty days, "after proof," meaning "preliminary proof," which is not particularly specified. Fire policies usually specify the preliminary proof. Life policies, like marine, usually make the loss payable sixty or ninety days after notice and proof; 2 Phill. Ins. ch. xx.; 11 Johns. 241; 16 Barb. 171; 31 Me. 325; 4 Mass. 88; 6 Gray, 396; 6 Cush. 342; 6 Harr. & J. 408; 3 Gill, 276; 2 Wash. Va. 61; 23 Wend. N. Y. 43; 1 La. 216; 11 Miss. 278; Stew. Low. C. 354; 14 Mo. 220; 10 Pet. 507; 6 Ill. 434; 13 *id.* 676; 5 Sneed, 139; 2 Ohio, 452; 6 Ind. 137; 30 Vt. 659.

PREMEDITATION. A design formed to commit a crime or to do some other thing before it is done.

Premeditation differs essentially from *will*, which constitutes the crime; because it supposes, besides an *actual* will, a *deliberation*, and a *continued persistence* which indicate more perversity. The preparation of arms or other instruments required for the execution of the crime are indications of a premeditation, but are not absolute proof of it; as these preparations may have been intended for other purposes, and then suddenly changed to the performance of the criminal act. Murder by poisoning must of necessity be done with premeditation.

PREMISES (Lat. *præ*, before, *mittere*, to put, to send).

That which is put before. The introduction. Statements previously made. See 1 East, 456.

In Conveyancing. That part of a deed which precedes the *habendum*, in which are set forth the names of the parties with their titles and additions, and in which are recited such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the contract then entered into is founded; and it is here, also, the consideration on which it is made is set down and the certainty of the thing granted. 2 Bla. Com. 298; 8 Mass. 174; 6 Conn. 289.

In Equity Pleading. The stating part of a bill. It contains a narrative of the facts and circumstances of the plaintiff's case, and the wrongs of which he complains, and the names of the persons by whom done and against whom he seeks redress. Cooper, Eq. Pl. 9; Barton, Suit in Eq. 27; Mitf. Eq. Pl. 43; Story, Eq. Pl. § 27.

Every material fact to which the plaintiff intends to offer evidence must be stated in the premises; otherwise, he will not be permitted to offer or require evidence of such fact; 1 Bro. C. C. 94; 3 Swanst. 472; 3 P. Wms. 276; 2 Atk. 96; 1 Vern. 483; 11 Ves. 240; 2 Hare, 264; 6 Johns. 565; 9 Ga. 148.

In Estates. Lands and tenements. 1 East, 453; 3 Maule & S. 169.

PREMIUM. In Insurance. The consideration for a contract of insurance.

A policy of insurance always expresses the consideration called the *premium*, which is a certain amount or a certain rate upon the value at risk, paid wholly in cash, or partly so and partly by promissory note or otherwise; 2 Parsons, Marit. Law, 182. By the charters of mutual fire insurance companies, the insured building is usually subject to a lien for the premium; 1 Phill. Ins. ch. vi.; 19 Miss. 53; 21 How. 35. The premium may be payable by service rendered; 5 Ind. 96.

In life insurance, the premium is usually payable periodically; 18 Barb. 541; and the continuance of the risk is usually made to depend upon the due payment of a periodical premium; 2 Dutch. 268. But if the practice of the company and its course of dealings with the insured, and others known to him, have been such as to induce a belief that so much of the contract as provides for a forfeiture upon non-payment at a fixed time will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief; May, Insurance, § 361; 95 U. S. 380. So far as the agreed risk is not run in amount or time under a marine policy, the whole or a proportional stipulated or customary part of the premium is either not payable, or, if paid, is to be returned unless otherwise agreed; 2 Phill. Ins. c. xxii.; 2 Pars. Marit. Law, 185; 16 Barb. 280; 7 Gray, 246.

PREMIUM NOTE. In Insurance. A note given in place of payment of the whole or a part of the premium.

The premium, or a part of it, is not unfrequently paid wholly or in part by a promissory note, with a stipulation in the policy that the unpaid amount shall be set off and deducted in settling for a loss; 1 Phill. Ins. § 51. It is also usually collaterally secured by a stipulation in the policy for the forfeiture of the policy by non-payment of the premium note, or any amount due thereon by assessment or otherwise; 19 Barb. 440; 21 *id.* 605; 25 *id.* 109; 12 N. Y. 477; 2 Ind. 65; 3 Gray, 215; 6 *id.* 288; 36 *id.* 252; 19 Miss. 135; 35 N. H. 328; 29 Vt. 23; 2 N. H. 198; 32 Penn. 75; 34 Me. 451.

PREMIUM PUDICITIÆ (Lat. the price of chastity). The consideration of a contract by which a man promises to pay to a woman with whom he has illicit intercourse a certain sum of money.

When the contract is made as the payment of *past* cohabitation, as between the parties, it is good, and will be enforced, if under seal, but such consideration will not support a parol promise; 3 Q. B. 483; 1 Story, Contr. § 670. It cannot be paid on a deficiency of assets, until all creditors are paid, though it has a preference over the heir, next of kin, or devisee. If the contract be for future cohabitation, it is void. 1 Story, Eq. Jur. § 296; 5 Ves. 286; 11 *id.* 535; 3 E. & B. 642; 2 P. Wms. 432; 1 W. Blackst. 517; 3 Burr. 1568; 1 Fonbl. Eq. b. 1, c. 4, § 4, and notes *s* and *y*; 1 Ball & B. 360; Roberts, Fraud. Conv. 428; Cas. Talb. 153, and the cases there cited; 6 Ohio, 21; 5 Cow. 253; Harp. 201; 3 T. B. Monr. 35; 11 Mass. 368; 2 N. & M'C. 251.

PRENDER, PRENDRE (L. Fr.). To take. This word is used to signify the right of taking a thing before it is offered: hence the phrase of law, it lies in render, but not in prender. See A PRENDRE; Gale & W. Easem.; Washb. Easem.

PRENOMEN (Lat.). The first or Christian name of a person. Benjamin is the prenomen of Benjamin Franklin. See Cas. Hardw. 286; 1 Tayl. 148.

PREPENSE. Aforethought. See 2 Chitty, Cr. Law, *784.

PREROGATIVE. In Civil Law. The privilege, pre-eminence, or advantage which one person has over another: thus, a person vested with an office is entitled to all the rights, privileges, *prerogatives*, etc. which belong to it.

In English Law. The royal prerogative is an arbitrary power vested in the executive to do good and not evil. Rutherforth, Inst. 279; Co. Litt. 90; Chitty, Prerog.; Bacon, Abr.

PREROGATIVE COURT. In English Law. An ecclesiastical court held in each of the two provinces of York and

Canterbury before a judge appointed by the archbishop of the province.

Formerly in this court testaments were proved, and administrations granted where a decedent left chattels to the value of five pounds (*bona notabilia*) in two distinct dioceses or jurisdictions within the province, and all causes relating to the wills, administrations, or legacies of such persons were originally cognizable. This jurisdiction was transferred to the court of probate by 20 & 21 Vict. c. 77, § 4, and 21 & 22 Vict. c. 95, and now, by the Judicature Acts, it is included in the supreme court of judicature.

An appeal lay formerly from this court to the king in chancery, by stat. 25 Hen. VIII. c. 19, afterwards to the privy council, by stat. 2 & 3 Will. IV. c. 92. 2 Steph. Com. 237, 238; 3 Bla. Com. 65, 66.

In American Law. A court having a jurisdiction of probate matters, in the state of New Jersey.

PREROGATIVE WRITS. Processes issued by an exercise of the extraordinary power of the crown on proper cause shown. They are the writs of *procedendo*, *mandamus*, prohibition, *quo warranto*, *habeas corpus*, and *certiorari;* 3 Steph. Com. 629. They differ from other writs in that they are never issued except in the exercise of the judicial discretion, and are directed generally not to the sheriff, but to the parties sought to be affected themselves; 3 Bla. Com. 132.

PRESCRIBABLE. To which a right may be acquired by prescription.

PRESCRIPTION. A mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment.

The distinction between a *prescription* and a *custom* is that a custom is a local usage and not annexed to a person; a prescription is a personal usage confined to the claimant and his ancestors or grantors. The theory of prescription was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time, in England, went back to the time of Richard I. To avoid the necessity of proof of such long duration, a custom arose of allowing a presumption of a grant on proof of usage for a long term of years.

The length of time necessary to raise a strict prescription was limited by statute 32 Hen. VIII. at sixty years; 8 Pick. 308; 7 Wheat. 59; 4 Mas. 402; 2 Greenl. Ev. § 539. See 9 Cush. 171; 29 Vt. 43; 24 Ala. N. S. 130; 29 Penn. 22. Grants of incorporeal hereditaments are presumed upon proof of enjoyment of the requisite character for a period of years equal to that fixed by statute as the period of limitation in respect of real actions; 3 Kent, 442; 12 Wend. 330; 19 *id.* 365; 27 Vt. 265; 2 Bail. 101; 4 Md. Ch. Dec. 386; 13 N. H. 360; 4 Day, 244; 10 S. & R. 63; 9 Pick. 251. See 14 Barb. 511; 3 Me. 120; 1 B. & P. 400; 5 B. & Ald. 232.

Prescription properly applies only to incorporeal hereditaments; 3 Barb. 105; Finch, Law, 132; such as *easements* of water, light and air, way, etc.; 4 Mas. 397; 20 Penn. 331; 1 Gale & D. 205, 210, n.; Tudor, Lead. Cas. 114; a class of *franchises;* Co. Litt. 114; 10 Mass. 70; 10 S. & R. Penn. 401. See FERRY.

It has been held that corporations may exist by prescription; 2 Kent, *277; 12 Mass. 400. It is necessary in such case to presuppose a grant by charter or act of parliament, which has been lost; 35 Barb. 319.

In Louisiana, a manner of acquiring property or discharging debts by the effect of time; Rev. Code of La., Art. 3457.

PRESENCE. The being in a particular place.

In many contracts and judicial proceedings it is necessary that the parties should be present in order to render them valid: for example, a party to a deed, when it is executed by himself, must personally acknowledge it, when such acknowledgment is required by law, to give it its full force and effect, and his presence is indispensable, unless, indeed, another person represent him as his attorney, having authority from him for that purpose.

Actual presence is being bodily in the precise spot indicated.

Constructive presence is being so near to or in such relation with the parties actually in a designated place as to be considered in law as being in the place.

It is a rule in the civil law that he who is incapable of giving his consent to an act is not to be considered present although he be actually in the place. A lunatic, or a man sleeping, would not, therefore, be considered present; Dig. 41. 2. 1. 3. And so if insensible; 1 Dougl. 241; 4 Bro. P. C. 71; 3 Russ. 441; or if the act were done secretly so that he knew nothing of it; 1 P. Wms. 740.

The English Statute of Frauds, § 5, directs that all devises and bequests of any lands or tenements shall be attested or subscribed in the presence of said devisor. Under this statute it has been decided that an actual presence is not indispensable, but that where there was a constructive presence it was sufficient: as, where the testatrix executed the will in her carriage standing in the street before the office of her solicitor, the witness retired into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in a situation to see the witness sign the will, through the window of the office; Bro. C. C. 98. See 2 Curt. Eccl. 320, 331; 2 Salk. 688; 3 Russ. 441; 1 Maule & S. 294; 2 C. & P. 491.

In Criminal Law. In trials for cases in which corporal punishment is assigned, the defendant's appearance must ordinarily be in person, and must so appear on record. There can be no judgment of conviction taken by default; 6 Barr, 387; Whart. Cr. Pl. & Pr. § 540. The prisoner's actual presence is not requisite at the making and arguing of motions of all kinds, though in motions for arrest of judgment and in error, the old practice was to require it; 88 Ill. 284; 63 Mo. 159. This is not now usually required in proceedings

in error; 1 Park. C. C. 360. In felonies presence at the verdict is essential, and this right cannot be waived; 18 Penn. 103; 63 *id.* 386; but where a prisoner was voluntarily absent during the taking of a portion of the testimony in an adjoining room, he was considered as constructively present; 25 Alb. L. J. 303. See 88 Penn. 189. In trials for misdemeanors these rules do not apply; 9 Dana, 304; 7 Cow. 525; Whart. Cr. Pl. & Pr. § 550.

PRESENT. A gift, or more properly, the thing given. It is provided by the constitution of the United States, art. 1, s. 9, n. 7, that "no person holding any office of profit or trust under them [the United States] shall, without the consent of congress, accept of any present, emolument, or office, or title, of any kind whatever, from any king, prince, or foreign state."

PRESENTS. This word signifies the writing then actually made and spoken of: as, *these presents;* know all men by *these presents;* to all to whom *these presents* shall come.

PRESENTATION. In Ecclesiastical Law. The act of a patron offering his clerk to the bishop of the diocese to be instituted in a church or benefice.

PRESENTEE. In Ecclesiastical Law. A clerk who has been presented by his patron to a bishop in order to be instituted in a church.

PRESENTMENT. In Criminal Practice. The written notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government. 4 Bla. Com. 301.

Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. In an extended sense, presentments include not only what are properly so called, but also inquisitions of office and indictments found by a grand jury. 2 Hawk. Pl. Cr. c. 25, s. 1.

The difference between a presentment and an inquisition is this: that the former is found by a grand jury authorized to inquire of offences generally, whereas the latter is an accusation found by a jury specially returned to inquire concerning the particular offence. 2 Hawk. Pl. Cr. c. 25, s. 6. See, generally, Comyns, Dig. *Indictment* (B); Bacon, Abr. *Indictment* (A); 1 Chitty, Cr. Law, 163; 7 East, 387; 1 Meigs, 112; 11 Humphr. 12.

The writing which contains the accusation so presented by a grand jury. 1 Brock. 156.

In Contracts. The production of a bill of exchange or promissory note to the party on whom the former is drawn, for his acceptance, or to the person bound to pay either, for payment.

The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all the parties he intends to hold liable; 2 Pet. 170; 4 Mas. 336; 5 *id.* 118; 12 Pick. 399; 7 Gray, 217; 20 Wend. 321; 12 Vt. 401; 13 La. 357; 7 B. Monr. 17; 8 Mo. 268; 7 Blackf. 367; 1 M'Cord, 322; 7 Leigh, 179. And when a bill or note becomes payable, it must be presented for payment.

In general, the presentment for payment should be made to the maker of a note, or the drawee of a bill, for acceptance, or to the acceptor, for payment; 2 Esp. 509; but a presentment made at a particular place, when payable there, is, in general, sufficient. A personal demand on the drawee or acceptor is not necessary; a demand at his usual place of residence; 17 Ohio, 78; of his wife, or other agent, is sufficient; 17 Ala. N. S. 42; 1 Const. 367; 2 Esp. 509; 5 *id.* 265; Holt, 313.

When a bill or note is made payable at a particular place, a presentment, as we have seen, may be made there; 8 N. Y. 266; but when the acceptance is general, it must be presented at the house; 2 Taunt. 206; 1 M. & G. 83; 3 B. Monr. 461; or place of business, of the acceptor; 3 Kent, 64, 65; 4 Mo. 52; 11 Gratt. 260; 2 Camp. 596. See 14 Mart. La. 511.

The presentment for acceptance must be made in reasonable time; and what this reasonable time is depends upon the circumstances of each case; 7 Taunt. 197; 9 Bingh. 416; 9 Moore, P. C. 66; 2 H. Blackst. 565; 4 Mas. 336; 1 M'Cord, 322; 7 Gray, 217; 7 Cow. 205; 9 Mart. La. 326; 7 Blackf. 367. The presentment of a note or bill for payment ought to be made on the day it becomes due; 4 Term, 148; 8 Mass. 453; 3 N. H. 14; 12 La. 386; 22 Conn. 213; 20 Me. 109; 7 Gill & J. 78; 8 Iowa, 394; 1 Blackf. 81; 10 Ohio, 496; and notice of non-payment given (otherwise the holder will lose the security of the drawer and indorsers of a bill and indorsers of a promissory note); and in case the note or bill be payable at a particular place, it should be presented for payment at that place; 1 Wheat. 171; 1 Harr. Del. 10; 5 Leigh, 522; 5 Blackf. 215; 2 Jones, No. C. 23; 13 Pick. 465; 19 Johns. 391; 8 Vt. 191; 1 Ala. N. S. 375; 8 Mo. 336; and if the money be lodged there for its payment, the holder would probably have no recourse against the maker or acceptor if he did not present them on the day and the money should be lost; 5 B. & Ald. 244; 3 Me. 147; 27 *id.* 149.

The excuses for not making a presentment are general, and applicable to all persons who are indorsers; or they are special, and applicable to the particular indorser only.

Among the former are—*inevitable accident* or overwhelming calamity; Story, Bills, § 308; 3 Wend. 488; 2 Ind. 224. *The prevalence of a malignant disease*, by which the ordinary operations of business are suspended; 2 Johns. Cas. 1; 3 Maule & S. 267. The *breaking out of war* between the country of the maker and that of the holder; 1 Paine, 156. *The occupation of the country* where the note is payable, or where the parties live, by a public enemy, which suspends commer-

cial operations and intercourse; 8 Cra. 155; 15 Johns. 57; 16 *id.* 438; 7 Pet. 586; 2 Brock. 20. *The obstruction of the ordinary* negotiations of trade by the *vis major*. *Positive interdictions* and public regulations of the state which suspend commerce and intercourse. *The utter impracticability of finding* the maker or ascertaining his place of residence; Story, Pr. Notes, §§ 205, 236, 238, 241, 264; 4 S. & R. 480; 6 La. 727; 14 La. An. 484; 3 M'Cord, 494; 1 Dev. 247; 2 Caines, 121.

Among the latter, or special excuses for not making a presentment, may be enumerated the following. *The receiving the note by the holder* from the payee, or other antecedent party, too *late* to make a due presentment: this will be an excuse as to such party; 16 East, 248; 7 Mass. 483; Story, Pr. Notes, §§ 201, 265; 2 Wheat. 373; 11 *id.* 431. *The note being an accommodation note* of the maker for the benefit of the indorser; Story, Bills, § 370. See 2 Brock. 20; 7 Harr. & J. 381; 1 H. & G. 468; 7 Mass. 452; 1 Wash. C. C. 461; 2 *id.* 514; 1 Hayw. 271; 4 Mas. 413; 1 Caines, 157; 1 Stew. Ala. 175; 5 Pick. 88; 21 *id.* 327. A *special agreement* by which the indorser waives the presentment; 8 Me. 213; 6 Wheat. 572; 11 *id.* 629; Story, Bills, §§ 371, 373. *The receiving security or money by an indorser* to secure himself from loss, or to pay the note at maturity. In this case, when the indemnity or money is a full security for the amount of the note or bill, no presentment is requisite; Story, Bills, § 374; Story, Pr. Notes, § 281; 4 Watts, 328; 9 Gill & J. 47; 7 Wend. 165; 2 Me. 207; 5 Mass. 170; 5 Conn. 175. *The receiving the note by the holder* from the indorser as a collateral security for another debt; Story, Pr. Notes, § 284; Story, Bills, § 372; 2 How. 427, 457.

A want of presentment may be waived by the party to be affected, after a full knowledge of the fact; 8 S. & R. 438. See 6 Wend. 658; 3 Bibb, 102; 5 Johns. 385; 4 Mass. 347; 7 *id.* 452; 8 Cush. 157; Bacon, Abr. *Merchant, etc.* (M). See, generally, 1 Hare & W. Sel. Dec. 214, 224; Story, Pr. Notes; Byles, Bills; Parsons, Bills; Dan. Neg. Instr.

PRESERVATION. Keeping safe from harm; avoiding injury. This term always presupposes a real or existing danger.

A jettison, which is always for the preservation of the remainder of the cargo, must therefore be made only when there is a real danger existing. See AVERAGE; JETTISON.

PRESIDENT. An officer of a company who is to direct the manner in which business is to be transacted. From the decision of the president there is an appeal to the body over which he presides.

PRESIDENT OF A BANK. This officer, under the banking system in the United States, is ordinarily a member of the board of directors of the bank, and is chosen by them. It is his duty to preside at all meetings of the board of directors; to exercise a constant, immediate, and personal supervision over the daily affairs of the bank; and to institute and carry on legal proceedings to collect demands or claims due the institution. This latter function is the most important of those attached to the office; Morse, Banks, 144, citing 2 Metc. (Ky.) 240; 5 How. 83; 28 Vt. 24. Mortgages to secure subscriptions to stock run in his name; 1 Sandf. Ch. 179; but he has no more control over the property of the bank than any other director; 7 Ala. 281; 1 Seld. 320; 9 P. C. L. J. 43. He has no authority to release the claims of the bank, without the authorization of the board of directors; 7 R. I. 224; 115 Mass. 547. See, generally, Ball, Nat. Banks, 58.

PRESIDENT OF THE UNITED STATES OF AMERICA. The title of the chief executive officer of the United States.

The constitution directs that the executive power shall be vested in a president of the United States of America. Art. 2, s. 1.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years and been fourteen years a resident within the United States. Art. 2, s. 1, n. 5.

He is chosen by presidential electors (*q. v.*). See 1 Kent, Lect. xiii.; Story, Const. § 1410. The constitution, after providing for the transmission of the votes by the electoral colleges to the president of the senate, provides (Amendment xii.), that "the president of the senate shall, in the presence of the senate and the house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

"The person having the greatest number of votes as vice-president shall be vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States."

After his election, and before he enters on the

execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm), that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States." Art. 2, s. 1, n. 8. He holds his office for the term of four years (art. 2, sec. 1, n. 1), and is re-eligible for successive terms, though no one has yet been elected for a third term.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president; and the congress may by law provide for the removal, death, resignation, or inability both of the president and vice-president, declaring what officer shall then act as president; and such officer shall act accordingly until the disability be removed or a president shall be elected. Art. 2, s. 1, n. 6. Congress have accordingly provided that, in case of the inability of both of said officers to serve, the president of the senate, or, if there is none, the speaker of the house for the time being, shall act as president, until the disability is removed or a president elected.

The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them. Art. 2, s. 1, n. 7. The act of March 3d, 1873, c. 226, fixed the salary of the president at fifty thousand dollars.

The powers of the president are to be exercised by him alone, or by him with the concurrence of the senate.

The constitution has vested in him *alone* the following powers: he is commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officers of each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. Art. 2, s. 2, n. 2. He shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session. Art, 2, s. 2, n. 3. He shall from time to time give congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all officers of the United States.

His power, with the concurrence of the senate, is as follows: to make treaties, provided two-thirds of the senators present concur; nominate, and, by and with the advice and consent of the senate, appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not provided for in the constitution, and which have been established by law; but the congress may by law vest the appointment of such inferior officers as they shall think proper in the courts of law, or in the heads of departments. Art. 2, s. 2, n. 2. See 1 Kent, Lect. 13; Story, Const. b. 3, c. 36; Rawle, Const. Index; Serg. Const. L. Index; Cooley, Const.

The president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Art 2, sec. 4.

PRESIDENTIAL ELECTORS. Persons appointed in the different states whose sole duty it is to elect a president and vice-president of the United States. Each state appoints a number of electors equal to the whole number of senators and representatives to which the state is entitled in congress, and it is within the power of the state legislature to direct how such electors shall be appointed. (Const. art. ii. sect. 1). The electors have frequently been appointed by the state legislatures directly, and they have been elected separately by congressional districts; but the more usual method of appointment is by general ballot, so that each voter in a state votes for the whole number of electors to which his state is entitled.

The constitution provides, Amend. art. 12, that "the electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate." See PRESIDENT OF THE UNITED STATES.

PRESS. By a figure, this word signifies the art of printing: the press is free.

All men have a right to print and publish whatever they may deem proper, unless by doing so they infringe the rights of another, as in the case of copyrights (*q. v.*), when they may be enjoined. For any injury they may commit against the public or individuals they may be punished, either by indictment or by a civil action at the suit of the party injured, when the injury has been committed against a private individual. See U. S. Const. Amendm. art. 1; LIBERTY OF THE PRESS.

PRESS COPIES. They are part of the original letters. The identity of the handwriting as shown on the impression is not destroyed, nor rendered unrecognizable by persons acquainted with its characteristics. A person having accurate knowledge can testify to the genuineness with as much accuracy as if the original sheets were before him. Such copies are the same as other writings partially obliterated by damp and exposure, which are admissible as evidence, if duly identified by testimony. They are not however satisfactory as standards of comparison of handwriting. Enough originality is left to be identified by a witness when its own originality is in question; 7 Allen, 561; 1 Cush. 217; to prove the contents of a lost letter, or where a party

refused to give up the original; 6 S. & R. 420; 19 La. An. 91; 37 Conn. 555. The necessity of producing the original, or laying the foundation in the usual way for secondary evidence, is not obviated by the fact that a party keeps letter press copies; 44 N. Y. 171; so in 35 Md. 123. A copy, sworn to be correctly made from a press copy, of a letter is admissible as secondary evidence, to prove its contents, without producing the press copy; 102 Mass. 362. Press copies are admissible against a party when they appear to be in his handwriting and the originals cannot be produced; 7 Allen, 561. Strictly speaking, a letter-press copy is secondary to the document from which it is taken, and cannot be treated as an original; 3 Camp. 228; 4 McLean, 378; 35 Md. 123; 19 La. An. 91.

Photographs are admissible in evidence under similar rules, and in them also the accuracy of mechanical processes is judicially recognized as a means of producing true representations. They may be treated of here.

A photograph, if proved to be fairly taken from the disputed object, is clearly admissible; 45 N. Y. 215.

Upon a criminal trial, photographic likenesses taken after death, of persons whom it is material to identify, may be exhibited to witnesses acquainted with such persons in life as aids in the identification; 45 N. Y. 215. Where a mutilated body was found, the witness was allowed to testify that the face resembled a photograph of a person alleged to be the one found, though he had not known the man before death; 76 Penn. 340. The healthy condition of the deceased may be proved by a colored photograph taken a short time before death; 1 W. N. C. (Pa.) 369; and in an indictment for bigamy a photograph of the first husband may be shown to a witness to the first marriage to prove his identity with the person mentioned in the marriage certificate; 4 F. & F. 103. See 52 Ala. 115; 9 Am. L. Rev. 18, 173.

Photographs of places have been introduced as evidence to prove that a grotto mentioned by the witness as the place where the act was committed, was not such a spot as the parties would likely have chosen to commit the act; 2 Tichb. Tr. 640; to show to the jury the location and surroundings of premises injured by a change of grade in the street, to aid them in determining the effect of such change; 31 Wisc. 512; and where damages are sought to be recovered for injuries caused by neglect to repair the highway, a photograph of the place showing its condition at the time is competent evidence; 1 Abb. App. 451. To be admissible the photographs must first be shown to be true representations of the places; 118 Mass. 420; 31 Wisc. 512. The weight of authority is in favor of the admissibility of photographic copies of signatures, when the genuineness of a signature is in question, if the copies are accompanied by competent preliminary proof that they are accurate in all respects except as to size and coloring. They may be used by an expert to aid him as a basis of opinion as to the genuineness of the original signature. The doctrine that such an opinion is only entitled to little weight, and is at best only secondary evidence, is not supported by the cases; 16 Gray, 161; 45 N. Y. 213; 36 Conn. 218; 115 Mass. 481; 47 Tex. 503; S. C. 26 Am. Rep. 315; *contra*, 10 Abb. Pr. Rep. N. S. 300. Photographs of instruments and public records which can not be brought into court are admissible in evidence; but it is necessary to authenticate them by proof of handwriting; 2 Woods, 682; 6 Blatch. 137; 8 Eng. Rep. 481; S. C. L. R. 9 C. P. 187. The copyright in a photograph is protected and a penalty imposed for the violation of it; R. S. 4965. See 6 Fed. Rep. 178.

See Whart. Hom. §§ 708 and 709; Whart. Cr. Ev. §§ 544, 805; Whart. & St. Med. J. § 1231; 10 Abb. Pr. N. S. 300; 2 Alb. L. J. 1; 7 *id.* 50; 8 Am. L. Reg. N. S. 1. See Pop. Science Monthly (1875), 710.

PRESUMPTION. An inference affirmative or disaffirmative of the truth or falsehood of any proposition or fact drawn by a process of probable reasoning in the absence of actual certainty of its truth or falsehood, or until such certainty can be ascertained. Best, Presump. 4.

An inference affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established. Best, Presump. 12.

A rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. Steph. Ev. 4.

Conclusive presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Best, Presump. 20. They are called, also, *absolute* and *irrebuttable* presumptions.

Disputable presumptions are inferences of law which hold good until they are invalidated by proof or a stronger presumption. Best, Presump. 29; 2 H. & M'H. 77; 4 Johns. Ch. 287.

Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. 1 Phill. Ev. 599; 3 B. & Ad. 890; 3 Hawks, 122; 1 Wash. C. C. 372.

Presumptions of law are rules which, in certain cases, either forbid or dispense with any ulterior inquiry. 1 Greenl. Ev. § 14. Inferences or positions established, for the most part, by the common, but occasionally by the statute, law, which are obligatory alike on judges and juries. Best, Presump. 17. They are either conclusive or disputable.

The distinctions between presumptions of law and presumptions of fact are—*first*, that in regard to presumptions of law a certain inference must be made whenever the facts appear which furnish the basis of the inference; while in case of other presumptions a discretion more or less extensive is vested in the tribunal as to drawing the inference. See 9 B. & C. 643. *Second*, in case of presumptions of law, the court may draw the inference whenever the requisite facts are developed in pleading; Stephen, Plead. 4th ed. 382; while all other presumptions can be made only by the intervention of a jury. Presumptions of law are reduced to fixed rules, and form a part of the system of jurisprudence to which they belong; presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind. See 2 Stark. Ev. 684; 6 Am. Law Mag. 370; 35 Penn. 440.

In giving effect to presumptions of fact, it is said that the presumption stands until proof is given of the contrary; 1 Cr. M. & R. 895; 2 H. & M'H. 77; 2 Dall. 22; 4 Johns. Ch. 287. See BURDEN OF PROOF; ONUS PROBANDI. This contrary proof may be a conflicting presumption; and Mr. Best lays down the following rules for application in such cases: *first*, special presumptions take the place of general ones; see 8 B. & C. 737; 9 *id.* 643; 5 Taunt. 326; 1 Marsh. 68; *second*, presumptions derived from the ordinary course of nature are stronger than casual presumptions; 1 C. & K. 134; 4 B. & C. 71; Co. Litt. 373 *a*; *third*, presumptions are favored which tend to give validity to acts; 1 Leach, 412; 5 Esp. 230; 1 Mann. & R. 668; 3 Camp. 432; 2 B. & C. 814; 7 *id.* 573; 2 Wheat. 70; 1 South. 148; 3 T. B. Monr. 54; 7 *id.* 344; 2 Gill & J. 114; 10 Pick. 359; 1 Rawle, 386; MAXIMS, *Omnia præsumuntur*, etc.; *fourth*, the presumption of innocence is favored in law; 4 C. & P. 116; Russ. & R. 61; 10 M. & W. 15.

Among conclusive presumptions may be reckoned *estoppels* by deed, see ESTOPPELS; *solemn admissions* of parties, and *unsolemn admissions* which have been acted on; 1 Camp. 139; 1 Taunt. 398; 2 Term, 275; 15 Mass. 82; see ADMISSIONS; 1 Greenl. Ev. § 205; *that a sheriff's return is correct* as to facts stated therein as between the parties; 15 Mass. 82; *that an infant under the age of seven years* is incapable of committing a felony; 4 Bla. Com. 23; *that a boy under fourteen* is incapable of committing a rape; 7 C. & P. 582; *contra*, 5 Lea, 352; *that the issue of a wife* with whom her husband has intercourse is legitimate, though her infidelity be proved; 3 C. & P. 215: 1 S. & S. 153; 5 Cl. & F. 163; 2 Allen, 453; 3 *id.* 151; *that despatches of an enemy* carried in a neutral vessel between two hostile ports are hostile; 6 C. Rob. 440; *that all persons subject to any law* which has been duly promulgated, or which derives its validity from general or immemorial custom, are acquainted with its provisions; 4 Bla. Com. 27; 1 Co. 177; 2 *id.* 3 *b*; 6 *id.* 54 *a* See, also, LIMITATION; PRESCRIPTION.

Among rebuttable presumptions may be reckoned the presumptions that a *man is innocent* of the commission of a crime; 2 Lew. Cr. Cas. 227; see 3 Gray, 465; 3 East, 192; 10 *id.* 211; 4 B. & C. 247; 5 *id.* 758; 2 B. & Ald. 385; that *the possessor of property* is its owner; 1 Stra. 505; 9 Cush. 150; 21 Barb. 333; 35 Me. 139, 150; that *possession of the fruits of crime* is guilty possession; 2 C. & P. 359; 7 *id.* 551; Russ. & R. 308; 1 Den. Cr. Cas. 596; 3 D. & B. 122; 7 Vt. 122; 9 Conn. 527; 19 Me. 398; that *things usually done in the course of trade* have been done; 1 Stark. 225; 1 M. & G. 46; 8 C. B. 827; 7 Q. B. 846; 7 Wend. 198; 9 *id.* 323; 9 S. & R. 385; 9 N. H. 519; 10 Mass. 205; 19 Pick. 112; 7 Gill, 34; 45 Me. 516, 550; 15 Conn. 206; that *solemn instruments are duly executed*; 1 Rob. Eccl. 10; 9 C. & P. 570; 15 Me. 470; 1 Metc. Mass. 349; 15 Conn. 206; that a *person, relation, or state of things* once shown to exist continues to exist, as, *life;* 2 Rolle, 461; 2 East, 313; 1 Pet. 452; 3 McLean, 390; see 2 Camp. 113; 14 Sim. 28, 277; 2 Phill. 199; 2 M. & W. 894; 19 Pick. 112; 1 Metc. Mass. 204; 1 Ga. 538; 11 N. H. 191; 4 Whart. 150, 173; 23 Penn. 114; 36 Me. 176; 13 Ired. 333; 1 Penn. N. J. 167; 18 Am. L. Reg. N. S. 639; 22 Alb. L. J. 38; 14 Cent. L. J. 86; see DEATH; a *partnership;* 1 Stark. 405; *insanity;* 3 Bro. C. C. 443; 3 Metc. Mass. 164; 4 *id.* 545; 39 N. H. 163; 4 Wash. C. C. 262; 5 Johns. 144; 1 Pet. C. C. 163; 2 Va. Cas. 132; 24 Alb. L. J. 304; that *official acts have been properly performed;* 1 J. J. Marsh. 447; 14 Johns. 182; 19 *id.* 345; 3 N. H. 310; 3 Gill & J. 359; 12 Wheat. 70; 7 Conn. 350.

Consult Greenleaf, Starkie, Phillips, Wharton, Stephen, on Evidence: Best, Matthews, on Presumptive Evidence; Russell on Crimes.

PRESUMPTIVE EVIDENCE. Any evidence which is not direct and positive. 1 Stark. Ev. 558. The proof of facts from which with more or less certainty, according to the experience of mankind of their more or less universal connection, the existence of other facts can be deduced. 2 Saunders, Pl. 673. The evidence afforded by circumstances, from which, if unexplained, the jury may or may not infer or presume other circumstances or facts. 1 Greenl. Ev. § 13. See Peake, Ev. Morris ed. 45; Best, Pres. 4, § 3.

PRESUMPTIVE HEIR. One who if the ancestor should die immediately would, under existing circumstances of things, be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as, a brother, who is the presumptive heir, may be defeated by the birth of a child to the ancestor. 2 Bla. Com. 208.

PRET A USAGE. (Fr. loan for use). A phrase used in the French law instead of *commodatum*.

PRETENSION. In French Law. The claim made to a thing which a party believes himself entitled to demand but which is not admitted or adjudged to be his.

The words *rights*, *actions*, and *pretensions* are usually joined; not that they are synonymous, for *right* is something positive and certain, *action* is what is demanded, while *pretension* is sometimes not even accompanied by a demand.

PRETERITION (Lat. *præter* and *eo*, to go by). **In Civil Law.** The omission by a testator of some one of his heirs who is entitled to a legitime (*q. v.*) in the succession.

Among the Romans, the preterition of children when made by the mother was presumed to have been made with design; the preterition of sons by any other testator, was considered as a wrong, and avoided the will, except the will of a soldier in service, which was not subject to so much form.

PRETEXT (Lat. *prætextum*, woven before). The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation, or which, if true, are not the true reasons for such act. Vattel, liv. 3, c. 3, § 32.

PRETIUM AFFECTIONIS (Lat.). An imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it. Bell, Dict.

When an injury has been done to an article, it has been questioned whether in estimating the damage there is any just ground, in any case, for admitting the *pretium affectionis*. It seems that when the injury has been done accidentally by culpable negligence such an estimation of damages would be unjust, but when the mischief has been intentional it ought to be so admitted. Kames, Eq. 74, 75.

PREVARICATION. In Civil Law. The acting with unfaithfulness and want of probity. The term is applied principally to the act of concealing a crime. Dig. 47. 15. 6.

PREVENTION (Lat. *prevenire*, to come before). **In Civil Law.** The right of a judge to take cognizance of an action over which he has concurrent jurisdiction with another judge.

In Pennsylvania it has been ruled that a justice of the peace cannot take cognizance of a cause which has been previously decided by another justice. 2 Dall. 77, 114.

PRICE. The consideration in money given for the purchase of a thing.

There are three requisites to the quality of a price in order to make a sale.

It must be *serious* and such as may be demanded: if, therefore, a person were to sell me an article, and by the agreement, reduced to writing, he were to release me from the payment, the transaction would no longer be a sale, but a gift. Pothier, Vente, n. 18.

It must be *certain* and *determinate;* but what may be rendered certain is considered as certain: if, therefore, I sell a thing at a price to be fixed by a third person, this is sufficiently certain, provided the third person make a valuation and fix the price; Pothier, Vente, n. 23, 24; 2 Sumn. 539; 4 Pick. 179; 13 Me. 400; 2 Ired. 36; 3 Penn. 50; 2 Kent, 477. When the parties have not expressed any price in their contract, the presumption of law is that the thing is sold for the price it generally brings at the time and place where the agreement was made; 3 T. B. Monr. 133; 6 H. & J. 273; Coxe, 261; 10 Bingh. 376; 11 U. C. Q. B. 545; 6 Taunt. 108.

The third quality of a price is that it consists in money, to be paid down, or at a future time; for if it be of any thing else it will no longer be a price, nor the contract a sale, but exchange or barter; Pothier, Vente, n. 30; 16 Toullier, n. 147; 12 N. H. 390; 10 Vt. 457; *contra*, 54 N. Y. 173.

The true price of a thing is that for which things of a like nature and quality are usually sold in the place where situated, if real property, or in the place where exposed to sale, if personal; Pothier, Vente, n. 243. The first price or cost of a thing does not always afford a sure criterion of its value. It may have been bought very dear or very cheap; Marsh. Ins. 620 *et seq.;* Ayl. Parerg. 447; Merlin, Répert.; 4 Pick. 179; 8 *id.* 252; 16 *id.* 227.

In a declaration in trover it is usual, when the chattel found is a living one, to lay it as of such a price; when dead, of such a value; 8 Wentw. Pl. 372, n.; 2 Lilly, Abr. 629. See Bouvier, Inst. Index.

Lord Tenterden's act has substituted *value* for *price* in the English Statute of Frauds; 25 L. J. C. P. 257. See Campb. Sales, 162.

PRIMA FACIE (Lat.). At first view or appearance of the business: as, the holder of a bill of exchange, indorsed in blank, is *primâ facie* its owner.

Primâ facie evidence of fact is in law sufficient to establish the fact, unless rebutted; 6 Pet. 622, 632; 14 *id.* 334. See, generally 7 J. J. Marsh. 425; 3 N. H. 484; 7 Ala. 267; 5 Rand. 701; 1 Pick. 332; 1 South. 77; 1 Yeates, 347; 2 N. & M'C. 320; 1 Mo. 334; 11 Conn. 95; 2 Root, 286; 16 Johns. 66, 136; 1 Bail. 174; 2 A. K. Marsh. 244. For example, when buildings are fired by sparks emitted from a locomotive engine passing along the road, it has been held to be *primâ facie* evidence of negligence on the part of those who have the charge of it; 3 C. B. 229.

PRIMA TONSURA (Lat.). A grant of a right to have the first crop of grass. 1 Chitty, Pr. 181.

PRIMAGE. In Mercantile Law. A duty payable to the master and mariners of a ship or vessel,—to the master for the use of his cables and ropes to discharge the goods of the merchant, to the mariners for lading and unlading in any port or haven. Abbott, Shipp. 270.

This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. It is sometimes called the master's hat-money. 3 Chitty, Com. Law, 431.

PRIMARY. That which is first or principal: as, *primary evidence*, that evidence which is to be admitted in the first instance, as distinguished from secondary evidence, which is allowed only when primary evidence cannot be had.

PRIMARY EVIDENCE. The best evidence of which the case in its nature is susceptible. 3 Bouvier, Inst. n. 3053. See EVIDENCE.

PRIMARY OBLIGATION. An obligation which is the principal object of the contract: for example, the primary obligation of the seller is to deliver the thing sold, and to transfer the title to it. It is distinguished from the accessory or secondary obligation to pay damages for not doing so. 1 Bouvier, Inst. n. 702.

PRIMARY POWERS. The principal authority given by a principal to his agent: it differs from *mediate powers*. Story, Ag. § 58.

PRIMATE. In Ecclesiastical Law. An archbishop who has jurisdiction over one or several other metropolitans.

PRIMER ELECTION. A term used to signify first choice.

In England, when coparcenary lands are divided, unless it is otherwise agreed, the eldest sister has the first choice of the purparts: this part is called the *enitia pars*. Sometimes the oldest sister makes the partition; and in that case, to prevent partiality, she takes the last choice. Hob. 107; Littleton, §§ 243, 244, 245; Bacon, Abr. *Coparceners* (U).

PRIMER SEISIN. In English Law. The right which the king had, when any of his tenants died seised of a knight's fee, to receive of the heir, provided he were of full age, one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion, expectant on an estate for life. 2 Bla. Com. 66.

PRIMOGENITURE. The state of being first born; the eldest.

At common law, in cases of descent of land, primogeniture gave a title to the oldest son in preference to the other children. This unjust distinction has been generally abolished in the United States. Formerly in Pennsylvania, in cases of intestacy, the oldest son took a double portion of the real estate.

PRIMOGENITUS (Lat.). The first-born. 1 Ves. 290. And see 3 Maule & S. 25; 8 Taunt. 468; 3 Vern. 660.

PRIMUM DECRETUM (Lat.). In the courts of admiralty, this name is given to a provisional decree. Bacon, Abr. *The Court of Admiralty* (E).

PRINCE. In *a general sense*, a sovereign; the ruler of a nation or state. The son of a king or emperor, or the issue of a royal family: as, princes of the blood. The chief of any body of men.

By a clause inserted in policies of insurance, the insurer is liable for all losses occasioned by "arrest or detainment of all kings, *princes*, and people, of what nation, condition, or quality soever." 1 Bouvier, Inst. n. 1218.

PRINCIPAL. Leading; chief; more important.

This word has several meanings. It is used in opposition to *accessary*, to show the degree of crime committed by two persons. Thus, we say, the principal is more guilty than the accessary after the fact.

In estates, principal is used as opposed to *incident* or *accessory*: as in the following rule: "The incident shall pass by the grant of the principal, but not the principal by the grant of the incident: *accessorium non ducit, sed sequitur suum principale.*" Co. Litt. 152 *a*.

It is used in opposition to *agent*, and in this sense it signifies that the principal is the prime mover.

It is used in opposition to *interest*: as, the principal being secured, the interest will follow.

It is used also in opposition to *surety*: thus, we say, the principal is answerable before the surety.

Principal is used also to denote the more important: as, the principal person.

In the English law, the chief person in some of the inns of chancery is called principal of the house. Principal is also used to designate the best of many things: as, the principal bed, the principal table, and the like.

In Contracts. One who, being competent *sui juris* to do any act for his own benefit or on his own account, confides it to another person to do for him. 1 Domat, b. 1, tit. 15, Introd.; Story, Ag. § 3.

Every one of full age, and not otherwise disabled, is capable of being a principal; for it is a rule that whenever a person has power, as owner, or in his own right, to do a thing, he may do it by another; Comyns, Dig. *Attorney* (C 1); Heineccius, ad Pand. p. 1, l. 3, tit. 1, § 424; 9 Co. 75 *b*; Story, Ag. § 6. Infants are generally incapable of appointing an agent; but under special circumstances they may make such appointments. For instance, an infant may authorize another to do any act which is beneficial to him, but not to do an act which is to his prejudice; 2 Kent, 233–243; 9 Co. 75, 76; 3 Burr. 1804; 6 Cow. 393; 10 Ohio, 37; 10 Pet. 58, 69; 14 Mass. 463. A married woman cannot, in general, appoint an agent or attorney; and when it is requisite that one should be appointed, the husband usually appoints for both. She may, perhaps, dispose of or incumber her separate property, through an agent or attorney; Cro. Car. 165; 2 Leon. 200; 2 Bulstr. 13; but this seems to be doubted; Cro. Jac. 617; Yelv. 1; 1 Brownl. 134; 2 *id.* 248; Adams, Ej. 174. Idiots,

lunatics, and other persons *sui juris* are wholly incapable of appointing an agent; Story, Ag. § 6.

The rights to which principals are entitled arise from obligations due to them by their agents or by third persons.

The rights of principals in relation to their agents are—*first*, to call them to an account at all times in relation to the business of the agency; 2 Bouvier, Inst. 28. *Second*, when the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence or omissions in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity; 1 Livermore, Ag. 398; Story, Ag. § 217 c; 12 Pick. 328; 20 *id.* 167; 6 Hare, 366; 7 Beav. 176. But the loss or damage must be actual, and not merely probable or possible; Story, Ag. § 222; Paley, Ag. 7, 8, 74, 75. But see *id.* 74, *note* 2. *Third*, where both the principal and agent may maintain a suit against a third person for any matter relating to the agency, the principal has a right to supersede the agent by suing in his own name; and he may by his own intervention intercept, suspend, or extinguish the right of the agent under the contract; Story, Ag. § 403; 4 Camp. 194; 3 Hill, N. Y. 72, 73; 6 S. & R. 27; 2 Wash. C. C. 283; 7 Taunt. 237, 243; 1 Maule & S. 576. But, as we shall presently see, an exception to this rule arises in favor of the agent, to the extent of any lien, or other interest, or superior right, he may have in the property; Story, Ag. §§ 393, 397, 407, 408, 424.

In general, the principal, *as against third persons*, has a right to all the advantages and benefits of the acts and contracts of his agent, and is entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally; Story, Ag. §§ 418, 420; Paley, Ag. 323; 8 La. 296; 2 Stark. 443. But to this rule there are the following exceptions. *First*, when the instrument is under seal, and it has been exclusively made between the agent and the third person, as, for example, a charter-party or bottomry bond made by the master of a ship in the course of his employment, in this case the principal cannot sue or be sued on it; Story, Ag. § 422; Abbott, Shipp. pt. 3, ch. 1, § 2; 4 Wend. 285; 1 Paine, 252; 3 Wash. C. C. 560. *Second*, when an exclusive credit is given to and by the agent, and therefore the principal cannot be considered in any manner a party to the contract, although he may have authorized it and be entitled to all the benefits arising from it. The case of a foreign factor buying or selling goods is an example of this kind: he is treated, as between himself and the other party, as the sole contractor, and the real principal cannot sue or be sued on the contract. This, it has been well observed, is a general rule of commercial law, founded upon the known usage of trade; and it is strictly adhered to, for the safety and convenience of foreign commerce; Story, Ag. § 423; Smith, Merc. Law. 66; 15 East, 62; 9 B. & C. 87; 4 Taunt. 574. *Third*, when the agent has a lien or claim upon the property bought or sold, or upon its proceeds, which is equal to or exceeds the amount of its value, the principal cannot sue without the consent of the agent; Story, Ag. §§ 403, 407, 408, 424.

But contracts are not unfrequently made without mentioning the name of the principal: in such case he may avail himself of the agreement; for the contract will be treated as that of the principal as well as of the agent. If, however, the person with whom the contract was made *bonâ fide* dealt with the agent as owner, he will be entitled to set off any claim he may have against the agent, in answer to the demand of the principal; and the principal's right to enforce contracts entered into by his agent is affected by every species of fraud, misrepresentation, or concealment of the agent which would defeat it if proceeding from himself; Story, Ag. §§ 420, 421, 440; 2 Kent, 632; Paley, Ag. 324, 325; 3 B. & P. 490; 7 Term, 359, 360, *note*; 24 Wend. 458; 3 Hill, 72.

Where the principal gives notice to the debtor not to pay money to the agent, unless the agent has a superior right, from a lien or otherwise, the amount of any payment afterwards made to the agent may be recovered by the principal from the debtor; Story, Ag. § 429; 4 Camp. 60; 6 Cow. 181, 186. Money paid by an agent may also be recovered by the principal under any of the following circumstances: *first*, where the consideration fails; *second*, where money is paid by an agent through mistake; *third*, where money is illegally extorted from an agent in the course of his employment; *fourth*, where the money of the principal has been fraudulently applied by the agent to an illegal and prohibited purpose; Paley, Ag. 335–337. When goods are intrusted to an agent for a specific purpose, a delivery by him for a different purpose, or in a manner not authorized by the commission, passes no property in them, and they may, therefore, be reclaimed by the owner; Paley, Ag. 340, 341; 3 Pick. 495. Third persons are also liable to the principal from any tort or injury done to his property or rights in the course of the agency. If both the agent and third person have been parties to the tort or injury, they are jointly as well as severally liable to the principal, and he may maintain an action against both or either of them; Story, Ag. § 436; 3 Maule & S. 562.

The liabilities of the principal are either to his agent or to third persons. The liabilities of the principal to his agent are—to reimburse him all his advances, expenses, and disbursements lawfully incurred about the agency, and also to pay him interest upon such advances and disbursements whenever interest may fairly be presumed to have been stipulated for or to be due to the agent; Story,

Ag. §§ 335, 336, 338; Story, Bailm. 196, 197; Paley, Ag. 107, 108; *second*, to pay him his commissions as agreed upon, or according to the usage of trade, except in cases of gratuitous agency; Story, Ag. § 324; Paley, Ag. 100–107; *third*, to indemnify the agent when, without his own default, he has sustained damages in following the directions of his principal: for example, when the agent has innocently sold the goods of a third person, under the direction or authority of his principal, and a third person recovers damages against the agent, the latter will be entitled to reimbursement from the principal; Story, Ag. § 339; 9 Metc. Mass. 212.

The principal is bound to fulfil all the engagements made by the agent for or in the name of the principal, and which come within the scope of his usual employment, although the agent in the particular instance has in fact exceeded or violated his private instructions; Story, Ag. 443; Smith, Merc. Law, 56–59; 4 Watts, 222; 21 Vt. 129; 26 Me. 84; 1 Wash. C. C. 174. And where an exclusive credit is not given to the agent, the principal is liable to third persons upon contracts made by his agent within the scope of his authority, although the agent contracts in his own name and does not disclose his agency; Story, Ag. § 446. But if the principal and agent are both known, and exclusive credit be given to the latter, the principal will not be liable though the agent should subsequently become insolvent; Story, Ag. § 447. When goods are sold to a person who in fact is the agent of another, but the seller has no knowledge of the agency, the latter may elect to make the principal his debtor on discovering him; 48 Conn. 314. The same principle applies where the seller is informed at the time of the sale that the buyer is an agent, but is not informed who the principal is; 9 B. & C. 78; 2 Metc. Mass. 319. Where money is paid by a third person to the agent, by mistake or upon a consideration that has failed, the principal will be liable to repay it although he may never have received it from his agent; Story, Ag. § 451; Paley, Ag. 293; 2 Esp. 509.

The principal is not, in general, liable to a criminal prosecution for the acts or misdeeds of his agent, unless he has authorized or co-operated in such acts or misdeeds; Story, Ag. § 452; Paley, Ag. 303; 1 Mood. & M. 433. He is, however, civilly liable to third persons for the misfeasance, negligence, or omission of duty of his agent in the course of the agency, although he did not authorize or know of such misconduct, or even although he forbade it; Story, Ag. § 452; Paley, Ag 294–307; 26 Vt. 112, 123; 6 Gill & J. 291; 20 Barb. 507; 7 Cush. 385; and he is liable for the injuries and wrongs of sub-agents who are retained by his direction, either express or implied; Story, Ag. § 454; Paley, Ag. 296; 1 B. & P. 409. But the responsibility of the principal for the negligence or unlawful acts of his agent is limited to cases properly within the scope of the agency. Nor is he liable for the *wilful* acts of his agent whereby damage is occasioned to another, unless he originally commanded or subsequently assented to the act; Paley, Ag. 298, 299; Story, Ag. § 456; 9 Wend. 268; 23 Pick. 25; 20 Conn. 284.

In Criminal Law. The actor in the commission of a crime.

Principals are of two kinds, namely, principals in the first degree, and principals in the second degree.

A *principal in the first degree* is one who is the actual perpetrator of the act. 1 Hale, Pl. Cr. 233, 615; 15 Ga. 346. But to constitute him such it is not necessary that he should be actually present when the offence is consummated; 3 Denio, 190. For if one lay poison purposely for another, who takes it and is killed, the offender, though absent when it was taken, is a principal in the first degree; Fost. 349; 1 Hawk. Pl. Cr. c. 31, § 7; 4 Bla. Com. 34; 1 Chitty, Crim. Law, 257. And the offence may be committed in his absence, through the medium of an innocent agent: as, if a person incites a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, to the commission of crime, the inciter, though absent when the fact was committed, is *ex necessitate* liable for the act of his agent and a principal in the first degree; 1 Hale, Pl. Cr. 514; 2 Leach, 978. But if the instrument be aware of the consequences of his act, he is a principal in the first degree; the employer, in such case, if present when the fact is committed, is a principal in the second degree, and, if absent, an accessary before the fact; Russ. & R. 163; 1 C. & K. 589; 1 Archb. Cr. Law, 58–60.

Principals in the second degree are those who are present aiding and abetting the commission of the fact. 2 Va. Cas. 356. They are generally termed aiders and abettors, and sometimes, improperly, accomplices; for the latter term includes all the *particeps criminis*, whether principals in the first or second degree or mere accessaries. A person to be a principal in the second degree need not be actually present, an ear or eye-witness of the transaction. The presence may be constructive. He is, in construction of law, present aiding and abetting if, with the intention of giving assistance, he be near enough to afford it should the occasion arise. If, for instance, he be outside the house watching to prevent surprise or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree; Foster, Cr. Law, 347, 350; 1 Russ. Cr. Law, 27; 1 Hale, 555; Wright, Ohio, 75; 9 Pick. 496; 9 C. & P. 437; 15 Ill. 511. There must, however, be a participation in the act; for although a person be present when a felony is committed, yet if he does not consent to the felonious purpose or contribute to its execu-

tion, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon; 1 Russ. Cr. 27; 1 Hale, Pl. Cr. 439; Foster, Cr. Law, 350; 9 Ired. 440; 3 Wash. C. C. 223; 1 Wisc. 159; 1 Archb. Cr. Law, 61, 62.

The law recognizes no difference between the offence of principals in the first and principals in the second degree. And so immaterial is the distinction considered in practice that, if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offence, although his was not the hand which actually did it, will support the indictment; and if he be indicted as principal in the second degree, proof that he was not only present, but committed the offence with his own hand, will support the indictment. So, when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute as much as the parties who actually commit the offence; 1 Archb. Cr. Law, 66, 67.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, provided the offence permits of a participation, or specially, as aiders and abettors; Archb. Cr. Pl. 7; 11 Cush. 422; 1 C. & M. 187. But where by particular statutes the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors; Archb. Cr. Pl. 7. If indicted as aiders and abettors, an indictment charging that A gave the mortal blow, and that B, C, and D were present aiding and abetting, will be sustained by evidence that B gave the blow, and that A, C, and D were present aiding and abetting; and even if it appears that the act was committed by a person not named in the indictment, the aiders and abettors may, nevertheless, be convicted; Dougl. 207; 1 East, Pl. Cr. 350. And the same though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting; 1 Den. Cr. Cas. 52; 2 C. & K. 382.

PRINCIPAL CHALLENGE. See CHALLENGE.

PRINCIPAL CONTRACT. One entered into by both parties on their own accounts or in the several qualities they assume.

PRINCIPAL OBLIGATION. That obligation which arises from the principal object of the engagement which has been contracted between the parties. It differs from an accessory obligation. For example, in the sale of a horse, the principal obligation of the seller is to deliver the horse; the obligation to take care of him till delivered is an accessory engagement. Pothier, Obl. n. 182. By principal obligation is also understood the engagement of one who becomes bound for himself, and not for the benefit of another. Pothier, Obl. n. 186.

PRINCIPLES. By this term is understood truths or propositions so clear that they cannot be proved nor contradicted unless by propositions which are still clearer.

That which constitutes the essence of a body or its constituent parts. 8 Term, 107. See PATENTS.

They are of two kinds: one when the principle is universal, and these are known as axioms or maxims: as, *no one can transmit rights which he has not; the accessory follows the principal*, etc. The other class are simply called first principles. These principles have known marks by which they may always be recognized. These are—*first*, that they are so clear that they cannot be proved by anterior and more manifest truths; *second*, that they are almost universally received; *third*, that they are so strongly impressed on our minds that we conform ourselves to them whatever may be our avowed opinions.

First principles have their source in the sentiment of our own existence, and that which is in the nature of things. A principle of law is a rule or axiom which is founded in the nature of the subject, and it exists before it is expressed in the form of a rule. Domat, Lois Civiles, liv. prél. t. 1, s. 2; Toullier, tit. prél. n. 17. *The right to defend one's self continues as long as an unjust attack*, was a principle before it was ever decided by a court: so that a court does not *establish* but *recognizes* principles of law.

PRINTING. The art of impressing letters; the art of making books or papers by impressing legible characters.

The right to print is guaranteed by law, and the abuse of the right renders the guilty person liable to punishment. See LIBEL; LIBERTY OF THE PRESS; PRESS.

PRIORITY. Precedence; going before.

He who has the precedency in time has the advantage in right, is the maxim of the law; not that time, considered barely in itself, can make any such difference, but because, the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards; 1 Fonbl. Eq. 320.

In the payment of debts, the United States is entitled to priority when the debtor is insolvent or dies and leaves an insolvent estate. The priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding or absent debtor, on which an act of legal bankruptcy had been committed; 1 Kent, 243; 1 Phil. Int. Law, 219, 251, and the cases there cited.

Among common creditors, he who has the oldest lien has the preference,—it being a maxim both of law and equity, *qui prior est tempore, potior est jure*; 2 Johns. Ch. 608. See INSOLVENCY.

But in respect to privileged debts, arising *ex contractu*, existing against a ship or vessel under the general admiralty law, the order of priority is most generally that of the inverse order of their creation,—thus reversing the

order of priority generally adopted in the courts of common law. The ground of this inversion of the rule is that the services performed at the latest hour are more efficacious in bringing the vessel and her freightage to their final destination. Each foregoing incumbrance is, therefore, actually benefited by means of the succeeding incumbrance; 16 Bost. Law Rep. 1, 264; 17 *id.* 421. See MARITIME LIENS; ASSETS.

PRISON. A public building for confining persons, either to insure their production in court, as accused persons and witnesses, or to punish, as criminals.

The root is French, as is shown by the Norman *prisons*, prisoners; Kelham, Norm. Fr. Dict.; and Fr. *prisons*, prisons. Britton, c. 11, *de Prisons*. Originally it was distinguished from gaol, which was a place for confinement, not for punishment. See Jacob, Dict. *Gaol*. But at present there is no such distinction. See PENITENTIARY.

PRISON-BREAKING. The act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody. This is an offence at common law. This offence is to be distinguished from rescue (*q. v.*) which is a deliverance of a prisoner from lawful custody by a third person. 2 Bish. Cr. L. § 1065.

To constitute this offence there must be—a *lawful commitment* of the prisoner on criminal process; Co. 2d Inst. 589; 1 Carr. & M. 295; 2 Ashm. 61; 1 Ld. Raym. 424; an *actual breach* with force and violence of the prison, by the prisoner himself, or by others with his privity and procurement; Russ. & R. 458; 1 Russ. Cr. 380; *the prisoner must escape;* 2 Hawk. Pl. Cr. c. 18, s. 12. See 1 Hale, Pl. Cr. 607; 4 Bla. Com. 130; Co. 2d Inst. 500; 1 Gabb. Cr. Law, 305; Alison, Scotch Law, 555; Dalloz, Dict. *Effraction;* 3 Johns. 449; 5 Metc. Mass. 559.

PRISONER. One held in confinement against his will.

Lawful prisoners are either prisoners charged with crimes or for a civil liability. Those charged with crimes are either persons accused and not tried; and these are considered innocent, and are therefore entitled to be treated with as little severity as possible, consistently with the certain detention of their persons; they are entitled to their discharge on bail, except in capital cases; or those who have been convicted of crimes, whose imprisonment, and the mode of treatment they experience, is intended as a punishment: these are to be treated agreeably to the requisitions of the law, and, in the United States, always with humanity. See PENITENTIARY. Prisoners in civil cases are persons arrested on original or mesne process, and these may generally be discharged on bail; and prisoners in execution, who cannot be discharged except under the insolvent laws.

Persons unlawfully confined are those who are not detained by virtue of some lawful, judicial, legislative, or other proceeding. They are entitled to their immediate discharge on *habeas corpus*. For the effect of a contract entered into by a prisoner, see 1 Salk. 402, n.; 6 Toullier, 82.

Prisoners charged with the commission of crimes under the United States laws are to be confined in the prisons of the states, or in proper places of confinement provided by the marshals; 9 Cra. 80.

PRISONER OF WAR. One who has been captured while fighting under the banner of some state. He is a prisoner although never confined in a prison.

In modern times, prisoners are treated with more humanity than formerly: the individual captor has now no personal right to his prisoner. Prisoners are under the superintendence of the government, and they are now frequently exchanged. See 1 Kent, 14.

It is a general rule that a prisoner is out of the protection of the laws of the state so far that he can have no civil remedy under them, and he can, therefore, maintain no action. But his person is protected against all unlawful acts. Bacon, Abr. *Abatement* (B 3), *Aliens* (D).

PRIVATE. Affecting or belonging to individuals, as distinct from the public generally. Not clothed with office.

PRIVATE ACT. An act operating only upon particular persons and private concerns, and rather an exception than a rule. Opposed to public act. 1 Bla. Com. 86; 1 Term, 125; Plowd. 28; Dy. 75, 119; 4 Co. Rep. 76. Private acts ought not to be noticed by courts unless pleaded. As to the constitutionality of statutes empowering guardians and trustees to sell lands, see Cooley, Const. Lim. 118.

PRIVATEER. A vessel owned by one or more private individuals, armed and equipped at his or their expense, for the purpose of carrying on a maritime war, by the authority of one of the belligerent parties.

For the purpose of encouraging the owners of private armed vessels, they are usually allowed to appropriate to themselves the property they capture, or, at least, a large proportion of it; 1 Kent, 96; Pothier, du Dr. de Propr. n. 90 *et seq.* See 2 Dall. 36; 3 *id.* 334; 4 Cra. 2; 1 Wheat. 46; 3 *id.* 546; 5 *id.* 338; 2 Gall. 19, 56, 526; 1 Mas. 365; 3 Wash. C. C. 209. On the 16th of April, 1856, most of the great maritime powers, assembled in congress at Paris, agreed that privateers should not be allowed in war.

Spain and Mexico, though represented, did not join in this portion of the Declaration of Paris. And the United States, although urged to accede to it, declined. During the civil war in America, congress authorized the president to issue letters of marque, but he did not do so. The Confederates offered their letters of marque to foreigners, but they were not accepted. The ostensibly Confederate vessels were commissioned as of its regular navy. Boyd's Wheat. Int. Law, 429.

PRIVEMENT ENCEINTE (L. Fr.). A term used to signify that a woman is pregnant, but not *quick with child*. See Wood, Inst. 662; ENCEINTE; FŒTUS; PREGNANCY.

PRIVIES. Persons who are partakers or have an interest in any action or thing, or any relation to another. Wood, Inst. b. 2, c. 3, p. 255; Co. Litt. 271 *a*.

There are several kinds of privies: namely, privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as the relation between the donor and donee, lessor and lessee; privies in respect to contracts; and privies on account of estate and contract together. Prest. Conv. 327–345. Privies have also been divided into privies in fact and privies in law. 8 Co. 42 *b*. See Viner, Abr. *Privity;* 5 Comyns, Dig. 347; Hamm. Part. 131; Woodf. Landl. & T. 279; 1 Dane, Abr. c. 1, art. 6.

PRIVIGNUS (Lat.). **In Civil Law.** Son of a husband or wife by a former marriage; a stepson. Calvinus, Lex.; Vicat, Voc. Jur.

PRIVILEGE. In Civil Law. A right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors. La. Code, art. 3153; Dalloz, Dict. *Privilege;* Domat, Lois Civ. liv. 2, t. 1, s. 4, n. 1.

Creditors of the same rank of privileges are paid in concurrence, that is, on an equal footing. Privileges may exist either in movables or immovables, or in both at once. They are general or special, on certain movables. The debts which are privileged on *all the movables in general* are the following, which are paid in this order. *Funeral charges. Law charges*, which are such as are occasioned by the prosecution of a suit before the courts. But this name applies more particularly to costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. Charges, of whatever nature, occasioned by the *last sickness*, concurrently among those to whom they are due. See LAST SICKNESS. The *wages of servants* for the year past, and so much as is due for the current year. *Supplies of provisions* made to the debtor or his family during the last six months by retail dealers, such as bakers, butchers, grocers, and during the last year by keepers of boarding-houses and taverns. The *salaries of clerks, secretaries*, and other persons of that kind. *Dotal rights* due to wives by their husbands.

The debts which are privileged on *particular movables* are—the debt of a workman or artisan, for the price of his labor, on the movable which he has repaired or made, if the thing continues still in his possession; that debt on the pledge which is in the creditor's possession; the carrier's charges and accessory expenses on the thing carried; the price due on movable effects, if they are yet in the possession of the purchaser; and the like. See LIEN.

Creditors have a privilege on immovables or real estate in some cases, of which the following are instances: the vendor, on the estate by him sold, for the payment of the price, or so much of it as is due, whether it be sold on or without a credit; architects and contractors, bricklayers, and other workmen, employed in constructing, rebuilding, or repairing houses, buildings, or making other works on such houses, buildings, or works by them constructed, rebuilt, or repaired; those who have supplied the owner with materials for the construction or repair of an edifice or other work, which he has erected or repaired out of these materials, on the edifice or other work constructed or repaired. La. Code, art. 3216.

See, generally, as to privilege, La. Code, tit. 21; Code Civ. tit. 18; Dalloz, Dict. *Privilege;* LIEN; LAST SICKNESS; PREFERENCE.

In Maritime Law. An allowance to the master of a ship of the general nature with primage, being compensation, or rather a gratuity, customary in certain trades, and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of such usage by the parties.

PRIVILEGE FROM ARREST. Privilege from arrest on civil process.

It is either permanent, as in case of ambassadors, public ministers, and their servants, the royal family and servants, peers and peeresses, etc., or temporary, as in case of members of both houses of congress, and of the state legislature, who are privileged *eundo, manendo, et redeundo;* 1 Kent, 243; Cooley, Const. Lim. 163; 8 R. I. 43; see 2 Stra. 985; practising barristers, while actually engaged in the business of the court; 2 Dowl. 51; 5 *id.* 86; 1 H. Blackst. 636; 1 M. & W. 488; 6 Ad. & E. 623; a clergyman in England whilst going to church, performing service, and returning; 7 Bingh. 320; witnesses and parties to a suit and bail, *eundo, manendo, et redeundo;* 5 B. & Ad. 1078; 6 Dowl. 632; 1 Stark. 470; 1 Maule & S. 638; 1 M. & W. 488; 6 Ad. & E. 623; and other persons who are privileged by law. See ARREST.

In case of the arrest of a legislator contrary to law, the house of which he is a member may give summary relief, by ordering his discharge, and if this be not complied with, by punishing the persons concerned in such arrest, as for contempt of its authority. If the house neglect to interfere, the court from which the process issued should set it aside, on the fact being shown to it; and any court or officer having authority to issue writs of *habeas corpus*, may inquire into the case and release the party; Cooley, Const. Lim. 163; Cush. Parl. Pract. §§ 546–597.

By the constitutions of some of the states,

the privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process; *e. g.* Michigan, Kansas, Nebraska, California, Wisconsin, Indiana, Oregon, and others.

PRIVILEGED COMMUNICATIONS. A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable.

Duty, in this canon, cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation; 5 E. & B. 347. The proper meaning of a privileged communication, said Mr. Baron Parke, is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made; 2 Cr. M. & R. 573. So, also, in 16 N. Y. 373.

The law recognizes two classes of cases in which the occasion either supplies an absolute defence, or a defence subject to the condition that the party acted *bonâ fide* without malice. The distinction turns entirely on the question of malice. The communications last mentioned lose their privilege on proof of express malice. (12 Fed. Rep. 526.) The former depend in no respect for their protection upon the *bona fides* of the defendant. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion; Heard, Lib. & S. § 89.

As to communications which are thus absolutely privileged, it may be stated as the result of the authorities that no person is liable, either civilly or criminally, in respect of any thing published by him as a member of a legislative body, in the course of his legislative duty, nor in respect of any thing published by him in the course of his duty in any judicial proceeding. This privilege extends not only to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, but also to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation. A fair report of any judicial proceeding or inquiry is also privileged; Heard, Lib. & S. §§ 90, 103, 110; Odger, Lib. & S. *185.

"A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it and such party stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

"The verbal statements of a mercantile agency, made in relation to the plaintiffs' business credit and standing as merchants, to its subscribers who had an interest in knowing the facts, and in answer to inquiries made by them, if made in good faith and upon information on which defendant relied, are privileged, and cannot be made the foundation of an action. But daily '*notification sheets*' sent to all the subscribers of such an agency without regard to the question whether they have any interest in the persons there referred to or their business, cannot be considered privileged communications. (See 46 N. Y. 188.)

"A communication which would otherwise be privileged, if made with malice in fact or through hatred, ill-will, and a malicious design to injure, is not a privileged communication, but the burden of proof is on the plaintiffs to show malice in fact." 12 Fed. Rep. 526.

Information furnished by a charity organization society at the request of a person not a member, but who was interested, is a privileged communication; 13 Cent. L. J. 432. So are communications to a near relative respecting the character of a person with whom the relative is negotiating for a marriage; 8 C. & P. 88; but not by a stranger; 5 Allen, 170; so where one communicated to an employer his suspicions of dishonest conduct in a servant towards himself; 8 C. B. N. S. 597. See Towns. Lib. & S.; CONFIDENTIAL COMMUNICATIONS.

PRIVILEGED COPYHOLDS. Those copyholds which are held according to the *custom of the manor*, and not according to the *will of the lord*. They include ancient demesne and customary freehold. See CUSTOMARY COPYHOLD. 2 Woodd. Lect. 33-49; Lee, Abs. 63; 1 Crabb, R. P. 709, 919; 2 Bla. Com. 100.

PRIVILEGED DEBTS. Those which an executor or administrator, assignee in bankruptcy, etc., may pay in preference to others, such as funeral expenses, servants' wages, and doctors' bills during last sickness, etc. See PRIVILEGE.

PRIVILEGED DEED. In Scotch Law. An instrument, for example, a testament, in the execution of which certain statutory formalities usually required are dispensed with, either from necessity or expediency. Erskine, Inst. 3. 2. 22; Bell, Dict.

PRIVILEGES OF CITIZENS. The federal constitution provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

These have been enumerated as some of the principal privileges: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as

the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of *habeas corpus*, to institute and maintain actions of every kind in the courts of the state, to take, hold, and dispose of property, and an exemption from higher taxes or impositions than are paid by the citizens of other states, etc.; 4 Wash. C. C. 371. Other judges have preferred to leave the meaning of the phrase to be determined as each case arises; 94 U. S. 391. See Cooley, Const. 188.

The constitution also declares that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

A citizen of the United States has been said to have a right as such to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, to pass from state to state and into foreign countries; he may petition the federal authorities, visit the seat of government without being subjected to the payment of a tax for the privilege (6 Wall. 35), be the purchaser of public lands on the same terms as others, participate in the government if he comes within the conditions of suffrage, and demand the protection of the government on the high seas or in foreign countries; Cooley, Const. 246; see 16 Wall. 36. A state may not impose a tax upon travellers passing by public conveyance out of the state; 6 Wall. 35; nor impose conditions upon the rights of citizens of other states to sue its citizens in the federal courts; 20 Wall. 445. See 37 Iowa, 145.

PRIVILEGIUM (*priva lex*, i. e. *de uno homine*). **In Civil Law.** A private law inflicting a punishment or conferring a reward. Calvinus, Lex.; Cicero, *de Lege*, 3, 19, *pro Domo*, 17; Vicat, Voc. Jur. Every peculiar right by which one creditor or class of creditors is preferred to another in personal actions. Vicat, Voc. Jur. Every privilege granted by law in derogation of common right. Mackeldey, §§ 188, 189. A claim or lien on a thing, which once attaching continued till waiver or satisfaction, and which existed apart from possession. So at the present day in maritime law: *e. g.* the lien of seamen on ship for wages. 2 Pars. Marit. Law, 561–563.

PRIVILEGIUM CLERICALE (Lat.). The same as benefit of clergy.

PRIVITY. The mutual or successive relationship to the same rights of property; 1 Greenl. Ev. § 189; 6 How. 60.

PRIVITY OF CONTRACT. The relation which subsists between two contracting parties.

From the nature of the covenant entered into by him, a lessee has both privity of contract and of estate; and though by an assignment of his lease he may destroy his privity of estate, still the privity of contract remains, and he is liable on his covenant notwithstanding the assignment; Dougl. 458, 764; Viner, Abr.; 6 How. 60.

PRIVITY OF ESTATE. Identity of title to an estate.

The relation which subsists between a landlord and his tenant.

It is a general rule that a termor cannot transfer the tenancy or privity of estate between himself and his landlord without the latter's consent: an assignee who comes in only in privity of estate is liable only while he continues to be legal assignee; that is, while in possession under the assignment; Bacon, Abr. *Covenant* (I 4); Woodf. Landl. & T. 279; Viner, Abr.; Washb. R. P.

PRIVY. One who is a partaker or has any part or interest in any action, matter, or thing.

PRIVY COUNCIL. The chief council of the sovereign, called, by pre-eminence, "the Council," composed of those whom the king appoints. 1 Bla. Com. 229–232.

The statute of Charles II. in 1679 limited the number to thirty,—fifteen the chief officers of the state *ex virtute officii*, the other fifteen at the king's pleasure; the number is now indefinite. A committee of the privy council was a court of ultimate appeal in admiralty and ecclesiastical cases and cases of lunacy, 3 P. Wms. 108, and from all dominions of the crown except Great Britain and Ireland, H. Wood. Lect. 157 b. The Court of Appeal now has its jurisdiction in lunacy and admiralty. See JUDICIAL COMMITTEE.

PRIVY SEAL. In English Law. A seal which the king uses to such grants or things as pass the great seal. Co. 2d Inst. 554.

PRIVY SIGNET. The seal which is first used in making grants, etc. of the crown. It is always in custody of the secretary of state. 2 Bla. Com. 347; 1 Woodd. Lect. 250; 1 Steph. Com. 571.

PRIVY TOKEN. By stat. 33 Henry VIII. c. 1, punishment is provided against those evil-disposed persons who devised how they might unlawfully get into their possession goods, chattels, and jewels of other persons by "privy tokens and counterfeit letters in other men's names," unto divers persons, their friends and acquaintances, by color whereof they have unlawfully obtained the same. A false privy token within the statute has generally been taken to denote some seal, visible mark or thing, as a key, a ring, etc.; 13 Viner, Abr. 460. When one makes use of a false token, he is indictable for the cheat, though the act is not larceny; 1 Bish. Cr. L. § 585. But when the consent obtained covers no more than the possession, and the goods are converted to his own use, the offence becomes larceny; 1 Leach, 420; East, Pl. Cr. 691.

PRIVY VERDICT. One which is delivered privily to a judge out of court.

PRIZE. In Maritime Law. The apprehension and detention at sea of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo. 1 C. Rob. 228.

The vessel or goods thus taken.

Goods taken on land from a public enemy are called booty; and the distinction between a prize and booty consists in this, that the former is taken at sea and the latter on land.

In order to vest the title of the prize in the captors, it must ordinarily be brought with due care into some convenient port for adjudication by a competent court. But circumstances may render such a step improper; and of these the captor must be the judge. In making up his decision, good faith and reasonable discretion are required; 18 How. 110; 1 Kent, 101. The condemnation must be pronounced by a prize court of the government of the captor sitting in the country of the captor or his ally: the prize court of an ally cannot condemn.

Strictly speaking, as between the belligerent parties the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over and the *spes recuperandi* was gone. But by the modern usage of nations this is not sufficient to change the property. A judicial tribunal must pass upon the case; and the property is not charged in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation; 1 Kent, 102. See Phill. Int. Law, Index, *Prize;* 1 Kent, 101; Ab. Sh.; 2 Brown, Civ. Law, 444; Merl. Répert.; INFRA PRÆSIDIA.

In Contracts. A reward which is offered to one of several persons who shall accomplish a certain condition; as, if an editor should offer a silver cup to the individual who shall write the best essay in favor of peace. In this case there is a contract subsisting between the editor and each person who may write such essay that he will pay the prize to the writer of the best essay; Wolff, Dr. de la Nat. § 675.

PRIZE COURT. In English Law. That branch of admiralty which adjudicates upon cases of maritime captures made in time of war. A special commission issues in England, in time of war, to the judge of the admiralty court, to enable him to hold such court. See ADMIRALTY.

Some question has been raised whether the prize court is or is not a separate court from the admiralty court. Inasmuch as the commission is always issued to the judge of that court, and the forms of proceeding are substantially those of admiralty, while the law applicable is derived from the same sources, the fact that the commission of prize is only issued occasionally would hardly seem to render the distinction a valid one.

In the United States, the admiralty courts discharge the duties both of a prize and an instance court.

PRIZE FIGHT. A public prize fight is an indictable offence. No concurrence of wills can justify a public tumult and alarm; therefore, persons who voluntarily engage in a prize fight and their abettors are all guilty of assault; 4 C. & P. 537; 1 Cox, C. C. 177; 2 Bish. C. L. § 35. All persons guilty of aiding and abetting a prize-fight are guilty of an assault, but mere voluntary presence at a prize-fight does not, as a matter of law, necessarily render a person so present guilty of an assault in aiding and abetting in such fight, though it is evidence for the jury; 8 Q. B. Div. 534; see, also, 108 Mass. 302.

PRO (Lat.). For. This preposition is of frequent use in composition.

PRO AMITA (Lat.). A grandfather's sister; a great-aunt. Ainsworth, Dict.

PRO CONFESSO (Lat. as confessed). **In Equity Practice.** A decree taken where the defendant has either never appeared in the suit, or, after having appeared, has neglected to answer. 1 Dan. Ch. Pr. 479; Ad. Eq. 327, 374; 1 Sm. Ch. Pr. 254.

PRO EO QUOD (Lat.). **In Pleading.** For this that. This is a phrase of affirmation, and is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; 2 Chit. Pl. 369–393; Gould, Pl. c. 3, § 34.

PRO HAC VICE (Lat.). For this occasion.

PRO INDIVISO (Lat.). For an undivided part. The possession or occupation of lands or tenements belonging to two or more persons, and where, consequently, neither knows his several portion till divided. Bract. l. 5.

PRO INTERESSE SUO (Lat.). According to his interest.

PRO QUERENTE (Lat.). For the plaintiff: usually abbreviated *pro quer.*

PRO RATA (Lat.). According to the rate, proportion, or allowance. A creditor of an insolvent estate is to be paid *pro rata* with creditors of the same class.

According to a certain rule or proportion. 19 Am. L. Reg. N. S. 355, n. (U. S. D. C. Cal.). It is presumed to be used in that sense in a will; *id.*

PRO RE NATA (Lat.). For the occasion as it may arise.

PRO TANTO (Lat.). For so much. See 17 S. & R. 400.

PROAMITA MAGNA. A great-great-aunt. Whart. Law Dict.

PROAVIA (Lat.). A great-grandmother. Ainsworth, Dict.

PROAVUNCULUS (Lat.). A great-grandmother's brother. Ainsworth, Dict.

PROAVUS (Lat.). Great-grandfather. This term is employed in making genealogical tables.

PROBABILITY. Likelihood; consonance to reason; for example, there is a strong probability that a man of good moral character, and who has heretofore been remarkable for truth, will, when examined as a witness under oath, tell the truth; and, on the contrary, that a man who has been guilty of perjury will not, under the same circum-

stances, tell the truth: the former will, therefore, be entitled to credit, while the latter will not

PROBABLE. Having the appearance of truth; appearing to be founded in reason.

PROBABLE CAUSE. Such a state of facts as to make it a reasonable presumption that their supposed existence was the cause of action.

Such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives. 1 Greenl. 135; s. c. 10 Am. Dec. 48. See, also, 72 Ill. 262; 83 *id.* 548; 4 Vt. 363; 62 N. Y. 525.

Whether the circumstances relied on to prove the existence of probable cause be true or not is a fact to be found by the jury; but whether if found to be true, they amount to probable cause, is a question of law; 2 Q. B. 169; 29 Cal. 644; 27 Me. 266; 10 N. Y. 240; 20 Ohio, 119.

When there are grounds for suspicion that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be a *probable cause* for making a charge against the accused, however malicious the intention of the accuser may have been; Cro. Eliz. 70; 2 Term, 231; 1 Wend. 140, 345; 5 Humphr. 357; 3 B. Monr. 4. See 1 Penn. 234; 6 W. & S. 236; 1 Meigs, 84; 3 Brev. 94. And probable cause will be presumed till the contrary appears.

In an action, then, for a malicious prosecution, the plaintiff is bound to show total absence of probable cause, whether the original proceedings were civil or criminal; 5 Taunt. 580; 1 Camp. 199; 2 Wils. 307; 1 Chitty, Pr. 48; see MALICIOUS PROSECUTION; 7 Cra. 339; 1 Mas. 24; 11 Ad. & E. 483; 1 Pick. 524; 24 *id.* 81; 8 Watts, 240; 3 Wash. C. C. 31; 6 W. & S. 336; 2 Wend. 424; 1 Hill, So. C. 82; 3 Gill & J. 377; 9 Conn. 309; 3 Blackf. 445.

In cases of municipal seizure for the breach of revenue, navigation, and other laws, if the property seized is not condemned, the party seizing is exempted from liability for such seizure if the court before which the cause is tried grants a certificate that there was *probable cause* for the seizure. If the seizure was without probable cause, the party injured has his remedy at common law; see 7 Cra. 339; 2 Wheat. 118; 9 *id.* 362; 16 Pet. 342; 3 How. 197; 4 *id.* 251; 13 *id.* 498.

PROBATE OF A WILL. The proof before an officer authorized by law that an instrument offered to be proved or registered is the last will and testament of the deceased person whose testamentary act it is alleged to be.

Jurisdiction. In England, the ecclesiastical courts were the only tribunals in which, except by special prescription, the validity of wills of personal estate could be established or disputed. Hence in all courts, the seal of the ecclesiastical court is conclusive evidence of the factum of a will of personalty; from which it follows that an executor cannot assert or rely on his authority in any other court, without showing that he has previously established it in the spiritual court,—the usual proof of which is the production of a copy of the will by which he is appointed, certified under the seal of the ordinary. This is usually called the probate.

The ecclesiastical courts have no jurisdiction of devises of lands; and in a trial at common law or in equity the probate of a will is not admissible as evidence, but the original will must be produced, and proved the same as any other disputed instrument. This rule has been modified by statute in some of the United States. In New York, the record, when the will is proved by the subscribing witnesses, is *prima facie* evidence, and provision is made for perpetuating the evidence. See 12 Johns. 192; 14 *id.* 407. In Massachusetts, North Carolina, and Michigan, the probate is conclusive of its validity, and a will cannot be used in evidence till proved; 12 Allen, 1; 1 Gall. 622; 2 Mich. Comp. Laws (1871), 1375; Battle Rev. 849. In Pennsylvania, the probate is not conclusive as to lands, and, although not allowed by the register's court, it may be read in evidence; 5 Rawle, 80; but it becomes conclusive as to realty, unless within five years from probate those interested shall contest its validity. In South Carolina the will must be proved *de novo* in the court of common pleas, though allowed in the ordinary; 1 N. & M'C. 326. In New Jersey, probate is necessary, but it is not conclusive; 1 Penn. N. J. 42; except in actions not commenced within seven years from the probate; N. J. Rev. Stat. 1250. See LETTERS TESTAMENTARY.

The effect of the probate in this country, and the rules in regard to jurisdiction, are generally the same as in England; but, as no ecclesiastical courts exist in the United States, probate is granted by some judicial officer, who performs the part of the ordinary in England, but generally with more ample powers in relation to the administration of the estate. See SURROGATE; LETTERS TESTAMENTARY.

The proof of the will is a judicial proceeding, and the probate a judicial act. The party propounding the instrument is termed the proponent, and the party disputing, the contestant. In England, proof *ex parte* was called probate in common form, and proof on notice to the next of kin, proof in solemn form. In the United States, generally speaking, proofs are not taken until citation or notice has been issued by the judge to all the parties interested to attend. On the return of the citation, the witnesses are examined, and the trial proceeds before the court. If the judge, when both parties have been heard, decides in favor of the will, he admits it to probate; if against the will, he rejects it.

More than one instrument may be proved;

and where the contents of two or more instruments are not wholly inconsistent with each other, they may all be admitted as together constituting the last will and testament of the deceased; Williams, Exec. 281.

On the probate the alleged will may be contested on any ground tending to impeach its validity: as, that it was not executed in due form of law and according to the requisite statutory solemnities; that it was forged, or was revoked, or was procured by force, fraud, misrepresentation, or undue influence over a weak mind, or that the testator was incompetent by reason of idiocy or lunacy.

PROBATION. The evidence which proves a thing. It is either by record, writing, the party's own oath, or the testimony of witnesses. Proof. It also signifies the time of a novitiate; a trial. Nov. 5.

PROBATOR. In Old English Law. Strictly, an accomplice in felony who to save himself confessed the fact, and charged or accused any other as principal or accessary, against whom he was bound to make good his charge. It also signified an approver, or one who undertakes to prove a crime charged upon another. Jacob, Law Dict.

PROBATORY TERM. In the British courts of admiralty, after the issue is formed between the parties, a time for taking the testimony is assigned. This is called a probatory term.

This term is common to both parties, and either party may examine his witnesses. When good cause is shown, the term will be enlarged. 2 Brown, Civ. Law, 418; Dunlop, Adm. Pr. 217.

PROBI ET LEGALES HOMINES (Lat.). Good and lawful men; persons competent in point of law to serve on juries. Cro. Eliz. 654, 751; Cro. Jac. 635; Mart. & Y. 147; Hard. 63; Bacon, Abr. *Juries* (A).

PROCEDENDO (Lat.). **In Practice.** A writ which issues where an action is removed from an inferior to a superior jurisdiction by habeas corpus, certiorari, or writ of privilege, and it does not appear to such superior court that the suggestion upon which the cause has been removed is sufficiently proved; in which case the superior court by this writ remits the cause to the court from whence it came, commanding the inferior court to *proceed* to the final hearing and determination of the same. See 2 W. Blackst. 1060; 1 Stra. 527; 6 Term, 365; 4 B. & Ald. 535; 16 East, 387.

PROCEEDING. In its general acceptation, this word means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing.

Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course at common law.

Summary proceedings are those where the matter in dispute is decided without the intervention of a jury: these must be authorized by the legislature, except perhaps in cases of contempt, for such proceedings are unknown to the common law.

In Louisiana there is a third kind of proceeding, known by the name of executory proceeding, which is resorted to in the following cases: When the creditor's right arises from an act importing a confession of judgment and which contains a privilege or mortgage in his favor; or when the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. La. Code, art. 732.

In New York the code of practice divides remedies into actions and special proceedings. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Every other remedy is a special proceeding.

PROCEEDS. Money or articles of value arising or obtained from the sale of property. Goods purchased with money arising from the sale of other goods, or obtained on their credit, are *proceeds* of such goods. 2 Pars. Marit. Law, 201, 202. The sum, amount, or value of goods sold, or converted into money. Wharton Dict.

PROCERES (Lat.). The name by which the chief magistrates in cities were formerly known. St. Armand, Hist. Eq. 88.

PROCES-VERBAL. In French Law. A true relation in writing, in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion. It is a species of inquisition of office.

The *procès-verbal* should be dated, contain the name, qualities, and residence of the public functionary who makes it, the cause of complaint, the existence of the crime, that which serves to substantiate the charge, point out its nature, the time, the place, the circumstances, state the proofs and presumptions, describe the place,—in a word, every thing calculated to ascertain the truth. It must be signed by the officer. Dalloz, Dict.

PROCESS. In Practice. The means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases.

The method taken by law to compel a compliance with the original writ or commands of the court.

In civil causes, in all real actions and for injuries not committed against the peace, the first step was a summons, which was served in personal actions by two persons called summoners, in real actions by erecting a white stick or wand on the defendant's grounds. If this summons was disregarded, the next step was an attachment of the goods of the defendant, and in case of trespasses the attachment issued at once without a summons. If the attachment failed, a distringas issued, which was continued till he appeared.

Here process ended in injuries not committed with force. In case of such injuries, an arrest of the person was provided for. See ARREST. In modern practice some of these steps are omitted; but the practice of the different states is too various to admit tracing here the differences which have resulted from retaining different steps of the process.

In the English law, process in civil causes is called *original* process, when it is founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like; *mesne* process is also sometimes put in contradistinction to *final* process, or process of execution; and then it signifies all process which intervenes between the beginning and end of a suit. 3 Bla. Com. 279. See REGULAR PROCESS.

In Patent Law. The art or method by which any particular result is produced.

A process, *eo nomine*, is not made the subject of a patent in our act of congress. It is included under the general term "useful art." Where a result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing india-rubber, smelting ores, and numerous others, are usually carried on by processes, as distinguished from machines. But the term process is often employed more vaguely in a secondary sense in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine, and does not constitute a patentable subject-matter, because there cannot be a valid patent for the function or abstract effect of a machine, but only for the machine which produces it. 15 How. 267, 268. See 2 B. & Ald. 349.

Letters patent for a process irrespective of the particular mode or form of apparatus for carrying it into effect are admissible under the laws of the United States. Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he discovers; 15 How. 62, 115; 102 U. S. 727, 728.

PROCESS OF GARNISHMENT. See GARNISHMENT.

PROCESS OF INTERPLEADER. A means of determining the right to property claimed by each of two or more persons, which is in the possession of a third.

Formerly when two parties concurred in bailment to a third person of things which were to be delivered to one of them on the performance of a covenant or other thing, and the parties brought several actions of detinue against the bailee, the latter might plead the facts of the case and pray that the plaintiffs in the several actions might interplead with each other: this was called process of interpleader. 3 Reeve, Hist. Eng. Law, ch. 23; Mitf. Eq. Pl. Jeremy ed. 141; 2 Story, Eq. Jur. § 802.

PROCESS OF LAW. See DUE PROCESS OF LAW; 3 Morr. Transcr. 88.

PROCESSION. A peaceable procession in the streets of a town, if lawful, and the streets are not obstructed more than is ordinarily the case under such circumstances, is not an indictable offence on the part of those composing it; 72 N. C. 25.

The peaceable procession in the streets of a religious body, known as the Salvation Army, has been held lawful, although the members were aware of the lawless intention of their opponents to make it the occasion of a riot; 26 Soli. Journ. 505. See 26 Alb. L. J. 22.

PROCESSIONING. In Tennessee. A term used to denote the manner of ascertaining the boundaries of land, as provided for by the laws of that state. 1 Tenn. Comp. Stat. § 2020. The term is also used in North Carolina. 3 Murph. 504; 3 Dev. 268.

PROCHEIN (L. Fr.). Next. A term somewhat used in modern law, and more frequently in the old law: as, *prochein ami*, *prochein cousin*. Co. Litt. 10.

PROCHEIN AMI (L. Fr.; spelled, also, *prochein amy* and *prochain amy*). Next friend. He who, without being appointed guardian, sues in the name of an infant for the recovery of the rights of the latter, or does such other acts as are authorized by law: as, in Pennsylvania, to bind the infant apprentice. 3 S. & R. 172; 1 Ashm. 27. For some of the rules with respect to the liability or protection of a prochein ami, see 3 Madd. 468; 4 *id.* 461; 2 Stra. 709; 1 Dick. Ch. 346; 1 Atk. 570; 1 Ves. 409; 7 *id.* 425; 10 *id.* 184; Edwards, Parties, 182–204.

PROCLAMATION. The act of causing some state matters to be published or made generally known. A written or printed document in which are contained such matters, issued by proper authority: as, the president's proclamation, the governor's, the mayor's proclamation. The word proclamation is also used to express the public nomination made of any one to a high office: as, such a prince was *proclaimed* emperor.

The president's proclamation may give

force to a law, when authorized by congress: as, if congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the president by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then it wanted. How far a proclamation is evidence of facts, see Bacon, Abr. *Evidence* (F); Dougl. 594, n.; Bull. N. P. 226; 12 Mod. 216; 8 State Tr. 212; 4 Maule & S. 546; 2 Camp. 44; Dane, Abr. ch. 96, a. 2, 3, 4; 6 Ill. 577; Brooke, Abr.

In Practice. The declaration made by the crier, by authority of the court, that something is about to be done.

It usually commences with the French word *Oyez, do you hear*, in order to attract attention: it is particularly used on the meeting or opening of the court, and at its adjournment; it is also frequently employed to discharge persons who have been accused of crimes or misdemeanors.

PROCLAMATION OF EXIGENTS. In Old English Practice. On awarding an *exigent*, in order to outlawry, a writ of proclamation issued to the sheriff of the county where the party dwelt, to make three proclamations for the defendant to yield himself or be outlawed.

PROCLAMATION OF A FINE. The proclamation of a fine was a notice, openly and solemnly given at all the assizes held in the county where the lands lay. It was made within one year after engrossing the fine; and anciently consisted in the fine as expressed being openly read in court sixteen times,—four times in the term in which it was made, and four times in each of the three succeeding terms. This, however, was afterwards reduced to one reading in each term. These proclamations were upon transcripts of the fine, sent by the justices of the common pleas to the justices of assize and the justices of the peace. Abb. Law Dic. See 2 Bla. Com. 352.

PROCLAMATION OF REBELLION. In Old English Practice. When a party neglected to appear upon a *subpœna*, or an attachment in chancery, a writ bearing this name issued; and, if he did not surrender himself by the day assigned, he was reputed and declared a rebel.

PROCREATION. The generation of children: it is an act authorized by the law of nature. One of the principal ends of marriage is the procreation of children. Inst. tit. 2, in pr.

PROCTOR. One appointed to represent in judgment the party who empowers him, by writing under his hand called a *proxy*. The term is used chiefly in the courts of civil, ecclesiastical, and admiralty law. The proctor is somewhat similar to the attorney. Ayliffe, Parerg. 421. By the Judicature Acts, proctors now practise in all divisions of the supreme court of judicature.

PROCURATION. In Civil Law. The act by which one person gives power to another to act in his place, as he could do himself. A letter of attorney.

An *express* procuration is one made by the express consent of the parties. An *implied* or *tacit* procuration takes place when an individual sues another managing his affairs and does not interfere to prevent it. Dig. 17. 1. 6. 2; 50. 17. 60; Code, 7. 32. 2.

Procurations are also divided into those which contain absolute power, or a general authority, and those which give only a limited power. Dig. 3. 3. 58; 17. 1. 60. 4. Procurations are ended in three ways: *first*, by the revocation of the authority; *second*, by the death of one of the parties; *third*, by the renunciation of the mandatory, when it is made in proper time and place and it can be done without injury to the person who gave it. Inst. 3. 27; Dig. 17. 1; Code, 4, 35. See AUTHORITY; LETTER OF ATTORNEY; MANDATE.

PROCURATIONS. In Ecclesiastical Law. Certain sums of money which parish priests pay yearly to the bishops or archdeacons *ratione visitationis*. Dig. 3. 39. 25; Ayliffe, Parerg. 429; 17 Viner, Abr. 544.

PROCURATOR. In Civil Law. A proctor; a person who acts for another by virtue of a procuration. *Procurator est, qui aliena negotia mandata Domini administrat.* Dig. 3. 3. 1. See ATTORNEY; AUTHORITY.

PROCURATOR, FISCAL. In Scotch Law. A public prosecutor. Bell, Dict.

PROCURATOR LITIS (Lat.). **In Civil Law.** One who by command of another institutes and carries on for him a suit. Vicat, Voc. Jur. *Procurator* is properly used of the attorney of *actor* (the plaintiff), *defensor* of the attorney of *reus* (the defendant). It is distinguished from *advocatus*, who was one who undertook the defence of persons, not things, and who was generally the patron of the person whose defence he prepared, the person himself speaking it. It is also distinguished from *cognitor*, who conducted the cause in the presence of his principal, and generally in cases of citizenship; whereas the procurator conducted the cause in the absence of his principal. Calvinus, Lex.

PROCURATOR IN REM SUAM. In Scotch Law. A term which imports that one is acting as attorney as to his own property. When an assignment of a thing is made, as a debt, and a procuration or power of attorney is given to the assignee to receive the same, he is in such case procurator *in rem suam*. 3 Stair, Inst. 1. 2. 3, etc.; 3 Erskine, Inst. 3. 5. 2; 1 Bell, Dict. b. 5, c. 2, s. 1, § 2.

PROCURATORIUM (Lat.). The proxy or instrument by which a proctor is constituted and appointed.

PRODIGAL. In Civil Law. A person who, though of full age, is incapable of

managing his affairs, and of the obligations which attend them, in consequence of his bad conduct, and for whom a curator is therefore appointed.

PRODITORIE (Lat.). Treasonably. This is a technical word formerly used in indictments for treason, when they were written in Latin. Tomlins.

PRODUCENT. In Ecclesiastical Law. He who produces a witness to be examined.

PRODUCTION OF SUIT (*productio sectæ*). The concluding clause of all declarations is, "and thereupon he brings his suit." In old pleading this referred to the production by the plaintiff of his *secta* or suit, *i.e.* persons prepared to confirm what he had stated in the declaration.

The phrase has remained; but the practice from which it arose is obsolete; 3 Bla. Com. 295; Steph. Pl. 428.

PROFANE. That which has not been consecrated. By a profane place is understood one which is neither sacred, nor sanctified, nor religious. Dig. 11. 7. 2. 4.

PROFANELY. In a profane manner. In an indictment, under the act of assembly of Pennsylvania, against profanity, it is requisite that the words should be laid to have been spoken profanely; 11 S. & R. 394.

PROFANENESS, PROFANITY. In Criminal Law. A disrespect to the name of God or His divine providence. This is variously punished by statute in the several states. See Cooley, Const. Lim. 560, 588.

PROFECTITUS (Lat.). **In Civil Law.** That which descends to us from our ascendants. Dig. 23. 3. 5.

PROFERT IN CURIA (Lat. he produces in court: sometimes written *profert in curiam*, with the same meaning). **In Pleading.** A declaration on the record that a party produces the deed under which he makes title in court. In ancient practice, the deed itself was actually produced; in modern times, the allegation only is made in the declaration, and the deed is then constructively in possession of the court; 3 Salk. 119; 6 M. & G. 277; 11 Md. 322.

Profert is, in general, necessary when either party pleads a deed and claims rights under it, whether plaintiff; 2 Dutch. 293; or defendant; 17 Ark. 279; to enable the court to inspect and construe the instrument pleaded, and to entitle the adverse party to oyer thereof; 10 Co. 92 *b*; 1 Chitty, Pl. 414; 1 Archb. Pr. 164; and is not necessary when the party pleads it without making title under it; Gould, Pl. c. 7, p. 2, § 47. But a party who is actually or presumptively unable to produce a deed may plead it without profert, as in suit by a stranger; Comyns, Dig. *Pleader*, O 8; Cro. Jac. 217; Cro. Car. 441; Carth. 316; or one claiming title by operation of law; Co. Litt. 225; Bacon, Abr. *Pleas* (I 12); 5 Co. 75; or where the deed is in the possession of the adverse party or is lost. In all these cases the special facts must be shown, to excuse the want of profert. See Gould, Pl. c. 8, p. 2; Lawes, Pl. 96; 1 Saund. 9 *a*, note. Profert and oyer are abolished in England by the Common Law Procedure Act, 15 & 16 Vict. c. 76; and a provision exists, 14 & 15 Vict. c. 99, for allowing inspection of all documents in the possession or under the control of the party against whom the inspection is asked. See 25 E. L. & E. 304. In many of the states of the United States profert has been abolished, and in some instances the instrument must be set forth in the pleading of the party relying upon it. The operation of profert and oyer, where allowed, is to make the deed a part of the pleadings of the party producing it; 11 Md. 322; 3 Cra. 234. See 7 Cra. 176.

PROFESSION. A public declaration respecting something. Code, 10. 41. 6. A state, art, or mystery: as, the legal profession. Dig. 1. 18. 6. 4; Domat, Dr. Pub. l. 1, t. 9, s. 1, n. 7.

In Ecclesiastical Law. The act of entering into a religious order. See 17 Viner, Abr. 545.

The term professions in a statute laying a tax, includes lawyers; 59 Ga. 187.

PROFITS. The advance in the price of goods sold beyond the cost of purchase.

The gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.

An excess of the value of returns over the value of advances.

The excess of receipts over expenditures; that is, net earnings. 15 Minn. 519.

The receipts of a business, deducting current expenses; it is equivalent to net receipts. 94 U. S. 500.

This is a word of very extended signification. In *commerce*, it means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, it is well understood to imply the net return to the capital or stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital or stock. Adam Smith, Wealth of Nat. b. i. c. 6, and M'Culloch's Notes; Mill, Polit. Econ. c. 15. After indemnifying the capitalist for his outlay there commonly remains a surplus, which is his profit, the net income from his capital. 1 Mill, Polit. Econ. c. 15. The word profit is generally used by writers on political economy to denote the difference between the value of advances and the value of returns made by their employment.

The profit of the farmer and the manufacturer is the gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed,—whether land, buildings, machinery, instruments, or money. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions. The income or the net income of an

estate means only the profit it will yield after deducting the charges of management; 5 Me. 202; 35 *id.* 420.

Under the term profit is comprehended the produce of the soil, whether it arise above or below the surface: as, herbage, wood, turf, coals, minerals, stones; also fish in a pond or running water. Profits are divided into *profits à prendre*, or those taken and enjoyed by the mere act of the proprietor himself, and *profits à vendre*, namely, such as are received at the hands of and rendered by another. Hamm. N. P. 172.

Profits are divided by writers on political economy into gross and net,—gross profits being the whole difference between the value of advances and the value of returns made by their employment, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name; but it represents the profits attributable to industry, skill, and enterprise. See Malthus, Def. in Polit. Econ.; M'Culloch, Polit. Econ. 563. But the word profit is generally used in a less extensive signification, and presupposes an excess of the value of returns over the value of advances.

Using profit in this more limited and popular sense, persons who share profits do not necessarily share losses; for they may stipulate for a division of gain, if any, and yet some one or more of them may, by agreement, be entitled to be indemnified against losses by the others: so that whilst all share profits, some only bear losses. Persons who share gross returns share profits in the sense of gain; but they do not by sharing the returns share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits if there are any, it is so only incidentally, and because such profits are included in what is divided: it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or loss, or neither; 1 Lindl. Part. Engl. ed. 10. These considerations have led to the distinction between agreements to share profits and agreements to share gross returns, and to the doctrine that, whilst an agreement to share profits creates a partnership, an agreement to share gross returns does not; 1 Lindl. Part. Engl. ed. 11. See 10 Vt. 170; 12 Conn. 69; 1 Campb. 329; 2 Curt. C. C. 609; 38 N. H. 287, 304.

Commissions may be considered as profits, for some purposes. A participation in commissions has been held such a participation in profits as to constitute the participants partners; 2 H. Blackst. 235; 4 B. & Ald. 663. So, commissions received from the sales of a pirated map are profits which must be accounted for by the commission merchant on a bill by the proprietor of the copyright; 2 Curt. C. C. 608. As between partners, all gains which equitably belong to the firm, but which are clandestinely received by one partner, are accounted profits of the firm; Story, Part. § 174; 2 Curt. C. C. 608, 609.

Depreciation of buildings in which a business is carried on, though they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the profits; 94 U. S. 500.

A direction or power given in a will to raise money out of the rents and profits of an estate for the payment of debts and legacies, or to raise a portion within a definite period, within which it could not be raised out of the annual rents and profits, authorizes a sale; 2 Ch. Cas. 205; 1 Vern. 104; 2 *id.* 26, 310, 420, 424; 1 Ves. Sen. 491; 1 Atk. 550. And judges in latter times, looking to the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, even at an indefinite period, as authorizing a sale or mortgage; 2 Jarm. Wills, 282, 383; 1 Ves. 234; 1 Atk. 505; 1 Ves. Sen. 42. But, as a general rule, the question whether the money is to be raised by a sale or mortgage or out of the annual rents and profits will depend upon the nature of the purpose for which the money is to be raised, and the general tenor of the will; 2 Jarm. Wills, 383, 384; 3 Bro. P. C. 66; 3 Y. & J. 360; 1 Atk. 550; 1 Russ. & M. 590; 3 *id.* 97; 2 P. Wms. 63. The circumstances that have chiefly influenced the decisions are —the appointment of a time within which the charge cannot be raised by annual profits; the situation of the estate, where a sale or mortgage would be very prejudicial, as in the case of a reversion, especially if it would occasion any danger that the charge would not be answered in its full extent; the nature of the charge, as where it is for debts or portions, and, in the latter instance, the age or death of the child; 2 Ves. 480, n. 1; 1 Ch. Cas. 170; 2 *id.* 205; 1 Vern. 256; 2 *id.* 26, 72, 420; 2 P. Wms. 13, 650; 1 Fonbl. Eq. 440, n. (o); 1 Atk. 506, 550; 2 *id.* 358. But in no case where there are subsequent restraining words has the word profit been extended; Prec. Ch. 586, note, and the cases cited there; 1 Atk. 506; 2 *id.* 105.

A devise of the rents and profits of land is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein; 1 Ves. Sen. 171; 2 B. & Ald. 42; Plowd. 540; 9 Mass. 372; 1 Cush. 93; 1 Ashm. 131; 1 Spenc. 142; 17 Wend. 393; 5 Me. 119; 35 *id.* 414; 1 Atk. 506; 2 *id.* 358; 1 Bro. C. C. 310. A direction by the testator that a certain person *shall receive for his support the net profits of the land* is a devise of the land itself, for such period of time as the profits were devised; 35 Me. 419.

An assignment of the profits of an estate amounts to an equitable lien, and would entitle the assignee in equity to insist upon a mortgage. Thus, if a tenant for life of the real estate should, by covenant, agree to set apart and pay the whole or a portion of the annual profits of that estate to trustees for certain objects, it would create a lien in the nature of a trust on those profits against him and all persons claiming as volunteers or with notice under him; 2 Cox, Ch. 253; s. c. 1 Ves. 477; 3 Bro. C. C. 531, 538.

Profits expected to arise from merchandise employed in maritime commerce are a proper subject of insurance in England and in the United States; Marsh. Ins. b. 1, ch. 3, § 8; 3 Kent, 271; 16 Pick. 399; 5 Metc. Mass. 391; 1 Sumn. 451. So in Italy; Targa, cap. xliii. no. 5; Portugal; Santerna, part iii. no. 40; and the Hanse Towns; 2 Magnus, 213; Beneck, Ass. chap. 1, sect. 10. vol. 1, p. 170. But in France; Code de Comm. art. 347; Holland; Bynkershoeck, Quæst. Priv. Jur. lib. iv. c. 5; and in Spain, except to certain distant parts; Ordinanzas de Bilboa, ch. xxii. art. 7, 8, 11; it is illegal to insure expected profits. Such insurance is required by the course and interest of trade, and has been found to be greatly conducive to its prosperity; 3 Kent, 271; *Lawrence*, J., 2 East, 544; 1 Arnould, Ins. 204, 205. Sometimes the profits are included in a valuation of the goods from which they are expected to arise; sometimes they are insured as profits; 1 Johns. 433; 3 Pet. 222; 1 Sumn. 451; 6 E. & B. 312; 2 East, 544; 6 *id.* 316. They must be insured as profits; May, Ins. § 79. They may be insured equally by valued and by open policies; 1 Arnould, Ins. 205; 3 Camp. 267. But it is more judicious to make the valuation; 1 Johns. 433; 3 Kent, 273. The insured must have a real interest in the goods from which the profits are expected; 3 Kent, 271; but he need not have the absolute property in them; 16 Pick. 397, 400; see May, Ins. § 79.

A trustee, executor, or guardian, or other person standing in a like relation to another, may be made to account for and pay all the profits made by him in any of the concerns of his trust, as by embarking the trust funds in trade; 1 Story, Eq. Jur. § 465; 2 My. & K. 66, 672, note; 1 Ves. 32, 41, 42, 43, in note; 11 *id.* 61; 2 V. & B. 315; 1 J. & W. 122, 131; 2 Will. Exec. 1311; 1 S. & R. 245; 1 Maule & S. 412; 2 Bro. C. C. 400; 10 Pick. 77; Lind. Part.

The expected profits of a special contract may be reckoned as a part of the damages for a failure to fulfil it, where it appears that such profits would have accrued from the contract itself as the direct and immediate consequence of its fulfilment; 13 How. 307, 344; 7 Cush. 516, 522, 523; 8 Exch. 401; 16 N. Y. 489; Mayne, Damages, 15, 16; 2 C. B. N. S. 592. But where the profits are such only as were expected to result from other independent bargains actually entered into on the faith of such special contract, or for the purposes of fulfilling it, or are contingent upon future bargains or speculations or states of the market, they are too remote and uncertain to be relied upon as a proper basis of damages; 13 How. 307, 344; 38 Me. 361; 7 Cush. 516, 522, 523; 7 Hill, 61; 13 C. B. 353. See, also, 21 Pick. 378, 381; 1 Pet. C. C. 85, 94; 3 Wash. C. C. 184; 1 Pet. 172; 11 S. & R. 445.

A purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; 2 Sugd. Vend. ch. 16, sect. 1, art. 1; 6 Dana, 298; 3 Gill, 82. See 12 M. & W. 761.

Under what circumstances a participation or sharing in profits will make one a partner in a trade or adventure, see PARTNERS; PARTNERSHIP.

PROGRESSION (Lat. *progressio;* from *pro* and *gredior*, to go forward). That state of a business which is neither the commencement nor the end. Some act done after the matter has commenced and before it is completed. Plowd. 343. See CONSUMMATION; INCEPTION.

PROHIBITION (Lat. *prohibitio;* from *pro* and *habeo*, to hold back). **In Practice.** The name of a writ issued by a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. 3 Bla. Com. 112; Comyns, Dig.; Bacon, Abr.; Saund. Index; Viner, Abr.; 2 Sell. Pr. 308; Ayliffe, Parerg. 434; 2 H. Blackst. 533.

The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed; Bull. N. P. 219; or when by the exercise of its jurisdiction, the inferior court would defeat a legal right; 2 Chitty, Pr. 355.

PROHIBITIVE IMPEDIMENTS. Those impediments to a marriage which are only followed by a punishment, but do not render the marriage null. Bowyer, Mod. Civ. Law, 44.

PROJET. In International Law. The draft of a proposed treaty or convention.

PROLES (Lat.). Progeny; such issue as proceeds from a lawful marriage; and, in its enlarged sense, it signifies any children.

PROLETARIUS. In Civil Law. One who had no property to be taxed, and paid a tax only on account of his children (*proles*); a person of mean or common extraction. The word has become, in French, *prolétaire*, signifying one of the common people.

PROLICIDE (Lat. *proles*, offspring, *cædere*, to kill). **In Medical Jurisprudence.** A word used to designate the destruction of the human offspring. Jurists divide the subject into *fœticide*, or the destruction of the fœtus in utero, and *infanticide*, or the destruction of the new born infant. Ryan, Med. Jur. 137.

PROLIXITY. The unnecessary and superfluous statement of facts in pleading or in evidence. This will be rejected as impertinent. 7 Price, 278, n.

PROLOCUTOR (Lat. *pro* and *loquor*, to speak before). **In Ecclesiastical Law.** The president or chairman of a convocation.

PROLONGATION. Time added to the duration of something.

When the time is lengthened during which a party is to perform a contract, the sureties of such a party are, in general, discharged, unless the sureties consent to such prolongation. See GIVING TIME.

In the civil law the prolongation of time to the principal did not discharge the surety; Dig. 2. 14. 27; 12. 1. 40.

PROLYTÆ (Lat.). **In Roman Law.** The term used to denominate students of law during the fifth and last year of their studies. They were left during this year very much to their own direction, and took the name (προλυτοι) prolytæ *omnino soluti*. They studied chiefly the Code and the imperial constitutions. See Dig. Pref. Prim. Const. 2; Calvinus, Lex.

PROMATERTERA (Lat.). Great maternal aunt; the sister of one's grandmother. Inst. 3. 6. 3; Dig. 38. 10. 10. 14 *et seq.*

PROMISE (Lat. *promitto*, to put forward). An engagement by which the promisor contracts with another to perform or do something to the advantage of the latter.

When a promise is made, all that is said at the time in relation to it must be considered: if, therefore, a man promises to pay all he owes, accompanied by a denial that he owes any thing, no action will lie to enforce such a promise; 15 Wend. 187.

And when the promise is conditional, the condition must be performed before it becomes of binding force; 7 Johns. 36. See CONDITION; CONTRACTS; 5 East, 17; 2 Leon. 224; 4 B. & Ald. 595.

PROMISE OF MARRIAGE. A contract mutually entered into by a man and a woman that they will marry each other. Every marriage is necessarily preceded by an express or implied contract of this description, as a wedding cannot be agreed upon and celebrated at one and the same instant; Addison, Contr. 676.

A promise of marriage is not to be likened to an actual marriage. The latter, as has been seen in the article on marriage, is not a contract, but a legal relation; while the former is an executory contract in the strict sense of the term, and governed in general by the ordinary law of contracts, though it has certain peculiarities of its own. As in other contracts, the parties must be *sui juris*. If, therefore, the man or the woman be an infant, or labor under any other legal disability, he or she will not be bound by a promise of marriage; but if one of the parties be an infant and the other be an adult, the promise will be binding upon the latter; Stra. 937; 5 Cow. 475; 7 *id.* 22; 5 Sneed, 659; 1 D. Chipm. 252. A promise made during infancy may be ratified after the infant attains majority. A late English statute requires a new and distinct contract, after majority, in order to bind the infant on his promise to marry after he comes of age; but a new contract may be inferred from continued acceptance of the engagement; L. R. 5 C. P. 410; and see 4 C. P. Div. 485. Neither does it follow, as we shall see presently, that a promise of marriage is not binding because the parties to the promise cannot form a valid marriage; they may be competent to *contract*, though not competent to *marry*.

There must be a legal and valid consideration; but as there are always mutual promises, they are a sufficient consideration for each other. There must be a meeting of the minds of the parties, *i.e.* a request or proposition on the one side, and an assent on the other. If the communications between the parties are verbal, the only questions which usually arise relate to evidence and proof. The very words or time or manner of the promise need not be proved, but it may be inferred from the conduct of the parties, and from the circumstances which usually attend an engagement to marry: as, visiting, the understanding of friends and relations, preparations for marriage, and the reception of the man by the woman's family as a suitor; 3 Salk. 16; 15 Mass. 1; 2 D. & C. 282; 2 Penn. 80; 13 *id.* 331; 1 Ohio St. 26; 2 C. & P. 553; 1 Stark. 82; 6 Cow. 254; 26 Conn. 398; 4 Zabr. 291. But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes permit parties themselves to take the stand; Schoul. Husb. & W. § 43. Therefore a promise cannot be inferred from devoted attention, frequent visits, and apparently exclusive attention; 53 N. Y. 267; nor from mere presents or letters not to the point; see 2 Brewst. 487; nor from the plaintiff's wedding preparations, unknown to the defendant; 48 Ind. 562; 63 Ill. 41; nor from the woman's unexplained possession of an engagement ring; 2 Brewst. 487. See generally 53 N. Y. 267. When the parties are at a distance from each other, and the offer is made by letter, it will be presumed to continue for a reasonable time for the consideration of the party addressed; and if accepted within a reasonable time, and before it is expressly revoked, the contract is then complete; 1 Pars. Contr. b. 2, c. 2. No particular form of words is necessary; 53 N. Y. 267.

A promise of marriage is not within the third clause of the fourth section of the Statute of Frauds, relating to agreements made upon consideration of marriage; but if not to be performed within a year, it has been held to be within the fifth clause, and must, therefore, be in writing in order to be binding; 1 Stra. 34; 1 Ld. Raym. 387; 58 Ind. 29; 2 N. H. 515. But the latest cases are inclined to construe the statute so as not to affect promises to marry; 56 Me. 187; 20 Conn. 495; Schoul. Husb. & W. § 44; the marriage may be performed within a year, and that is enough; see 85 Ill. 222.

If no time be fixed and agreed upon for the performance of the contract, it is, in contem-

plation of law, a contract to marry within a reasonable period, considering the circumstances of the age, pecuniary means, etc., of the contracting parties, and either party may call upon the other to fulfil the engagement, and in case of default may bring an action for damages. If both parties lie by for an unreasonable period, and do not treat the contract as continuing, it will be deemed to be abandoned by mutual consent. If the parties are somewhat advanced in years, and the marriage is appointed to take place at a remote period of time, the contract would be voidable at the option of either party, as in restraint of marriage; Addison, Contr. 678.

Upon a refusal to marry, an action lies at once, although the time set for the marriage has not come; 42 N. Y. 246; so if a party puts it out of his power to perform his promise of marriage; 27 Mich. 217; 15 M. & W. 189. A refusal to fulfil the contract may be as well manifested by acts as by words. After the lapse of a reasonable time, if one party, without excuse, neglects or refuses to fulfil his promise, the other may consider this a breach and sue; 42 Mich. 346.

The defences which may be made to an action for a breach of promise of marriage are, of course, various; but it is only necessary to notice in this place such as are in some degree peculiar. Thus, if either party has been convicted of an infamous crime, or has sustained a bad character generally, and the other was ignorant of it at the time of the engagement, or if the woman has committed fornication, and this was unknown at the time to the man who promised to marry her, or if the woman prove unchaste subsequently; 77 Penn. 504; 51 Ill. 288; or if the woman is deeply involved in debt at the time of the engagement, and the fact is kept secret from her intended husband; Addison, Contr. 680; but see 1 E. B. & E. 7, 96; or if false representations are made by the woman, or by her friends in collusion with her, as to her circumstances and situation in life and the amount of her fortune and marriage portion, either of these will constitute a good defence; 1 C. & P. 350, 529; 3 Esp. 236; 44 Me. 164; 1 C. & K. 463; 3 Bingh. N. C. 54; 5 La. An. 316; 18 Ill. 44. But it has been held not to be a defence that the plaintiff at the time of the engagement was under an engagement to marry another person, unless the prior engagement was fraudulently concealed; 1 E. B. & E. 796. But see 1 Pars. Contr. 550. And the defendant's pre-engagement would be no defence; Schoul. Husb. & W. § 48.

If after the engagement either party is guilty of gross misconduct, inconsistent with the character which he or she was fairly presumed to possess, the other party will be released; 4 Esp. 256; so if either party is guilty of acts of unchastity after the making the promise, the other party will be absolved; 51 Ill. 288; 77 Penn. 504; but mutual improprieties and lewdness between the parties will not be allowed to bar the action or to go in mitigation or aggravation of damages; 3 Pittsb. 84. If the engagement is made without any agreement respecting the woman's property, and she afterwards disposes of any considerable portion of it without her intended husband's knowledge and consent, or if she insists upon having her property settled to her own separate use, it is said that this will justify him in breaking off the engagement; Addison, Contr. 680. So, if the situation and position of either of the parties as regards his or her fitness for the marriage relation is materially and permanently altered for the worse (whether with or without the fault of such party) after the engagement, this will release the other party. Thus, if one of the parties is attacked by blindness, or by an incurable disease, or any malady calculated permanently to impair and weaken the constitution, this will dispense with the performance of the contract on the part of the other party; Addison, Contr. 681; Pothier, Tr. du Mar. no. 1, 60, 61, 63. (In 1 Abb. app. sec. 282, it was held that evidence that the plaintiff drank intoxicating liquors to excess was not admissible as a defence.) Whether it will also constitute a defence for the party afflicted, is a question of much difficulty. In 1 E. B. & E. 746, 765, where it appeared that the defendant since the engagement had become afflicted with consumption, whereby he was rendered incapable of marriage without great danger of his life, it was held, by six judges against five, that this constituted no defence; though it seemed to be agreed that it would have been a good defence for the other party.

The common opinion that an agreement to marry between persons incapable of forming a valid marriage is necessarily void, is erroneous. If the disability pertains only to one of the parties, and the other party was ignorant of it at the time of the engagement, it will constitute no defence for the former. Thus, if a man who already has a wife living makes a promise of marriage to another woman who is ignorant of the former marriage, he will be liable in damages for a breach of his promise, although a performance is impossible; 2 C. & P. 553; 7 C. B. 999; 5 Exch. 775; 29 Barb. 22; 106 Mass. 339. Otherwise, if the woman knew at the time the engagement to marry was entered into, that the man was married; 39 N. J. L. 133; 63 Ill. 99. Knowledge that the man was married, obtained by the woman subsequently to the engagement to marry, is not a defence, but may go in mitigation of damages; 1 Heisk. 368.

In an action for breach of promise of marriage, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by improper motives; 1 C. B. N. S. 660; 1 Y. & J. 477; 26 Conn. 398. And if the defendant has undertaken to rest his defence, in whole or in part, on the general bad char-

acter or the criminal conduct of the plaintiff, and fails altogether in the proof, the jury may take this into consideration as enhancing the damages; 6 Cow. 254; 27 Mo. 600. Where such an action is brought by a woman, she may prove, in aggravation of damages, that the defendant, under color of a promise of marriage, has seduced her; 106 *id.* 395; s. c. 8 Am. Rep. 838 n.; 42 Mich. 346; s. c. 36 Am. Rep. 442; 37 Wisc. 46; 33 Md. 288; s. c. 3 Am. Rep. 174; L. R. 1 C. P. 331; 8 Barb. 323; 2 Ind. 402; 3 Mass. 73. But see, *contra*, 2 Penn. 80, commented on in 11 *id.* 316; 1 R. I. 493. And misconduct, showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation of damages; 1 Abb. App. Dic. 282. The defendant may show that his failure to marry the plaintiff proceeded from opposition by his mother to the marriage; 24 N. Y. 252; or that he was afflicted with an incurable disease at the time of his breach of the promise to marry, in mitigation of damages; 51 Ill. 288. Evidence that the general character of the plaintiff for chastity previously to the engagement, was bad, is admissible in mitigation of damages; 71 Penn. 240; 4 Mo. App. 94; 2 Bradw. 236; so is indelicate conduct (not criminal) of plaintiff before the promise was made; 7 Wend. 142. Evidence of the defendant's financial standing is admissible; 42 Mich. 346; s. c. 36 Am. Rep. 442; so of his social position; Schoul. Husb. & W. § 49.

See 21 Alb. L. J. 327; Schouler, Husb. & W. §§ 40–51; 5 So. L. Rev. N. S. 57.

PROMISEE. A person to whom a promise has been made.

In general, a promisee can maintain an action on a promise made to him; but when the consideration moves not from the promisee, but some other person, the latter, and not the promisee, has a cause of action, because he is the person for whose use the contract was made; Latch, 272; Poph. 81; Cro. Jac. 77; 1 T. Raym. 271, 368; 4 B. & Ad. 435; 1 N. & M. 303; Cowp. 437; Dougl. 142. But see Carth. 5; 2 Ventr. 307; 9 M. & W. 92, 96.

PROMISES. When a defendant has been arrested, he is frequently induced to make confessions in consequence of promises made to him that if he will tell the truth he will be either discharged or favored: in such a case, evidence of the confession cannot be received, because, being obtained by the flattery of hope, it comes in so questionable a shape, when it is to be considered evidence of guilt, that no credit ought to be given to it; 1 Mass. 144; 1 Leach, 299. This is the principle; but what amounts to a promise is not so easily defined. See CONFESSION.

PROMISOR. One who makes a promise.

The promisor is bound to fulfil his promise, unless when it is contrary to law, as a promise to steal or to commit an assault and battery; when the fulfilment is prevented by the act of God, as where one has agreed to teach another drawing and he loses his sight, so that he cannot teach it; when the promisee prevents the promisor from doing what he agreed to do; when the promisor has been discharged from his promise by the promisee; when the promise has been made without a sufficient consideration; and perhaps in some other cases.

PROMISSORY NOTE. A written promise to pay a certain sum of money, at a future time, unconditionally. 7 W. & S. 264; 2 Humphr. 143; 10 Wend, 675; 1 Ala. 263; 7 Mo. 42; 2 Cow. 536; 6 N. H. 364; 7 Vern. 22.

An unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated or his order. Benj. Chalm. Bills etc., Art. 271.

A promissory note differs from a mere acknowledgment of debt without any promise to pay, as when the debtor gives his creditor an I O U. See 2 Yerg. 50; 15 M. & W. 23. But see 2 Humphr. 143; 6 Ala. N. S. 373. In its form it usually contains a promise to pay, at a time therein expressed, a sum of money to a certain person therein named or to his order, for value received. It is dated and signed by the maker. It is never under seal; 9 Hun. 981; even when made by a corporation; 15 Wend. 265; 8 Fed. Rep. 408. But see L. R. 3 Ch. Ap. 758. No particular form of words is necessary: but there must be an intention to make a note; see 15 M. & W. 29; Benj. Chalm. Bills, etc., 274.

He who makes this promise is called the *maker*, and he to whom it is made is the payee; 3 Kent, 46. A writing in the form of a note payable to the maker's order, becomes a note by indorsement; 22 Penn. 89.

Although a promissory note in its original shape, bears no resemblance to a bill of exchange, yet when indorsed it is exactly similar to one; for then it is an order by the indorser of the note upon the maker to pay the indorsee. The indorser is as it were the drawer; the maker, the acceptor; and the indorsee, the payee; 4 Burr. 669; 4 Term, 148; 3 Burr. 1224.

Most of the rules applicable to bills of exchange equally affect promissory notes. No particular form is requisite to these instruments: a promise to deliver the money, or to be accountable for it, or that the payee shall have it, is sufficient; Chitty, Bills, 53, 54.

There are two principal qualities essential to the validity of a note: *first*, that it be payable at all events, not dependent on any contingency; 20 Pick. 132; 22 *id.* 132; nor payable out of any particular fund; 3 J. J. Marsh. 170, 542; 5 Ark. 441; 2 Blackf. 48; 1 Bibb, 503; 9 Miss. 393; 3 Pick. 541; 4 Hawks, 102; 5 How. 382. *Second*, it is required that it be for the payment of money only; 10 S. & R. 94; 47 Wisc. 551; 27 Mich. 191;

35 Me. 364; 11 Vt. 268; (though statutes in some states have made notes payable in merchandise negotiable) that is, in whatever is legal tender at the place of payment; 2 Ames, Bills, etc., 828, and not in bank-notes; though it has been held differently in the state of New York; 9 Johns. 120; 19 *id.* 144. The rule on this subject is said to be more strict in England than here, but to have been relaxed there in 2 Q. B. Div. 194. The same writer says that the tendency here is to use the term money in a very wide sense; Benj. Chalm. Bills, etc., 10.

A promissory note payable to order or bearer passes by indorsement, and, although a chose in action, the holder may bring suit on it in his own name. Although a simple contract, a sufficient consideration is implied from the nature of the instrument. See 5 Comyns, Dig. 133, n., 151, 472; Smith, Merc. Law, b. 3, c. 1; 4 B. & C. 235; 1 C. & M. 16. It has been urged that upon principle, negotiable instruments are contracts binding by their own force, and therefore not requiring any consideration; Langd. Contr. § 49.

A stipulation in an instrument, otherwise in the form of a promissory note, for the payment of an attorney's fee for the collection of the note in case of dishonor renders the instrument non-negotiable; 84 Penn. 470; 71 Mo. 622; *contra*, 33 Ill. 372; 32 Iowa, 184; 35 Ind. 103; 18 Kan. 433; 11 Bush, 180; *per* Miller, J., in U. S. C. C.; referred to in an article in 14 Cent. L. J. 88; see *id.* 266; 1 Dan. Neg. Instr. 54.

As to promises to pay a debt in specific articles; see 21 Am. Dec. 422.

See BILL OF EXCHANGE; INDORSEMENT; NOTICE; Dan. Neg. Instr.; Ames, Bills & Notes; Byles, Bills.

PROMOTERS. Those who in popular and penal actions, prosecute offenders in their own name and the king's. Persons or corporations at whose instance private bills are introduced into, and passed through parliament. Especially those who press forward bills for the taking of land for railways and other public purposes; who are then called promoters of the undertaking. Persons who assist in establishing joint-stock companies. Mozl. & W.

In this country the use of the term is in the sense last given; but it is not as much used here as in England.

As to the liability of a corporation in regard to any contract made by its promoters on its behalf (supposing the contract to be one which the corporation, after its organization, could legally have made), these rules have been laid down by a late writer in 16 Am. L. Rev. 281:—

I. As long as the contract remains executory on both sides, the party who contracted with the promoter cannot enforce the contract against the corporation, unless the corporation has ratified the same; and the corporation cannot enforce the contract against the other contracting party without carrying out all the engagements entered into with the other contracting party at the time of making the contract.

II. When a contract made by a promoter on behalf of a future corporation has been ratified and performed by the latter, it may force the party who contracted with the promoter to perform on his side.

III. When the contract has been executed by the other contracting party, the corporation should be held to perform on its side, if (1) it has ratified the contract, or (2) voluntarily accepted the benefit arising from the performance of the contract in such a manner as to estop the corporation from denying that it has ratified the contract. But on the other hand if the benefit from the contract came to the corporation without any voluntary action on its part, or on the part of those whose acts in regard to the subject-matter of the contract are to be regarded as the acts of the corporation, then there is no principle in law or in equity on which it can be compelled to carry out engagements entered into without its authority, and which it has never even impliedly ratified.

Ratification may be express, or may be implied from the voluntary acceptance of the benefit of the contract, whereby an estoppel is worked; see 12 N. H. 205; 15 Barb. 323. See, also, 7 Ch. Div. 368; L. R. 2 C. P. 174. A corporation cannot enforce a subscription to shares made before its formation on the faith of certain promises of its promoters, without fulfilling the promises; 10 N. Y. 550.

Promoters are personally liable on contracts made by them for the intended company when the latter proves abortive; L. R. 2 C. P. 174; and also for subscriptions paid in to an abortive company, and that without any deduction for expenses incurred; 3 B. & C. 814.

A promoter is not liable *ex contractu* to a person who has been induced by his fraud to take shares in a company, but he may be liable *ex delicto;* 2 E. & B. 476. A bill in equity lies to recover back money which a person has been induced, through fraud, to invest in a bubble; 2 P. Wms. 153. As against a person acting as promoter, the corporation is entitled to the full benefit of all acts done and contracts made by him while acting in that capacity; and the promoter, as between himself and the corporation, is entitled to no secret profits; he may not purchase property for the corporation, and then sell the same to the corporation at an advance; 61 Penn. 202; 5 Ch. Div. 73, 395; 6 *id.* 371. Where one has already purchased a certain property at a good bargain, it is no fraud to organize a company and sell the property to it at an advance; Thomp. Liab. of Off. 222. See 1 Ch. Div. 182; 4 Hun. 192. But if at the time of making the sale he occupies towards the corporation a position of trust, as promoter or otherwise, it would seem that he should not be allowed to sell at an exorbitant price; 16 Am. L. Rev. 289;

but see 64 Penn. 43; and he should faithfully state to the company all material facts relating to the property which would influence it in deciding as to the purchase; Thomp. Liab. of Off. 219; L. R. 5 Eq. 464. See 2 Lind. Part. 580. See also, 3 App. Cas. 1218 (S. C. 4 Cent. L. J. 510); affirming 5 Ch. Div. 103.

The subject is fully treated by Judge Thompson in his work above cited, and by Mr. Taylor in 16 Am. L. Rev. 281.

PROMULGATION. The order given to cause a law to be executed, and to make it public: it differs from publication. 1 Bla. Com. 45; Stat. 6 Hen. VI. c. 4.

With regard to trade, unless previous notice can be brought home to the party charged with violating their provisions, laws are to be considered as beginning to operate in the respective collection districts only from the time they are received from the proper department by the collector; Paine, 32. See *id.* 23.

The promulgation of laws is an executive function. The mode may be presented by the legislature. It is the extrinsic act which gives a law, perfect in itself, executory force. Unless the law prescribes that it shall be executory from its passage, or from a certain date, it is presumed to be executory only from its passage; 17 La. An. 390. Formerly promulgation meant introducing a law to the senate; Aust. Jur. Lect. 28.

PROMUTUUM (Lat.). **In Civil Law.** A quasi contract, by which he who receives a certain sum of money, or a certain quantity of fungible things, which have been paid to him through mistake, contracts towards the payer the obligation of returning him as much. Pothier, de l'Usure, pt. 3, s. 1, a. 1.

This contract is called *promutuum*, because it has much resemblance to that of *mutuum*. This resemblance consists in this: *first*, that in both a sum of money or some fungible things are required; *second*, that in both there must be a transfer of the property in the thing; *third*, that in both there must be returned the same amount or quantity of the thing received. But, though there is this general resemblance between the two, the *mutuum* differs essentially from the *promutuum*. The former is the actual contract of the parties, made expressly, but the latter is a quasi contract, which is the effect of an error or mistake. 1 Bouvier, Inst. n. 1125, 1126.

PRONEPOS (Lat.). Great-grandson.

PRONEPTIS (Lat.). A niece's daughter. A great-granddaughter. Ainsworth, Dict.

PRONURUS (Lat.). The wife of a great-grandson.

PROOF. In Practice. The conviction or persuasion of the mind of a judge or jury, by the exhibition of evidence, of the reality of a fact alleged. Thus, *to prove* is to determine or persuade that a thing does or does not exist; 8 Toullier, n. 2; Ayliffe, Parerg. 442; 2 Phill. Ev. 44, n. a. Proof is the perfection of evidence; for without evidence there is no proof, although there may be evidence which does not amount to proof: for example, if a man is found murdered at a spot where another has been seen walking but a short time before, this fact will be *evidence* to show that the latter was the murderer, but, standing alone, will be very far from *proof* of it.

Ayliffe defines *judicial proof* to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner by fit and proper arguments, and likewise by all other legal methods: first, by proper arguments, such as conjectures, presumptions, indicia, and other adminicular ways and means; secondly, by legal methods, or methods according to law, such as witnesses, public instruments, and the like. Ayliffe, Parerg. 442; Aso & M. Inst. b. 3, t. 7.

PROPER. That which is essential, suitable, adapted, and correct.

Congress is authorized, by art. 1, s. 8, of the constitution of the United States, "to make all laws which shall be necessary and *proper* for carrying into execution the foregoing powers, and all other powers vested by this constitution of the United States, in any department or officer thereof."

PROPERTY. The right and interest which a man has in lands and chattels to the exclusion of others. 6 Binn. 98; 4 Pet. 511; 17 Johns. 283; 11 East, 290, 518; 14 *id.* 370.

The term "property" embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments; 19 Am. L. Reg. N. S. 376 (N. Y. Sup. Ct.).

All things are not the subject of property: the sea, the air, and the like cannot be appropriated; every one may enjoy them, but he has no exclusive right in them. When things are fully our own, or when all others are excluded from meddling with them or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases: so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat, liv. prél. tit. 3; Pothier, des Choses; 18 Viner, Abr. 63; Comyns, Dig. *Biens*. See, also, 2 B. & C. 281; 9 *id.* 396; 3 Dowl. & R. 394; 1 C. & M. 39; 4 Call, 472; 18 Ves. 193; 6 Bingh. 630.

Property is said to be real and personal property. See those titles.

It is also said to be, when it relates to goods and chattels, *absolute* or *qualified*. Absolute property is that which is our own without any qualification whatever: as, when a man is the

owner of a watch, a book, or other inanimate thing, or of a horse, a sheep, or other animal which never had its natural liberty in a wild state.

Qualified property consists in the right which men have over wild animals which they have reduced to their own possession, and which are kept subject to their power: as, a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost his property is gone, unless the animals go *animo revertendi*. 2 Bla. Com. 396; 3 Binn. 546.

But property in personal goods may be absolute or qualified without any relation to the nature of the subject-matter, but simply because more persons than one have an interest in it, or because the right of property is separated from the possession. A bailee of goods, though not the owner, has a qualified property in them; while the owner has the absolute property. See BAILEE; BAILMENT.

Personal property is further divided into property in possession, and property or choses in action. See CHOSE IN ACTION.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like.

Property is lost by the act of man by—*first*, *alienation*; but in order to do this the owner must have a legal capacity to make a contract; *second*, by the voluntary abandonment of the thing; but unless the abandonment be purely voluntary the title to the property is not lost: as, if things be thrown into the sea to save the ship, the right is not lost; Pothier, n. 270; 3 Toullier, n. 346. But even a voluntary abandonment does not deprive the former owner from taking possession of the thing abandoned at any time before another takes possession of it.

It is lost *by operation of law—first*, by the forced sale, under a lawful process, of the property of a debtor to satisfy a judgment, sentence, or decree rendered against him, to compel him to fulfil his obligations; *second*, by confiscation, or sentence of a criminal court; *third*, by prescription; *fourth*, by civil death; *fifth*, by capture of a public enemy. It is lost *by the act of God*, as in the case of the death of slaves or animals, or in the total destruction of a thing: for example, if a house be swallowed up by an opening in the earth during an earthquake.

It is proper to observe that, in some cases, the moment that the owner loses his possession he also loses his property or right in the thing: animals *feræ naturæ*, as mentioned above, belong to the owner only while he retains the possession of them. But, in general, the loss of possession does not impair the right of property, for the owner may recover it within a certain time allowed by law. See, generally, Bouvier, Inst. Index.

PROPINQUITY (Lat.). Kindred; parentage. See AFFINITY; CONSANGUINITY; NEXT OF KIN.

PROPIOR SOBRINA, PROPIOR SOBRINO (Lat.). The son or daughter of a great-uncle or great-aunt on the father's or mother's side. Calvinus, Lex.

PROPIOS, PROPRIOS. In Spanish Law. Certain portions of ground laid off and reserved when a town was founded in Spanish America, as the unalienable property of the town, for the purpose of erecting public buildings, markets, etc., or to be used in any other way, under the direction of the municipality, for the advancement of the revenues or the prosperity of the place. 12 Pet. 442, note.

PROPONENT. In Ecclesiastical Law. One who propounds a thing: as, "the party proponent doth allege and propound." 6 Eccl. 356, n.

PROPOSAL. An offer. A formal offer to perform some undertaking, stating the time and manner of performance and price demanded, or one or more of these particulars, either directly or by implied or direct reference to some announcement requesting such an offer. See 35 Ala. N. S. 33. A proposal of this character is not to be considered as subject to different rules from any other offer. Pierce, Am. Railw. Law, 364. See OFFER.

PROPOSITUS (Lat.). The person proposed. In making genealogical tables, the person whose relations it is desired to find out is called the *propositus*.

PROPOUND. To offer; to propose: as, the *onus probandi* in every case lies upon the party who propounds a will. 1 Curt. Eccl. 637; 6 Eccl. 417.

PROPRES. In French Law. The term *propres* or *biens propres* is used to denote that property which has come to an individual from his relations, either in a direct line, ascending or descending, or from a collateral line, whether the same have come by operation of law or by devise. *Propres* is used in opposition to *acquêts*. Pothier, Des Propres; 2 Burge, Confl. of Law, 61.

PROPRIA PERSONA (Lat. in his own person). It is a rule in pleading that pleas to the jurisdiction of the court must be pleaded *in propriâ personâ*, because if pleaded by attorney they admit the jurisdiction, as an attorney is an officer of the court, and he is presumed to plead after having obtained leave, which admits the jurisdiction. Lawes, Plead. 91.

An appearance may be *in propriâ personâ*, and need not be by attorney.

PROPRIETARY. In its strict sense, this word signifies one who is master of his actions, and who has the free disposition of his property. During the colonial government

of Pennsylvania, William Penn was called the proprietary.

The domain which William Penn and his family had in the state was, during the revolutionary war, divested by the act of November 27, 1779, from that family, and vested in the commonwealth for the sum which the latter paid to them of one hundred and thirty thousand pounds sterling.

PROPRIETATE PROBANDA. See DE PROPRIETATE PROBANDA.

PROPRIETOR. The owner.

PROPRIO VIGORE (Lat.). By its own force or vigor: an expression frequently used in construction. A phrase is said to have a certain meaning *proprio vigore.*

PROPTER AFFECTUM (Lat.). For or on account of some affection or prejudice. A juryman may be challenged *propter affectum:* as, because he is related to the party, has eaten at his expense, and the like. See CHALLENGE.

PROPTER DEFECTUM (Lat.). On account of or for some defect. This phrase is frequently used in relation to challenges. A juryman may be challenged *propter defectum:* as, that he is a minor, an alien, and the like. See CHALLENGE.

PROPTER DELICTUM (Lat.). For or on account of crime. A juror may be challenged *propter delictum* when he has been convicted of an infamous crime. See CHALLENGE.

PROROGATED JURISDICTION. In Scotch Law. That jurisdiction which by the consent of the parties, is conferred upon a judge who, without such consent, would be incompetent. Erksine, Inst. 1. 2. 15.

At common law, when a party is entitled to some privilege or exemption from jurisdiction he may waive it, and then the jurisdiction is complete; but the consent cannot give jurisdiction.

PROROGATION (Lat.). Putting off to another time. It is generally applied to the English parliament, and means the continuance of it from one day to another: it differs from adjournment, which is a continuance of it from one day to another in the same session. 1 Bla. Com. 186.

In Civil Law. The giving time to do a thing beyond the term prefixed. Dig. 2. 14. 27. 1. See PROLONGATION.

PROSCRIBED (Lat. *proscribo*, to write before). **In Civil Law.** Among the Romans, a man was said to be proscribed when a reward was offered for his head; but the term was more usually applied to those who were sentenced to some punishment which carried with it the consequences of civil death. Code, 9. 49.

PROSECUTION (Lat. *prosequor*, to follow after). **In Criminal Law.** The means adopted to bring a supposed offender to justice and punishment by due course of law.

Prosecutions are carried on in the name of the government, and have for their principal object the security and happiness of the people in general. Hawk. Pl. Cr. b. 2, c. 25, s. 3; Bacon, Abr. *Indictment* (A 3).

In England, the modes most usually employed to carry them on are—by indictment; 1 Chitty, Cr. Law, 132; presentment of a grand jury; *id.* 133; coroner's inquest; *id.* 134; and by an information. In this country, the modes are—by indictment, by presentment, by information, and by complaint.

PROSECUTOR. In Practice. He who prosecutes another for a crime in the name of the government.

The *public* prosecutor is an officer appointed by the government to prosecute all offences: he is the attorney-general or his deputy.

A *private* prosecutor is one who prefers an accusation against a party whom he suspects to be guilty.

Every man may become a prosecutor; but no man is bound, except in some few of the more enormous offences, as treason, to be one; but if the prosecutor should compound a felony he will be guilty of a crime. The prosecutor has an inducement to prosecute, because he cannot, in many cases, have any civil remedy until he has done his duty to society by an endeavor to bring the offender to justice. If a prosecutor act from proper motives, he will not be responsible to the party in damages though he was mistaken in his suspicions; but if, from a motive of revenge, he institute a criminal prosecution without any reasonable foundation, he may be punished by being mulcted in damages, in an action for a malicious prosecution.

In Pennsylvania, a defendant is not bound to plead to an indictment, where there is a private prosecutor, until his name shall have been indorsed on the indictment as such, and on acquittal of the defendant, in all cases except where the charge is for a felony, the jury may direct that he shall pay the costs. See 1 Chitty, Cr. Law, 1–10; 1 Phill. Ev.; 2 Va. Cas. 3, 20; 1 Dall. 5; 2 Bibb. 210; 6 Call, 245; INFORMER.

PROSOCER (Lat.). A father-in-law's father; grandfather of wife. Vicat. Voc. Jur.

PROSOCERUS (Lat.). A wife's grandmother.

PROSPECTIVE (Lat. *prospicio*, to look forward). That which is applicable to the future: it is used in opposition to retrospective. To be just, a law ought always to be prospective. 1 Bouvier, Inst. n. 116.

PROSPECTUS. A prospectus of an intended company ought not to omit actual and material facts, or to conceal facts material to be known, the misrepresentation or concealment of which may improperly influence the mind of the reader; for if he is thereby deceived into becoming an allottee of shares and suffers loss he may proceed against those who have misled him. The purpose of a prospec-

tus is only to invite persons to become allottees of shares; when it has performed this office it is exhausted; L. R. 6 H. L. 377.

A prospectus is admissible in evidence in an action at law by a company against its promoters for secret profits; 61 Penn. 202. See Thomp. Liab. of Off. 309.

PROSTITUTION. The common lewdness of a woman for gain. The act of permitting a common and indiscriminate sexual intercourse for hire; 12 Metc. 97.

In all well-regulated communities this has been considered a heinous offence, for which the woman may be punished; and the keeper of a house of prostitution may be indicted for keeping a common nuisance.

So much does the law abhor this offence that a landlord cannot recover for the use and occupation of a house let for the purpose of prostitution; 1 Esp. Cas. 13; 1 B. & P. 340, n.

In a figurative sense, it signifies the bad use which a corrupt judge makes of the law, by making it subservient to his interest: as, the prostitution of the law, the prostitution of justice.

PROTECTION. In Mercantile Law. The name of a document generally given by notaries public to sailors and other persons going abroad, in which is certified that the bearer therein named is a citizen of the United States.

In Governmental Law. That benefit or safety which the government affords to the citizens.

In English Law. A privilege granted by the king to a party to an action, by which he is protected from a judgment which would otherwise be rendered against him. Of these protections there are several kinds. Fitzh. N. B. 65.

PROTEST. In Contracts. A notarial act, made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchange, etc.

A formal notarial certificate attesting the dishonor of a bill of exchange or promissory note; Benj. Chalm. Bills, etc., art. 176.

There are two kinds of protest, namely, protest for non-acceptance, and protest for non-payment. There is also a species of protest common in England, which is called protest for better security. Protest for non-acceptance or non-payment, when duly made and accompanied by notice to all the parties to the bill or note, has the effect of making all of them responsible to the holder for the amount of the bill or note, together with damages, etc.; 3 Kent, 63; Chitty, Bills, 278; Comyns, Dig. *Merchant* (F 8, 9, 10); Bacon, Abr. *Merchant, etc.* (M 7). Protest for better security may be made when the acceptor of a bill fails, becomes insolvent, or in any other way gives the holder just reason to suppose it will not be paid. It seems to be of doubtful utility, except that it gives the drawer of a bill on a foreign country an opportunity of availing himself of any attachment law there in force; 1 Ld. Raym. 745.

The protest is a formal paper signed and sealed by a notary wherein he certifies that on the day of its date he presented the original bill attached thereunto, or a copy of which is above written (a description of the bill is enough; 17 How. 606), to the acceptor, or the original note to the maker thereof, and demanded payment, or acceptance, which was refused, for reasons given in the protest, and that thereupon he protests against the drawer and indorsers thereof, for exchange, re-exchange, damages, costs, and interest. See Benj. Chalm. Bills, etc., art. 176; 2 Ames, Bills, etc., 863. It is usual, also, for the notary to serve notices of the protest on all the parties to the bill. The notice contains a description of the bill, including its date and amount, the fact of demand and refusal, and that the holder looks to the person notified for payment. Protest of foreign bills is proof of demand and refusal to pay or accept; 2 H. & J. 399; 4 *id.* 54; 8 Wheat. 333; 2 Pet. 179, 688. Protest is said to be part of the constitution of a foreign bill; and the form is governed by the *lex loci contractus;* 2 Hill, N. Y. 227; 11 La. 14; 2 Pet. 179, 180; Story, Bills, 176 (by the place where the protest is made; Benj. Chalm. Bills, etc., art. 180). A protest must be made by a notary public or other person authorized to act as such; Benj. Chalm. Bills, etc., art. 177; but it has been held that the duties of a notary cannot be performed by a clerk or deputy; 102 Mass. 141. Inland bills and promissory notes need not be protested; 6 How. 23. See ACCEPTANCE; BILLS OF EXCHANGE.

In Legislation. A declaration made by one or more members of a legislative body that they do not agree with some act or resolution of the body: it is usual to add the reasons which the protestants have for such a dissent.

In Maritime Law. A writing, attested by a justice of the peace, a notary public, or a consul, made and verified by the master of a vessel, stating the severity of a voyage by which a ship has suffered, and showing that it was not owing to the neglect or misconduct of the master. See Marsh. Ins. 715, 716; 1 Wash. C. C. 145, 238, 408, n.; 1 Pet. C. C. 119; 1 Dall. 6, 10, 317; 2 *id.* 195; 3 W. & S. 144.

The protest is not, in general, evidence for the master of the vessel or his owners in the English or American courts; yet it is often proper evidence against them; Abbott, Shipp. 465, 466; Bland. Shipp. § 285.

PROTEST, PAYMENT UNDER. A person who without the compulsion of legal process, or duress of goods or of the person, yields to the assertion of an invalid or unjust claim by paying it, cannot by mere protest, either

in writing or oral, change its character from a voluntary to an involuntary payment. The payment overcomes and nullifies the protest; 4 Wait. Act. & Def. 493. Where an illegal tax is paid under protest to one having authority to enforce its collection, it is an involuntary payment and may be recovered back; 29 Iowa, 310; 21 Mich. 483; but see 34 *id.* 170; s. c. 22 Am. Rep. 512.

A mere apprehension of legal proceedings to collect a tax is not sufficient to make the payment compulsory; there must be an immediate power or authority to institute them; 46 Md. 552.

An action will not lie to recover money voluntarily paid to redeem land sold upon a void tax judgment, when the party making the payment has at the time full knowledge of the character of the sale and all the facts affecting its validity; 26 Minn. 543.

The payment of illegal fees cannot generally be considered as voluntary, so as to preclude the plaintiff from recovering them back; 2 B. & C. 729; 2 B. & A. 562. Where money is paid under an illegal demand, *colore officii*, the payment can never be voluntary; 8 Exch. 625.

Where a railway company exacted from a carrier more than they charged to other carriers in breach of the acts of parliament, it was held that sums thus exacted could be recovered back; 7 M. & G. 253. Where a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, he is entitled to recover back the excess; L. R. 4 H. L. C. 249.

The object of the protest is to take from the payment its voluntary character; it serves as evidence that the payment was not voluntary, and in order to be efficacious, there must be actual coercion, duress or fraud, presently existing, or the payment will be voluntary in spite of the protest; 59 N. Y. 603; 115 Mass. 367. Whether actual protest, in case of the payment of money illegally demanded by a public officer is a condition precedent to a recovery by the party paying the money is not clearly settled; 4 Wait. Act. & Def. 495. Where the person demanding the money has notice of the illegality of the demand, a protest is not necessary, but otherwise it is necessary; 49 Cal. 624.

PROTESTANDO. See PROTESTATION.

PROTESTATION. In Pleading. The indirect affirmation or denial, by means of the word protesting (in the Latin form of pleadings, *protestando*), of the truth of some matter which cannot with propriety or safety be positively affirmed, denied, or entirely passed over. See 3 Bla. Com. 311.

The exclusion of a conclusion. Co. Litt. 124.

Its object was to secure to the party making it the benefit of a positive affirmation or denial in case of success in the action, so far as to prevent the conclusion that the fact was admitted to be true as stated by the opposite party, and at the same time to avoid the objection of duplicity to which a direct affirmation or denial would expose the pleading; 19 Johns. 96; 2 Saund. 103; Comyns, Dig. *Pleader* (N). Matter which is the ground of the suit upon which issue could be taken could not be protested; Plowd. 276; 2 Johns. 227. But see 2 Wms. Saund. 103, n. Protestations are no longer allowed; 3 Bla. Com. 312; and were generally an unnecessary form; 3 Lev. 125.

The common form of making protestations was as follows: "because protesting that," etc., excluding such matters of the adversary's pleading as are intended to be excluded in the protestando, if it be matter of fact; or, if it be against the legal sufficiency of his pleading, "because protesting that the plea by him above pleaded in bar" (or by way of reply, or rejoinder, etc., as the case might be) "is wholly insufficient in law." See generally, 1 Chitty, Pl. 534; Comyns, Dig. *Pleader* (N); Steph. Pl. 235.

In Practice. An asseveration made by taking God to witness. A protestation is a form of asseveration which approaches very nearly to an oath. Wolffius, Inst. § 375.

PROTHONOTARY. The title given to an officer who officiates as principal clerk of some courts. Viner, Abr.

In the ecclesiastical law, the name of prothonotary is given to an officer of the court of Rome. He is so called because he is the *first notary*,—the Greek word πρωτος signifying *primus*, or first. These notaries have pre-eminence over the other notaries, and are put in the rank of prelates. There are twelve of them. Dalloz, Dict. de Jur.

PROTOCOL. A record or register. Among the Romans, *protocollum* was a writing at the head of the first page of the paper used by the notaries or tabellions. Nov. 44.

In France the minutes of notarial acts were formerly transcribed on registers, which were called protocols. Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 6, s. 1, n. 413.

By the German law it signifies the minutes of any transaction. Encyc. Amer. *Protocol.* In the latter sense the word has of late been received into international law. *Id.*

PROTUTOR (Lat.). **In Civil Law.** He who, not being the tutor of a pupil or minor, has administered his property or affairs as if he had been, whether he thought himself legally invested with the authority of a tutor or not.

He who marries a woman who is tutrix becomes, by the marriage, a protutor. The protutor is equally responsible as the tutor.

PROUT PATET PER RECORDUM (Lat.). As appears by the record. This phrase is frequently used in pleading; as, for example, in debt on a judgment or other matter of record, unless when it is stated as an inducement, it is requisite, after showing the matter of record, to refer to it by the

prout patet per recordum. 1 Chitty, Pl. *356; 10 Me. 127.

PROVER. In Old English Law. One who undertakes to prove a crime against another. 28 Edw. I.; 5 Hen. IV. One who, being indicted and arraigned for treason or felony, confesses before plea pleaded, and accuses his accomplices to obtain pardon; state's evidence. 4 Bla. Com 330*. To prove. Law Fr. & Lat. Dict.; Britton, c. 22.

PROVINCE. Sometimes this signifies the district into which a country has been divided: as, the province of Canterbury, in England; the province of Languedoc, in France. Sometimes it means a dependency or colony: as, the province of New Brunswick. It is sometimes used figuratively to signify power or authority: as, it is the province of the court to judge of the law, that of the jury to decide on the facts.

PROVISION. In Common Law. The property which a drawer of a bill of exchange places in the hands of a drawee: as, for example, by remittances, or when the drawee is indebted to the drawer when the bill becomes due, provision is said to have been made. Acceptance always presumes a provision. See Code de Comm. art. 115–117.

In French Law. An allowance granted by a judge to a party for his support,—which is to be paid before there is a definite judgment. In a civil case, for example, it is an allowance made to a wife who is separated from her husband. Dalloz, Dict.

PROVISIONAL SEIZURE. In Louisiana. A term which signifies nearly the same as attachment of property.

It is regulated by the Code of Practice as follows, namely:—

The plaintiff may, in certain cases, hereafter provided, obtain the provisional seizure of the property which he holds in pledge, or on which he has a privilege, in order to secure a payment of his claim. La. Code, art. 284.

Provisional seizure may be ordered in the following cases: *first*, in executory proceedings, when the plaintiff sues on a title importing confession of judgment; *second*, when a lessor prays for the seizure of furniture or property used in the house, or attached to the real estate which he has leased; *third*, when a seaman, or other person, employed on board of a ship or water craft, navigating within the state, or person having furnished materials for or made repairs to such ship or water craft, prays that the same may be seized, and prevented from departing, until he has been paid the amount of his claim; *fourth*, when the proceedings are *in rem*, that is to say, against the thing itself which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent. La. Code, art. 285. See 6 Mart. La. N. S. 168; 7 *id.* 153; 8 *id.* 320; 1 Mart. La. 168; 12 *id.* 32.

PROVISIONS. Food for man; victuals.

As good provisions contribute so much to the health and comfort of man, the law requires that they shall be wholesome: he who sells unwholesome provisions may, therefore, be punished for a misdemeanor. 2 East, Pl. Cr. 822; 3 Maule & S. 10; 4 *id.* 214; 4 Camp. 10.

And in the sale of provisions the rule is that the seller impliedly warrants that they are wholesome. 3 Bla. Com. 166.

PROVISO. The name of a clause inserted in an act of the legislature, a deed, a written agreement, or other instrument, which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect.

It always implies a condition, unless subsequent words change it to a covenant; but when a proviso contains the mutual words of the parties to a deed, it amounts to a covenant; 2 Co. 72; Cro. Eliz. 242; Moore, 707.

A proviso differs from an exception; 1 B. & Ald. 99. An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*. An exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse; 8 Am. Jur. 242; Plowd. 361; 1 Saund. 234 *a*, note; Lilly, Reg., and the cases there cited. See, generally, Am. Jur. no. 16, art. 1; Bacon, Abr. *Conditions* (A); Comyns, Dig. *Condition* (A 1), (A 2), Dwarris, Stat. 660.

PROVISOR. He that hath the care of providing things necessary; but more especially one who sued to the court of Rome for a provision. Jacobs; 25 Edw. III. One nominated by the pope to a benefice before it became void, in prejudice of right of true patron. 4 Bla. Com. 111*.

PROVOCATION (Lat. *provoco*, to call out). The act of inciting another to do something.

Provocation simply, unaccompanied by a crime or misdemeanor, does not justify the person provoked to commit an assault and battery. In cases of homicide it may reduce the offence from murder to manslaughter. But when the provocation is given for the purpose of justifying or excusing an intended murder, and the party provoked is killed, it is no justification; 2 Gilb. Ev. by Lofft, 753.

The unjust provocation by a wife of her husband, in consequence of which she suffers from his ill usage, will bar her divorce on the ground of the husband's cruelty; her remedy in such cases is to change her manners; 2 Lee, 172; 1 Hagg. Cons. 155. See CRUELTY; PERSUADE; 1 Russ. Cr. 434, 486; 1 East, Pl. Cr. 232–241.

PROVOST. A title given to the chief of some corporations or societies. In France, this title was formerly given to some presiding judges. The word is derived from the Latin *præpositus*.

PROXENETÆ (Lat.). **In Civil Law.** Among the Romans, these were persons whose functions somewhat resembled those of the brokers of modern commercial nations. Dig. 50. 14. 3; Domat, l. 1, t. 17, § 1, art. 1.

PROXIMATE CAUSE. See 23 Am. Rep. 21; 35 *id.* 649. CAUSA PROXIMA.

PROXIMITY (Lat.). Kindred between two persons. Dig. 38. 16. 8.

PROXY (contracted from procuracy, procurator). A person appointed in the place of another, to represent him.

The instrument by which a person is appointed so to act.

The right of voting at an election of an incorporated company by proxy is not a general right, and the party claiming it must show a special authority for that purpose; Ang. & A. Corp. § 128; 76 Penn. 42. At common law it was allowable only by the peers of England, and that is said to be in virtue of a special permission of the king; 1 Paige, 590.

Where there was no clause in the act of incorporation empowering the members of the company to vote by proxy, but a by-law provided that the shareholders may so vote, it was held in view of this by-law that a vote given by proxy should have been received; 5 Day, 329. The court did not say how they would have decided had there been no such by-law, but drew a clear distinction between public and moneyed corporations. In 2 Green, N. J. 222, it was held that it required legislative sanction before any corporation could make a by-law authorizing members to vote by proxy. So, also, in 3 Grant, Cas. 209. See 2 Kent, 294; 6 Wend. 509. Stockholders of national banks may vote by proxy, but no officer, clerk, teller, or book-keeper of a bank may act as proxy; R. S. § 5144; many of the states have passed statutes regulating the right to vote by proxy.

In Ecclesiastical Law. A judicial proctor, or one who is appointed to manage another man's law concerns, is called a proxy. Ayliffe, Parerg.

An annual payment made by the parochial clergy to the bishop, etc., on visitations. Tomlins Law Dict.

In Rhode Island and Connecticut the name of an election or day of voting for officers of government. Webst. Dict.

PUBERTY. In Civil Law. The age in boys of fourteen, and in girls of twelve years. Ayliffe, Pand. 63; Hall, Pract. 14; Toullier, Dr. Civ. Fr. tom. 5, p. 100; Inst. 1. 22; Dig. 1. 7. 40. 1; Code, 5. 60. 3; 1 Bla. Com. 436.

PUBLIC. The whole body politic, or all the citizens of the state. The inhabitants of a particular place: as, the New York public.

This term is sometimes joined to other terms, to designate those things which have a relation to the public: as, a public officer, a public road, a public passage, a public house.

A distinction has been made between the terms *public* and *general*: they are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large, portion of the community. Greenl. Ev. § 128.

When the public interests and its rights conflict with those of an individual, the latter must yield. Co. Litt. 181. If, for example, a road is required for public convenience, and in its course it passes on the ground occupied by a house, the latter must be torn down, however valuable it may be to the owner. In such a case both law and justice require that the owner shall be fully indemnified. See EMINENT DOMAIN.

PUBLIC DEBT. That which is due or owing by the government.

The constitution of the United States provides, art. 6, s. 1, that "all debts contracted or engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution as under the confederation." The fourteenth amendment provides that "the validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned."

PUBLIC ENEMY. This word, used in the singular number, designates a nation at war with the United States, and includes every member of such nation. Vattel, b. 3, c. 5, § 70.

To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy; 2 Marsh. Ins. 508; 3 Esp. 131, 132.

A common carrier is exempt from responsibility whenever a loss has been occasioned to the goods in his charge by the act of a public enemy; but the burden of proof lies on him to show that the loss was so occasioned; 3 Munf. 239; 4 Binn. 127; 2 Bail. 157. See COMMON CARRIER.

In the late rebellion, the Federal troops were a public enemy, against whose acts a common carrier within the Confederate lines did not insure; 1 Heisk. 256.

PUBLIC HOUSE. A house kept for the entertainment of all who come lawfully and pay regularly; 3 Brewst. 344. It does not include a boarding house; *id.*; but under a statute a store house in the country is included by this term; 29 Ala. 40; and a barber shop; 30 *id.* 550; and a broker's office; 31 *id.* 371. A room to which persons generally are permitted to resort, to play cards, though not every one has access to it, is a public gambling-house. See many cases collected in 22 Alb. L. J. 24, and Abb. Dic.

PUBLIC LANDS. Such lands as are subject to sale or other disposition by the United States, under general laws; 92 U. S. 761. See 10 Nev. 260.

PUBLIC MONEY. As used in the U. S. statutes, the money of the federal government received from the public revenues, or intrusted to its fiscal officers, wherever it may be. It does not include money in the hands of the marshals and other officers of the courts, held to await the judgment of the court; 12 Ct. Cl. 281.

PUBLIC PASSAGE. A right to pass over a body of water. This term is synonymous with public highway, with this difference: by the latter is understood a right to pass over the land of another; by the former is meant the right of going over the water which is on another's land. Carth. 193; Hamm. N. P. 195. See PASSAGE.

PUBLIC PLACE. Under a statute against gaming, a steamboat carrying passengers and freight is a public place; 13 Ala. 602; so is an infirmary; 19 *id.* 551; so is a shoemaker's shop into which many went, but a few were excluded during the gaming; 17 *id.* 369. Under statutes against indecent exposure, a public omnibus is a public place; 3 C. & K. 360; so is a urinal in a public park; L. R. 1 C. C. 282; and a part of the sea beach, visible from inhabited houses; 2 Campb. 89. See many cases cited in 22 Alb. L. J. 24, and Abb. Dic. See PUBLIC HOUSE.

PUBLICAN. In Civil Law. A farmer of the public revenue; one who held a lease of some property from the public treasury; Dig. 39. 4. 1. 1; 39. 4. 12. 3; 39. 4. 13.

PUBLICATION. The act by which a thing is made public.

It differs from promulgation, which see; and see, also, Toullier, Dr. Civ. Fr. titre *Préliminaire*, n. 59, for the difference in the meaning of these two words.

Publication has different meanings. When applied to a law it signifies the rendering public the existence of the law; when it relates to the opening the depositions taken in a case in chancery, it means that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties, or by the rules or orders of the court, to show the depositions openly, and to give out copies of them; Pract. Reg. 297; Blake, Ch. Pr. 143. And when spoken of a will, it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as his will; 3 Atk. 161; 4 Me. 220; 3 Rawle, 15; Comyns, Dig. *Estates by Devise* (E 2). See Comyns, Dig. *Chancery* (Q). As to the publication of an award, see 6 N. H. 36.

Some of the state constitutions provide that general laws shall not take effect till published. The mode of publication is for the legislature to determine. A general law printed in a volume of private laws was held to have been *published;* 9 Wisc. 264: but an unauthorized publication is no publication; 10 Wisc. 136. In Pennsylvania, where the constitution did not require publication, it was held to be necessary before an act could be operative; but nevertheless that publication in the legislative journals was sufficient, and that neglect to publish an act in the pamphlet laws did not invalidate the act; 31 Penn. 432. An inaccuracy in the publication of a statute which does not change its substance or legal effect, will not invalidate the publication; 14 Wisc. 212; a joint resolution of a general nature must be published; 4 Kan. 261. See Cooley, Const. Lim. 161.

In law of libel. The communication of the defamatory words to a third party; Odg. Lib. & S. 150.

A *libel* may be published either by speaking or singing, as where it is maliciously repeated or sung in the presence of others, or by delivery, as when a libel, or a copy of it, is delivered to another. A libel may also be published by pictures or signs, as by painting another in an ignominious manner, or making the sign of a gallows, or other reproachful and ignominious sign, upon his door or before his house. If the libel is contained in a letter addressed to the plaintiff, this is not evidence of a publication sufficient to support a civil action; although it would be otherwise in an indictment for libel. But if the letter, though addressed to the plaintiff, was forwarded during his known absence, and with intent that it should be opened and read by his family, clerks, or confidential agents, and it is read by them, it is a sufficient publication. If it was not opened by others, even though it were not sealed, it is no publication; Heard, Lib. & S. §§ 264, 265. In a modern case the publication relied on was a sale of a copy of a newspaper to a person sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff. It was held that this was a sufficient publication to the agent to sustain an action; 14 Q. B. 185. A sealed letter or other communication delivered to the wife of the plaintiff is a publication within the meaning of the law; 13 C. B. 836; Spenc. 209. If the libel be published in a *newspaper*, proof that copies were distributed, and that the clerk of the printer received payment for them, is evidence of publication; 3 Yeates, 128. Publication may be by telegraph; L. R. 9 C. P. 393; and by postal card; 4 L. R. Jur. 391. Having a letter copied by a clerk is publication; 1 Clarke (Ia.) 482. In criminal cases, the publication must be proved to have been made within the county where the trial is had. If it was contained in a newspaper printed in another state, yet it will be sufficient to prove that it was circulated, and read within the county; 3 Pick. 304. If it was written in one county and sent by post to a person in another, or if its publication in another county be otherwise consented to, this is evidence of a publication in the latter county; 7 East, 65; 12 How. St. Tr. 331, 332. If a libel is written in one county with

intent to publish it in another, and it is accordingly so published, this is evidence sufficient to charge the party in the county in which it was written; 4 B. & Ald. 95.

Uttering slanderous words in the presence of the person slandered only is not a publication. It is immaterial that the words were spoken in a public place. The question for the jury is whether they were so spoken as to have been heard by third persons; 13 Gray, 304. It must also be shown that the words were spoken in the presence of some one who understood them. Words in a foreign language, whether spoken or written, must be proved to have been understood by those who heard or read them; otherwise there is no publication which is prejudicial to the plaintiff; Heard, Lib. & S. § 263. See Odg.; Towns. Lib. & S.

PUBLICIANA (Lat.). **In Civil Law.** The name of an action introduced by the prætor Publicius, the object of which was to recover a thing which had been lost. Inst. 4. 6. 4; Dig. 6. 2. 1. 16 et 17. Its effects were similar to those of our action of trover.

PUBLICITY. The doing of a thing in the view of all persons who choose to be present.

The law requires that courts should be open to the public: there can therefore be no secret tribunal, except the grand jury (*q. v.*); and all judgments are required to be given in public.

Publicity must be given to the acts of the legislature before they can be in force; but in general their being recorded in a certain public office is evidence of their publicity.

PUBLISHER. One who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.

The publisher of a libel is responsible as if he were the author of it, and it is immaterial whether he has any knowledge of its contents or not; 9 Co. 59; Hawk. Pl. Cr. c. 73, § 10; 4 Mas. 115; and it is no justification to him that the name of the author accompanies the libel; 10 Johns. 447; 2 Mood. & R. 312.

When the publication is made by writing or printing, if the matter be libellous, the publisher may be indicted for a misdemeanor, provided it was made by his direction or consent; but if he was the owner of a newspaper merely, and the publication was made by his servants or agents, without any consent or knowledge on his part, he will not be liable to a criminal prosecution. But see 107 Mass. 199. In either case he will be liable to an action for damages sustained by the party aggrieved; 7 Johns. 260; 60 Ill. 51; 38 Mich. 10.

In order to render the publisher amenable to the law, the publication must be maliciously made; but malice will be presumed if the matter be libellous. This presumption, however, will be rebutted if the publication be made for some lawful purpose, as, drawing up a bill of indictment, in which the libellous words are embodied for the purpose of prosecuting the libeller; or if it evidently appear that the publisher did not, at the time of publication, know that the matter was libellous: as, when a person reads a libel aloud in the presence of others, without beforehand knowing it to be such; 9 Co. 59. See Libel; Libeller; Publication; Odg. Lib. & S.

PUDICITY. Chastity; the abstaining from all unlawful carnal commerce or connection. A married woman or a widow may defend her pudicity as a maid may her virginity. See Chastity; Rape.

PUDZELD. In Old English Law. To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 *a*. The same as *Woodgeld*.

PUER (Lat. a boy; a child). In its enlarged sense this word signifies a child of either sex; though in its restrained meaning it is applied to a boy only.

A case once arose which turned upon this question, whether a daughter could take lands under the description of *puer;* and it was decided by two judges against one that she was entitled; Dy. 337 *b*. In another case, it was ruled the other way; Hob. 33.

PUERILITY. In Civil Law. A condition which commenced at the age of seven years, the end of the age of infancy, and lasted till the age of puberty,—that is, in females till the accomplishment of twelve years, and in males till the age of fourteen years fully accomplished. Ayliffe, Pand. 63.

The ancient Roman lawyers divided puerility into *proximus infantiæ*, as it approached infancy, and into *proximus pubertati*, as it became nearer to puberty. 6 Toullier, n. 100.

PUERITIA. (Lat.). **In Civil Law.** Age from seven to fourteen. 4 Bla. Com. 22; Wharton, Dict. The age from birth to fourteen years in the male, or twelve in the female. Calvinus, Lex. The age from birth to seventeen. Vicat, Voc. Jur.

PUFFER. A person employed by the owner of property which is sold at auction to bid it up, who does so accordingly, for the purpose of raising the price upon *bonâ fide* bidders.

This is a fraud, which, at the option of the purchaser, invalidates the sale. 3 Madd. 112; 2 Kent, 423; 3 Ves. 628; 2 Bro. C. C. 326; 11 S. & R. 89; 2 Hayw. 328; 4 H. & McH. 282; 2 Dev. 126. See Auction; Bidder; By Bidder.

PUIS DARREIN CONTINUANCE (L. Fr. since last continuance). **In Pleading.** A plea which is put in after issue joined, for the purpose of introducing new matter, or matter which has come to the knowledge of the party pleading it subsequently to such joinder. See Continuance; Plea.

PUISNE (L. Fr.). Younger; junior. Associate.

PUNCTUALITY. As a general rule, a railroad company is liable to damage accruing to a passenger for a negligent failure on its part to run its trains according to the company's time tables; but there must be proof of negligence. Neither time table nor advertisement is a warrant of punctuality. Whart. Negl. § 662.

The publication of the time table cannot amount to less than this, viz.: a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on their part that they will do all that can be done, by the use of due care and skill, to accomplish that result; 52 N. H. 596. See also 5 E. & B. 860. The company is undoubtedly liable for any want of punctuality which they could have avoided by the use of due care and skill; nor can they excuse a want of conformity to the time table for any cause, the existence of which was known to them, or ought to have been known to them, at the time of publishing the table; 52 N. H. 596.

See 8 E. L. & Eq. 362; 14 Allen, 433; 36 Miss. 660; L. R. 2 C. P. 339. In Ang. Carriers, 527 a, it is said that time tables are in the nature of a special contract, so that any deviation from them renders the company liable. But it does not appear that the cases go so far.

PUNCTUATION. The division of a written or printed instrument by means of points, such as the comma, semicolon, and the like.

In construing deeds, it is said that no regard is to be had to punctuation, and although stops are sometimes used, they are not to be regarded in the construction of the instrument; 3 Washb. R. P. 397. Punctuation is not allowed to throw light on printed statutes in England; 24 Beav. 330.

Where a comma after a word in a statute, if any force was attached to it, would give the section containing it broader scope than it would otherwise have, it was held that that circumstance should not have a controlling influence. Punctuation is no part of the statute; 4 Morr. Transcr. 613; in construing statutes, courts will disregard punctuation, or, if need be, repunctuate, to render the true meaning of the statute; 16 Ohio St. 432; approved in 4 Morr. Transcr. 613; also 65 Penn. 311; 9 Gray, 385.

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first ascertain the meaning from the four corners of the instrument; 11 Pet. 64.

Lord St. Leonards said "In wills and deeds you do not ordinarily find any stops; but the court reads them as if they were properly punctuated." 2 Dr. & War. 98.

Judges, in the later cases, have been influenced in construing wills by the punctuation of the original document; 2 M. & G. 679; 26 Beav. 81; 1 Phil. 528; 17 Beav. 589; 24 L. J. Ch. 523; but see 1 Mer. 651, where Sir William Grant refused to resort to punctuation as an aid to construction. See, also, 25 Barb. 405; 16 Can. L. J. 183.

PUNISHMENT. In Criminal Law. Some pain or penalty warranted by law, inflicted on a person for the commission of a crime or misdemeanor, or for the omission of the performance of an act required by law, by the judgment and command of some lawful court.

The right of society to punish is derived, by Beccaria, Mably, and some others, from a supposed agreement which the persons who composed the primitive societies entered into, in order to keep order, and, indeed, the very existence of the state. According to others, it is the interest and duty of man to live in society: to defend this right, society may exert this principle, in order to support itself; and this it may do whenever the acts punishable would endanger the safety of the whole. And Bentham is of opinion that the foundation of this right is laid in public utility or necessity. Delinquents are public enemies, and they must be disarmed and prevented from doing evil, or society would be destroyed. But, if the social compact has ever existed, says Livingston, its end must have been the preservation of the natural rights of the members; and therefore the effects of this fiction are the same with those of the theory which takes abstract justice as the foundation of the right to punish; for this justice, if well considered, is that which assures to each member of the state the free exercise of his rights. And if it should be found that utility, the last source from which the right to punish is derived, is so intimately united to justice that it is inseparable from it in the practice of law, it will follow that every system founded on one of these principles must be supported by the other.

To attain their social end, punishments should be *exemplary*, or capable of intimidating those who might be tempted to imitate the guilty; *reformatory*, or such as should improve the condition of the convicts; *personal*, or such as are at least calculated to wound the feelings or affect the rights of the relations of the guilty; *divisible*, or capable of being graduated and proportioned to the offence and the circumstances of each case; *reparable*, on account of the fallibility of human justice.

Punishments are either corporal or not corporal. The former are—death, which is usually denominated capital punishment; imprisonment, which is either with or without labor, see PENITENTIARY; whipping, in some states; and banishment.

The punishments which are not corporal are—fines; forfeitures; suspension or deprivation of some political or civil right; deprivation of office, and being rendered incapable to hold office; compulsion to remove nuisances.

The object of punishment is to reform the offender, to deter him and others from committing like offences, and to protect society. See 4 Bla. Com. 7; Rutherforth, Inst. b. 1, c. 18.

The constitution of the United States, Amendments, art. 8, forbids the infliction of cruel and unusual punishments. This is intended only for congress and the federal courts; 12 S. & R. 220; 3 Cow. 686.

What punishment is suited to a specified offence must in general be determined by the legislature, and the case must be very extraordinary in which its judgment could be brought in question. A punishment may possibly be unlawful because it is so manifestly out of all proportion to the offence as to shock the moral sense with its barbarity, or because it is a punishment long disused for its cruelty until it has become unusual; Cooley, Const. 296. So, for example, is the punishment of depriving a native of China of his hair; 18 Am. L. Reg. 676. Whipping, as a punishment for stealing mules, is not contrary to this provision; 1 New Mex. 415. In New York, where a general law created a crime and fixed the maximum of its punishment, a special statute operating only in localities, or upon particular individuals, whereby, for no perceptible reason, the same identical crime, which consists in the violation of a statute applicable to the whole state, can therein or in those persons be punished with double the severity that it can be elsewhere in the same state, is within the prohibition of section five of article one, of the constitution of the state as to "cruel and unusual punishments." 61 How. Pr. 294.

PUPIL. In Civil Law. One who is in his or her minority. See Dig. 1. 7; 26. 7. 1. 2; 50. 16. 239; Code, 6. 30. 18. One who is in ward or guardianship.

PUPILLARIS SUBSTITUTIO (Lat.). **In Civil Law.** The nomination of another besides his son pupil to succeed, if the son should not be able or inclined to accept the inheritance, or should die before he came of age to make a testament.

If the child survived the age of puberty, though he made no testament, the substitute had no right of succession. See Bell, Dict. *Substitution;* Dig. 28. 6.

PUPILLARITY. In Civil Law. That age of a person's life which included infancy and puerility.

PUR. A corruption of the French word *par*, by or for. It is frequently used in old French law phrases: as, *pur autre vie*. It is also used in the composition of words: as, puparty; purlieu, purview.

PUR AUTRE VIE (old French, *for another's life*). An estate is said to be *pur autre vie* when a lease is made of lands or tenements to a man to hold for the life of another person. 2 Bla. Com. 259; 10 Viner, Abr. 296; 2 Belt, Suppl. Ves. Jr. 41.

PURCHASE. A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. 2 Washb. R. P. 401.

There are six ways of acquiring a title by purchase, namely, by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat. In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money or some other valuable consideration; Cruise, Dig. tit. 30, §§ 1–4; 1 Dall. 20. In common parlance, purchase signifies the buying of real estate and of goods and chattels.

PURCHASER. A buyer; a vendee. See SALE; PARTIES; CONTRACTS.

PURCHASE-MONEY. The consideration which is agreed to be paid by the purchaser of a thing in money.

It is the duty of the purchaser to pay the purchase-money as agreed upon in making the contract; and in case of the conveyance of an estate before it is paid, the vendor is entitled, according to the laws of England, which have been adopted in several of the states, to a lien on the estate sold for the purchase-money so remaining unpaid. This is called an equitable lien. This doctrine is derived from the civil law; Dig. 18. 1. 19. The case of Chapman *vs.* Tanner, 1 Vern. 267, decided in 1684, is the first where this doctrine was adopted; 7 S. & R. 73. It was strongly opposed, but is now firmly established in England and in the United States; 6 Yerg. 50; 1 Johns. Ch. 308; 7 Wheat. 46, 50; 5 Monr. 287; 1 Harr. & J. 106; 4 Hawks, 256; 5 Conn. 468; 2 J. J. Marsh. 330.

But the lien of the seller exists only between the parties and those having notice that the purchase-money has not been paid; 3 J. J. Marsh. 557; 3 Gill & J. 425. See LIEN.

PURE DEBT. In Scotch Law. A debt actually due, in contradistinction to one which is to become due at a future day certain, which is called a future debt, and one due provisionally, in a certain event, which is called a contingent debt. 1 Bell, Com. 315.

PURE OBLIGATION. One which is not suspended by any condition, whether it has been contracted without any condition, or, when thus contracted, the condition has been performed. Pothier, Obl. n. 176.

PURE PLEA. In Equity Pleading. One which relies wholly on some matter dehors the bill, as, for example, a plea of a release on a settled account.

Pleas not pure are so called in contradistinction to pure pleas; they are sometimes also denominated negative pleas. 4 Bouvier, Inst. n. 4275.

PURGATION. (Lat. *purgo;* from *purum* and *ago*, to make clean). The clearing one's self of an offence charged, by denying the guilt on oath or affirmation.

Canonical purgation was the act of justi-

fying one's self, when accused of some offence, in the presence of a number of persons worthy of credit, generally twelve, who would swear they believed the accused. See COMPURGATOR; LAW OF WAGER.

Vulgar purgation consisted in superstitious trials by hot and cold water, by fire, by hot irons, by batell, by corsned, etc.

In modern times a man may purge himself of an offence in some cases where the facts are within his own knowledge; for example, when a man is charged with a contempt of court, he may purge himself of such contempt by swearing that in doing the act charged he did not intend to commit a contempt.

PURGED OF PARTIAL COUNSEL. In Scotland every witness, before making oath or affirmation, is *purged of partial counsel*, *i. e.* cleared by examination on oath of having instigated the plea, of having been present with the party for whom he testifies at consultations of lawyers, where it might be shown what was necessary to be proved, or of having acted as his agent in any of the proceedings. So, in a criminal case, he who is agent of prosecutor or who tampers with the panel cannot be heard to testify, because of *partial counsel*. Stair, Inst. p. 768, § 9; Bell, Dict. *Partial Counsel*.

PURLIEU. In English Law. A space of land near a forest, known by certain boundaries, which was formerly part of a forest, but which has been separated from it.

The history of purlieus is this. Henry II., on taking possession of the throne, manifested so great a taste for forests that he enlarged the old ones wherever he could, and by this means enclosed many estates which had no outlet to the public roads; forests increased in this way until the reign of king John, when the public reclamations were so great that much of this land was disforested,—that is, no longer had the privileges of the forests—and the land thus separated bore the name of purlieu.

PURPARTY. That part of an estate which, having been held in common by parceners, is by partition allotted to any of them. To make purparty is to divide and sever the lands which fall to parceners. Old N. B. 11.

PURPORT. In Pleading. The substance of a writing as it appears on the face of it to the eye that reads it. It differs from tenor. 2 Russ. Cr. 365; 1 East, 179.

PURPRESTURE. An enclosure by a private individual of a part of a common or public domain.

According to Lord Coke, purpresture is a close or enclosure, that is, when one encroaches or makes several to himself that which ought to be in common to many: as, if an individual were to build between high and low water mark on the side of a public river. In England this is a nuisance, and in cases of this kind an injunction will be granted, on ex-parte affidavits, to restrain such a purprestura and nuisance; 2 Bouvier, Inst. n. 2382; 4 *id.* n. 3798; Co. 2d Inst. 28. And see Skene, *Pourpresture;* Glanville, lib. 9, ch. 11, p. 239, note; Spelman, Gloss. *Purpresture;* Hale, de Port. Mar.; Hargrave, Law Tracts, 84; 2 Anstr. 606; Callis, Sew. 174.

PURSER. The person appointed by the master of a ship or vessel, whose duty it is to take care of the ship's books, in which every thing on board is inserted, as well the names of mariners as the articles of merchandise shipped. Roccius, Ins. note.

By statute pursers in the navy are now called paymasters. R. S. § 1383.

PURSUER. The name by which the complainant or plaintiff is known in the ecclesiastical courts. 3 Eccl. 350.

PURVIEW. That part of an act of the legislature which begins with the words, "Be it enacted," etc., and ends before the repealing clause. Cooke, 330; 3 Bibb, 181. According to Cowel, this word also signifies a conditional gift or grant. It is said to be derived from the French *pourvu*, provided. It always implies a condition. Interpreter.

PUT. In Pleading. To select; to demand: as, "the said C D puts himself upon the country;" that is, he selects the trial by jury as the mode of settling the matter in dispute, and does not rely upon an issue in law. Gould, Pl. c. 6, part 1, § 19.

PUTATIVE. Reputed to be that which is not. The word is frequently used: as, putative father, putative marriage, putative wife, and the like. And Toullier, tome 7, n. 29, uses the words putative owner, *propriétaire putatif.* Lord Kames uses the same expression. Princ. of Eq. 391.

PUTATIVE FATHER. The reputed father.

This term is usually applied to the father of a bastard child.

The putative father is bound to support his children, and is entitled to the guardianship and care of them in preference to all persons but the mother. 1 Ashm. 55. And see 5 Esp. 131; 1 B. & Ald. 491; Bott, Poor Law, 499; 1 C. & P. 268; 3 *id.* 36; 1 Ball & B. 1.

PUTATIVE MARRIAGE. A marriage which is forbidden but which has been contracted in good faith and ignorance of the impediment on the part of at least one of the contracting parties.

Three circumstances must concur to constitute this species of marriage. *There must be a bona fides.* One of the parties at least must have been ignorant of the impediment, not only at the time of the marriage, but must also have continued ignorant of it during his or her life, because if he became aware of it he was bound to separate himself from his wife. *The marriage must be duly solemnized. The marriage must have been considered lawful* in the estimation of the parties or of that party who alleges the *bona fides.*

A marriage in which these three circumstances concur, although null and void, will have the effect of entitling the wife, if she be

in good faith, to enforce the rights of property which would have been competent to her if the marriage had been valid, and of rendering the children of such marriage legitimate.

This species of marriage was not recognized by the civil law: it was introduced by the canon law. It is unknown to the law of the United States, and in England and Ireland. In France it has been adopted by the Code Civil, art. 201, 202. In Scotland the question has not been settled. Burge, Confl. Laws, 151, 152.

PUTTING IN FEAR. These words are used in the definition of a robbery from the person: the offence must have been committed by *putting in fear* the person robbed. Co. 3d Inst. 68; 4 Bla. Com. 243.

This is the circumstance which distinguishes robbery from all other larcenies. But what force must be used or what kind of fears excited are questions very proper for discussion. The goods must be taken *against the will* of the possessor.

There must either be a putting in fear or actual violence, though both need not be positively shown, for the former will be inferred from the latter, and the latter is sufficiently implied in the former. For example, when a man is suddenly knocked down, and robbed while he is senseless, there is no fear, yet in consequence of the violence, it is presumed; 2 East, Pl. Cr. 711; 4 Binn. 379; 3 Wash. C. C. 209.

In an indictment for robbery, at common law, it is not necessary to allege a putting in fear in addition to the allegation of force and violence; 7 Mass. 242; 8 Cush. 217.

Q.

QUACK. One who, without sufficient knowledge, study, or previous preparation, undertakes to practise medicine or surgery, under the pretence that he possesses secrets in those arts.

To call a regular physician a quack is actionable. A quack is criminally answerable for his unskilful practice, and also civilly to his patient in certain cases. See MALPRACTICE; PHYSICIAN.

QUADRANS (Lat.). **In Civil Law.** The fourth part of the whole. Hence the heir *ex quadrante;* that is to say, of the fourth part of the whole.

QUADRIENNIUM UTILE (Lat.). **In Scotch Law.** The four years of a minor between his age of twenty-one and twenty-five years are so called. During this period he is permitted to impeach contracts made against his interest previous to his arriving at the age of twenty-one years. 1 Bell, Com. 135.

QUADRIPARTITE (Lat.). Having four parts, or divided into four parts: as, this indenture quadripartite, made between A B, of the one part, C D, of the second part, E F, of the third part, and G H, of the fourth part.

QUADROON. A person who is descended from a white person, and another person who has an equal mixture of the European and African blood. 2 Bail. 558. See MULATTO.

QUADRUPLICATION. In Pleading. Formerly this word was used instead of surrebutter. 1 Brown, Civ. Law, 469, n.

QUÆ EST EADEM (Lat. which is the same). **In Pleading.** A clause containing a statement that the trespass, or other fact mentioned in the plea, is the same as that laid in the declaration, where from the circumstances there is an apparent difference between the two. 1 Chitty, Pl. *582, Gould, Pl. c. 3, §§ 79, 80; 29 Vt. 455.

The form is as follows: "which are the same assaulting, beating, and ill-treating, the said John, in the said declaration mentioned, and whereof the said John hath above thereof complained against the said James." See 1 Saund. 14, 208, n. 2; 2 *id.* 5 a, n. 3; Arch. Civ. Pl. 217; Comyns, Dig. *Pleader* (E 31); Cro. Jac. 372.

QUÆRE (Lat.). Query; noun and verb. A word frequently used to denote that an inquiry ought to be made of a doubtful thing. 2 Lilly, Abr. 406. Commonly used in the syllabi of the reports, to mark points of law considered doubtful.

QUÆRENS NON INVENIT PLEGIUM (Lat.). **In Practice.** The plaintiff has not found pledge. The return made by the sheriff to a writ directed to him with this clause, namely, *si A fecerit B securum de clamore suo prosequando*, when the plaintiff has neglected to find sufficient security. Fitz. N. B. 38.

QUÆSTIO (Lat.). **In Roman Law.** A sort of commission (*ad quærendum*) to inquire into some criminal matter given to a magistrate or citizen, who was called *quæsitor* or *quæstor*, who made report thereon to the senate or the people, as the one or the other appointed