tion where the guilty party procures the delivery to him, under a pretended contract, of the personal property of another, with the felonious design of appropriating it to his own use; 2 Russ. Cr. 130; Alison, Cr. Law, 250; 2 Mass. 406.

The terms cheat and swindler are not actionable unless spoken of the plaintiff in relation to his business; 6 Cush. 185; 10 How. Pr. 128. The words "you are living by imposture," spoken of a person with the intention of imputing that he is a swindler, are not actionable *per se;* 8 C. B. 142.

SWORN CLERKS IN CHANCERY. Officers who had charge of records, and performed other duties in connection with the court of chancery. Abolished in 1842.

SYB AND SOM. A Saxon form of greeting, meaning peace and safety. T. L.

SYMBOLIC DELIVERY. The delivery of some thing as a representation or sign of the delivery of some other.

Where an actual delivery of goods cannot be made, a symbolical delivery of some particular thing, as standing for the whole, will vest the property equally with an actual delivery; 1 Pet. 445; 8 How. 399; 6 Md. 10; 19 N. H. 419; 39 Me. 496; 11 Cush. 282; 3 Cal. 140. See 1 Sm. L. C. 33.

SYNALLAGMATIC CONTRACT. In Civil Law. A contract by which each of the contracting parties binds himself to the other: such are the contracts of sale, hiring, etc. Pothier, Obl. 9.

SYNDIC. In French Law. The assignee of a bankrupt.

One who is chosen to conduct the affairs and attend to the concerns of a body corporate or community. In this sense the word corresponds to director or manager. Rodman, Notes to Code de Com. p. 351; La. Civ. Code, art. 429; Dalloz, Dict. *Syndic.*

SYNDICATE. A university committee. A combination of persons or firms united for the purpose of enterprises too large for individuals to undertake; or a group of financiers who buy up the shares of a company in order to sell them at a profit by creating a scarcity. Moz. & W.

SYNDICOS (Gr. σύν with, δικῆ cause). One chosen by a college, municipality, etc. to defend its cause. Calv. Lex. See SYNDIC.

SYNGRAPH (Gr. σύν with, γράφω, to write). A deed, bond, or other instrument of writing, under the hand and seal of all the parties. It was so called because the parties *wrote together.*

Formerly such writings were attested by the subscription and crosses of the witnesses; afterwards, to prevent frauds and concealments, they made deeds of mutual covenant in a script and rescript, or in a *part* and *counterpart*, and in the middle between the two copies they wrote the word *syngraphus* in large letters, which, being cut through the parchment and one being delivered to each party, on being afterwards put together proved their authenticity.

Deeds thus made were denominated *syngraphs* by the canonists, and by the common-lawyers *chirographs.* 2 Bla. Com. 296.

SYNOD. An ecclesiastical assembly, which may be general, national, provincial, or diocesan.

SYNODALES TESTES. See SIDESMEN.

T.

T. Every person convicted of felony short of murder, and admitted to benefit of clergy, was at one time marked with this letter upon the brawn of the thumb. Abolished by 7 & 8 Geo. IV. c. 27. Whart. Dict.

T. R. E. These letters, an abbreviation for *Tempore Regis Edwardi*, "in the time of King Edward" (the Confessor), often occur in Domesday Book.

TABELLA (Lat.). **In Civil Law.** A small table on which votes were often written. Cicero, in Rull. 2. 2. Three tablets were given to the judges, one with the letter A for *Absolutio*, one with C for *Condemnatio*, and one with N. L. for *Non Liquet*, not proven. Calvinus, Lex.

TABELLIO (Lat.). **In Roman Law.** An officer among the Romans, who reduced to writing, and into proper form, agreements, contracts, wills, and other instruments, and witnessed their execution.

The term tabellio is derived from the Latin *tabula, seu tabella*, which, in this sense, signified those tables or plates covered with wax which were then used instead of paper. 8 Toullier, n. 53; Delaurière, sur Ragneau, *Notaire.*

Tabelliones differed from notaries in many respects: they had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aiders of the tabelliones; they received the agreements of the parties which they reduced to short *notes;* and these contracts were not binding until they were written *in extenso*, which was done by the

tabelliones. Encyclopédie de M. D'Alembert, *Tabellione;* Jacob, Law Dict. *Tabellion;* Merlin, Répert. *Notaire*, § 1; 3 Giannone, Istoria di Napoli, p. 86.

TABLE-RENTS. Rents paid to bishops and other ecclesiastics, appropriated to their table or housekeeping. Jacob.

TABLEAU OF DISTRIBUTION. In Louisiana. A list of creditors of an insolvent estate, stating what each is entitled to. 4 Mart. La. N. S. 535.

TABLES. A synopsis in which many particulars are brought together in a general view: as, genealogical tables, which are composed of the names of persons belonging to a family. As to the law of the Twelve Tables, see Code.

TABULA IN NAUFRAGIO (Lat. a plank in a wreck). **In English Law.** A figurative term used to denote the power of a third mortgagee, who, having obtained his mortgage without any knowledge of a second mortgage, may acquire the first incumbrance, and squeeze out and have satisfaction before the second. 2 Ves. Ch. 573; 1 Ch. Cas. 162; 1 Story, Eq. §§ 414, 415; TACKING.

TABULÆ. In Civil Law. Contracts and written instruments of all kinds, especially wills. So called because originally written on tablets and with wax. Calvinus.

TAC. A kind of customary payment by a tenant. Blount, Ten. 155.

TAC FREE. Free from payments, etc.: *e. g.* "*tac free de omnibus propriis porcis suis infra metas de C*," *i. e.* paying nothing for his hogs running within that limit. Jacob.

TACIT (from Lat. *taceo*, to be silent). That which, although not expressed, is understood from the nature of the thing or from the provision of the law; implied.

TACIT LAW. A law which derives its authority from the common consent of the people without any legislative enactment. 1 Bouvier, Inst. 120.

TACIT RELOCATION. In Scotch Law. The tacit or implied renewal of a lease when the landlord instead of warning a tenant has allowed him to continue without making a new agreement. Bell, Dict. *Relocation.*

TACIT TACK. See TACIT RELOCATION.

TACITURNITY. In Scotland this signifies laches in not prosecuting a legal claim, or in acquiescing in an adverse one. Moz. & W.

TACK. In Scotch Law. A contract of location by which the use of land or any other immovable subject is set to the lessee or tacksman for a certain yearly rent, either in money, the fruits of the ground, or services. Erskine, Inst. 2. 6. 8. This word is nearly synonymous with lease.

TACKING. In English Law. The union of securities given at different times, so as to prevent any intermediate purchaser's claiming title to redeem or otherwise discharge one lien which is prior, without redeeming or discharging other liens also which are subsequent, to his own title. Jeremy, Eq. Jur. 188–191; 1 Story, Eq. Jur. § 412.

It is an established doctrine in the English chancery that a *bona fide* purchaser and without any notice of a defect in his title at the time of the purchase may lawfully buy any statute, mortgage, or incumbrance, and if he can defend by those at law his adversary shall have no help in equity to set those incumbrances aside, for equity will not disarm such a purchaser. And as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has extended to them, and a mortgagee who has advanced his money without notice of any prior incumbrance may, by getting an assignment of a statute, judgment, or recognizance, protect himself from any incumbrance subsequent to such statute, judgment, or recognizance, though prior to his mortgage; that is, he will be allowed to *tack* or unite his mortgage to such old security, and will by that means be entitled to recover all moneys for which such security was given, together with the money due on his mortgage, before the prior mortgagees are entitled to recover any thing; 2 Cruise, Dig. t. 15, c. 5, s. 27; 1 Vern. 188; 1 White & T. L. C. Eq. 615, notes. Tacking was abolished by sec. 7 of the Vendor and Purchaser Act, stat. 37 and 38 Vict. c. 78, but that section is repealed by sec. 129 of the Land Titles and Transfer Act of 38 & 39 Vict. c. 87. Moz. & W.

This doctrine is inconsistent with the laws of the several states, which require the recording of mortgages; and does not exist to any extent in the United States; 1 Caines, Cas. 112; 2 Pick. 517; 12 Conn. 195; 14 Ohio, 318; 11 S. & R. 208; 1 White & T. L. C. Eq. 615; 1 Johns. Ch. 399; Bisph. Eq. § 159. A rule apparently analogous may, however, be found in those cases where a mortgage is given to secure future advances, and where the mortgagee is allowed to recover sums subsequently advanced, as against a *mesne* mortgage; Bisph. Eq. § 159.

TAIL. See ESTATE TAIL.

TAILAGE. See TALLAGE.

TAINT. A conviction of felony, or, the person so convicted. Cowel. See ATTAINT.

TAKE. A technical expression which signifies to be entitled to: as, a devisee will take under the will.

To seize: as, to take and carry away, either lawfully or unlawfully.

To choose: *e. g. ad capiendas assisas*, to choose a jury.

To obtain: *e. g.* to take a verdict in court, to get a verdict.

TAKING. In Criminal Law, Torts. The act of laying hold upon an article, with or without removing the same. A felonious

taking is not sufficient, without a carrying away, to constitute the crime of larceny. See Dearsl. 621. And when the taking has been legal, no subsequent act will make it a crime; 1 Mood. Cr. Cas. 160.

The taking is either actual or constructive. The former is when the thief takes, without any pretence of a contract, the property in question.

A constructive felonious taking occurs when under pretence of a contract the thief obtains the felonious possession of goods: as, when under the pretence of hiring he had a felonious intention, at the time of the pretended contract, to convert the property to his own use.

When property is left through inadvertence with a person, and he conceals it *animo furandi*, he is guilty of a felonious taking and may be convicted of larceny; 17 Wend. 460.

But when the owner parts with the property willingly, under an agreement that he is never to receive the same identical property, the taking is not felonious: as, when a person delivered to the defendant a sovereign to get it changed, and the defendant never returned either with the sovereign or the change, this was not larceny; 9 C. & P. 741. See 2 B. & P. 508; Co. 3d Inst. 408; LARCENY; ROBBERY.

The wrongful taking of the personal property of another, when in his actual possession, or such taking of the goods of another who has the right of immediate possession, subjects the tort-feasor to an action. For example, such wrongful taking will be evidence of a conversion, and an action of trover may be maintained; 2 Saund. 47; 3 Willes, 55. Trespass is a concurrent remedy in such a case; 3 Wils. 336. Replevin may be supported by the unlawful taking of a personal chattel. See CONVERSION; TRESPASS; TROVER; REPLEVIN.

TAKE UP. An indorser or acceptor is said to take up, or retire, a bill when he discharges the liability upon it. In such a case, the indorser would hold the instrument with all his remedies intact; while the acceptor would extinguish all the remedies on it. One who accepts a lease is also said to take it up.

TALE. In English Law. The ancient name of the declaration or count. 3 Bla. Com. 293

TALES (Lat. *talis*, such, like). A number of jurors added to a deficient panel sufficient to supply the deficiency.

A list of such jurymen as were of the tales, kept in the king's bench office in England.

TALES DE CIRCUMSTANTIBUS (Lat. a like number of the bystanders). A sufficient number of jurors selected from the bystanders to supply a deficiency in the panel.

The order of the judge for taking such bystanders as jurors.

Whenever from any cause the panel of jurors is insufficient, the judge may issue the above order, and the officer immediately executes it; see 2 Hill, So. C. 381; Coxe, N. J. 283; 1 Blackf. 65; 2 H. & J. 426; 1 Pick. 43, n. The number to be drawn on successive panels is in the discretion of the court; 17 Ga. 497.

TALITER PROCESSUM EST. "So it has proceeded;" words formerly used in pleading, by which a defendant, in justifying his conduct by the process of an inferior court, alleged the proceedings in such inferior court. Steph. Pl. 5th ed. p. 369; Moz. & W.

TALLAGE OR TALLIAGE (Fr. *tailler* to cut). **In English Law.** A term used to denote subsidies, taxes, customs, and, indeed, any imposition whatever by the government for the purpose of raising a revenue. Bacon, Abr. *Smuggling, etc.* (B); Fort. De Laud. 26; Madd. Exch. c. 17; Co. 2d Inst. 531.

TALLAGIUM (perhaps from Fr. *taille*, cut off). A term including all taxes. Co. 2d Inst. 532; Stat. de tal. non concedendo, temp. Edw. I.; Stow, Annals, 445; 1 Sharsw. Bla. Com. 311*. Chaucer has talaigiers for "tax-gatherers"

TALLY (Fr. *tailler;* It. *tagliare*, i.e. *scindere*, to cut off). A stick cut into two parts, on each whereof is marked, with notches or otherwise, what is due between debtor and creditor. Hence the tallier of the exchequer is now called the teller. Lex. Constit. 205; Cowel. One party must have one part, and the other the other, and they must match. Tallies in the exchequer were abolished by 23 Geo. III. c. 82, and were ordered to be destroyed in 1834. They were thereupon used in such quantities to heat the stoves in the house of lords that it is supposed they were the cause of the fire which destroyed both houses of parliament. There was the same usage in France. Dict. de l'Acad. Franç.; Pothier, Obl. pt. 4, c. 1, art. 2, § 8; 2 Reeves, c. 11, p. 253.

TALZIE, TAILZIE. In Scotch Law. Entail.

TANGIBLE PROPERTY. That which may be felt or touched: it must necessarily be corporeal, but it may be real or personal.

TANISTRY (*a thanis*). **In Irish Law.** A species of tenure founded on immemorial usage, by which lands, etc. descended, *seniori et dignissimo viri sanguinis et cognominis*, i.e to the oldest and worthiest man of the blood and name. Jacob, Law Dict.

TARDE VENIT (Lat.). **In Practice.** The name of a return made by the sheriff to a writ, *when it came into his hands too late* to be executed before the return day.

The sheriff is required to show that he has yielded obedience to the writ, or give a good excuse for his omission; and he may say, *quod breve adeo tarde venit quod exequi non potuit.* It is usual to return the writ with an indorsement of *tarde venit.* Comyns, Dig. *Retorn* (D 1).

TARE. An allowance in the purchase and sale of merchandise for the weight of the box, bag, or cask, or other thing, in which the goods are packed. It is also an allowance made for any defect, waste, or diminution in the weight, quality, or quantity of goods. It differs from TRET, which see.

TARIFF. Customs, duties, toll, or tribute payable upon merchandise to the general government is called tariff; the rate of customs, etc. also bears this name, and the list of articles liable to duties is also called the tariff.

TAVERN. A place of entertainment; a house kept up for the accommodation of strangers. Webster, Dict. Originally, a house for the retailing of liquors to be drunk on the spot. Webster, Dict.

In almost all the states the word has come to mean the same as inn, with no particular reference to the sale of liquors. See 2 Kent, 597*, note a. Tavern has been held to include "hotel;" 46 Mo. 593; *contra*, 7 Ga. 296.

These are regulated by various local laws. For the liability of tavern-keepers, see Story, Bailm. § 7; 2 Kent, 458; 12 Mod. 487; Jones, Bailm. 94; 1 Bla. Com. 430; 1 Rolle, Abr. (3 F); Bacon, Abr. *Inn*, etc.; INN; INNKEEPER.

TAX. A pecuniary burden imposed for the support of the government. 17 Wall. 322. The enforced proportional contribution of persons and property, levied by the authority of the state for the support of government, and for all public needs. 58 Me. 591; Cooley, Tax. 1. Burdens or charges imposed by the legislative power of a state upon persons or property, to raise money for public purposes. Blackw. Tax Titles, 1; 20 Cal. 318. See 64 Penn. 154; 20 Wall. 655; 27 Iowa, 28; 34 Cal. 432; 27 Ind. 62. Taxes are not "debts;" 20 Cal. 318.

Taxes differ from subsidies, in being certain and orderly, and from forced contributions, etc., in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government; Cooley, Tax. 2. See 51 Penn. 9. No matter how equitable a tax may be, it is void unless legally assessed; 3 Cush. 567; and, on the other hand, the injustice of a particular tax cannot defeat it when it is demanded under general rules prescribed by the legislature for the general good; Cooley, Tax. 3; 17 Mass. 52. A sovereign power has the unlimited power to tax all persons or property within its jurisdiction; 21 Vt. 152; 4 Wheat. 316; 20 Wall. 46; 66 N. C. 361; but the power of taxation of a state is limited to persons, property, and business within her jurisdiction; thus bonds issued by a railroad company and held by non-residents of the state in which the company was incorporated, are property beyond the jurisdiction of that state; 15 Wall. 300.

Taxes are classified as *direct*, which includes "those which are assessed upon the property, person, business, income, etc., of those who pay them; and *indirect*, or those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity." Cooley, Tax. 5. The latter include duties upon imports and stamp duties levied upon manufactures; *ibid.* The term "direct taxes" in the federal constitution is used in a peculiar sense, and such taxes are perhaps limited to capitation and land taxes; 3 Dall. 171; 7 Wall. 433; 8 *id.* 533.

Direct taxes within the meaning of the constitution are only capitation taxes and taxes on real estate; 102 U. S. 586.

Judge Cooley gives, as the most common taxes:—

Capitation taxes, which can only in a few cases be said to be either just or politic.

Land taxes. These are usually laid by value.

House taxes. These, except when the houses are treated as appurtenant to the lands, have been measured by rents, and sometimes by hearths and windows. Both of these latter have been laid in England, but are now abolished.

Income taxes. These may be on all incomes, or the smaller incomes may be exempted; and sometimes there has been an increasing percentage on larger incomes. This tax is objectionable as being inquisitorial, and as leading to evasion.

Taxes on employments. This usually takes the form of an excise tax on the license to pursue the employment. See as to such a tax on lawyers, 23 Gratt. 464.

Taxes on the carriage of property. These may be laid by licenses, by taxing the vehicles employed, by tonnage duties, etc.

Taxes on wages. These have been unusual in modern times.

Taxes on servants, horses, carriages, etc.

Taxes on the interest of money. These are objectionable for the same reasons that apply to income taxes.

Taxes on dividends are more easily collected, and are a common method of raising revenue.

Taxes on legacies and inheritances. These may be on direct or collateral succession. See, as to their validity, 14 Gratt. 422; 28 Md. 577.

Taxes on sales, bills of exchange, etc. These, when laid by way of stamp duties, are, perhaps, the least objectionable of all taxes.

Taxes of legal process may be imposed as stamp fees on process, fees for permission to begin suit, etc.

Taxes on consumable luxuries, as whiskey, etc.

Taxes on exports. These are usually impolitic, either as tending to diminish exports, or as leading to retaliatory legislation. The states cannot levy export duties without the consent of congress, and congress cannot lay any export duty on articles exported from any state. Art. 1, §§ ix., x. of the constitution.

Taxes on imports have been the chief reliance of the federal government.

Taxes on corporate franchises have been a source of large revenue in some states, while, in other states, corporations have been taxed, like individuals, on their property. See 18 Wall. 231.

Taxes on the value of property have been the main reliance in the United States. As to taxes on personalty it is objected, among other things,

that their assessment is necessarily inquisitorial, that they hold out constant temptations to taxpayers to defraud the state, and that such taxation requires a large addition to the revenue officers, and renders necessary more frequent assessments than would be required were taxation confined to subjects more permanent in characteristics and ownership.

Stockholders in a moneyed corporation are liable to taxation on their shares, although the capital stock has also paid a tax; 6 Baxt. 553; s. c. 32 Am. Rep. 532, and note; but see cases cited in this note.

Taxes on amusements. These are in the nature of a tax on luxuries, and therefore unobjectionable.

The state may undoubtedly require the payment of taxes *in kind*, that is, in products, or in gold or silver bullion, etc.; Cooley, Tax. 12; see 20 Cal. 318; 7 Wall. 71.

The power to tax is vested entirely in the legislative department. No matter how oppressive taxation may be, the judiciary cannot interfere on that account; 8 Wall. 533; 18 *id.* 206; 47 Miss. 367. It can only check excess of authority. The right to lay taxes cannot be delegated by the legislature to any other department of the government; 52 Mo. 133; 47 Cal. 456; 4 Bush, 464: except that municipal corporations may be authorized to levy and collect local taxes; Cooley, Tax. 51; 49 Mo. 559, 574; 73 Penn. 448.

The constitutional guaranty which declares that no person shall be deprived of property, etc., except by the judgment of his peers or the law of the land does not necessarily apply to the collection of taxes; 23 Ga. 566; Cooley, Tax. 37; taxes have been said to be recoverable, not only without a jury, but without a judge; 6 T. B. Monr. 641. Though differing from procedure in courts of justice, the general system of procedure for the levy and collection of taxes established in this country, is due process of law; 104 U. S. 78; 96 U. S. 97.

Persons and property not within the limits of a state cannot be taxed by the state; Cooley, Tax. 42; but when a person is resident within a state, his personal property may be taxed wherever it is, on the ground that in contemplation of law its *situs* is the place of his residence; 16 Pick. 572; 46 N. H. 389; 3 Oreg. 13; and the stock of a foreign corporation may be taxed to the resident owner; 82 N. C. 420; s. c. 33 Am. Rep. 692; but the mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state; 15 Wall. 300; see *supra*. So shares in a corporation are the shares of the stockholder wherever he may have his domicil, and can only be taxed by the jurisdiction to which his person is subject; 16 Pick. 572; 30 N. J. 13; 49 Penn. 526; subject to the qualification that a foreign corporation must always accept the privilege of doing business in a state on such terms as the state may see fit to exact; Cooley, Tax. 16. Under a statute providing for taxation of all personal property within the state owned by non-residents, a tax cannot be imposed on choses in action, owned by a non-resident and left with an attorney in the state for collection, nor on municipal bonds so owned and temporarily on deposit in a bank in the state for safe keeping; 59 Ind. 472; s. c. 26 Am. Rep. 87.

Tangible personal property situate within a state may be taxed there without regard to the residence of the owner; 48 N. Y. 390; 21 Vt. 152; 52 Penn. 140; and the real estate of a non-resident may be taxed where it is situated; 4 Wall. 210; 16 Mass. 208; see, generally, 15 Am. L. Reg. N. S. 65 *et seq.*

A state may bind itself by a contract, *based upon a consideration*, to refrain from exercising the right of taxation in a particular case; 15 Wall. 460; 16 *id.* 244; 6 Conn. 223; s. c. 16 Am. Dec. 46 n.

The agencies selected by the federal government for the exercise of its functions cannot be taxed by the states: for instance, a bank chartered by congress as the fiscal agent of the government; 4 Wheat. 316; the loans of the United States; 2 Wall. 220; 7 *id.* 16, 26; the United States revenue stamps; 101 Mass. 329; the salary of a federal officer; 16 Pet. 435; see 9 Metc. 73. On the other hand, the federal government cannot tax the corresponding agencies of the states; 12 Wall. 418; 105 Mass. 49; s. c. 7 Am. Rep. 499; including the salary of a state officer; 11 Wall. 113; and a state municipal corporation; 17 Wall. 322; but railroad corporations are not included in this exemption; 9 Wall. 579. The states have no power to tax the operations of the Union Pacific R. R. Company, which was chartered by congress, but may tax their property; 18 Wall. 5.

A state tax on telegraphic messages sent out of the state is unconstitutional as a regulation of interstate commerce, and so taxes on government messages are void, as burdens upon the agencies of the federal government; 4 Morr. Transcr. 447; a state tax on freights transported from state to state is a regulation of commerce, and therefore void; 15 Wall. 232.

But a state tax upon the gross receipts of a railroad company is not repugnant to the federal constitution, although they are made up in part from articles transported from state to state. There is a distinction between a tax upon freights carried between states and a tax upon the fruits of such transportation after they have become mingled with the other property of the carrier; 15 Wall. 284; nor is such a tax a tax upon exports or imports or upon interstate transportation; *id.*

The federal constitution provides that no state shall, without consent of congress, (1) lay any imposts or duties on exports or imports, except what may be necessary for executing its inspection laws. See 24 How. 169; 8 Wall. 123; (2) lay any duties of tonnage. Under this clause a tax on vessels at a certain sum per ton is forbidden; 20 Wall. 577. Congress having the power to

regulate commerce with foreign nations, etc., the states cannot tax the commerce which is regulated by congress; 4 Wheat. 316; but a tax may be laid upon merchandise in the original packages that has been the subject of commerce and has been sold by the importer; 5 Wall. 475; 8 *id.* 110; locomotives may be taxed as property, but not their use as vehicles of commerce between the states; 2 Abb. U. S. 323. See 15 Wall. 232, 284. See TONNAGE TAX; COMMERCE.

No tax is valid which is not laid for a public purpose; 20 Wall. 655; 58 Me. 590; 2 Dill. 353; such are (according to Cooley, Tax. 81): to preserve the public order; to make compensation to public officers, etc.; to erect, etc., public buildings; to pay the expenses of legislation, and of administering the laws, etc.; also, to provide secular instruction; Cooley, Tax. 84; 104 U. S. 81; see 10 Metc. 508; 30 Mich. 69; but not in a school founded by a charitable bequest, though a majority of the trustees were to be chosen (but from certain religious societies) by the inhabitants of the town; 103 Mass. 94. See, also, 24 Wisc. 350. A town may tax itself for the erection of a state educational institution within its limits; 12 Allen, 500; see 47 N. Y. 608. The support of public charities is a public purpose, and money raised by taxation may be applied to private charitable institutions. Taxation for the purpose of giving or loaning money to private business enterprises is illegal; 111 Mass. 454; 60 Me. 124; S. C. 11 Am. Rep. 185, and 12 Am. L. Reg. N. S. 493 and n. In some cases, governments have applied public funds to pay equitable claims (upon which no legal right exists), such as for the destruction of private property in war, or for loss incurred in a contract for the construction of a public work: Cooley, Tax. 91; see 108 Mass. 408; 19 N. Y. 116. Taxes may be levied for the construction and repair of canals, railroads, highways, roads, etc.; Cooley, Tax. 94; and the construction of a free bridge in a city; 58 Penn. 320; and for the payment of the public debt, if lawfully incurred; and for protection against fire; 104 U. S. 81. A preponderance of authority favors the proposition that the legislatures of states may confer upon municipalities the right to take stock in railroad corporations, and to lend their credit to such, and to levy taxes to enable them to pay the debt incurred; the decision has turned upon the question whether this is a public purpose; 20 Wall. 655. Taxation to provide municipal gas and water works is lawful; 43 Ga. 67; 27 Vt. 70; and for the preservation of the public health; 31 Penn. 175, 185; Cooley, Tax. 101. Municipalities may pay money by way of bounties to those who volunteer as soldiers in times of actual or threatened hostility; 50 Penn. 150; 56 *id.* 466; 52 Me. 590; but not to provide amusements for the people, or to celebrate the declaration of independence, etc.; 1 Allen, 103; 2 Denio, 110; though the purchase and support of public parks is lawful; Cooley, Tax. 93.

It is said to be an essential rule of taxation that the purpose for which a tax is levied "should be one which in an especial manner pertains to the district within which it is proposed that the contribution shall be collected. . . . A state purpose must be accomplished by a state taxation, a county purpose by a county taxation, etc." Cooley, Tax. 104, 105. Thus an act imposing an assessment upon lands fronting on a county road for the purpose of paving the road in a costly manner, not for the local but for the general public benefit, was held void; 69 Penn. 352; S. C. 8 Am. Rep. 255.

Apportionment is a necessary element of taxation; it consists in a selection of the subjects to be taxed, and in laying down the rule by which to measure the contribution which each of those subjects shall make to the tax. Apportionment is therefore a matter of legislation; Cooley, Tax. 175. See 4 N. Y. 419. The same writer arranges all taxes under three classes: specific taxes, *ad valorem* taxes, and taxes apportioned by special benefit, and lays down the following general rules: (1) Though the districts are established at the discretion of the legislature, the basis of apportionment which is fixed upon must be applied throughout the district. See 25 Ill. 557; 25 Ark. 289. (2) Though the apportionment must be general, a diversity in the methods of collection violates no rule of right, and is as much admissible as a diversity in police regulations. Indeed, this may, under some circumstances, be an absolute necessity. (3) It is no objection to a tax that the rule of apportionment which has been provided for it fails in some instances, or even in many instances, of enforcement. (4) It is not to be extended to embrace persons or property outside the district. If there are any exceptions to the rule, they must stand on very special and peculiar reasons. (5) Although exemptions may be made, special and invidious discriminations against individuals are illegal.

It has been said that perfect equality in the assessment of taxes is unattainable, and that approximation to it is all that can be had. It is only when statutes are passed which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges, that courts can interpose and declare such enactments void; 5 Allen, 426; see 57 Penn. 433; 19 *id.* 258; 73 *id.* 370; 3 Bland, Ch. 186.

The constitution of Illinois provides that taxation shall be uniform, and uniform as to the class upon which it operates; under these provisions a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals; 92 U. S. 575. This case further held that the capital stock, franchises, and all the real and

personal property of corporations are justly liable to taxation in the place where they do business and by the state which creates them; and a rule which ascertains the value of all this by ascertaining the cost value of the funded debt and of the shares of the capital stock as the basis of assessment is probably as fair as any other, all modes being more or less imperfect.

A constitutional provision to the effect that taxation shall be uniform is met by taxation which is uniform among all persons engaged in the same business; 14 La. An. 318. Such provisions are usually held not to apply to municipal assessments; see Dill. Mun. Corp. § 746 *et seq.*

Taxes may be levied upon occupations, even to the extent of duplicating the burden to the one who pays it, as by taxing both a merchant's stock and his gross sales; Cooley, Tax. 385. Taxes on the privilege of following an occupation are usually imposed by way of a license, which is a prerequisite to the right to carry on the business. There is a distinction between a license granted as a condition precedent before a thing can be done and a tax assessed on the business which that license may authorize one to engage in; 50 Ga. 530; 42 Ga. 596.

Such taxes have been laid on bankers, auctioneers, lawyers, 12 Mo. 268; 23 Gratt. 464; 4 Tex. App. 312; 17 Fla. 169; s. c. 35 Am. Rep. 93; clergymen, 29 Penn. 226; Peddlers, etc. See 5 Wall. 462 as to federal license taxes.

Municipal assessments made for local improvements, though resting for their foundation upon the taxing power, are distinguishable in many ways from taxes levied for general state or municipal purposes. A local assessment upon the property benefited by a local improvement may be authorized by the legislature, but such an assessment must be based upon benefits received by the property owner over and above those received by the community at large. The legislature may make provision for ascertaining what property will be specially benefited and how the benefits shall be apportioned. The assessments may be made upon all the property specially benefited according to the exceptional benefit which each parcel of property actually and separately receives. Where the property is urban and plotted into blocks with lots of equal depth, the frontage rule of assessment is generally, but not always, a competent one for the legislature to provide. This rule is, in the long run, a just one, especially as to sidewalks, sewers, grading and paving. (See 30 Mich. 24; but see, *contra;* 82 Penn. 360; s. c. 22 Am. Rep. 760; 9 Heisk. 349.) The legislature may, under some circumstances, authorize the assessment of the lots benefited, in proportion to their area (but see 35 Mich. 155). Whether it is competent for the legislature to declare that the whole of an improvement of a public nature shall be assessed upon the abutting property, and other property in the vicinity, is in doubt. The earlier cases so held; but since many state constitutions have made provision for equality of taxation, several courts have held that the cost of a local improvement can be assessed upon particular property only to the extent that it is especially and particularly benefited, and that as to the excess, it must be borne by the public. See 82 Penn. 360; 69 *id.* 352; 18 N. J. Eq. 519. This whole subject is fully treated by Judge Dillon in his work on Municipal Corporations, where he summarizes the subject as above.

As to *exemptions* from taxation: In cases where there is no constitutional provision such as exists in many of the states, Judge Cooley (Taxation, 145) deduces these rules: (1) The general right to make exemptions is involved in the right to apportion taxes, and must be understood to exist wherever it is not forbidden. See 73 Penn. 448; 27 Mo. 464; 24 Ind. 391. (2) Exemptions thus granted on considerations of public policy may be recalled whenever the legislative view of public policy shall have changed. See 24 How. 300; 13 Wall. 373; 47 Cal. 222; 15 *id.* 454. (3) The intention to exempt must in any case be expressed in clear and unambiguous terms. See 53 Penn. 219; 47 N. Y. 501; 49 Mo. 490; 104 Mass. 470. (4) All exemptions are to be strictly construed; 18 Wall. 225.

The courts do not favor exemptions of property; 76 N. Y. 64. Where the constitution provided that the legislature might exempt from taxation "institutions of purely public charity," it was held that the phrase did not necessarily refer to institutions solely controlled by the state, but extended to private institutions of purely public charity and not administered for private gain; and that the essential features of a public use are that it is not confined to privileged individuals, but is open to the indefinite public; 86 Penn. 306. The residence of a clergyman is not exempt as a "building for religious worship" because it contains one room set apart as a religious chapel; 12 R. I. 19; s. c. 34 Am. Rep. 597. See, generally, Burroughs, Taxation; Blackwell, Tax Titles.

TAX DEED. An instrument whereby the officer of the law undertakes to convey the title of the rightful proprietor to the purchaser at the tax sale, or sale of the land for non-payment of taxes.

This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government or deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have

performed every duty which the law imposed upon them, every condition essential in its character, then the deed becomes conclusive evidence of the title in the grantee, according to its extent and purport. See Blackw. Tax Titles, 430; 2 Washb. R. P. 542.

TAX SALE. A sale of lands for the non-payment of taxes assessed thereon.

The power of sale does not attach until every prerequisite of the law has been complied with; 9 Miss. 627. The regularity of the anterior proceedings is the basis upon which it rests. Those proceedings must be completed and perfected before the authority of the officer to sell the land of the delinquent can be regarded as consummated. The land must have been duly listed, valued, and taxed, the assessment roll placed in the hands of the proper officer with authority to collect the tax, the tax demanded, all collateral remedies for the collection of the tax exhausted, the delinquent list returned, a judgment rendered when judicial proceedings intervene, the necessary precept, warrant, or other authority delivered to the officers intrusted with the power of sale, and the sale advertised in due form of law, before a sale can be made; Blackw. Tax Titles, 294; 4 Wheat. 78; 6 *id.* 119; 7 Cow. 88; 6 Mo. 64; 12 Miss. 627; 5 S. & R. 332.

There are important details connected with the auction itself and the duties of the officer intrusted with the conducting thereof.

The sale must be a *public*, and not a *private*, one. The sale must take place at the precise time fixed by the law or notice, otherwise it will be void.

It is equally important that the sale should be made at the *place* designated in the advertisement.

The sale to be valid must be made to the "highest bidder," which ordinarily means the person who offers to pay for the land put up the largest sum of money. This is the rule in Pennsylvania; but in most of the states the highest bidder is he who will pay the taxes, interest, and costs due upon the tract offered for sale for the least quantity of it.

The sale must be for cash.

Where a part of the land sold is liable to sale and the residue is not, the sale is void *in toto*.

The sale must be according to the parcels and descriptions contained in the list and the other proceedings, or it cannot be sustained.

When a tract of land is assessed against tenants in common, and one of them pays the tax on his share, the interest of the other may be sold to satisfy the residue of the assessment.

Where several parcels of land belonging to the same person are separately assessed, each parcel is liable for its own specific tax and no more.

The quantity of land that may be sold by the officer depends upon the phraseology of each particular statute.

Where, after an assessment is made, the county in which the proceedings were had is divided, the collector of the old county has power to sell land lying in the territory in the newly created county; 4 Yerg. 307; 11 How. 414; 24 Me. 283; 13 Ill. 253; 9 Ohio, 43; 13 Pick. 492; 21 N. H. 400; 9 W. & S. 80.

TAXATION. The process of taxing or imposing a tax. Webster, Dict.

In Practice. Adjustment. Fixing the amount: *e. g.* taxation of costs. 3 Chitty, Gen. Pr. 602.

TAXATION OF COSTS. In Practice. Fixing the amount of costs to which a party is entitled.

It is a rule that the jury must assess the damages and costs separately, so that it may appear to the court that the costs were not considered in the damages; and when the jury give costs in an amount insufficient to answer the costs of the suit, the plaintiff may pray that the officer may tax the costs, and such taxation is inserted in the judgment. This is said to be done *ex assensu* of the plaintiff, because at his prayer. Bacon, Abr. *Costs* (K). The costs are taxed in the first instance by the prothonotary or clerk of the court. See 2 Wend. 244; Harp. 326; 1 Pick. 211. A bill of costs, having been once submitted to such an officer for taxation, cannot be withdrawn from him and referred to another; 2 Wend. 252.

TEAMSTER. One who drives horses in a wagon for the purpose of carrying goods for hire. He is liable as a common carrier. Story, Bailm. § 496. See CARRIER.

TECHNICAL. That which properly belongs to an art.

In the construction of contracts it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into or to which it relates, unless they have manifestly been understood in another sense by the parties; 2 B. & P. 164; 6 Term, 320; see CONSTRUCTION.

Words which do not of themselves denote that they are used in a technical sense are to have their plain, popular, obvious, and natural meaning; 6 W. & S. 114.

The law, like other professions, has a technical language. "When a mechanic speaks to me of the instruments and operations of his trade," says Mr. Wynne, Eunom. Dial. 2, s. 5, "I shall be as unlikely to comprehend him as he would me in the language of my profession, though we both of us spoke English all the while. Is it wonderful, then, if in systems of law, and especially among the hasty recruits of commentators, you meet (to use Lord Coke's expression) with a whole army of words that cannot defend themselves in a grammatical war? Technical language, in all cases, is formed from the most intimate knowledge of any art. One word stands for a great many, as it is always to be resolved into many ideas by definitions. It is, therefore, unintelligible because it is concise, and it is useful for the same reason." See LANGUAGE; WORDS.

TEIND COURT. In Scotch Law. A court which has jurisdiction of matters relating to *teinds*, *q. v.*

TEINDS. In Scotch Law. Tithes.

TELEGRAPH. An apparatus, or a process for communicating rapidly between distant points, especially by means of preconcerted visible signals representing words or ideas, or by means of words and signs transmitted by electro-magnetism. Webster, Dict. The term, as generally used, applies distinctively to the electro-magnetic telegraph. And it is in the operation of this instrument by incorporated companies that the principal legal questions upon the subject of telegraphs have arisen.

In the United States all telegraph lines are operated by companies, either under the authority of general laws, or by express charter; Scott & J. Telegr. § 3. Telegraph companies are private corporations deriving their franchise from the grant of the legislature; when the grant has been accepted, a contract exists between the state on the one part and the company on the other; 4 Wheat. 518; 22 Cal. 398. Exclusive franchises may be granted, but will not be implied; 11 Pet. 420; 11 Leigh, 42. By statute, telegraph companies are authorized to construct their lines upon any public road or highway, and across navigable streams, but so as not to interfere with their public use or navigation; 46 Me. 483. The telegraph is a public use authorizing the exercise of the right of eminent domain; 43 N. J. L. 381. Under the general police power, municipal corporations may regulate the manner in which the lines are to be constructed in cities, so as not to interfere with the comfort and safety of the inhabitants; Scott & J. Telegr. § 54. But the power of the municipality is to regulate, not to prohibit, and in the absence of evidence that a proposed method of laying the wires by a company will impede or endanger the use of the streets by the public, a court of equity will enjoin the town from interfering with the wires; 19 Am. L. Reg. N. S. 325. Unless under the sanction of legislative enactment the erection of telegraph posts or the laying of tubes in any highway is a nuisance at common law; 9 Cox, C. C. 174; 30 Beav. 287; 21 Alb. L. J. 44. It has been generally held that the obligations of telegraph companies are not the same as those of common carriers of goods; 41 N. Y. 544; 45 Barb. 274; 18 Md. 341; 15 Mich. 525; see Laws. Carr. 3; but this language has been thought to be too broad, and it has been said that these companies are common carriers of messages, subject to all the rules which are in their nature applicable to all classes of common carriers; Shearm. & R. Negligence, § 554. The better opinion would seem to be that since these companies perform a *quasi*-public employment, under obligations analogous to those of common carriers, the rules governing the latter should be applied to them, but modified to meet the changed conditions of the case; 1 Daly, 547; 35 Penn. 298; 13 Allen, 226; 58 Ga. 433. They were held to be common carriers in 17 C. B. 3; 13 Cal. 422.

Due and reasonable care is required of telegraph companies in the performance of their duties; 13 Allen, 226; 78 Penn. 238; 48 N. Y. 132; 15 Mich. 525; and the necessity for such care is made the greater by the delicacy of the instrument and the skill required to manage it; 15 Mich. 525; 48 N. Y. 132; 60 Ill. 421.

Telegraph companies may limit their liability by notice to the sender of the message; 35 Ind. 429; 74 Ill. 168; 30 How. Pr. 413; 113 Mass. 299; 17 C. B. 3; 13 Cent. L. J. 475; 14 *id.* 386. A company may make reasonable rules relative to its business and thereby limit its liability. A rule that the company will not be responsible for the correct transmission of despatches, beyond the amount received therefrom, unless repeated at an additional expense, is reasonable; 11 Neb. 87; but see 25 Alb. L. J. 478 (S. C. of Ga.). But they cannot by any device avoid liability for the consequences of gross negligence or fraud of their agents; 33 Wisc. 558; 34 *id.* 471; 37 Mo. 472.

The current of authority favors the rule that the usual conditions in the blanks of telegraph companies exempt them only from the consequences of errors arising from causes beyond their control, whether the message be repeated or unrepeated; 6 So. L. Rev. 335; 78 Penn. 238; 27 Iowa, 433; 1 Col. 230; 5 S. C. 358; 17 Wall. 357; 95 U. S. 655; 2 Am. L. Rev. 615. Notice of regulations must be brought home to the sender of the despatch, if they are to be regarded as incorporated in his contract; 1 Daly, 547. His signature to the printed conditions is sufficient evidence of knowledge, and he will not be heard to say that he did not read them; 113 Mass. 299; 15 Mich. 525.

Telegraph companies are not allowed to show any preference in the transmission of despatches, except as regulated by statute; 23 Ind. 377; 56 Barb. 46. They may refuse to send obscene messages, but they cannot judge of the good or bad faith of the senders in the use of language not in itself immoral; 57 Ind. 495.

In England, it is held that the receiver of a message, not being party to the contract for despatching it, can claim no rights under it; L. R. 4 Q. B. 706; 3 C. P. Div. 1; but in the United States the right of action in such cases has been conceded; 1 Am. L. Reg. 685; and this right has been based upon the "misfeasance" of the company upon which the receiver acted to his injury; 35 Penn. 298; 52 Ind. 1; 6 So. L. Rev. 344.

Telegraph companies are bound to receive and transmit messages from other companies, but are not held responsible for their defaults; 45 N. Y. 744; 41 *id.* 544.

A railroad company cannot grant a telegraph company the exclusive right to establish telegraph lines along its way, such contracts being void as in restraint of trade; 11 Fed. Rep. 1.

Employés of telegraph companies cannot refuse to answer questions as to messages

transmitted by them; and they must, if called upon, produce such messages; 20 Law Times, N. S. 421; an operator may be required to testify to the contents of a telegram addressed and delivered to a defendant on trial under indictment; 58 Me. 267; 7 West Va. 544; 3 Dillon, 567. And even when a statute forbids the divulging of the contents of a telegram, it has been held not to apply when the testimony of an operator is required in a court of justice; 2 Pars. Eq. Cas. 274. See Allen, Tel. Cas. 496, n. The power of the court to compel the local manager of a company to search for and produce private telegrams has been enforced in Missouri by *subpœna duces tecum*, notwithstanding a statute similar to that referred to above; 8 Cent. L. J. 378. These decisions have been severely criticized, but have not been overruled; Cooley, Const. Lim. 387; 18 Am. L. Reg. N. S. 65. See 5 So. L. Rev. 473.

In estimating the measure of damages for the failure to transmit a message properly, the general rules upon the subject of damages *ex contractu* are applied; 98 Mass. 232; 18 U. C. Q. B. 60; 15 Gratt. 122. Unless the despatch shows on its face the importance of the matter to which it relates, or information on this point is communicated to the company's agents, only nominal damages can be recovered for the default of the company; 9 Bradw. 283; 29 Md. 232; 21 Minn. 155; 45 N. Y. 744; 16 Nev. 222. Orders to agents to buy and sell stocks, though briefly expressed, have been held to impart information sufficiently as to their importance; 55 Penn. 262; 60 Ill. 421; 44 N. Y. 263; *contra*, 29 Md. 232. And the company is liable for the losses sustained, the fluctuations in the market being the measure of damages; *supra*. See also 41 Iowa, 458; 27 La. An. 49. If the default of the company arises from the dishonesty of some third person, the company will not be held liable for such remote damages; 30 Ohio St. 555; 60 N. Y. 198.

A company is bound to use reasonable efforts to ascertain where the persons are to whom a message is sent and to deliver the same; 9 Bradw. 283.

A contract may be made and proved in court by telegraphic despatches; 20 Mo. 254; 41 N. Y. 544; 103 Mass. 327; L. R. 6 Ex. 7; and the same rules apply in determining whether a contract has been made by telegrams as in cases of a contract made by letter; 36 N. Y. 307; 31 U. C. Q. B. 18; 4 Dill. 431. Messages are instruments of evidence, and are governed by the same rules as other writings; Scott & J. Telegr. § 340; the original message is said to be the best evidence: if this cannot be produced, then a copy should be produced; *id.* § 341; see 40 Wisc. 440. As to which is the original, it is said to "depend upon which party is responsible for its transmission across the line, or, in other words, whose agent the telegraph company is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination;" 29 Vt. 140. See 36 N. Y. 307; 40 Wisc. 440. See, on this subject, an article in 14 C. L. J. 262.

The signature of a clerk of a telegraph company to a despatch was held to be sufficient, under the Statute of Frauds, where the original instructions had been signed by the party; L. R. 5 C. P. 295; see 6 U. C. C. P. 221.

By act of congress of July 24, 1866, any telegraph company organized under the laws of any state of the Union is granted the right under certain restrictions to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, and over, under, or across navigable streams or waters, provided that they do not obstruct their navigation, or interfere with ordinary travel; R. S. § 5263. This act, so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to execute the powers of congress over the postal service; 96 U. S. 1. Since this act a railroad company cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other companies which have accepted the provisions of the said act, and the lines of which would not disturb or obstruct the business of the company to which the use has first been granted; 19 Am. L. Reg. N. S. 173.

As to *submarine cables*, in international law, see 15 Am. L. Rev. 211.

See generally Allen, Telegraph Cases; Scott & Jarnagin, Telegraphs, Shearman & Redfield, Negligence; COMMERCE.

TELEPHONE. An instrument for transmitting spoken words.

In law the owners and operators of telephones are in much the same position as telegraph companies. They have been called "common carriers of articulate speech," that is to say, even though their liabilities do not in all respects resemble the liabilities of ordinary common carriers, yet, like common carriers, they are engaged in a semi-public occupation, and have duties and privileges accordingly; 24 Alb. L. J. 283; 22 *id.* 363. See TELEGRAPH.

It has been held that a telephone company must transmit despatches impartially for all who choose to send them; and may make no discriminations in favor of or against particular individuals. So a contract between a telephone company and the owner of patented telephone instruments, that in the use of such instruments by the telephone company discriminations should be made against certain

telegraph companies, was declared void; 36 Ohio St. 296; 22 Alb. L. J. 363. But see 25 *id.* 224.

In England, a message sent by Edison's telephone has been held to come within the statute (32 & 33 Vict. c. 73, s. 4) placing the transmission of telegraphic messages and telegrams under the control of the postmaster-general, though the telephone was not invented or contemplated in 1869; 6 Q. B. Div. 244; s. c. 29 Moak, Engl. Rep. 602. As to making affidavit by means of the telephone, see 26 Alb. L. J. 326.

TELLER (*tallier*, one who keeps a tally). An officer in a bank or other institution. A person appointed to receive votes. A name given to certain officers in the English exchequer.

The duties of tellers in banks in this country consist of the receiving of all sums of money paid into the bank, and the paying of all sums drawn out. In large institutions there are generally three,—the first or paying teller, the second or receiving teller, and the third or note teller. It is the duty of the first teller to pay all checks drawn on the bank, and, where the practice of certification is in use, to certify those that are presented for that purpose. The position ranks next in importance to that of cashier. The authority of a teller to certify that a cheque is "good," so as to bind the bank, has been denied; 9 Metc. (Mass.) 306; but is supported by the weight of decisions; 39 Penn. 92; 52 N. Y. 96; Morse, Bk. 201. The second teller receives the deposits made in the bank, and also payment for bills that may be drawn on other places. The third teller receives payment of bills and notes held by the bank. The receiving teller often does the duty of the note teller. Sewell, Bank.

TEMPLE. See INNS OF COURT.

TEMPORALITIES (L. Lat. *temporalia*). Revenues, lands, tenements, and lay fees which bishops have from livery of the king, and in virtue of which they sit in parliament. 1 Rolle, Abr. 881.

TEMPORALTY. The laity.

TEMPORARY. That which is to last for a limited time. See STATUTE.

TEMPORIS EXCEPTIO (Lat.). **In Civil Law.** A plea of lapse of time in bar of an action, like our statute of limitations. Dig. *de diversis temporalibus actionibus.*

TEMPUS (Lat.). **In Civil and Old English Law.** Time in general. A time limited; a season: e. g. *tempus pessonis*, mast time in the forest.

TEMPUS CONTINUUM (Lat.). **In Civil Law.** A period of time which runs continually having once begun, feast-days being counted as well as ordinary days, and it making no difference whether the person against whom it runs is present or absent. Calvinus.

TEMPUS UTILE (Lat.). **In Civil Law.** A period of time which runs beneficially: *i. e.* feast-days are not included, nor does it run against one absent in a foreign country, or on business of the republic, or detained by stress of weather. But one detained by sickness is not protected from its running; for it runs where there is power to act by an agent as well as where there is power to act personally; and the sick man might have deputed his agent. Calvinus.

TENANCY. The state or condition of a tenant; the estate held by a tenant.

TENANT (Lat. *teneo*, *tenere*, to hold). One who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. In a popular sense, he is one who has the temporary use and occupation of lands or tenements which belong to another, the duration and other terms of whose occupation are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant. See LANDLORD AND TENANT; 5 M. & G. 54.

TENANTS IN COMMON are such as hold lands and tenements by several and distinct titles, and not by a joint title, but occupy in common, the only unity recognized between them being that of possession. They are accountable to each other for the profits of the estate; and if one of them turns another out of possession, an action of ejectment will lie against him. They may also have reciprocal actions of waste against each other; 2 Bla. Com. 191. See ESTATE IN COMMON; 7 Cruise, Dig.; Bac. Abr. *Joint Tenants, and Tenants in Common;* Comyns, Dig. *Abatement* (E 10, F 6), *Chancery* (3 V 4), *Devise* (N 8), *Estates* (K 8, R 2); 1 Vern. Ch. 353; Will. R. Pr. *137; 47 Conn. 474.

TENANT BY THE CURTESY at common law is a species of life tenant who, on the death of his wife seized of an estate of inheritance, after having issue by her which is capable of inheriting her estate, holds her lands for the period of his own life: after the birth of such a child, the tenant is called tenant by the curtesy *initiate;* Co. Litt. 29 *a*; 2 Bla. Com. 126; but to *consummate* the tenancy the marriage must be lawful, the wife must have possession, and not a mere right of possession, the issue must be born alive, during the lifetime of the mother, and the husband must survive the wife. Tenancy by curtesy has been adopted as a common law estate in most of the United States, although modified in many of them by statute; 1 Washb. R. P. 163. Thus, in Pennsylvania, the right to curtesy is by the act of 8th of April, 1833, given to the husband "although there be no issue of the marriage;" Will. R. P. *229 n. 2. In some states, *e. g.* Louisiana, Indiana, and Michigan, no curtesy is allowed. See CURTESY.

TENANT OF THE DEMESNE. One who is tenant of a mesne lord: as, where A is ten-

ant of B, and C of A; B is the lord, A the mesne lord, and C tenant of the demesne. Hamm. N. P. 392, 393.

TENANT IN DOWER is another species of life tenant, occurring where the husband of a woman is seized of an estate of inheritance and dies, and the wife thereby becomes entitled to hold the third part of all the lands and tenements of which he was seized at any time during the coverture to her own use, for the term of her natural life. See DOWER; 2 Bla. Com. 129; Comyns, Dig. *Dower* (A).

The right of dower has been adopted, in a somewhat modified form, throughout the United States, and in nearly every state excepting Louisiana and Indiana it will be found to exist, substantially like the dower of the common law; 1 Washb. R. P. p. 187. Dower has substantially defeated in England under modern statutes; Schoul. Husb. & W. 453.

TENANT IN FEE, *under the feudal law*, held his lands either immediately or derivatively from the sovereign, in consideration of the military or other services he was bound to perform. If he held directly from the king he was called a tenant in fee, *in capite*. With us, the highest estate which a man can have in land has direct reference to his duty to the state: from it he ultimately holds his title, to it he owes fealty and service, and if he fails in his allegiance to it, or dies without heirs upon whom this duty may devolve, his lands revert to the state under which he held. Subject to this qualification, however, a tenant in fee has an absolute unconditional ownership in land, which upon his death vests in his heirs; and hence he enjoys what is called an estate of inheritance; see ESTATE; 2 Bla. Com. 81; Litt. § 1; Plowd. 555; Will. R. P. *60.

JOINT-TENANTS are two or more persons to whom lands or tenements have been granted to hold in fee-simple, for life, for years, or at will. In order to constitute an estate in joint-tenancy, the tenants thereof must have one and the same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession; 2 Bla. Com. 180. The principal incident to this estate is the right of survivorship, by which upon the death of one joint-tenant the entire tenancy remains to the surviving co-tenant, and not to the heirs or other representatives of the deceased, the last survivor taking the whole estate. It is an estate which can only be created by the acts of the parties, and never by operation of law; Co. Litt. 184 *b*; 2 Cruise, Dig. 43; 4 Kent, 358; 2 Bla. Com. 179.

The policy of American law is against survivorship, and in many states it is abolished by statute, except in case of joint trustees; while in others, estates to two or more persons are held to create tenancies in common, unless expressly declared to be joint tenancies; 16 Gray, 308; 7 Mass. 131; Washb. R. P. 644.

TENANT FOR LIFE has a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event; 1 Cruise, 76. When he holds the estate by the life of another, he is usually called tenant *pur autre vie*; 2 Bla. Com. 120; Comyns, Dig. *Estates* (F 1). See ESTATE FOR LIFE; EMBLEMENTS.

TENANT BY THE MANNER. One who has a less estate than a fee in land which remains in the reversioner. He is so called because in avowries and other pleadings it is specially shown in what manner he is tenant of the land, in contradistinction to the *veray tenant*, who is called simply tenant. See VERAY.

TENANT PARAVAIL. The tenant of a tenant. He is so called because he has avails or profits of the land.

TENANT IN SEVERALTY is he who holds lands and tenements in his own right only, without any other person being joined or connected with him in point of interest during his estate therein; 2 Bla. Com. 179.

TENANT AT SUFFERANCE is he who comes into possession by a lawful demise, but after his term is ended continues the possession wrongfully by holding over. He has only a naked possession, stands in no privity to the landlord, and may, consequently, be removed without notice to quit; Co. Litt. 57 *b*; 2 Leon. 46; 3 *id.* 153; 1 Johns. Cas. 123; 4 Johns. 150, 312; 54 Penn. 86; 17 Pick. 263; Jacks. & G. Landl. & T. § 471.

TENANT IN TAIL is one who holds an estate in fee, which by the instrument creating it is limited to some particular heirs, exclusive of others; as, to the heirs of *his body* or to the heirs, *male* or *female*, of his body. The whole system of entailment, rendering estates inalienable, is so directly opposed to the spirit of our republican institutions as to have become very nearly extinct in the United States. Most of the states at an early period of our independence passed laws declaring such estates to be estates in fee-simple, or provided that the tenant and the remainderman might join in conveying the land in fee-simple. In New Hampshire, Chancellor Kent says, entails may still be created; while in some of the states they have not been expressly abolished by statute, but in practice they are now almost unknown. See ENTAILS; 2 Bla. Com. 113; 2 Kent; 2 Washb. R. P.

TENANT AT WILL is where a person holds rent-free by permission of the owner, or where he enters under an agreement to purchase, or for a lease, but has not paid rent. Formerly all leases for uncertain periods were considered to be tenancies at will merely; but in modern times they are construed into tenancies from year to year; and, in fact, the general language of the books now is that the former species of tenancy cannot exist without an express agreement to that effect; 8 Cow. 75; 4 Ired. 291; 3 Dana, 66; 12

Mass. 325; 23 Wend. 616; 12 N. Y. 346; but see Wood. Landl. & T. 30, n. 1. The great criterion by which to distinguish between tenancies from year to year, and at will, is the payment or reservation of rent; 5 Bing. 361; 2 Esp. 718.

A tenancy at will must always be at the will of either party, and such a tenant may be ejected at any time, and without notice, unless notice is rendered necessary by statute, as in Massachusetts and other states; Wood. Landl. & T. 51; 10 Gray, 290; but as soon as he once pays rent he becomes tenant from year to year; 1 W. & S. 90; Tayl. Land. & T. § 56; Co. Litt. 55; 2 Bla. Com. 145.

TENANT FOR YEARS is he to whom another has let lands, tenements, or hereditaments, for a certain number of years, agreed upon between them, and the tenant enters thereon. Before entry he has only an inchoate right, which is called an *interesse termini;* and it is of the essence of this estate that its commencement as well as its termination be fixed and determined, so that the lapse of time limited for its duration will, *ipso facto*, determine the tenancy; if otherwise, the occupant will be tenant from year to year, or at will, according to circumstances. See LEASE; Tayl. Landl. & T. § 54; 2 Bla. Com. 140; 28 Mo. 65; 26 N. J. L. 565.

TENANT FROM YEAR TO YEAR is where lands or tenements have been let without any particular limitation for the duration of the tenancy: hence any general occupation with permission, whether a tenant is holding over after the expiration of a lease for years, or otherwise, becomes a tenancy from year to year; 3 Burr. 1609; 3 B. & C. 478; 9 Johns. 330; 3 Zab. 311. The principal feature of this tenancy is that it is not determinable even at the end of the current year, unless a reasonable notice to quit is served by the party intending to dissolve the tenancy upon the other; 4 Cow. 349; 11 Wend. 616; 5 Bingh. 185. See LANDLORD AND TENANT; NOTICE TO QUIT; and as to this latter title, 15 C. L. J. 322.

TENANT RIGHT. In leases from the crown, corporations, or the church, it is usual to grant a further term to the old tenants in preference to strangers; and, as this expectation is seldom disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term; and this interest is called the *tenant right*. Bacon, Abr. *Leases and Terms for Years* (U).

TENDER (Lat. *tendere*, to extend, to offer). An offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer.

Legal tender, money of a character which by law a debtor may require his creditor to receive in payment, in the absence of any agreement in the contract or obligation itself. See LEGAL TENDER.

In Contracts. It may be either of money or of specific articles.

Tender of money must be made by some person authorized by the debtor; Co. Litt. 206; 2 Maule & S. 86; to the creditor, or to some person properly authorized, and who must have capacity to receive it; 1 Camp. 477; Dougl. 632; 5 Taunt. 307; 4 B. & C. 29; 14 S. & R. 307; 11 Me. 475; 1 Gray, 600; 13 La. An. 529; but necessity will sometimes create exceptions to this rule; thus any one may make a tender for an idiot; 1 Inst. 206 b; an uncle, although not appointed guardian, has been permitted to make a tender on behalf of an infant whose father was dead; 1 Rawle, 408; in lawful coin of the country; 5 Co. 114; 13 Mass. 235; 4 N. H. 296; or paper money which has been legalized for this purpose; 2 Mas. 1; as, U. S. treasury notes, or "greenbacks;" 12 Wall. 457; 27 Ind. 426; or foreign coin made current by law; 2 Nev. & M. 519; but a tender in bank-notes will be good if not objected to on that account; 2 B. & P. 526; 9 Pick. 539; 1 Johns. 476; 1 Bay. 115; 1 Rawle, 408; 6 Harr. & J. 53; 7 Mo. 556; 6 Ala. N. S. 226; or by a check; Dowl. Pr. Cas. 442; 7 Ohio, 257. As to what has been held objection, see 2 Caines, 116; 13 Mass. 235; 5 N. H. 296; 10 Wheat. 333. The exact amount due must be tendered; 3 Camp. 70; 6 Taunt. 336; 5 Mass. 365; 2 Conn. 659; 41 Vt. 66; 29 Iowa, 480; though more may be tendered, if the excess is not to be handed back; 5 Co. 114; 3 Term, 683; 4 B. & Ad. 546; and asking change does not vitiate unless objection is made on that account; 1 Camp. 70; 5 Dowl. & R. 289; and the offer must be unqualified; 1 Camp. 131; 3 *id.* 70; 4 *id.* 156; 1 M. & W. 310; 9 Metc. 162; 20 Wend. 47; 18 Vt. 224; 1 Wisc. 141.

When a larger sum than is due is tendered, it is not necessary that the debtor pay or keep good the whole amount; for, although the tender of money is supposed to be an admission by the debtor that the entire sum tendered is due and payable, yet it is not *conclusive* evidence to that effect; 24 Ind. 250. But where tender was made after suit brought, and the amount supposed by defendant to be due was paid into court, it was decided that the full amount must be paid over to the plaintiff, notwithstanding a much less sum was found by arbitrators to be due; 82 Penn. 64.

It is said that the amount must be stated in making the offer; 30 Vt. 577. It must be made at the *time* agreed upon; 5 Taunt. 240; 7 *id.* 487; 1 Saund. 33 *a*, n.; 5 Pick. 187, 240; 8 Wend. 562; 4 Ark. 450; but may be given in evidence in mitigation of damages, if made subsequently, before suit brought; 1 Saund. 33 *a*. n.; statutes have been passed in many of the states, permitting the debtor to make a tender at any time before trial, of

the amount he admits to be due, together with all costs accrued up to date of tender, and compelling plaintiff, in case he do not recover more than the sum tendered, to pay all costs subsequently incurred; 27 Am. L. Reg. 747. In Pennsylvania, by statute of 1705, in case of a tender made before suit, in the event of a suit, the amount tendered must be paid into court under a rule; 10 S. & R. 14; otherwise, the plea of tender is a nullity. If so paid tender is a good plea in bar, and if followed up, protects the defendant; 66 Penn. 158. Tender may be made after suit brought by paying the amount tendered into court with the costs up to the time of payment; 1 T. & H. Pr. 744. At common law the tender of a mortgage debt on the day it falls due and at the appointed place discharges the mortgage; but if made after the maturity of the debt, it must be kept good, in order to have that effect; 86 Ill. 431; s. c. 29 Am. Rep. 41, n.; 5 Pick. 240; 27 Me. 237; 50 Cal. 650; 34 N. J. L. 496; but in New York and Michigan mere tender is sufficient to discharge the mortgage; 26 Wend. 541; 21 N. Y. 343; 70 *id.* 553; 12 Mich. 270; 13 *id.* 303. See 27 Am. L. Reg. 182, n.; 2 Jon. Mort. §§ 886–903; at a suitable hour of the day, during daylight; 7 Me. 31; 19 Vt. 587; at the *place* agreed upon, or, if no place has been agreed upon, wherever the person authorized to receive payment may be found; 2 M. & W. 223; 2 Maule & S. 120; and, in general, all the conditions of the obligation must be fulfilled. The money must have been actually produced and offered, unless the circumstances of the refusal amount to a waiver; 3 C. & P. 342; 8 Me. 107; 15 Wend. 637; 6 Md. 37; 6 Pick. 356; 1 Wisc. 141; or at least be in the debtor's possession, ready for delivery; 5 N. H. 440; 7 *id.* 535; 3 Penn. 381. As to what circumstances may constitute a waiver, see 2 Maule & S. 86; 1 Tyl. 381; 1 A. K. Marsh. 321. Presence of the debtor with the money ready for delivery is enough, if the creditor be absent from the appointed place at the appointed time of payment; 4 Pick. 258; or if the tender is refused; 3 Penn. 381; 18 Conn. 18.

Tender of specific articles must be made to a proper person, by a proper person, at a proper time; 2 Pars. Contr. 158. The *place* of delivery is to be determined by the contract, or, in the absence of specific agreement, by the situation of the parties and circumstances of the case; 7 Barb. 472; for example, at the manufactory or store of the seller on demand; 2 Denio, 145; at the place where the goods are at the time of sale; 7 Me. 91; 3 W. & S. 295; 5 Cow. 518; 6 Ala. N. S. 326; Hard. 80, n.; 1 Wash. C. C. 328; the creditor's place of abode, when the articles are portable, like cattle, and the time fixed; 4 Wend. N. Y. 377; 2 Penn. 63; 1 Me. 120. When the goods are cumbrous, it is presumed that the creditor was to appoint a place; 5 Me. 192; 3 Dev. 78; or, if he fails to do so upon request, the debtor may appoint a place, giving notice to the creditor, if possible; 13 Wend. 95; 1 Me. 120. Whether a request is necessary if the creditor be without the state, see 5 Me. 192; 2 Greenl. Ev. § 611. The articles must be set apart and distinguished so as to admit of identification by the creditor; 4 Cow. 452; 7 Conn. 110; 1 Miss. 401. It must be made during daylight, and the articles must be at the place till the last hour of the day; 5 Yerg. 410; 3 Wash. C. C. 140; 19 Vt. 587; 5 T. B. Monr. 372; unless waived by the parties. See 2 Scott, N. S. 485.

In Pleading. If made before action brought; 5 Pick. 106; 3 Bla. Com. 303; tender may be pleaded in excuse; 2 B. & P. 550; 5 Pick. 291; it must be on the exact day of performance; 5 Taunt. 240; 1 Saund. 33 *a*, n. It cannot be made to an action for general damages when the amount is not liquidated; 3 Sharsw. Bla. Com. 303, n.; 2 Burr. 1120; 19 Vt. 592; as, upon a *contract;* 2 Bos. & P. 234; *covenant* other than for the payment of money; 7 Taunt. 486; 1 Ld. Raym. 566; *tort;* 2 Stra. 787; or *trespass;* 2 Wils. 115. It may be pleaded, however, to a *quantum meruit;* 1 Stra. 576; accidental or involuntary *trespass*, in the United States; 13 Wend. 390; 2 Conn. 659; 36 Me. 407; *covenant* to pay money; 7 Taunt. 486.

The effect of a tender is to put a stop to accruing damages and interest, and to entitle the defendant to judgment for his costs; Chit. Contr. ch. 5, sec. 8; 3 Bingh. 290; 9 Cow. 641; 3 Johns. Cas. 243; 17 Mass. 389; 10 S. & R. 14; 9 Mo. 697; and it may be of effect to prevent interest accruing, though not a technical tender; 5 Pick. 106.

It admits the plaintiff's right of action as to the amount tendered; 1 Bibb, 272; 14 Wend. 221; 2 Dall. 190. The benefit may be lost by a subsequent demand and refusal of the amount due; 1 Camp. 181; 5 B. & Ad. 630; Kirb. Conn. 293; 24 Pick. 168; but not by a demand for more than the sum tendered; 22 Vt. 440; or due; 3 Q. B. 915; 11 M. & W. 356. See 26 Am. L. Reg. 745, and *supra.*

The law of tender on the Continent of Europe is quite different from that of England, the debtor being allowed to make payment to his creditor, by depositing the amount which he admits to be due, in a special department of the public treasury, termed Caisse des Consignations. This is considered as an actual payment, and the money thus deposited bears interest at a rate fixed by the state; Code Civ. arts. 1257 *et seq.* This system is derived from the Roman law. Benj. Sales, § 754.

TENDER OF AMENDS. See AMENDS.

TENEMENT (from Lat. *teneo*, to hold). Every thing of a permanent nature which may be holden.

House, or homestead. Jacob. Rooms let in houses.

In its most extensive signification, tenement comprehends every thing which may be *holden*, provided it be of a *permanent* nature; and not

only lands and inheritances which are holden, but also rents and profits *à prendre* of which a man has any frank-tenement, and of which he may be seized *ut delibero tenemento*, are included under this term; Co. Litt. 6 *a*; 2 Bla. Com. 17; 1 Washb. R. P. 10. But the word *tenements* simply, without other circumstances, has never been construed to pass a fee; 10 Wheat. 204. See 4 Bingh. 293; 1 Term, 358; 3 *id.* 772; 1 B. & Ad. 161; Comyns, Dig. *Grant* (E 2), *Trespass* (A 2); 1 Washb. R. P. 10.

Its original meaning, according to some, was house or homestead. Jacob. In modern use it also signifies rooms let in houses. Webster, Dict.; 10 Wheat. 204; 104 Mass. 95; 107 *id.* 212.

Bracton says that tenements acquired by a villein were as to the lord in the same condition as chattels, because bought with the chattels which rightfully belong to the lord. Bracton, 26.

TENEMENTAL LAND. Land distributed by a lord among his tenants, as opposed to the demesnes which were occupied by himself and his servants. 2 Bla. Com. 90.

TENENDAS (Lat.). **In Scotch Law.** The name of a clause in charters of heritable rights, which derives its name from its first words, *tenendas prædictas terras*, and expresses the particular tenure by which the lands are to be holden. Erskine, Inst. b. 2, t. 3, n. 10.

TENENDUM (Lat.). That part of a deed which was formerly used in expressing the tenure by which the estate granted was holden; but since all freehold tenures were converted into socage, the tenendum is of no further use even in England, and is therefore joined to the *habendum* in this manner,—to have and to hold. The words "to hold" have now no meaning in our deeds. 2 Bla. Com. 298. See HABENDUM.

TENERI (Lat.). **In Contracts.** That part of a bond where the obligor declares himself to be held and firmly bound to the obligee, his heirs, executors, administrators, and assigns, is called the *teneri*. 3 Call, 350.

TENET (Lat. he holds). **In Pleading.** A term used in stating the tenure in an action for waste done during the tenancy.

When the averment is in the *tenet*, the plaintiff on obtaining a verdict will recover the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in a part only, together with treble damages. But when the averment is in the *tenuit*, the tenancy being at an end, he will have judgment for his damages only. 2 Greenl. Ev. § 652.

TENNESSEE. The name of one of the United States of America. It is divided into three grand divisions: East Tennessee, that part of the state lying east of the Cumberland Mountains; Middle Tennessee, between the Cumberland Mountains on the east and the Tennessee River on the west; and West Tennessee, lying west of the Tennessee River. The state contains ninety-six counties.

It was originally a part of North Carolina. In April, 1784, the legislature of North Carolina passed an act ceding to the United States, upon certain conditions, all her territory west of the Appalachian or Alleghany Mountains. Before the cession was accepted by congress, it was repealed by another act passed in October, 1784. In the mean time, movements had been set on foot by the people to constitute themselves an independent state. They acted upon the assumed but erroneous ground that North Carolina had by the cession abdicated her sovereignty, and, as the congress had not accepted it and might not upon the conditions proposed, they were left without any regular government, and therefore had an inherent right to provide one for themselves. They consummated their design after the cession act was repealed, and gave to their new state the name of The State of Franklin.

This revolutionary state maintained its existence for about three years, when it was suppressed and the rightful dominion of North Carolina reinstated. In December, 1789, the legislature again ceded the territory to the United States; and the cession was accepted by congress by an act approved April 2, 1790. North Carolina made it a fundamental condition of the cession that the territory so ceded should be laid out and formed into a state or states, containing a suitable extent of territory, the inhabitants of which should enjoy all the privileges, benefits, and advantages set forth in the ordinance of the late congress for the government of the western territory of the United States: *provided, always*, that no regulations made or to be made by congress should tend to emancipate slaves. One of the privileges thus secured to the territory was that when the number of its inhabitants should amount to sixty thousand, it should be entitled to admission into the Union upon an equality with the original states. Under the authority of the territorial legislature, the census was taken in 1795, and, the necessary number of inhabitants being found in the territory, a convention was called, and a constitution established on February 6, 1796. The legal name of the territory while in a colonial condition was The Territory of the United States South of the River Ohio. But in the constitution the people adopted the name of The State of Tennessee.

As congress had not previously decided whether the territory should constitute one state or more than one, and had not itself authorized the enumeration of the inhabitants or the formation of a constitution, there was a strong minority against the admission of Tennessee into the Union. 1 Benton, Debates, 154. But she was admitted by an act approved June 1, 1796. Prior to this time a legislature had been elected, the state government organized, and many important laws enacted.

It was a part of the avowed object of the cession made by North Carolina to the United States to furnish "further means of hastening the extinguishment of the national debt." This object wholly failed. The land was to be first subject to the satisfaction of the claims which had originated against it under the laws of North Carolina. These claims ultimately absorbed nearly all the land that was fit for cultivation. Congress from time to time ceded the refuse land to Tennessee, and finally, by the act passed August 7, 1846, surrendered to her the last remnant to which the right of the United States had been previously reserved.

The constitution of 1796 was not submitted to the people for ratification. The authority of the convention established it as the constitution of the state. The constitution of 1834 was the work of a convention assembled in that year to revise and amend the first. It was submitted to the

people, and ratified by popular vote, in 1835. The government was reorganized in 1835–36, in accordance with its provisions. Amendments were ratified in 1853 and 1866. The present constitution was framed, submitted to the people, and ratified in 1870, and went into effect May 5, 1870.

THE LEGISLATIVE POWER. *The Legislature* is styled "the General Assembly." It consists of a senate and house of representatives. The number of senators is not to exceed one-third the number of representatives. The number of representatives is not to exceed seventy-five, until the population of the state is a million and a half, and never to exceed ninety-nine. A representative must be twenty-one years old, and a senator thirty. In all other respects their qualifications are the same. They are: citizenship of the United States, three years' residence in the state, and one year's residence in the county or district represented. They are elected by ballot, on the first Tuesday after the first Monday in November of each even year, to serve for two years. The sessions of the assembly are also biennial, commencing on the first Monday in January next ensuing the election. The governor may, on extraordinary occasions, convene the general assembly by proclamation, in which he shall state specifically the purposes for which they are convened, and they cannot enter upon any business except that for which they were called; Const. Art. III. Every male person of the age of twenty-one years, being a citizen of the United States, a resident of the state for twelve months, and of the county wherein he offers to vote for six months next preceding the day of election, may be an elector. No qualification is attached except that each voter must give satisfactory evidence to the judge of elections that he has paid the poll tax prescribed by law; Const. Art. IV. § 1. This provision has not been carried into effect by legislative enactment.

THE EXECUTIVE POWER. *The Governor* is to be thirty years of age, a citizen of the United States, and a citizen of the state seven years next before his election. The supreme executive power is vested in him. He is elected at the times and places of electing members of the general assembly, and by the same electors. A plurality of votes elects a governor or member of assembly. He holds his office for two years and until his successor is elected and qualified. He is not eligible more than six years in any term of eight. He has a negative on the acts and resolutions of the general assembly. In other respects he has the ordinary powers of the chief executive magistrate of the American states. His compensation can neither be increased nor diminished during the term for which he is elected.

A *Treasurer* and a *Comptroller* of the treasury are appointed for the state by vote of both houses of the general assembly, and hold their offices for a term of two years; Const. Art. VII. § 3.

THE JUDICIAL POWER. The judicial power is vested in one supreme court, in such inferior courts as the legislature may establish, and in the judges thereof, and in justices of the peace, and corporation courts.

The Supreme Court is composed of five judges, of whom not more than two shall reside in any one of the grand divisions of the state. Its jurisdiction is appellate only, with a few inconsiderable exceptions; Const. Art. VI.; 3 Hayw. 59; 3 Cold. 255; T. & S. Rev. S. 4094, *et seq.* Its sessions are held annually, at Knoxville, Nashville, and Jackson. The judges are elected for eight years, by the qualified voters of the state at large. They must be thirty-five years of age, and residents of the state five years before their election.

The court of general original jurisdiction is *the Circuit Court;* it also has general appellate jurisdiction. The state is divided into sixteen judicial circuits; and three terms of the court are held annually in every county in the state. The people of each circuit elect the judge thereof, for the term of eight years. The only qualifications required by the constitution are that he shall be thirty years of age, a resident of the state for five years before his election, and of the circuit or district one year. An appeal lies from every decision of the circuit court to the supreme court; Code, §§ 3155, 3172, 3176.

The Chancery Court has general original jurisdiction of all cases of an equitable nature where the demand exceeds fifty dollars; Code, § 4280. There are some cases of an equitable nature in which the circuit and county courts have concurrent jurisdiction with the chancery courts. Act of March 26, 1879, c. 97. The state is divided into twelve chancery districts, in each of which a chancellor is elected, by the people, for eight years. In nearly every county in the state two terms of the chancery court are held annually. An appeal lies to the supreme court from all its decisions.

The County Court is divided into a *Quarterly Court* and a *Quorum Court.* The quarterly court is held each quarter in each county in the state by one-half of the justices of the county, and has a police jurisdiction. The quorum court is held on the first Monday in each month in each county by three justices appointed by the quarterly court, except in some of the more populous counties where there is a county judge. The county court has jurisdiction of the probate of wills, the granting of administrations, the appointment of guardians, and the general administration of decedents' estates. There are some cases in which its jurisdiction is concurrent with that of the circuit and chancery courts; Code, §§ 4201–4205. An appeal lies from its decisions to the circuit court in all cases, and in some to the supreme court; Code, §§ 3147–3154.

Justices of the Peace have jurisdiction in cases to an extent varying from fifty to five hundred dollars, according to the nature of the demand. An appeal lies from their decisions to the circuit court. Act 1875, ch. 11.

An Attorney-General and a Reporter for the state are appointed by the judges of the supreme court for a term of eight years. An attorney for the state for any circuit or district for which a judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the state five years, and of the circuit or district one year.

By the constitution of 1796, these judicial officers were elected by the general assembly, and held their offices during good behavior. By the constitution of 1834, they were elected by the general assembly for a term of years. Since the amendment of the constitution in 1853, they have been elected by the people, as above set forth.

TENOR. A term used in pleading to denote that an exact copy is set out. 1 Chitty, Cr. Law, 235; 1 Mass. 203; 1 East, 180.

The tenor of an instrument signifies the true meaning of the matter therein contained. Cowel. In Scotland an action for proving the purport of a lost deed is called the action of proving the tenor.

In Chancery Pleading. A certified copy of records of other courts removed into chancery by certiorari. Gresl. Ev. 309.

TENSE. A term used in grammar to denote the distinction of time.

The acts of a court of justice ought to be in the present tense: as, *præceptum est*, not *præceptum fuit;* but the acts of the party may be in the perfect tense: as, *venit et protulit hic in curiâ quandam querelam suam*, and the continuances are in the perfect tense: as, *venerunt*, not *veniunt;* 1 Mod. 81.

The contract of marriage should be made in language of the present tense; 6 Binn. 405. See 1 Saund. 393, n. 1.

TENUIT (Lat. he held). A term used in stating the tenure in an action for waste done after the termination of the tenancy. See TENET.

TENURE (from Lat. *tenere*, to hold). The mode by which a man holds an estate in lands.

Such a holding as is coupled with some service, which the holder is bound to perform so long as he continues to hold.

The thing held is called a tenement; the occupant, a tenant; and the manner of his holding constitutes the tenure. Upon common-law principles, all lands within the state are held directly or indirectly from the king, as lord paramount or supreme proprietor. To him every occupant of land owes fidelity and service of some kind, as the necessary condition of his occupation. If he fails in either respect, or dies without heirs upon whom this duty may devolve, his land reverts to the sovereign as ultimate proprietor. In this country, the people in their corporate capacity represent the state sovereignty; and every man must bear true allegiance to the state, and pay his share of the taxes required for her support, as the condition upon which alone he may hold land within her boundaries; Co. Litt. 65 *a;* 2 Bla. Com. 105; 3 Kent, 487.

In the earlier ages of the world the condition of land was probably *allodial*, that is, without subjection to any superior,—every man occupying as much land found unappropriated as his necessities required. Over this he exercised an unqualified dominion; and when he parted with his ownership the possession of his successor was equally free and absolute. An estate of this character necessarily excludes the idea of any tenure, since the occupant owes no service or allegiance to any superior as the condition of his occupation. But when the existence of an organized society became desirable to secure certain blessings only by its means to be acquired, there followed the establishment of governments, and a new relation arose between each government and its citizens,—that of protection on the one hand and dependence on the other,—necessarily involving the idea of service to the state as a condition to the use and enjoyment of lands within its boundaries. This relation was of course modified according to the circumstances of particular states; but throughout Europe it early took the form of the feudal system. See ALLODIUM.

Some writers suggest that the image of a feudal policy may be discovered in almost every age and quarter of the globe; but, if so, its traces are very indistinct, and, in fact, we have nothing reliable on the subject until we come to the history of the Gothic conquerors of the Roman empire. The military occupation of the country was their established policy, and enabled them more effectually to secure their conquests. The commander-in-chief, as head of the conquering nation, parcelled out the conquered lands among his principal followers, and they in turn granted portions of it to their vassals; but all grants were upon the same condition of fealty and service. The essential element of a feudal grant was that it did not create an estate of absolute ownership, but the grantee was merely a tenant or holder of the land, on condition of certain services to be rendered by him; the neglect of which caused a forfeiture to the grantor. Hargrave's note to Co. Litt. 64 *a;* Wright, Ten. 7; Spelm. Feuds, c. 2; 1 Hallam, Mid. Ages, 83; 6 Cra. 87; 12 Johns. 365.

The introduction of feudal tenures into England is usually attributed to the Normans, but it evidently existed there before their arrival. It appears from the laws of the Saxons that a considerable portion of land was held under their lords by persons of a greater or less degree of bondage, who owed services of either a civil, military, or agricultural character. A large quantity of the lands which were entered in the Conqueror's celebrated Domesday book were then held by the same tenure and subjected to the same services as they had been in the time of Edward the Confessor. The Normans probably introduced some new provisions, and attempted to re-establish more, which had become obsolete, and we know there were many severe contests between the Normans and the English with respect to their restoration; but the general system of their laws remained much the same under the new dynasty of the Normans as it was under that of the Saxons. Hale, Hist. Com. Law, 120; Stevens, Const. Eng. 22.

The principal species of tenure which grew out of the feudal system was the tenure by *knight's service*. This was essentially military in its character, and required the possession of a certain quantity of land, called a knight's fee,—the measure of which, in the time of Edward I., was estimated at twelve ploughlands, of the value of twenty pounds per annum. He who held this portion of land was bound to attend his lord to the wars forty days in every year, if called upon. It seems, however, that if he held but half a knight's fee he was only bound to attend twenty days. Many arbitrary and tyrannical incidents or lordly privileges were attached to this tenure, which at length became so odious and oppressive that the whole system was destroyed at a blow by the statute of 12 Charles II. c. 24, which declared that all such lands should thenceforth be held in free and common socage,—a statute, says Blackstone, which was a greater acquisition to the civil property of this kingdom than even Magna Charta itself; since that only pruned the luxuriances which had grown out of military tenures, and thereby preserved them in vigor, but the statute of king Charles extirpated the whole, and demolished both root and branches. See FEUDAL LAW; Co. Litt. 69; Stat. Westm. 1, c. 36.

Tenure *in socage* seems to have been a relic of Saxon liberty which, up to the time of the abolition of military tenures, had been evidently struggling with the innovations of the Normans. Its great redeeming quality was its certainty; and in this sense it is by the old law-writers put in opposition to the tenure by knight's service, where the tenure was altogether precarious and uncertain. Littleton defines it to be where a tenant holds his tenement by any certain service, in lieu of all other services, so that they be not services of chivalry or knight's service: as, to hold by fealty and twenty shillings rent, or by homage, fealty, and twenty shillings rent, or by homage and fealty without any rents, or by fealty and a certain specified service, as, to plough the lord's land for three days. Littleton, 117; 2 Bla. Com. 79. See SOCAGE.

Other tenures have grown out of the two last mentioned species of tenure, and are still extant in England, although some of them are fast becoming obsolete. Of these is the tenure by *grand serjeanty*, which consists in some service immediately respecting the person or dignity of the sovereign: as, to carry the king's standard, or to be his constable or marshal, his butler or chamberlain, or to perform some similar service. While the tenure by *petit serjeanty* requires some inferior service, not strictly military or personal, to the king; as, the annual render of a bow or sword. The late duke of Wellington annually presented his sovereign with a banner, in acknowledgment of his tenure. There are also tenures by *copyhold* and in *frankalmoigne*, in *burgage* and of *gavelkind*; but their nature, origin, and history are explained in the several articles appropriated to those terms. See 2 Bla. Com. 66; Co. 2d Inst. 233.

Tenures were distinguished by the old common-law writers, according to the quality of the service, into *free* or *base*; the former were such as were not unbecoming a soldier or a freeman to perform, as, to serve the lord in the wars; while the latter were only considered fit for a peasant, as to plough the land, and the like. They were further distinguished with reference to the person from whom the land was held: as, a tenure in *capite*, where the holding was of the person of the king, and tenure in *gross*, where the holding was of a subject. Before the statute of Quia Emptores, 18 Edw. I., any person might by a grant of land have created an estate as a tenure of his person or of his house or manor; and although by Magna Charta a man could not alienate so much of his land as not to leave enough to answer the services due to the superior lord, yet, as that statute did not remedy the evil then complained of, it was provided by the statute above referred to, that if any tenant should alien any part of his land in fee, the alienee should hold immediately of the lord of the fee, and should be charged with a proportional part of the service due in respect to the quantity of land held by him. The consequence of which was that upon every such alienation the services upon which the estate was originally granted became due to the superior lord, and not to the immediate grantee; 4 Term, 443; 4 East, 271; Crabb, R. P. § 735.

The remote position of the United States, as well as the genius of its institutions, has preserved its independence of these embarrassing tenures. With scarce an exception, its present condition includes no tenure but that which, as we have intimated, is necessarily incident to all governments. Every estate in fee-simple is held as absolutely and unconditionally as is compatible with the state's right of eminent domain. Many grants of land made by the British government prior to the revolution created socage tenures, which were subsequently abolished or modified by the legislatures of the different states. Thus, by the charter of Pennsylvania, the proprietary held his estate of the crown in free and common socage, his grantees being thereby also authorized to hold of him direct, notwithstanding the statute of Quia Emptores. The act of Pennsylvania of November 27, 1779, substituted the commonwealth in place of the proprietaries as the ultimate proprietor of whom lands were held. In 44 Penn. 492, it was held that Pennsylvania titles are allodial not feudal. In New York there was supposed to have been some species of military tenure introduced by the Dutch previously to their surrender to the English, in 1664; but the legislature of that state in 1787 turned them all into a tenure in free and common socage, and finally, in 1830, abolished this latter tenure entirely, and declared that all lands in that state should thenceforth be held upon a uniform allodial tenure. On this subject, consult Bracton; Glanville; Coke, Litt.; Wright, Tenures; Maddox, Hist. Exch.; Sullivan, Lect.; Craig, de Feud.; Du Cange; Reeve, Hist. of Eng. Law; Kent, Commentaries; Sharswood's Lecture before the Law Academy of Philadelphia, 1855; Washburn, Real Property.

TENURE OF OFFICE. By R. S. § 1765, it is provided that every person holding any civil office under the United States to which he has been, or may thereafter be, appointed by and with the advice and consent of the senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he was appointed, unless sooner removed by and with the advice and consent of the senate, or by the appointment, by and with the like advice and consent, of a successor in his place, except that (by § 1768) during any recess of the senate, the president is authorized to suspend any such officer so appointed, except judges, until the next sessson of the senate, and to designate some suitable person, subject to be removed by the designation of another, to perform the duties of such suspended officer in the mean time. See 12 Ct. Cl. 455; 18 Wall. 112

TERCE. In Scotch Law. A life-rent competent by law to widows who have not accepted of special provisions in the third part of the heritable subjects in which the husband died infeft. It thus corresponds to *dower;* Craig, Inst. § 8; Erskine, Inst. 2, 9, 26; Burge, Confl. of Laws, 429–435. See KENNING TO THE TERCE.

TERM. Word; expression; speech.

Terms are words or characters by which we announce our sentiments, and make known to others things with which we are acquainted. These must be properly construed or interpreted in order to understand the persons using them. See CONSTRUCTION; INTERPRETATION; WORD.

In Estates. The limitation of an estate: as, a term for years, for life, and the like. The word *term* does not merely signify the time specified in the lease, but the estate, also, and interest that passes by that lease: and therefore the *term* may expire during the continuance of the time: as, by surrender, forfeiture, and the like. 2 Bla. Com. 145; 8 Pick. 339.

Terms legal and conventional in Scotland are periods for the payment of rent, corresponding to quarter days in England. The *legal terms* are Whitsunday, which for this purpose is the 15th of May; and Martinmas, the 11th of November. Bell. Conventional terms are such as are created by contract between different parties, the principal ones being Candlemas (Feb. 2), and Lammas-day (Aug. 1). Moz. & W.

In Practice. The space of time during which a court holds a session. Sometimes the term is a monthly, at others it is a quarterly period, according to the constitution of the court.

The whole term is considered as but one day: so that the judges may at any time during the term revise their judgments. In the computation of the term, all adjournments are to be included; 9 Watts, 200. Courts are presumed to know judicially when their terms are required to be held by public law; 4 Dev. 427. In England, by the Judicature Acts, *q. v.*, the division of the legal year into the four terms of Hilary, Easter, Trinity, and Michaelmas has been abolished, so far as relates to the administration of justice; see EASTER TERM.

TERM FEE. In English Practice. A certain sum which a solicitor is entitled to charge to his client, and the client to recover, if successful, from the unsuccessful party; payable for every term in which any proceedings subsequent to the summons shall take place. Whart. Lex.

TERM FOR YEARS. An *estate for years* and the *time* during which such estate is to be held are each called a term: hence the term may expire before the time, as, by a surrender. Co. Litt. 45. See ESTATE FOR YEARS; LEASE.

TERM IN GROSS. An estate for years which is not held in trust for the party entitled to the land on the expiration of the term.

TERM PROBATORY. In an ecclesiastical suit, the time during which evidence may be taken. Cootes, Eccl. Pr. 240.

TERMINUM (Lat.). **In Civil Law.** A day set to the defendant. Spelman. In this sense Bracton, Glanville, and some others sometimes use it. Reliquiæ Spelmanianæ, p. 71; Beames, Glanville, 27, n.

TERMINUS (Lat.). A boundary or limit, either of space or time. A bound, goal, or borders parting one man's land from another's. *Est inter eos non determinis, sed tota possessione contentio.* Cic. Acad. 4, 43. It is used also for an estate for a term of years: e. g. "*interesse termini.*" 2 Bla. Com. 143. See TERM.

Terminus a quo (Lat.). The starting-point of a private way is so called. Hamm. N. P. 196.

Terminus ad quem (Lat.). The point of termination of a private way is so called. In common parlance, the point of starting and that of termination of a line of railway, are each called the terminus.

TERMOR. One who holds lands and tenements for a term of years, or life. Littleton, § 100; 4 Tyrwh. 561.

TERMS, TO BE UNDER. A party is said to be *under terms*, when an indulgence is granted to him by the court in its discretion, on certain conditions. Thus, when an injunction is granted *ex parte*, the party obtaining it is put *under terms* to abide by such order as to damages as the court may make at the hearing. Moz. & W.

TERRE-TENANT (improperly spelled *ter-tenant*). One who has the actual possession of land; but, in a more technical sense, he who is seised of the land; and in the latter sense the owner of the land, or the person seised, is the terre-tenant, and not the lessee. 4 W. & S. 256; Bacon, Abr. *Uses and Trusts.* It has been holden that mere occupiers of the land are not terre-tenants. See 16 S. & R. 432; 3 Saund. 7, n. 4; 2 Bla. Com. 91, 328.

Contribution among Terre-tenants. The question whether purchasers, at different times, of land bound by an incumbrance created by the grantor, stand in equal equity as regards this incumbrance, and if so, must each contribute proportionably to its discharge, has been settled in England in the affirmative, following the rule laid down in the Year Books and repeated in Coke's Reports; 2 Wms. Saund. p. 10, n.; 3 Rep. 14 b. In this country, the opposite view has been taken; 1 Johns. Ch. 447; 5 *id.* 235; 10 S. & R. 450; 20 Penn. 222. See Lecture before Phila. Law Acad. 1863, by G. W. Biddle, LL.D.

TERRIER. In English Law. A roll, catalogue, or survey of lands, belonging either to a single person or a town, in which are stated the quantity of acres, the names of the tenants, and the like.

By the ecclesiastical law, an inquiry is directed to be made from time to time of the temporal rights of the clergymen of every parish, and to be returned into the registry of

the bishop: this return is denominated a terrier. 1 Phill. Ev. 602.

TERRITORIAL COURTS. The courts established in the territories of the United States. See COURTS OF THE UNITED STATES.

TERRITORY. A part of a country separated from the rest and subject to a particular jurisdiction.

The word is derived from *terreo*, and is said to be so called because the magistrate within his jurisdiction has the power of inspiring a salutary fear. *Dictum est ab eo quod magistratus intra fines ejus* terendi *jus habet.* Henrion de Pansy, Auth. Judiciaire, 98. In speaking of the ecclesiastical jurisdictions, Francis Duaren observes that the ecclesiastics are said not to have *territory*, nor the power of arrest or removal, and are not unlike the Roman magistrates of whom Gellius says *vocationem habebant non prehensionem.* De Sacris Eccles. Minist. lib. 1, cap. 4.

In American Law. A portion of the country subject to and belonging to the United States which is not within the boundary of any state or the District of Columbia.

The constitution of the United States, art. 4, s. 3, provides that the congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property of the United States; and nothing in this constitution shall be construed so as to prejudice any claims of the United States or of any state.

Congress possesses the power to erect territorial governments within the territory of the United States: the power of congress over such territory is exclusive and universal, and their legislation is subject to no control, unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled. Story, Const. § 1322; Rawle, Const. 237; 1 Kent, 243, 359; 1 Pet. 511. See the articles on the various territories; STATE. As to whether a territory is a *state* under the judiciary act, see STATE.

TERROR. That state of the mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger.

One of the constituents of the offence of riot is that the acts of the persons engaged in it should be to the terror of the people, as a show of arms, threatening speeches, or turbulent gestures; but it is not requisite in order to constitute this crime that personal violence should be committed; 3 Camp. 369; 1 Hawk. Pl. Cr. c. 65, s. 5; 4 C. & P. 373, 538. See Rolle, 109; Dalton, Just. c. 186; Viner, Abr. *Riots* (A 8).

To constitute a forcible entry; 1 Russ. Cr. 287; the act must be accompanied with circumstances of violence or terror; and in order to make the crime of robbery there must be violence or putting in fear; but both these circumstances need not concur; 4 Binn. 379. See RIOT; ROBBERY; PUTTING IN FEAR.

TERTIUS INTERVENIENS (Lat.). **In Civil Law.** One who, claiming an interest in the subject or thing in dispute in action between other parties, asserts his right to act with the plaintiff, to be joined with him, and to recover the matter in dispute, because he has an interest in it; or to join the defendant, and with him oppose the interest of the plaintiff, which it is his interest to defeat. He differs from the intervenor, or he who interpleads in equity. 4 Bouvier, Inst. n. 3819, note.

TEST. Something by which to ascertain the truth respecting another thing. 7 Penn. 428; 6 Whart. 284.

TEST ACT. The act of 25 Car. II. c. 2, by which it was enacted that all persons holding any office, civil or military (excepting some very inferior ones), or receiving pay from the crown, or holding a place of trust under it, should take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England, under a penalty of £500 and disability to the office. 4 Bla. Com. 59. Abolished, 9 Geo. IV. c. 17, so far as taking the sacrament is concerned, and new form of declaration substituted. Mozl. & W.

TESTAMENT. **In Civil Law.** The appointment of an executor or testamentary heir, according to the formalities prescribed by law. Domat, liv. l, tit. 1, s. 1.

At first there were only two sorts of testaments among the Romans,—that called *calatis comitiis*, and another called *in procinctu.* (See below.) In the course of time, these two sorts of testament having become obsolete, a third form was introduced, called *per æs et libram*, which was a fictitious sale of the inheritance to the heir apparent. The inconveniences which were experienced from these fictitious sales again changed the form of testament; and the prætor introduced another, which required the seal of seven witnesses. The emperors having increased the solemnity of these testaments, they were called written or solemn testaments, to distinguish them from nuncupative testaments, which could be made without writing. Afterwards military testaments were introduced, in favor of soldiers actually engaged in military service.

A *testament calatis comitiis*, or made in the comitia,—that is, the assembly of the Roman people,—was an ancient manner of making wills used in times of peace among the Romans. The comitia met twice a year for this purpose. Those who wished to make such testaments caused to be convoked the assembly of the people by these words, *calatis comitiis.* None could make such wills that were not entitled to be at the assemblies of the people. This form of testament was repealed by the law of the Twelve Tables.

A *civil testament* is one made according to all the forms prescribed by law, in contradistinction to a military testament, in making which some of the forms may be dispensed with. Civil testaments are more ancient

than military ones; the former were in use during the time of Romulus, the latter were introduced during the time of Coriolanus. See Hist. de la Jurisp. Rom. de M. Terrason, p. 119.

A *common testament* is one which is made jointly by several persons. Such testaments are forbidden in Louisiana, Civ. Code of La. art. 1565, and by the laws of France, Code Civ. 968, in the same words, namely: "A testament cannot be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition."

A *testament ab irato* is one made in a gust of passion or hatred against the presumptive heir, rather than from a desire to benefit the devisee. When the facts of unreasonable anger are proved, the will is annulled as unjust and as not having been freely made. See AB IRATO.

A *mystic testament* (called a solemn testament, because it requires more formality than a nuncupative testament) is a form of making a will which consists principally in enclosing it in an envelope and sealing it in the presence of witnesses.

This kind of testament is used in Louisiana. The following are the provisions of the Civil Code of that state on the subject, namely: the mystic or secret testament, otherwise called the close testament, is made in the following manner: the testator must sign his dispositions, whether he has written them himself, or has caused them to be writen by another person. The paper containing these dispositions, or the paper serving as their envelope, must be closed and sealed. The testator shall present it thus closed and sealed to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence; then he shall declare to the notary in the presence of the witnesses that that paper contains his testament written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription, which shall be written on that paper, or on the sheet that serves as its envelope, and that act shall be signed by the testator and by the notary and the witnesses. (5 Mart. La. 182.) All that is above prescribed shall be done without interruption or turning aside to other acts; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary in that case to increase the number of witnesses. Those who know not how or are not able to write, and those who know not how or are not able to sign their names, cannot make dispositions in the form of the mystic will. If any one of the witnesses to the act of superscription knows not how to sign, express mention shall be made thereof. In all cases the act must be signed by at least two witnesses. La. Civ. Code, art. 1584–1588.

A *nuncupative testament* was one made verbally, in the presence of seven witnesses: it was not necessary that it should have been in writing; the proof of it was by parol evidence. See NUNCUPATIVE.

In Louisiana, testaments, whether nuncupative or mystic, must be drawn up in writing, either by the testator himself, or by some other person under his dictation. The custom of making verbal statements, that is to say, resulting from the mere deposition of witnesses who were present when the testator made known to them his will, without his having committed it or caused it to be committed to writing, is abrogated. Nuncupative testaments may be made by public act, or by act under private signature. La. Civ. Code, art. 1568–1570.

An *olographic testament* is one which is written wholly by the testator himself. In order to be valid, it must be entirely written, dated, and signed by the hand of the testator. It is subject to no other form. See La. Civ. Code, art. 1581.

TESTAMENTARY. Belonging to a testament; as, a testamentary gift; a testamentary guardian, or one appointed by will or testament; letters testamentary, or a writing under seal, given by an officer lawfully authorized, granting power to one named as executor to execute a last will.

TESTAMENTARY CAPACITY. Mental capacity sufficient for making a valid will. As to what constitutes, see WILLS; 12 Am. L. Reg. 385.

TESTAMENTARY CAUSES. In English Law. Causes relating to probate of testaments and administration and accounts upon the same. They are enumerated among ecclesiastical causes by Lord Coke. 5 Co. 1, and Table of Cases at the end of the part. Over these causes the probate court has now exclusive jurisdiction, by 20 & 21 Vict. c. 77, amended by 21 & 22 Vict. c. 95. See JUDICATURE ACTS for the present jurisdiction.

TESTAMENTARY GUARDIAN. A guardian appointed by last will of a father to have custody of his child and his real and personal estate till he attains the age of twenty-one. In England, the power to appoint such guardian was given by 12 Car. II. c. 34. The principles of this statute have been generally adopted in the United States; 12 N. H. 437; but not in Connecticut; 1 Swift, Dig. 48.

TESTAMENTARY POWER. The power to make a will is neither a natural nor a constitutional right, but depends wholly upon statute; 100 Mass. 234. Such power has been expressly conferred by statute in most of the states, in some cases unrestricted, in others with various restrictions by reason of dower and homestead rights, and for other reasons; 3 Jarm. Wills, 721, n.; 731, n.

TESTATE. The condition of one who leaves a valid will at his death.

TESTATOR (Lat.). One who has made a testament or will.

In general, all persons may be testators. But to this rule there are various exceptions. *First*, persons who are deprived of understanding cannot make wills; idiots, lunatics, and infants are among this class. *Second*, persons who have understanding, but being under the power of others cannot freely ex-

ercise their will; and this the law presumes to be the case with a married woman, and therefore she cannot make a will without the express consent of her husband to the particular will. When a woman makes a will under some general agreement on the part of the husband that she shall make a will, the instrument is not properly a will, but a writing in the nature of a will or testament. *Third*, persons who are deprived of their free will cannot make a testament: as, a person in duress. 2 Bla. Com. 497; 2 Bouvier, Inst. n. 2102 *et seq.* See DEVISOR; DURESS; FEME COVERT; IDIOT; WIFE; WILL.

TESTATRIX (Lat.). A woman who has made a will or testament.

TESTATUM (Lat.). **In Practice.** The name of a writ which is issued by the court of one county to the sheriff of another county in the same state, when the defendant cannot be found in the county where the court is located: for example, after a judgment has been obtained, and a *ca. sa.* has been issued, which has been returned *non est inventus*, a *testatum ca. sa.* may be issued to the sheriff of the county where the defendant is. See Viner, Abr. *Testatum*, 259.

In Conveyancing. That part of a deed which commences with the words "this indenture witnesseth."

TESTE OF A WRIT (Lat.). **In Practice.** The concluding clause, commencing with the word *witness*, etc. A signature in attestation of the fact that a writ is issued by authority. A writ which bears the teste is sometimes said to be *tested*.

The act of congress of May 8, 1792, 1 Story, Laws, 227, directs that all writs and process issuing from the supreme or a circuit court shall bear teste of the chief justice of the supreme court, or, if that office be vacant, of the associate justice next in precedence; and that all writs of process issuing from a district court shall bear teste of the judge of such court, or, if the said office be vacant, of the clerk thereof. See R. S. §§ 911, 912; Sergeant, Const. Law; 20 Viner, Abr. 262; Steph. Pl. 25.

TESTES. Witnesses.

TESTIFY. To give evidence according to law. A witness testifying in regard to conversations had with a party, must state either the language used, or the substance of it. The *impression* left upon his mind by the conversations is not evidence; 33 Md. 135.

TESTIMONIAL PROOF. In Civil Law. A term used in the same sense as *parol evidence* is used at common law and in contradistinction to *literal proof*, which is written evidence.

TESTIMONIES. In Spanish Law. An attested copy of an instrument by a notary. Neuman & Baretti, Dict.; Tex. Dig.

TESTIMONY. The statement made by a witness under oath or affirmation.

Testimony and evidence are synonymous, but evidence includes testimony, as well as all other kinds of proof. It seems settled, both in England and this country, that a prisoner may be convicted on the testimony of an accomplice alone, though the court may, at its discretion, advise an acquittal unless such testimony is corroborated on material points; Whart. Cr. Law, § 783.

Where testimony was introduced under objection for the purpose of corroboration, did not tend to connect the defendant with the crime, and the jury were instructed that if they were satisfied of the defendant's guilt upon the whole testimony, they should convict; held, error; 127 Mass. 424; s. c. 34 Am. Rep. 391, n.

TESTMOIGNE. This is an old and barbarous French word, signifying, in the old books, evidence. Comyns, Dig. *Testmoigne*.

TEXAS. The name of one of the states of the American Union.

Under the names of Coahuila and Texas, it was a province of Mexico until 1836, when the inhabitants established a separate republic. On the first day of March, 1845, the congress of the United States, by a joint resolution, submitted to the new republic a proposition providing for the erection of the territory of Texas into a new state, and for its annexation to that country under the name of the state of Texas. This proposition was accepted by the existing government of Texas on the 23d of June, 1845, and was ratified by the people in convention on the 6th of July. On the 29th of December following, by a joint resolution of congress, the new state was formally admitted into the Union. The present constitution of the state was adopted by a convention of the people, at Austin, on the 24th day of November, 1875, and was voted upon and accepted by the people on the 17th day of February, 1876.

The powers of the government are divided into three distinct departments—the legislative, the executive, and the judicial.

THE LEGISLATIVE POWER.—The legislative power of the state is vested in a senate and house of representatives. The senate consists of thirty-one members, and cannot be increased above this number. The house of representatives, at present, consists of ninety-three members, but may be increased after any apportionment upon the ratio of not more than one representative for every fifteen thousand inhabitants; *provided*, the number never exceeds one hundred and fifty.

Senators are chosen by the qualified electors for four years, but a new senate shall be chosen after every apportionment. They are divided into two classes, so that one-half of the senate is chosen biennially. No person can be a senator unless he is a citizen of the United States and a qualified elector of the state, and has been a resident of the state five years next preceding his election, and for the last year thereof a resident of the district for which he is chosen, and has attained the age of twenty-six years.

The House of Representatives is composed of members chosen by the qualified electors for the term of two years from the day of the general election, at such times and places as are now, or may hereafter be, designated by law. Const. art. 3. No person can be a representative unless he is a citizen of the United States, or was at the time of the adoption of the constitution a citizen

of the republic of Texas, and has been an inhabitant of this state two years next preceding his election, and the last year thereof a citizen of the county, city, or town for which he shall be chosen; and he must have attained the age of twenty-one years.

Two-thirds of each house constitute a quorum to do business. The pay of the members for their services cannot exceed five dollars per day for the first sixty days of each session; and after that not exceeding two dollars per day for the remainder of the session. They are also entitled to mileage at the rate of five dollars for every twenty-five miles.

The regular sessions of the legislature take place biennially. Extra sessions may be called by the governor at any time.

The third article of the constitution contains the customary provisions for securing the organization of the two houses, choice of officers, qualification of members, power of expulsion and punishment of members, privilege from arrest, preservation and publication of proceedings, and open sessions.

THE EXECUTIVE POWER.—The executive department of the state consists of a governor, lieutenant-governor, secretary of state, comptroller, treasurer, commissioner of general land office, and attorney-general. All of these officers are elected by the people except the secretary of state, who is appointed by the governor, by and with the advice and consent of the senate.

The Governor is elected by the qualified electors of the state, at the time and places of elections for members of the legislature. He holds his office for two years from the regular time of installation, and until his successor has been duly qualified. He must be at least thirty years of age, a citizen of the United States or of Texas at the time of the adoption of the constitution, and have resided in the same for five years next immediately preceding his election. He is commander-in-chief of the military forces of the state, may require information from officers of the executive department, may convene the legislature, may recommend measures to the legislature, must cause the laws to be executed. In all criminal cases except treason and impeachment, he has power after conviction, to grant reprieves, commutations of punishment, and pardons, and under such rules as the legislature may prescribe he has power to remit fines and forfeitures. With the advice and consent of the senate he has the pardoning power in cases of treason. In the exercise of the powers of pardon, reprieve, and remission of fines, he is required to file in the office of the secretary of state his reasons therefor. He has the power to fill vacancies in all state offices, which, when made during the session of the legislature, must be confirmed by the senate. The same veto power is given him as is given by the constitution of the United States to the president, with these additions, that the power is given him to veto every bill passed by the legislature within the last ten days of the session, by filing his objections in the office of the secretary of state within twenty days after adjournment, and giving notice thereof by public proclamation. If any bill contains several items of appropriation, he can object to one or more of such items and approve the other portion of the bill. Every order, resolution, or vote to which the concurrence of both houses of the legislature is necessary, except on questions of adjournment, shall be printed and approved by the governor before it shall take effect, and if disapproved, shall be repassed as in cases of a bill.

A Lieutenant-Governor is chosen at every election for governor, by the same persons and in the same manner, continues in office for the same time, and must possess the same qualifications. In voting for governor and lieutenant-governor, the electors are to distinguish for whom they vote as governor and for whom as lieutenant-governor. The lieutenant-governor, by virtue of his office, is president of the senate, and has, when in committee of the whole, a right to debate and vote on all questions, and, when the senate is equally divided, to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the governor to serve, or of his impeachment or absence from the state, the lieutenant-governor exercises the power and authority appertaining to the office of governor until another is chosen at the periodical election and is duly qualified, or until the governor impeached, absent, or disabled is acquitted, returns, or his disability is removed.

The lieutenant-governor, while he acts as president of the senate, receives for his services the same compensation and mileage as allowed to the members of the senate.

The Seal of the State is a star of five points, encircled by olive and live oak branches and the words "The State of Texas."

THE JUDICIAL POWER.—The judicial power is vested in one supreme court, in one court of appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be established by law. Power is given the legislature to establish criminal courts in districts where there is a city containing thirty thousand inhabitants. All judicial officers are elected by the qualified voters of the state at a general election.

The Supreme Court consists of a chief justice and two associate justices, any two of whom form a quorum, and the concurrence of two judges is necessary to the decision of a case. No person is eligible as a member of the supreme court unless he be at the time of his election a citizen of the United States or the state of Texas, and unless he shall have attained the age of thirty years, and shall have been a practising lawyer or a judge of a court in the state, or such lawyer and judge together, at least seven years. They hold their offices for six years, and receive an annual salary fixed by law of not more than three thousand five hundred and fifty dollars.

The supreme court has appellate jurisdiction only, coextensive with the limits of the state; it only extends to civil cases of which the district courts have original or appellate jurisdiction, and to appeals from interlocutory judgments, with such exceptions and under such regulations as may be prescribed by the legislature. It and the judges thereof have the power to issue the writ of mandamus, and all other writs necessary to enforce the jurisdiction of the court. It also has power, upon affidavit or otherwise, as by the court may be thought proper, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. The supreme court holds its sessions between the months of October and June inclusive, at Austin, Galveston, and Tyler. The clerk is appointed by the court, and holds his office for four years.

The Court of Appeals consists of three judges, any two of whom form a quorum. The judges must possess the same qualifications as required of a judge of the supreme court. They receive the same salary and hold their office for the same length of time as prescribed for judges of the

supreme court. The court of appeals has appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade, and in all civil cases of which the county courts have original or appellate jurisdiction. The court of appeals and the judges thereof have power to issue the writ of *habeas corpus* and such writs as it may deem necessary to enforce its jurisdiction. It sits at the same time and in the same places as the supreme court.

District Courts.—The state is divided into a convenient number of judicial districts. For each district there is elected by the qualified voters a judge, who must be at least twenty-five years of age, must be a citizen of the United States, must have been a practising attorney or a judge of a court in the state for the period of four years, and must have resided in the district in which he is elected for two years next before his election, and receives an annual salary of twenty-five hundred dollars. Two terms are held each year, but the legislature can provide for more than two terms a year.

The District Court has original jurisdiction in criminal cases of the grade of felony; of all suits in behalf of the state to recover penalties, forfeitures, and escheats; of all cases of divorces; in cases of misdemeanor involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for the trial of title to land, and for the enforcement of liens thereon; of all suits for trial to right of property levied on by virtue of any writ of execution, sequestration, or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; and of all suits, complaints, or pleas whatsoever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; the courts and the judges thereof have power to issue writs of *habeas corpus* in felony cases and misdemeanors, injunctions, certiorari, and all writs necessary to enforce their jurisdiction. They have appellate jurisdiction and general control in probate matters over the county courts, and original jurisdiction and general control over executors, administrators, guardians, and minors, under such regulations as may be prescribed by the legislature. The clerk is elected by the people, and holds office for two years. In case of vacancy the judge appoints until the vacancy is filled by an election. In the trial of all cases in the district court, either party is entitled to a trial by jury, but no jury is empanelled unless demanded in open court by a party to the case, and then only when the party demanding a jury shall pay the jury fee. The grand and petit jurors in the district court are composed of twelve men; but nine members of a grand jury constitute a quorum to transact business and find bills. In trials of civil cases and in trials of criminal cases below the grade of felony, nine members of the jury may render a verdict, but when so rendered it shall be signed by every member of the jury concurring in it; but power is given the legislature to modify or change the rule authorizing less than the whole number of the jury to render a verdict.

All judges of the supreme court, court of appeals, and district courts are conservators of the peace. All prosecutions are carried on in the name and by the authority of "The State of Texas," and conclude "against the peace and dignity of the state."

The pleading and practice of the district court are peculiar, and deserve some attention. Prior to the revolution which severed Texas form the Mexican confederacy, the Spanish civil law, modified to some extent by local statutes, was in force. The common law was introduced at an early period after the declaration of independence; but the old system left behind it distinct traces, and some of its features are apparent in the existing laws. Amid the changes which followed the revolution, when the body of the civil law was abrogated, and the common law was adopted in its application to juries and to evidence, and as a rule of decision, where not inconsistent with the constitution and laws, the system of pleading previously in use was carefully preserved. That system is still in force, except where it has been expressly changed by subsequent legislation altering or establishing the course of proceedings in the courts, or where it has been necessarily modified by the introduction of the trial by jury,—a mode of trial wholly unknown to the civil law,—and with it, to a great extent, the practice peculiar to the common-law courts, the analogies of which are constantly consulted by the Texas practitioner.

The system of pleading formerly in force, and which has impressed its character on that now practised, consisted in written allegations by the parties on either side.

As defined by the Spanish law-writers, an *action* was the legal method of demanding in a court of justice that which is our own and is withheld from us. Actions were divided into real and personal,—the former having reference to the right which we have in a thing, the latter, to the obligation which one has assumed to perform a certain duty. The *defence* to an action was called an *exception*. It embraced every allegation and defence used to defeat a recovery by the plaintiff. Exceptions were either *dilatory*, when they delayed or suspended the action, or *peremptory*, when they destroyed it and prevented further litigation.

The first step in the progress of the action was the demand, which was a written petition adapted to the nature of the action, and must have contained the following requisites:—*first*, the name of the judge to whom it was addressed; *second*, the name of the plaintiff; *third*, the name of the defendant; *fourth*, the statement of the cause of action; *fifth*, the ground of the demand, or the right by which the relief was sought.

The demand concluded with the word "*juro*," which signified that the party had taken an oath that his action was begun in good faith, and the words "*el oficio de vmd. implora*," by which the interposition of the judge was invoked.

The *citation* followed the demand. This was the process by which the defendant was brought into court to answer the demand.

Then followed the *contestation*, which was the answer made by the defendant, either confessing or denying the plaintiff's right.

To this the plaintiff might present a *replica*, or replication; and the defendant might add a *duplica*, or rejoinder. Here the pleadings originally ended, and new facts could only be presented upon affidavit that they had just come to the knowledge of the party pleading them.

The *history of a lawsuit* in the present district courts of the state will give the reader an insight into their system of pleading and practice, and show how far the ancient form of the pleadings has been preserved, and wherein it has been modified.

It will be recollected that the district courts have jurisdiction in all cases without regard to any distinction between law and equity. There is no difference in the mode of proceeding in the application of legal and equitable remedies, nor are there any forms of action adapted to different

injuries. The pleadings in all cases consist of the *petition* and *answer*. Demands entitling a party to legal and equitable relief can be united in the same action: an equitable defence can be opposed to a legal demand. The court may so frame its judgment as to afford all the relief required by the nature of the case and which could be granted by a court of law or equity, and may also grant all such orders, writs, and process as may be necessary to make the relief granted effectual.

There being no forms of action, the rules of pleading known to the common-law and equity systems are only applicable so far as they are the rules of sound logic and conduce to a clear and methodical statement of the cause of action or ground of defence. No rule of pleading which is purely technical and has reference to the form of proceeding has any place in the system. The pleadings are the same in cases of legal and equitable cognizance, and the application of legal or equitable principles to the decision of the case presented depends upon the facts, and not upon the manner of stating them.

Every suit is commenced by the *filing of the petition*, which is a written statement of the cause of action, and of the relief sought by the plaintiff. The petition should contain certain formal but essential parts, the omission of any of which would render it defective. They are—

The marginal venue: "The State of Texas, County of ——;" the term of the court: "District Court, —— Term, A.D. 18—;" the address: "To the District Court of said County;" the commencement, consisting of the names and residences of the parties: the statement of the cause of action, which should be a clear, logical, and succinct statement of the facts, which, upon the general denial, the plaintiff would be bound to prove, and which if admitted will entitle him to a judgment; the statement of the nature of the relief sought; the signature of the party or his attorney. The petition must be filed with the clerk of the proper county, whose duties are the same as at common law, to indorse upon it the day on which it was filed, together with its proper file number. The clerk must also make an entry of the case in his docket.

Next follows the *citation*, or writ, which is issued by the clerk, and dated, tested, and signed by him. Its style is, "The State of Texas." It is addressed to the sheriff or any constable of the county in which the defendant is alleged to be found, and commands him to summon the defendant to appear at the next term of the court to answer the plaintiff's petition, a certified copy of which accompanies the writ. The citation is executed by the sheriff like an original writ.

There are certain auxiliary writs, which may be sued out at the commencement or during the progress of the suit, whereby the effects of the defendant or the property in controversy may be seized by the sheriff and held until replevied or until the final termination of the suit, so that it may be subject to the judgment rendered therein, or the defendant is restrained from the commission of some act until the question of right between the parties shall be determined. These are the writs of *attachment*, *garnishment*, *sequestration*, and *injunction*. But there is no peculiarity in these writs under the Texas practice which renders it necessary to explain them here.

When the citation has been served, the defendant is in court, and must file his answer within the time prescribed by law for pleading. In those counties in which the term of the court is limited to one week, the answer must be filed on or before the fourth day of the term; if the term is not so limited, the answer must be filed on or before the fifth day; and this is, accordingly, called the *appearance-day*.

Upon the morning of the appearance-day the cases upon the appearance docket are called over by the judge in the order in which they have been filed. If the defendant in any suit has failed to appear by his answer, a final *judgment by default* may be rendered against him, and a short entry to that effect is made upon the judge's docket. If the cause of action is liquidated, and established by an instrument in writing, the amount due may be computed by the clerk, or may be found by a jury, upon a writ of inquiry, if asked for by either party. Where the cause of action is unliquidated, the damages must be assessed by a jury upon the writ of inquiry when the case is reached on the regular call of the docket. When the damages have been assessed by the clerk, or jury, as the case may be, judgment is accordingly entered upon the minutes.

The defendant, if he does not intend to resist the suit, may appear and *confess judgment*; or, if he has pleaded, he may *withdraw his answer*, and suffer judgment by *nil dicit*,—in either of which cases the appearance is a waiver of all errors. If the defendant intends to resist the plaintiff's recovery, he must, within the time prescribed for pleading, file his *answer*.

The *answer* includes all defensive pleading, and may consist of as many several matters, whether of law or of fact, as the defendant may deem necessary for his defence and which may be pertinent to the cause. They must all be filed at the same time, and in the due order of pleading.

The answer may be by *demurrer*, usually termed an *exception*, or by *plea*, or by both. The demurrer is either general or special; and its office is the same as under the common-law system of pleading. It is not, however, an admission of the allegations of fact, but simply calls upon the court to say whether, granting all the facts to be as the plaintiff states them, any cause of action is shown requiring an answer.

A *plea* is an answer either denying the truth of the matter alleged in the petition, or admitting its truth, and showing some new matter to avoid its effect.

The exception or plea may, as at common law, be either dilatory or peremptory.

The *due order of pleading* above referred to is the ancient and what is said to be the natural order of pleading. See PLEADING.

The answer may embrace one or all of the grounds of defence, provided only that they be presented in the due order of pleading.

The defendant may also, by a *plea in reconvention*, which is analogous to the cross-bill of the equity system, show that he has a claim against the plaintiff similar in its nature to that set out in the petition, and pray for judgment over against the plaintiff; and upon the trial, judgment will be given for that party who may establish the largest claim, for the excess of his claim over that of his opponent.

The pleading may proceed one step further; the plaintiff may, by a *replication*, set up new matter in avoidance of that relied upon by the defendant in his answer; or he may, as at common law, demur to the answer.

No formal *joinder in demurrer* or in issue is necessary. The demurrer is to be decided by the court before the questions of fact are submitted to the jury. The party against whom judgment is rendered sustaining the demurrer may abide by his pleadings,—in which case judgment final will be given against him; or he may, under leave of the court, remove the objection by amendment.

The questions of law having been thus disposed of, the *issues of fact* arising upon the pleadings are submitted to the jury in the same manner as at common law, who may respond thereto by a general or special verdict, upon which the judgment of the court is then rendered.

There is established in each county of the state a *County Court*, which is a court of record, presided over by a county judge, elected by the qualified voters of the county, who is required to be well informed in the law of the state, and who holds office for two years and until his successor is elected and qualified. He receives such fees and perquisites as may be prescribed.

The *county courts* have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justices' courts by law, and where the fine to be imposed shall exceed two hundred dollars; and they have exclusive original jurisdiction in all civil cases where the matter in controversy shall exceed in value two hundred dollars, and not exceed five hundred dollars, exclusive of interest; and concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred dollars and not exceed one thousand dollars exclusive of interest. They have appellate jurisdiction in cases originating in justices' courts, but appeals in civil cases are limited to civil cases where the judgment appealed from exceeds twenty dollars exclusive of costs. They also have the general jurisdiction of a probate court. The county court holds a term for civil business at least once every two months, and a term for criminal business once every month.

Justices of the Peace have jurisdiction in criminal matters of all cases where the penalty or fine to be imposed by law may not be more than two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less exclusive of interest, of which exclusive original jurisdiction is not given to the district or county courts.

THAINLAND. In Old English Law. The land which was granted by the Saxon kings to their thains or thanes was so called. Crabb, Comm. Law, 10.

THANE (Sax. *thenian*, to serve). **In Saxon Law.** A word which sometimes signifies a nobleman, at others a freeman, a magistrate, an officer, or minister. A tenant of the part of the king's lands called the king's "thaneage." Termes de la Ley.

THEFT. A popular term for larceny.

In Scotch Law. The secret and felonious abstraction of the property of another for sake of lucre, without his consent. Alison, Cr. Law, 250.

THEFT-BOTE. The act of receiving a man's goods from the thief, after they had been stolen by him, with the intent that he shall escape punishment.

This is an offence punishable at common law by fine and imprisonment. Hale, Pl. Cr. 130. See COMPOUNDING A FELONY.

THELUSSON ACT. The stat. 39 & 40 Geo. III., passed in consequence of objections to a Mr. Thelusson's will, for the purpose of preventing the creation of perpetuities; see PERPETUITY; 4 Ves. 221.

THEOCRACY. A species of government which claims to be immediately directed by God.

La religion, qui, dans l'antiquité, s'associa souvent au despotisme, pour règner par son bras ou à son ombrage, a quelquefois tenté de règner seule. C'est ce qu'elle appelait le règne le Dieu, la théocratie. Matter, De l'Influence des Mœurs sur les Lois, et de l'Influence des Lois sur les Mœurs, 189. (Religion, which in former times frequently associated itself with despotism, to reign by its power or under its shadow, has sometimes attempted to reign alone; and this she has called the reign of God—theocracy.)

THIEF. One who has been guilty of larceny or theft. The term covers both compound and simple larceny; 1 Hill (N. Y.), 25.

THINGS. By this word is understood every object, except man, which may become an active subject of right. Code du Canton de Berne, art. 332. In this sense it is opposed, in the language of the law, to the word persons. See CHOSE; PROPERTY; RES.

THIRD-BOROW. In Old English Law. A constable. Lombard, Duty of Const. 6; 28 Hen. VIII. c. 10.

THIRD PARTIES. A term used to include all persons who are not parties to the contract, agreement, or instrument of writing by which their interest in the thing conveyed is sought to be affected. 1 Mart. La. N. S. 384. See, also, 2 La. 425; 6 Mart. La. 528.

But it is difficult to give a very definite idea of *third persons;* for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons. See 1 Bouvier, Inst. n. 1335 *et seq.*

THIRD PENNY. In Old English Law. Of the fines and other profits of the county courts (originally, when those courts had superior jurisdiction, before other courts were created) two parts were reserved to the king, and a third part or *penny* to the earl of the county. See DENARIUS TERTIUS COMITATUS; Kennett, Paroch. Antiq. 418; Cowel.

THIRLAGE. In Scotch Law. A servitude by which lands are astricted or thirled to a particular mill, and the possessors bound to grind their grain there, for the payment of certain multures and sequels as the agreed price of grinding. Erskine, Inst. 2. 9. 18.

THOROUGHFARE. A street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a *cul de sac*, which is open only at one end.

Whether a street which is not a thoroughfare is a highway seems not fully settled; 1 Ventr. 189; 1 Hawk. Pl. Cr. c. 76; § 1. In a case tried in 1790, where the *locus in quo* had been used as a common street for

fifty years, but was no thoroughfare, Lord Kenyon held that it would make no difference; for otherwise the street would be a trap to make people trespassers; 11 East, 375. This decision in several subsequent cases was much criticized, though not directly overruled; 5 Taunt. 126; 5 B. & Ald. 456; 3 Bingh. 447; 1 Camp. 260; 4 Ad. & E. 698. But in a recent English case the decision of Lord Kenyon was affirmed by the unanimous opinion of the court of queen's bench. The doctrine established in the latter case is that it is a question for the jury, on the evidence, whether a place which is not a thoroughfare is a highway or not; 14 E. L. & E. 69. And see 28 *id.* 30. The United States authorities seem to follow the English; 8 Allen, 242; 24 N. Y. 559 (overruling 23 Barb. 103); 87 Ill. 189; s. c. 29 Am. Rep. 49 and note; *contra*, 2 R. I. 172. See HIGHWAY; STREET.

THOUGHT. The operation of the mind. No one can be punished for his mere thoughts, however wicked they may be. Human laws cannot reach them,—first, because they are unknown; and secondly, unless made manifest by some action, they are not injurious to any one; but when they manifest themselves, then the act which is the consequence may be punished. Dig. 50. 16. 225.

THREAD. A figurative expression used to signify the central line of a stream or watercourse. Hargr. Law Tracts, 5; 4 Mas. 397; Holt, 490. See FILUM AQUÆ; ISLAND; WATERCOURSE; RIVER.

THREAT. In Criminal Law. A menace of destruction or injury to the lives, character, or property of those against whom it is made. To extort money under threat of charging the prosecutor with an unnatural crime has been held to be robbery; 1 Park. C. R. 199; 12 Ga. 293; but to extort money or other valuable thing by threat of prosecution for passing counterfeit money, or any prosecution except that for an unnatural crime, is not robbery; 7 Humph. 45; though it is a criminal offence; 11 Mod. 137; 2 Dall. 399, n. See THREATENING LETTER.

In Evidence. Menace.

When a confession is obtained from a person accused of crime, in consequence of a threat, evidence of such confession cannot be received, because, being obtained by the torture of fear, it comes in so questionable a shape that no credit ought to be given to it; 1 Leach, 263. This is the general principle: but what amounts to a threat is not so easily defined. It is proper to observe, however, that the threat must be made by a person having authority over the prisoner, or by another in the presence of such authorized person and not dissented from by the latter; 8 C. & P. 733. See CONFESSION.

THREATENING LETTER. Sending threatening letters to persons for the purpose of extorting money is said to be a misdemeanor at common law; Hawk. Pl. Cr. b. 1, c. 52, s. 1; 2 Russ. Cr. 575; 4 Bla. Com. 126. To be indictable, the threat must be of a nature calculated to overcome a firm and prudent man; but this rule has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed; 1 Den. Cr. Cas. 512. The party who makes a threat may be held to bail for his good behavior. See Comyns, Dig. *Battery* (D).

In England, by statute 24 & 25 Vict. c. 96, § 46, written accusations of crime, punishable by death or penal servitude for not less than seven years, or accusations of assaults with intent to commit any rape or buggery with a view or intent to extort or gain by means of such letter or writing, any property, chattel, money, or valuable security, or other valuable thing, constitute an indictable offence. Similar statutes exist in many of the United States, though they vary somewhat in their provisions, some of them requiring the threatening to have been done "maliciously," others "knowingly." The indictment for this offence need not specify the crime threatened to be charged, for the specific nature of the crime which the prisoner intended to charge might intentionally be left in doubt; 1 Mood. 134; 36 Ohio St. 318; 3 Heisk. 262; 26 Iowa, 122; 8 Barb. 547. The threat need not be to accuse before a judicial tribunal; 2 M. & R. 14; 30 Mich. 460; 1 Cox, C. C. 22. A person whose property has been stolen, has himself no power to punish the thief without process of law, and cannot claim the right to obtain compensation for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him; 24 Me. 71; 128 Mass. 55. A mere threat that the prosecutor would be indicted or complained of, has been held to be within the statute, even though no distinct crime was spoken of in the letter, because of the likelihood of threatening letters being written with as much disguise and artifice as possible, but still being sufficient to accomplish the purpose intended; 68 Me. 473; 68 Mo. 66. See 3 Cr. L. Mag. 720; 2 Whart. Cr. L. § 1664; 2 Bish. Cr. L. § 1200.

THREE-DOLLAR PIECE. A gold coin of the United States, of the value of three dollars.

The three-dollar piece was authorized by the seventh section of the act of Feb. 21, 1853. 10 Stat. at L. It is of the same fineness as the other gold coins of the United States. The weight of the coin is 77.4 grains. The devices upon this coin, and upon the gold dollar also, are not authoritatively fixed by act of congress, as is the case with all the other gold coins of the United States; and hence greater latitude was allowed to the treasury department and the officers of the mint in fixing these devices. The *obverse* of the piece presents an ideal head, emblematic of America, enclosed within the national legend; on the *reverse* is a wreath composed of wheat, cotton, corn, and tobacco, the

staple productions of the United States; within the wreath the value and date of the coin are given.

The three-dollar piece is a legal tender in payment of any amount; R. S. § 3511.

THROAT. In Medical Jurisprudence. The anterior part of the neck. Dunglison, Med. Dict.; Cooper, Dict.; 2 Good, Study of Med. 302; 1 Chitty, Med. Jur. 97, n.

The word *throat*, in an indictment which charged the defendant with murder by cutting the throat of the deceased, does not mean, and is not to be confined to, that part of the neck which is scientifically called the throat, but signifies that which is commonly called the throat; 6 C. & P. 401. As to meaning of throat disease, in life insurance, see 22 Int. Rev. Rec. 152.

TICK. Credit: as, if a servant usually buy for the master upon tick, and the servant buy something without the master's order, yet if the master were trusted by the trader he is liable; 3 Kebl. 625; 10 Mod. 111; 3 Esp. 214; 4 *id.* 174.

TICKET. A certificate or token showing the existence of some right in the holder thereof. For example, a ticket may give the right of admission to a place of assembly or to the conveyance of a common carrier, or it may give the right to be repossessed of some property that has been placed in the hands of a bailee or pledgee, as a cloak-room ticket, a pawnbroker's ticket, etc.

A *railroad* ticket is not a contract, nor does it contain a contract. It is a mere receipt or voucher, showing that the passenger has paid his fare from one place to another; 17 N. Y. 306; 52 N. H. 596; 13 Reporter, 295. In this sense, however, it may be used as evidence of a contract. Thus a ticket from A. to B. is evidence that the holder has entered into a contract with the carrier to be conveyed from A. to B.; 14 C. L. J. 31. So a railway ticket for one part of a route does not entitle the holder to travel over another part of the route for which the same fare is charged; 10 C. L. J. 84.

It is not yet thoroughly settled what conditions may be printed on a ticket, and how far they are binding on the passenger. But it may perhaps be stated, as a general rule, that such conditions are not binding unless they are reasonable, and the passenger's assent thereto is clearly established; 2 C. L. J. 460; 1 Q. B. Div. 515; 1 C. P. Div. 418; Lawson, Carriers, 116–123.

When there is a condition on a ticket that it shall not be good unless used on or before a certain date, it is a sufficient compliance with the condition if the use is *begun* on the last day named, even though the journey which the ticket describes be not completed until after that day has expired 14 C. L. J. 461.

A carrier may require passengers to purchase tickets before entering his conveyance, and, when this is not done, may charge an extra rate of fare; 18 Ill. 460; 53 Me. 279; 5 S. L. Rev. 766. But the carrier must furnish the passenger with all conveniences necessary for obtaining tickets; 19 Ill. 352; 43 Ill. 364; 15 Minn. 49; 38 Ind. 116; 56 Ala. 246. The carrier, however, need not keep its ticket office open after the published time for the departure of a train which has been delayed; 43 Ill. 176. The carrier can at all times demand the exhibition of a passenger's ticket; 3 Park. Cr. Cas. 326; 27 Ind. 277; 15 N. Y. 455; or the surrender of the ticket in exchange for a conductor's check; 22 Barb. 130. But a passenger ought not to be obliged to give up his ticket without receiving such check when at a considerable distance from his destination; 20 N. H. 251; 39 Ind. 509. Persons holding commutation or season tickets may be required to exhibit them whenever requested, and on refusal may be compelled to pay the regular fare; 7 Phila. 11; 36 Conn. 287.

Limitations as to the time within which tickets may be used are usually valid. "Good for this day only" is the commonest form of limitation; 63 N. Y. 101; 1 Allen, 267; 40 Vt. 88; 5 So. L. Rev. 770. A commutation ticket, good for a certain number of miles of travel, but limited to certain time, is worthless after the term has expired, even though the whole number of miles has not been travelled; 25 Ohio St. 70; 40 Iowa, 45; 64 Mo. 464.

As a rule, a carrier's contract for conveyance is an entirety. The passenger cannot leave the train, and then afterwards resume his journey on another. The production of a ticket will not help him to enter the second train, unless the ticket expressly authorize him to stop over; 47 Iowa, 82; 71 Penn. 432; *id.* 66; 24 N. J. L. 435; 46 N. H. 213; 31 Barb. 556. Nor will he be aided by the fact that it has been customary to allow passengers to stop over at intermediate stations. The company may at any time make a regulation to the contrary without notice to passengers; 46 N. H. 213; 71 Penn. 432.

Fare is the sum charged by a carrier for the conveyance of a person by land or water. Though one who holds himself out as a carrier of passengers is bound to transport all who apply to him for conveyance, yet it is presupposed that he shall receive reasonable compensation for the performance of this duty. A carrier may therefore lawfully expel from his conveyance all persons who refuse to pay their fare. After a person has been so expelled, he cannot gain readmittance by tendering the fare, because in this way a railway train might be stopped at any time by the whim or humor of any of its passengers, thereby interfering with the reasonable arrangements of the company, and jeopardizing human life; 15 Gray, 20; 19 Mich. 305; Thomps. Carriers, 29, 340.

The legislature of a state may, in the exercise of its police power, regulate and limit the fares charged by common carriers, as being property "affected with a public interest;" 94 U. S. 113; Pierce, Railroads, 466; Cooley, Const. Lim. 742.

In life insurance. In accident insurance it is the practice to issue tickets to the insured. The sale and delivery by an agent, and the payment of the price, give the owner a valid claim against the company, subject to the conditions set forth in the ticket; 45 Mo. 221.

TICKETS OF LEAVE. Licenses to be at large, granted to convicts for good conduct, but recallable upon subsequent misconduct. Whart. Dic.

TIDE. The ebb and flow of the sea.

The law takes notice of three kinds of tides, viz.: the *high* spring tides, which are the fluxes of the sea at those tides which happen at the two equinoctials; the *spring* tides, which happen twice every month, at the full and change of the moon; the *neap* or *ordinary* tides, which happen between the full and change of the moon, twice in twenty-four hours; Ang. Tide-Wat. 68. The changeable condition of the tides produces, of course, corresponding changes in the line of high-water mark. Now, inasmuch as the soil of all tidal waters up to the limit of high-water mark, at common law, is in the crown, or, in this country, in the state, it is important to ascertain what is high-water mark, in legal contemplation, considered as the boundary of the royal or public ownership. This ownership has been held to be limited by the average of the medium high tides between the spring and the neap in each quarter of a lunar revolution during the year, excluding only extraordinary catastrophes or overflows; 4 De G. M. & G. 206.

TIDE-WATER. Water which flows and reflows with the tide. All arms of the sea, bays, creeks, coves or rivers, in which the tide ebbs and flows, are properly denominated tide-waters.

The term tide-water is not limited to water which is salt, but embraces, also, so much of the water of fresh rivers as is propelled backwards by the ingress and pressure of the tide; 5 Co. 107; 2 Dougl. 441; 6 Cl. & F. 628; 7 Pet. 324; 108 Mass. 436. The supreme court of the United States has decided that, although the current of the river Mississippi at New Orleans may be so strong as not to be turned backwards by the tide, yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it might properly be said to be within the ebb and flow of the tide; 7 Pet. 324. The flowing, however, of the waters of a lake into a river, and their reflowing, being caused by the occasional swell and subsidence of the lake, and not by the ebb and flow of regular tides, do not constitute such a river a tidal or, technically, navigable river; 20 Johns. 98. And see 17 Johns. 195; 2 Conn. 481; Woolr. Waters, c. ii.; Ang. Tide-Wat. c. iii.

The bed or soil of all tide-waters belongs, in England, to the crown, and in this country to the state in which they lie; and the waters themselves are public; so that all persons may use the same for the purposes of navigation and fishery, unless restrained by law; 5 B. & A. 304; 1 Macq. Hou. L. 49; 4 Ad. & E. 384; 8 *id.* 329; Ang. Watere. c. iii., xiii. In England, the power of parliament to restrain or improve these rights is held to be absolute; 4 B. & C. 598. In this country, such a power is subject to the limitations of the federal constitution; and while both the general and state governments may adopt measures for the improvement of navigation; 7 Pick. 209; 6 Rand. 245; 4 Rawle, 9; 9 Conn. 436; and the states may grant private rights in tide-waters, provided they do not conflict with the public right of navigation; 21 Pick. 344; 23 *id.* 360; yet neither the general nor the state governments have the power to destroy or materially impair the right of navigation. The state governments have no such power, because its exercise would be in collision with the laws of congress regulating commerce; 9 Wheat. 1; the general government has no such power, because the states have never relinquished to it such a power over the waters within their jurisdictional limits; 2 Pet. 245. See BRIDGE. As to the power of the state to regulate the public fisheries, see FISHERY. And see, generally, RIVER; RIPARIAN PROPRIETORS; WHARF.

TIE. When two persons receive an equal number of votes at an election, there is said to be a tie.

In that case neither is elected. When the votes are given on any question to be decided by a deliberative assembly, and there is a tie, the question is lost. See MAJORITY.

TIEL. An old manner of spelling *tel:* such as, nul tiel record, no such record.

TIEMPO INHABIL (Span.). **In Louisiana.** A time when a man is not able to pay his debts.

A man cannot dispose of his property, at such a time, to the prejudice of his creditors; 4 Mart. La. N. S. 292; 3 Mart. La. 270; 10 *id.* 70.

TIERCE. A liquid measure, containing the third part of a pipe, or forty-two gallons.

TIGNI IMMITTENDI (Lat.). **In Civil Law.** A servitude which confers the right of inserting a beam or timber from the wall of one house into that of a neighboring house, in order that it may rest on the latter and that the wall of the latter may bear this weight. Dig. 8. 2. 36; 8. 5. 14.

TIMBER-TREES. Oak, ash, elm, in all places, and, by local custom, such other trees as are used in building; 2 Bla. Com. 281; also beech, chestnut, walnut, cedar, fir, aspen, lime, sycamore, and birch trees; 6 George III. ch. 48; and also such as are used in the mechanical arts; Lewis, Cr. L. 506. Timber-trees, both standing, fallen, and severed and lying upon the soil, constitute a portion of the realty, and are embraced in a mortgage of the land; 1 Washb. R. P. 13; 1 Wall. 53, 59, 60; 2 Greenl. 173; *id.* 387;

19 Me. 53; 5 Pa. L. J. 412; and pass, by a judicial sale under such mortgage, to the purchaser; 4 Rep. 62, a.; 11 Rep. 81, b; 1 Washb. R. P. 12, 13; 1 Wall. 53; 19 Me. 53; 54 Me. 313; 1 Denio, 554; 18 Penn. 185; 45 *id.* 128; 61 *id.* 294. A contract for the sale of timber-trees is a contract for the sale of an interest in lands; 10 N. Y. 117; 53 Penn. 206; 69 *id.* 474; and, as such, is within the Statute of Frauds; 33 Penn. 266. The better action for damages for cutting and carrying away timber trees, seems to be that of trespass *quare clausum fregit, et de bonis asportatis* (unless otherwise designated by statute); 2 Greenl. 173; *id.* 387; 11 Penn. 195; 4 Watts, 220; 15 Penn. 371; 4 *id.* 254. See WASTE.

TIME. The measure of duration. Lapse of time often furnishes a presumption, stronger or weaker according to the length of time which has passed, of the truth of certain facts, such as the legal title to rights, payment of or release from debts. See PRESCRIPTION; MEMORY; LIMITATIONS.

The general rule of law is that the performance of a contract must be completed at or within the time fixed by the contract; Leake, Contr. 834. Wherever, in cases not governed by particular customs of trade, the parties bind themselves to the performance of duties within a certain number of days, they have to the last minute of the last day to perform their obligations; 6 M. & G. 593.

Generally, in computing time, one day is included and one excluded; 2 P. A. Browne, 18; 4 T. B. Monr. 464; 26 Ala. N. S. 547; see 2 Harr. Del. 461; 5 Blackf. 319; 16 Ohio, 408; 10 Rich. So. C. 395; excluding the day on which an act is done, when the computation is to be made from such an act; 15 Ves. Ch. 248; 1 Ball & B. 196; 16 Cow. 659; 1 Pick. 485; 3 Denio, 12; 27 Ala. N. S. 311; 19 Mo. 60; see 18 Conn. 18; including it, according to Dougl. 463; 3 East, 417; 2 P. A. Browne, 18; 15 Mass. 193; 4 Blackf. 320; 18 How. 151; except where the exclusion will prevent forfeiture; 2 Camp. 294; 4 Me. 298. See 2 Sharsw. Bla. Com. 140, n. 3; Comyns, Dig. *Temps;* 1 Rop. Leg. 518; 2 Pothier, Obl. Evans ed. 50. Time from and after a given day excludes that day; 1 Pick. 485; 7 J. J. Marsh. 202; 1 Blackf. 392; 9 Cra. 104; 4 N. H. 267; 3 Penn. R. 200; 1 N. & M'C. 565. But see 94 U. S. 560. A policy of insurance includes the last day of the term for which it is issued; L. R. 5 Exch. 296; 34 L. J. C. B. 11. Particular words, *e. g. at, on,* or *upon* a certain time, will be construed according to a reasonable interpretation of the contract; 10 A. & E. 370. Deeds, bills of exchange, letters, and other written instruments are generally construed to have been made and issued at the time of their date, but the execution of a deed may be averred and proved according to the fact; 10 Exch. 40.

The construction of contracts with regard to the time of performance is the same in equity as at law; but in case of mere delay in performance, a court of equity will in general relieve against the legal consequences and decree specific performance upon equitable terms notwithstanding the delay, if the matter of the contract admits of that form of remedy. In such cases it is said that in equity time is not considered to be of the essence of the contracts; 3 D. M. & G. 284; L. R. 3 Ch. 67; Leake, Contr. 845. Ordinarily time is not of the essence of the contract, but it may be made so by express stipulation of the parties; or it may arise by implication, because of the nature of the property involved; or because of the avowed object of the seller or purchaser; or from the nature of the contract itself; or by one party giving the other notice that performance must be made within a certain reasonable time fixed in the notice; 2 Ohio St. 326; 5 C. E. Green, 367; 15 West. Jur. 97; time is always of the essence of unilateral contracts; 51 N. Y. 629; 35 Md 352; 50 Ill. 298.

In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court will seek to discover the real intention of the parties in deciding whether time is of the essence of the contract; Benj. Sales, § 593. If a thing sold is of greater or less value according to the lapse of time, stipulations with regard to it must be literally complied with both at law and in equity; 42 Barb. 320; 10 Allen, 239. See 15 West. Jur. 97.

In Pleading. A point in or space of duration at or during which some fact is alleged to have been committed.

In *criminal actions*, both the day and the year of the commission of the offence must appear; but there need not be an express averment, if they can be collected from the whole statement; Comyns, Dig. *Indictment* (G 2); 5 S. & R. 315. The prosecutor may give evidence of an offence committed on any day which is previous to the finding of the indictment; Archb. Cr. Pl. 95; 5 S. & R. 316; but a day subsequent to the trial must not be laid; Add. Penn. 36.

In *mixed and real actions*, no particular day need be alleged in the declaration; 3 Chitty, Pl. 620; Gould, Pl. c. 3, § 99; Metc. Yelv. 182 *a*, n.; Cro. Jac. 311.

In personal actions, all traversable affirmative facts should be laid as occurring on some day; Gould, Pl. § 63; Steph. Pl. 292; Yelv. 94; but no day need be alleged for the occurrence of negative matter; Comyns, Dig. *Pleader* (C 19); Plowd. 24 *a;* and a failure in this respect is, in general, aided after verdict; 13 East, 407. Where the cause of action is a trespass of a permanent nature or constantly repeated, it should be laid with a *continuando*, which title see. The day need not, in general, be the actual day of commission of the fact; 2 Saund. 5 *a;* Co. Litt. 283 *a;* 12 Johns. 287; 3 N. H. 299; if the actual day is not stated, it should be laid under a videlicet; Gould, Pl. c. 3, § 63.

The exact time may become material, and must then be correctly laid; 10 B. & C. 215; 1 Cr. & J. 394; 4 S. & R. 576; 7 *id.* 405; 1 Stor. 528; as, the time of execution of an executory written document; Gould, Pl. c. 3, § 67. The defence must follow the time laid in the declaration, if time is not material; 1 Chitty, Pl. 509; 1 Saund. 14, 82; need not when it becomes material; 2 Saund. 5 *a*, *b* (n. 3); or in pleading matter of discharge; 2 Burr. 944; Plowd. 46; 2 Stra. 944; or a record; Gould, Pl. § 83.

TIME-TABLES. See PUNCTUALITY.

TIPPLING-HOUSE. A place where spirituous liquors are sold and drunk in violation of law. Sometimes the mere selling is considered as evidence of keeping a tippling-house.

TIPSTAFF. An officer appointed by the marshal of the court of king's bench, to attend upon the judges with a kind of rod or *staff tipped* with silver.

In the United States, the courts sometimes appoint an officer who is known by this name, whose duty it is to wait on the court and serve its process.

TITHES. In English Law. A right to the tenth part of the produce of lands, the stocks upon lands, and the personal industry of the inhabitants. These tithes are raised for the support of the clergy. Almost all the tithes of England and Wales are now commuted into rent charges, under the Tithe Commutation Act (stat. 6 & 7 Will. IV. c. 71), and the various statutes since passed for its amendment; 3 Steph. Com. 731; Moz. & W.

In the United States, there are no tithes. See Cruise, Dig. tit. 22; Ayliffe, Parerg. 504.

TITHING. In English Law. Formerly, a district containing ten men, with their families. In each tithing there was a tithingman, whose duty it was to keep the peace, as a constable now is bound to do. St. Armand, in his Historical Essay on the Legislative Power of England, p. 70, expresses an opinion that the tithing was composed not of ten common families, but of ten families of lords of a manor.

TITHINGMAN. In Saxon Law. The head or chief of a decennary of ten families: he was to decide all lesser causes between neighbors. Now tithingmen and constables are the same thing. Jacob, Law Dict.

In New England, a parish officer to keep good order in church. Webster, Dict.

TITLE. Estates. The means whereby the owner of lands hath the just possession of his property. Co. Litt. 345; 2 Bla. Com. 195. See 1 Ohio, 349. This is the definition of title to lands only.

A *bad* title is one which conveys no property to the purchaser of an estate.

A *doubtful* title is one which the court does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it; 1 J. & W. 568; 9 Cow. 344.

A *good* title is that which entitles a man by right to a property or estate, and to the lawful possession of the same.

A *marketable* title is one which a court of equity considers to be so clear that it will enforce its acceptance by a purchaser.

The ordinary acceptation of the term *marketable title* would convey but a very imperfect notion of its legal and technical import. To common apprehension, unfettered by the technical and conventional distinction of lawyers, all titles being either good or bad, the former would be considered marketable, the latter non-marketable. But this is not the way they are regarded in courts of equity, the distinction taken there being, not between a title which is absolutely good or absolutely bad, but between a title which the court considers to be so clear that it will enforce its acceptance by a purchaser, and one which the court will not go so far as to declare a bad title, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it; 1 J. & W. 568. In short, whatever may be the private opinion of the court as to the goodness of the title, yet if there be a reasonable doubt either as to a matter of law or fact involved in it, a purchaser will not be compelled to complete his purchase; and such a title, though it may be perfectly secure and unimpeachable as a holding title, is said, in the current language of the day, to be unmarketable; Atkins, Tit. 2.

The doctrine of marketable titles is purely equitable and of modern origin; *id.* 26. At law every title not bad is marketable; 5 Taunt. 625; 6 *id.* 263; 1 Marsh. 258. See 2 Penn. L. J. 17.

There are several stages or degrees requisite to form a complete title to lands and tenements. The lowest and most imperfect degree of title is the *mere possession*, or actual occupation of the estate, without any apparent right to hold or continue such possession: this happens when one man disseises another. The next step to a good and perfect title is the *right of possession*, which may reside in one man while the actual possession is not in himself, but in another. This right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better, and an *actual* right of possession, which will stand the test against all opponents. The mere *right of property*, the *jus proprietatis*, without either possession or the right of possession. 2 Bla. Com. 195.

Title to real estate is acquired by two methods, namely, by *descent* and by *purchase*. See these words.

Title to personal property may accrue in three different ways: by *original acquisition*; by *transfer by act of law*; by *transfer by act of the parties*.

Title by original acquisition is acquired by *occupancy*, see OCCUPANCY; by *accession*, see ACCESSION; by *intellectual labor*. See PATENT; COPYRIGHT.

The title to personal property is acquired and lost by transfer by act of law, in various

ways: by *forfeiture; succession; marriage; judgment; insolvency; intestacy.* See those titles.

Title is acquired and lost by transfer by the act of the party, by *gift, by contract or sale.*

In general, possession constitutes the criterion of title of *personal* property, because no other means exist by which a knowledge of the fact to whom it belongs can be attained. A seller of a chattel is not, therefore, required to show the origin of his title, nor, in general, is a purchaser, without notice of the claim of the owner, compellable to make restitution; but it seems that a purchaser from a tenant for life of personal chattels will not be secure against the claims of those entitled in remainder; Cowp. 432; 1 Bro. C. C. 274; 2 Term, 376; 3 Atk. 44; 3 V. & B. 16.

As an exception to the rule that possession is the criterion of title of property may be mentioned the case of ships, the title of which can be ascertained by the register; 15 Ves. Ch. 60; 17 *id.* 251; 8 Price, 256, 277.

To convey a title, the seller must himself have a title to the property which is the subject of the transfer. But to this general rule there are exceptions. The lawful coin of the United States will pass the property along with the possession. A negotiable instrument indorsed in blank is transferable by any person holding it, so as by its delivery to give a good title "to any person honestly acquiring it;" 3 B. & C. 47; 3 Burr. 1516; 5 Term, 683.

In Legislation. That part of an act of the legistature by which it is known and distinguished from other acts; the name of the act.

Formerly the title was held to be no part of a bill, though it could be looked to when the statute was ambiguous; 3 Wheat. 610; 31 Wisc. 431; but it could not enlarge or restrain the provisions of the act itself; 5 Wall. 107. In later years constitutional provisions have required that the title of every legislative act shall correctly indicate the subject of the act; Cooley, Const. Lim. 172. The object of this was mainly to prevent surprise in legislation. An act must have but one general object, which is fairly indicated by the title; a title may be general if it does not cover incongruous legislation; *id.* 176; 7 Ind. 681; 50 N. Y. 553; the use of the words "other purposes" have no effect; 22 Barb. 642. It is said that the courts will construe these provisions liberally rather than embarrass legislation by a construction, the strictness of which is unnecessary to the attainment of the beneficial purposes for which they were adopted; Cooley, Const. Lim. 178. In construing an act, the court will strike from it all that relates to the object not indicated by the title, and sustain the rest if it is complete in itself; *id.* 181. These provisions are usually considered mandatory, though they were held to be directory in 4 Cal. 388; 6 Ohio, N. S. 187.

It is the settled rule in Pennsylvania that where an act of assembly is entitled a supplement to a former act, and the subject thereof is germane to that of the original act, its subject is sufficiently expressed; 77 Penn. 429; 88 *id.* 42; 13 Fed. Rep. 431.

See a paper in 5 Rep. Am. Bar Association (1882) by U. M. Rose.

In Literature. The particular division of a subject, as a law, a book, and the like: for example, Digest, book 1, *title* 2.

Personal Relations. A distinctive appellation denoting the rank to which the individual belongs in society.

The constitution of the United States forbids the grant by the United States or any state of any title of nobility. Titles are bestowed by courtesy on certain officers: the president of the United States sometimes receives the title of *excellency;* judges and members of congress, that of *honorable;* and members of the bar and justices of the peace are called *esquires.* See RANK; NOBILITY; Brackenridge, Law Misc.

Titles are assumed by foreign princes, and among their subjects they may exact these marks of honor; but in their intercourse with foreign nations they are not entitled to them as a matter of right; Wheat. Int. Law, pt. 2, c. 3, § 6.

In Pleading. The right of action which the plaintiff has. The declaration must show the plaintiff's title, and if such title be not shown in that instrument the defect cannot he cured by any of the future pleadings. Bacon, Abr. *Pleas, etc.* (B 1).

In Rights. The name of a newspaper, a book, and the like.

The owner of a newspaper having a particular title has a right to such title; and an injunction will lie to prevent its use unlawfully by another; 8 Paige, Ch. 75. See Pardessus, n. 170. See TRADE-MARK.

TITLE-DEEDS. Those deeds which are evidences of the title of the owner of an estate. The person who is entitled to the inheritance has a right to the possession of the title-deeds; 1 Carr. & M. 653. As to a lien created by deposit of title-deeds, see LIEN.

TITLE OF A CAUSE. The peculiar designation of a suit, consisting usually of the name of the court, the venue, and the parties. The method of arranging the names of the parties is not everywhere uniform. The English way, and that formerly in vogue in this country, and still retained in many of the states, is for the actor in each step of the cause to place his name first, as if he were plaintiff in that particular proceeding, and his adversary's afterwards. Thus the case of Upton *vs.* White would, if taken from a county court to the supreme court on a writ of error by defendant, be entitled White *vs.* Upton. In New York and many other states

which have enacted codes of procedure, the rule now is that the original order of names of parties is retained throughout. See AD SECTAM.

TITLE OF A DECLARATION. At the top of every declaration the name of the court is usually stated, with the term of which the declaration is filed, and in the margin the venue—namely, the city or county where the cause is intended to be tried is set down. The first two of these compose what is called the title of the declaration; 1 Tidd, Pr. 366.

TITLE OF CLERGYMEN (to orders). Some certain place where they may exercise their functions; also, an assurance of being preferred to some ecclesiastical benefice. 2 Steph. Com. 661; Whart. Dict.

TITLE OF ENTRY. The right to enter upon lands. Cowel. See ENTRY.

TO WIT. That is to say; namely; scilicet; videlicet.

TOFT. A place or piece of ground on which a house formerly stood, which has been destroyed by accident or decay; 2 Broom & H. Com. 17.

TOGATI (Lat.). **In Roman Law.** Under the empire, when the *toga* had ceased to be the usual costume of the Romans, advocates were nevertheless obliged to wear it whenever they pleaded a cause. Hence they were called *togati*. This denomination received an official or legal sense in the imperial constitutions of the fifth and sixth centuries; and the words *togati*, *consortium* (*corpus*, *ordo*, *collegium*) *togatorum*, frequently occur in those acts.

TOKEN. A document or sign of the existence of a fact.

Tokens are either public or general, or privy tokens. They are either true or false. When a token is false and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating; 12 Johns. 292; but if it is a mere privy token, as, counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable; 9 Wend. 182; 1 Dall. 47; 2 Const. 139; 4 Hawks, 348; 6 Mass. 72; 2 Dev. 199; 1 Rich. 244.

In Common Law. In England, this name is given to pieces of metal, made in the shape of money, passing among private persons by consent at a certain value. 2 Chitty, Com. Law, 182. They are no longer permitted to pass as money.

TOLERATION. In some countries, where religion is established by law, certain sects who do not agree with the established religion are nevertheless permitted to exist; and this permission is called toleration. They are permitted and allowed to remain rather as a matter of favor than a matter of right. By the Toleration Act of 1 W. & M. c. 18, and subsequent statutes down to the 35 & 36 Vict. c. 26, enabling any person to take any degree (other than a divinity degree) in the universities of Oxford, Cambridge, or Durham, the disabilities of the Roman Catholics, Jews, and Dissenters have been almost wholly removed; 2 Steph. Com. 707. See CATHOLIC EMANCIPATION ACT.

In the United States there is no such thing as toleration; all men have an equal right to worship God according to the dictates of their consciences. See CHRISTIANITY; RELIGION; RELIGIOUS TEST.

TOLL. In Contracts. A sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature.

The compensation paid to a miller for grinding another person's grain.

The rate of taking toll for grinding is regulated by statute in most of the states. See 2 Washb. R. P.; 6 Q. B. 31.

In Real Law. To bar, defeat, or take away: as, to toll an entry into lands is to deny or take away the right of entry.

TOLLS. In a general sense, tolls signify any manner of customs, subsidy, prestation, imposition, or sum of money demanded for exporting or importing of any wares or merchandise, to be taken of the buyer. Co. 2d Inst. 58.

TON. Twenty hundredweight, each hundredweight being one hundred and twelve pounds avoirdupois. See act of congress of Aug. 30, 1842, c. 270, s. 20; 3 Wall. Jr. 46; 29 Penn. 27; 9 Paige, 188; MEASURE.

TONNAGE. The capacity of a ship or vessel.

This term is most usually applied to the capacity of a vessel in tons as determined by the legal mode of measurement; in England reckoned according to the number of tons burden a ship will carry, but here to her internal cubic capacity; and, as a general rule, in the United States the official tonnage of a vessel is considerably below the actual capacity of the vessel to carry freight. 40 N. Y. 259; see *infra*.

For the rule for determining the tonnage of British vessels under the law of England, see McCulloch, Com. Dict. *Tonnage;* English Merchant Shipping Act of 1854, §§ 20–29. Foard's Mer. Shipping, p. 17.

The duties paid on the tonnage of a ship or vessel.

These duties were altogether abolished in relation to American vessels by the act of May 31, 1830, s. 1. And, by the second section of the same act, all tonnage-duties on foreign vessels are abolished, provided the president of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished.

But tonnage duties have been revived, and are now imposed as follows: Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States, but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States, at the rate of fifty cents per ton. Upon

every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares, or merchandise, taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton. Nothing in this section shall be deemed in any wise to impair any rights or privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of two dollars per ton; and none of the duties on tonnage, above mentioned, shall be levied on the vessels of any foreign nation if the president of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. In addition to the tonnage-duty above imposed, there shall be paid a tax, at the rate of thirty cents per ton, on vessels which shall be entered at any custom-house within the United States from any foreign port or place; and any rights or privileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel, any officer of which shall not be a citizen of the United States, shall pay a tax of fifty cents per ton. R. S. § 4219.

No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, or employed in the bank, whale, or other fisheries, shall be subject to tonnage tax or duty, if such vessel be licensed, registered or enrolled. R. S. § 4220.

The tonnage duty imposed on all vessels engaged in foreign commerce shall be levied but once within one year, and when paid by such vessel, no further tonnage tax shall be collected within one year from the date of such payment. But this provision shall not extend to foreign vessels entered in the United States from any foreign port, to and with which vessels of the United States are not ordinarily permitted to enter and trade. § 4223.

A duty of fifty cents per ton, to be denominated "light money," shall be levied and collected on all vessels not of the United States, which may enter the ports of the United States; to be levied and collected in the same manner as the tonnage duties. § 4225. See other sections under R. S. ch. 3, title xlviii.

The constitution of the United States provides, art. 1, s. 10, n. 2, that no state shall, without the consent of congress, lay any duty on tonnage. (12 Wall. 204; 94 U. S. 238.) But a municipal corporation situated on a navigable river can, consistently with the constitution of the United States, charge and collect from the owner of licensed steamboats, which moor at a wharf constructed by it, wharfage proportioned to their tonnage; 95 U. S. 80; 45 Iowa, 196. See COMMERCE.

By act of congress, approved May 6, 1864, it is provided that the registered tonnage of a vessel shall be her entire internal cubic capacity, in tons of one hundred cubic feet each, to be ascertained as follows: Measure the length of the vessel in a straight line along the upper side of the tonnage deck, from the inside of the inner plank (average thickness) at the side of the stem to the inside of the plank on the stern timbers (average thickness), deducting from this length what is due to the rake of the bow in the thickness of the deck, and what is due to the rake of the stern timber in the thickness of the deck, and also what is due to the rake of the stern timber in one-third of the round of the beam; divide the length so taken into the number of equal parts required by the following table, according to the class in such table to which the vessel belongs. See R. S. §§ 4150 *et seq.*

TABLE OF CLASSES.

Class I.—Vessels of which the tonnage-length, according to the above measurement, is fifty feet or under, into six equal parts.

Class II.—Vessels of which the tonnage-length, according to the above measurement, is above fifty feet and not exceeding one hundred feet long, into eight equal parts.

Class III.—Vessels of which the tonnage-length, according to the above measurement, is above one hundred feet long and not exceeding one hundred and fifty feet long, into ten equal parts.

Class IV.—Vessels of which the tonnage-length, according to the above measurement, is above one hundred and fifty feet and not exceeding two hundred feet long, into twelve equal parts.

Class V.—Vessels of which the tonnage-length, according to the above measurement, is above two hundred feet and not exceeding two hundred and fifty feet long, into fourteen equal parts.

Class VI.—Vessels of which the tonnage-length, according to the above measurement, is above two hundred and fifty feet long, into sixteen equal parts.

Then, the hold being sufficiently cleared to admit of the required depths and breadths being properly taken, find the transverse area of such vessel at each point of division of the length, as follows. Measure the depth at each point of division from a point at a distance of one-third of the round of the beam below such deck, or, in case of a break, below a line stretched in continuation thereof, to the upper side of the floor-timber, at the inside of the limber-strake, after deducting the average thickness of the ceiling which is between the bilge-planks and limber-strake; then, if the depth at the midship division of the length do not exceed sixteen feet, divide each depth into four equal parts; then measure the inside horizontal breadth at each of the three points of division, and also at the upper and lower points of the depth, extending each measurement to the average thickness of that part of the ceiling which is between the points of measurement; number these breadths from above (numbering the upper breadth one, and so on down to the lowest breadth); multiply the second and fourth by four, and the third by two; add these products together, and to the sum add the first breadth and the last or fifth; multiply the quantity thus obtained by one-third the interval between the breadths, and the product shall be deemed the transverse area; but if the midship depth exceed sixteen feet, divide each depth into six equal parts, instead of four, and measure as before directed the horizontal breadths at the five points of division and also at the upper and lower points of the depth; number them from above, as before, multiply the second, fourth, and sixth by four, and the third and fifth by two; add these products together, and to the sum add the first breadth and

the last or seventh; multiply the quantity thus obtained by one-third of the common interval between the breadths, and the product shall be deemed the transverse area.

Having thus ascertained the transverse area at each point of division of the length of the vessel, as required above, proceed to ascertain the register-tonnage of the vessel, in the following manner:—

Number the areas successively one, two, three, etc., number one being at the extreme limit of the length at the bow, and the last number at the extreme limit of the length at the stern; then, whether the length be divided according to table into six or sixteen parts, as in classes one and six, or into any intermediate number, as in classes two, three, four, and five, multiply the second and every even-numbered area by four, and the third and every odd-numbered area (except the first and last) by two; add the products together, and to the sum add the first and last, if they yield anything; multiply the quantities thus obtained by one-third of the common interval between the areas, and the product will be the cubical contents of the space under the tonnage-deck; divide this product by one hundred, and the quotient, being the tonnage under the tonnage-deck, shall be deemed the register-tonnage of the vessel, subject to the additions hereinafter mentioned.

If there be a break, a poop, or any other permanent closed-in space on the upper decks or the spar-deck available for cargo or stores or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows:—

Measure the internal mean length of such space in feet, and divide into an even number of equal parts of which the distance asunder shall be most nearly equal to those into which the length of the tonnage-deck has been divided; measure at the middle of its height the inside breadths,—namely, one at each end and at each of the points of division,—numbering them successively one, two, three, etc.; then to the sum of the end breadths add four times the sum of the even-numbered breadths and twice the sum of the odd-numbered breadths, except the first and last, and multiply the whole sum by one-third of the common interval between the breadths; the product will give the mean horizontal area of such space; then measure the mean height between the planks of the decks, and multiply it by the mean horizontal area; divide the product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and shall be added to the tonnage under the tonnage-deck ascertained as aforesaid.

If the vessel has a third deck, or spar-deck, the tonnage of the space between it and the tonnage-deck shall be ascertained as follows:—

Measure in feet the inside length of the space, at the middle of its height, from the plank at the side of the stem to the plank on the timbers at the stern, and divide the length into the same number of equal parts into which the length of the tonnage-deck is divided; measure (also at the middle of its height) the inside breadth of the space at each of the points of division, also the breadth of the stem and the breadth at the stern; number them successively one, two, three, and so forth, commencing at the stem; multiply the second and all other even-numbered breadths by four, and the third and all other odd-numbered breadths (except the first and last) by two; to the sum of these products add the first and last breadths; multiply the whole sum by one-third of the common interval between the breadths, and the result will give, in superficial feet, the mean horizontal area of such space; measure the mean height between the plank of the two decks, and multiply it by the mean horizontal area, and the product will be the cubical contents of the space; divide this product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and shall be added to the other tonnage of the vessel ascertained as aforesaid. And if the vessel has more than three decks, the tonnage of each space between decks above the tonnage-deck shall be severally ascertained in the manner above described, and shall be added to the tonnage of the vessel ascertained as aforesaid.

In ascertaining the tonnage of open vessels, the upper edge of the upper strake is to form the boundary-line of measurement, and the depth shall be taken from an athwartship line extending from the upper edge of said strake at each division of the length.

TONNAGE TAX. See TONNAGE.

TONTINE. In French Law. The name of a partnership composed of creditors or recipients of perpetual or life rents or annuities, formed on the condition that the rents of those who may die shall accrue to the survivors, either in whole or in part.

This kind of partnership took its name from *Tonti*, an Italian of the 17th century, who first conceived the idea and put it in practice. Merlin, Répert.; Dalloz, Dict.; 5 Watts, 351.

TOOK AND CARRIED AWAY. In Criminal Pleading. Technical words necessary in an indictment for simple larceny. Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 6); Cro. Car. 37; 1 Chitty, Cr. Law, 244. See CEPIT ET ASPORTAVIT.

TOOLS. Those implements which are commonly used by the hand of one man in some manual labor necessary for his subsistence.

The apparatus of a printing-office, such as types, presses, etc., are not, therefore, included under the term *tools;* 10 Pick. 423; 3 Vt. 133. And see 2 Pick. 80; 5 Mass. 313.

By the forty-sixth section of the act of March 2, 1789, 1 Story, Laws, 612, the tools or implements of a mechanical trade of persons who arrive in the United States are free and exempted from duty.

TORT (Fr. *tort*, from Lat. *torquere*, to twist, *tortus*, twisted, wrested aside). A private or civil wrong or injury. A wrong independent of contract. 1 Hill. Torts, 1. The breach of a legal duty. Bigelow, Torts, 3.

The law recognizes certain rights as belonging to every individual, such as the right to personal security, to liberty, to property, to reputation, to the services of a daughter or servant, to the companionship of a wife, etc. Any violation of one of these rights is a tort. In like manner the law recognizes certain duties as attached to every individual, as the duty of not deceiving by false representations, of not prosecuting another maliciously, of not using your own property so as to injure another, etc. The breach of any of these duties coupled with consequent damages to any one is also a tort. Underhill, Torts, 4.

The word torts is used to describe that

branch of the law which treats of the redress of injuries which are neither crimes nor arise from the breach of contracts. All acts or omissions of which the law takes cognizance may in general be classed under the three heads of *contracts*, *torts*, and *crimes*. *Contracts* include agreements and the injuries resulting from their breach. *Torts* include injuries to individuals, and *crimes* injuries to the public or state. 1 Hill. Torts, 1.

This division of the redress of injuries by civil suit into actions of tort and actions of contract is not thoroughly accurate. For often the party injured has his election whether he will proceed by tort or by contract, as in the case of a fraudulent sale, or the fraudulent recommendation of a third person; 1 Hill. Torts, 28; 10 C. B. 83; 24 Conn. 392. But for general usage this division has been found sufficient, and is universally adopted; Cooley, Torts, 2.

As distinguished from contracts, torts are characterized by the following qualities: (1) parties jointly committing torts are in many cases severally liable without right to contribution from each other; (2) the death of either party to a tort destroys the right of action; (3) persons under personal disabilities to contract are liable for their torts; 1 Hill. Torts, 2; Cooley, Torts, 147.

As the same act may sometimes constitute the breach of a contract as well as a tort, so the same act may often constitute a tort and also a crime. For a tort may amount to, or may be likely to lead to, a breach of the peace, and thus become a matter of public concern. The torts which are usually at the same time crimes are assault, libel, and nuisance. In such cases it is the general rule of law that a public prosecution and a private action for damages can both be maintained either at the same or at different times; 1 B. & P. 191; 3 Bla. Com. 122; 1 Hill. Torts, 57. In French law the two suits are combined, so that the criminal is punished and damages awarded by one proceeding; 8 Alb. L. J. 509.

In England there is a doctrine that when a tort amounts to a felony, the private right of action is suspended until the public prosecution is completed. This, however, is not generally recognized in the United States; 1 Gray, 83; 6 N. H. 454; 1 Miles, 312; 4 Ohio, 376; 22 Wend. 285, *note;* 1 Hill. Torts, 61 *et seq.*

The infringement of a right or the violation of a duty are necessary ingredients of a tort. If neither of these is present the act is not a tort, although damage may have resulted. Hence the maxim: *Ex damno sine injuria non oritur actio.* Thus if a building be erected whereby a shop is hidden from view of the public, this, though causing great loss to the shopkeeper, is yet no tort; for no man has the right to an uninterrupted view of a particular spot if the land of another intervene. Therefore, though in this case there was damage, yet there was no infringement of a right or violation of a duty: in other words, no wrongful act; L. R. 2 Ch. App. 158; Underhill, Torts, 6.

A wrongful or malicious intent is an essential element in some torts. As, for example, deceit, slander and libel, malicious prosecution, and conspiracy. In general, however, it may be stated as a prominent distinction between torts and crimes, that in the former the party's intent is immaterial, while in prosecutions for the latter a criminal purpose must always be alleged and proved; 1 Hill. Torts, 90; Cooley, Torts, 688. Thus one may be made liable in damages for what is usually called a mere accident. So insane persons and minors, under the age of discernment, are in general liable for torts. But the French law holds that every tort implies a fault, and consequently that the insane and minors under the age of discernment, being incapable of an intent, are not liable; 2 Hill. Torts, 521; Cooley, Torts, 99, 103; 8 Alb L. J. 508; 32 L. J. C. P. 189; 1 Esp. 172.

The various acts which constitute torts may be classed as injuries to person, property, or reputation. But more particularly under the following heads: deceit, slander and libel, malicious prosecution, conspiracy, assault and battery, false imprisonment, enticement and seduction, trespass, conversion, infringement of patents, copyrights, and trade-marks, damage by animals, violation of water rights and rights of support, nuisance, negligence, etc. etc. In general, it may be said that whenever the law creates a right the violation of such right will be a tort, and wherever the law creates a duty, the breach of such duty coupled with consequent damage will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute; Underhill, Torts, 20; Cooley, Torts, 650; Addison, Torts, secs. 53–77. Thus a statute enacting that every ship shall carry medicines suitable to accidents and diseases at sea creates a duty; and any breach of this duty whereby damage results to any individual is a tort. That the statute in such case provides a penalty for non-performance, to be recovered by a common informer, does not interfere with the private action. The penalty concerns the public wrong, and has nothing to do with the private injury or the private right of action; 3 E. & B. 402.

Torts may also arise in the performance of the duties of a ministerial officer, when such duties are due to individuals and not to the state; Cooley, Torts, 376. See OFFICER; JUDGE; SHERIFF; ATTACHMENT; EXECUTION; BAIL; ARREST.

As to torts committed against property or in the relations of master and servant, husband and wife, parent and child, bailor and bailee, landlord and tenant, mortgagor and mortgagee, see these several titles.

As to remedies, the law has given particular forms of action for certain injuries, as trover for conversion, trespass for injuries to

property, etc. But by far the larger class of torts is included under actions on the case, which is the form of proceeding allowed when the injury is consequential or indirect, or not capable of being brought under any of the ancient forms of action. The remedies not included under actions on the case are usually classed as trespass *vi et armis*. See CASE.

In order to maintain an action of tort the relation of cause and effect between the act and the injury must be clearly shown. The damage must not be remote or indirect. *In jure non remota causa, sed proxima spectatur.* Cooley, Torts, 68; Broom, Max. 216; 3 Wils. 403. Thus, where it was attempted to make a common carrier liable in tort for goods destroyed by a flood, because if they had not been delayed by the lameness of his horse they would have been beyond the locality of the flood, the court held that the lameness of the horse was the remote and not the proximate cause of the injury; 20 Penn. 171.

A party injured cannot generally maintain an action for the injury if caused in any degree by his own contributory negligence. See NEGLIGENCE; 14 Am. L. Rev. 1.

TORTFEASOR. A wrong-doer; one who commits or is guilty of a tort.

TORTURE. The rack, or question, or other mode of examination by violence to the person, to extort a confession from supposed criminals, and a revelation of their associates.

It is to be distinguished from punishment, which usually succeeds a conviction for offences, as it was inflicted *in limine*, and as part of the introductory process leading to trial and judgment.

It was wholly unknown to the common and statute law of England, and was forbidden by Magna Charta, ch. 29; Co. 2d Inst. 48; 4 Bla. Com. 326.

It prevailed in Scotland, where the civil law which allowed it obtained; Dig. 48. 18. It was, however, declared contrary to the claim of right, and was expressly prohibited, 7 Anne, c. 21, § 5, A. D. 1708. Several instances of its infliction may be found in Pitcairn's Criminal Trials of Scotland.

Sir John Kelynge, in the time of Hale, says, persons standing mute were also compelled to answer, by tying their thumbs together with a whip-cord, and that this was said to be the "constant practice at Newgate." Kely. 27.

Although torture was confessedly contrary to the common law of England, it was, nevertheless, often employed as an instrument of state to wring confessions from prominent criminals,—especially in charges of treason. It was usually inflicted by warrant from the privy council. Jardine, Torture, 7, 15, 42; 1 Rush. Coll. 638.

In 1596 a warrant was issued to the attorney-general (Sir Edward Coke), the solicitor-general (Sir Thomas Fleming), Mr. Francis Bacon, and the recorder of London, to examine four prisoners "upon such articles as they should think meet, and for the better boulting forth of the truth of their intended plots and purposes, that they should be removed to Bridewell and *put to the manacles and torture.*" Mr. Jardine proves from the records of the privy council that the practice was not unfrequent during the time of Elizabeth, and continued to the close of the reign of the first two Stuarts. There is positive evidence that Guy Fawkes was directed to be tortured in regard to the Gunpowder Plot, in the warrant in the king's handwriting authorizing the commissioners, of whom Coke was one, to examine him upon the rack, "using the gentler tortures first, *et sic per gradus ad ima tenditur.*" 1 Jardine, Crim. Trials, Int. 17; 2 *id.* 106.

This absurd and cruel practice has never obtained in the United States; for no man is bound to accuse himself. An attempt to torture a person to extort a confession of crime is a criminal offence; 2 Tyl. Vt. 380. See QUESTION; PEINE FORTE ET DURE; MUTE.

TORY. Originally a nickname for the wild Irish in Ulster. The words whig and tory were first applied to English political factions in 1679.

TOTAL LOSS. In Insurance. A total loss in marine insurance is either the absolute destruction of the insured subject by the direct action of the perils insured against, or a constructive—sometimes called technical—total loss, in which the assured is deprived of the possession of the subject, still subsisting in specie, or where there may be remnants of it or claims subsisting on account of it, and the assured, by the express terms or legal construction of the policy, has the right to recover its value from the underwriters, so far as, and at the rate at which, it is insured, on abandonment and assignment of the still subsisting subject or remnants or claims arising out of it. 2 Phill. Ins. ch. xvii.; 2 Johns. 286.

A constructive total loss may be by capture; seizure by unlawful violence; as, piracy; 1 Phill. Ins. § 1106; 2 E. L. & E. 85; or damage to ship or goods over half of the value at the time and place of loss; 1 Curt. C. C. 148; 9 Cush. 415; 5 Denio, 342; 19 Ala. N. S. 108; 6 Johns. 219; or loss of the voyage; 4 Me. 431; 24 Miss. 461; 19 N. Y. 272; 1 Mart. La. 221; though the ship or goods may survive in specie, but so as not to be fit for use in the same character for the same service or purpose; 2 Caines, Cas. 324; Valin, tom. 2, tit. Ass. a. 46; or by jettison; 1 Caines, 196; or by necessity to sell on account of the action and effect of the peril insured against; 5 Gray, 154; 1 Cra. 202; or by loss of insured freight consequent on the loss of cargo or ship; 18 Johns. 208.

There may be a claim for a total loss in addition to a partial loss; 17 How. 595. A

total loss of the ship is not necessarily such of cargo; 3 Binn. 287; nor is submersion necessarily a total loss; 7 East, 38; nor is temporary delay of the voyage; 5 B. & Ald. 597.

A constructive total loss, and an abandonment thereupon of the ship, is a constructive total loss of freight; and a constructive total loss and abandonment of cargo has a like effect as to commissions or profits thereon; and the validity of the abandonment will depend upon the actual facts at the time of the abandonment, as the same may subsequently prove to have been; 2 Phillips, Ins. § 1630; 3 Johns. Cas. 93. See 2 Pars. Mar. Ins. §§ 68–106; Lowndes, Mar. Ins. §§ 210–241; ABANDONMENT.

TOTIDEM VERBIS (Lat.). In so many words.

TOTIES QUOTIES (Lat.). As often as the thing shall happen.

TOTTED. A good debt to the crown, *i. e.* a debt paid to the sheriff, to be by him paid over to the king. Cowel; Moz. & W. See FOREIGN APPOSER.

TOUCH AND STAY. Words frequently introduced in policies of insurance, giving the party insured the right to stop and stay at certain designated points in the course of the voyage. A vessel which has the power to touch and stay at a place in the course of the voyage must confine herself strictly to the terms of the liberty so given; for any attempt to trade at such a port during such a stay, as, by shipping or landing goods, will amount to a species of deviation which will discharge the underwriters, unless the ship have also liberty to trade as well as to touch and stay at such a place; 1 Marsh. Ins. 275; 1 Esp. 610; 5 *id.* 96.

And even where the printed form of policy contains the clause: *And it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance*, the right of deviation is held to be limited by the words *in this voyage*, to places in the usual course of the voyage between the termini named in the policy; 1 Dougl. 284; Park. Ins. 626; 1 Exch. 257; and, as to purpose, to objects within the main scope of the voyage insured; 4 B. & Ald. 72; 5 B. & Cr. 210; Lowndes, Mar. Ins. § 85 *et seq.*

TOUJOURS ET UNCORE PRIST (L. Fr.). Always and still ready. This is the name of a plea of tender: as, where a man is indebted to another, and he tenders the amount due, and afterwards the creditor brings a suit, the defendant may plead the tender, and add that he has always been and is still ready to pay what he owes, which may be done by the formula *toujours et uncore prist.* He must then pay the money into court; and if the issue be found for him the defendant will be exonerated from costs, and the plaintiff made liable for them; 3 Bouvier, Inst. n. 2923. See TOUT TEMPS PRIST; TENDER.

TOUR D'ECHELLE. In French Law. A right which the owner of an estate has of placing ladders on his neighbor's property to facilitate the reparation of a party-wall or of buildings which are supported by that wall. It is a species of servitude. Lois des Bât. part 1, c. 3, sect. 2, art. 9, § 1.

The space of ground left unoccupied around a building for the purpose of enabling the owner to repair it with convenience: this is not a servitude, but an actual corporeal property.

TOURN. See SHERIFF'S TOURN.

TOUT TEMPS PRIST (L. Fr. always ready). A plea by which the defendant signifies that he has always been ready to perform what is required of him. The object of the plea is to save costs: as, for example, where there has been a tender and refusal; 3 Bla. Com. 303; Comyns, Dig. *Pleader*, 2 Y, 5. So, in a writ of dower, where the plea is detinue of charters, the demandant might reply, *always ready;* Rast. Entr. 229 *b;* Stearns, Real Act. 310. See UNCORE PRIST.

TOWAGE. The act of towing or drawing ships and vessels, usually by means of a small steamer called a tug.

Where towage is rendered in the rescue or relief of a vessel from imminent peril, it becomes *salvage* service, entitled to be compensated as such; 6 N. Y. Leg. Obs. 223. A tug, sometimes called towing- or tow-boat, while not held to the responsibility of a common carrier, is bound to exercise reasonable care and skill in everything pertaining to its employment; 9 Fed. Rep. 614. See TOW-BOATS; TUGS.

That which is given for towing ships in rivers. Guidon de la Mer, c. 16; Pothier, Des Avaries, n. 147; 2 Chitty, Com. Law, 16.

TOW-BOATS. According to the weight of authority, the owners of steamboats engaged in the business of towing are not common carriers; Lawson, Carriers, 3. So held in 2 N. Y. 204; 18 Penn. 40; 9 C. L. J. 153; S. C. 14 Bush, 698, and 29 Am. Rep. 455; see TOWAGE; *contra*, 5 Jones, N. C. 174; 11 La. 46. See 6 Cal. 462; 28 N. J. L. 180.

TOWN. A term of somewhat varying signification, but denoting a division of a country next smaller in extent than a county.

In Pennsylvania and some other of the Middle states, it denotes a village or city. In the New England states, it is to be considered for many purposes as the unit of civil organization,—the counties being composed of a number of towns. Towns are regarded as corporations or *quasi*-corporations; 13 Mass. 193. In New York and Wisconsin, towns are subdivisions of counties; and the same is true of the *townships* of most of the Western states. In Ohio, Michigan, Illinois, and Iowa, they are called towhships. In England, the term *town* or *vill* comprehends under it the several species of cities, boroughs, and common towns. 1 Bla. Com. 114.

TOWN CAUSE. **In English Practice.** A cause tried at the sittings for London and Middlesex. 3 Steph. Com. 517.

TOWN-PLAT. The acknowledgment and recording of a town-plat vests the legal title to the ground embraced in the streets and alleys in the corporation of the town: therefore it is held that the proprietor who has thus dedicated the streets and alleys to the public cannot maintain trespass for an injury to the soil or freehold. The corporation alone can seek redress for such injury; 11 Ill. 554; 13 *id.* 54, 308. This is not so, however, with a highway: the original owner of the fee must bring his action for an injury to the soil; 13 Ill. 54. See HIGHWAY. If the streets or alleys of a town are dedicated by a different mode from that pointed out by the statute, the fee remains in the proprietor, burdened with the public easement; 13 Ill. 312.

TOWNSHIP. The public lands of the United States are surveyed first into tracts called townships, being in extent six miles square. The subdivisions of a township are called sections, each a mile square and containing six hundred and forty acres; these are subdivided into quarter-sections, and from that into lots of forty acres each. This plan of subdividing the public lands was adopted by act of congress of May 18, 1796. See Brightly, Dig. U. S. Laws, 493.

TRADE. Any sort of dealings by way of sale or exchange; commerce, traffic. 101 U. S. 231. The dealings in a particular business: as, the Indian trade; the business of a particular mechanic: hence boys are said to be put apprentices to learn a trade: as, the trade of a carpenter, shoemaker, and the like. Bacon, Abr. *Master and Servant* (D 1). Trade differs from art.

It is the policy of the law to encourage trade; and therefore all contracts which restrain the exercise of a man's talents in trade are detrimental to the commonwealth and therefore void; though he may bind himself not to exercise a trade in a particular place; for in this last case, as he may pursue it in another place, the commonwealth has the benefit of it; 8 Mass. 223; 9 *id.* 522. See Ware, Dist. Ct. 257, 260; Comyns, Dig. *Trade;* Viner, Abr. *Trade;* RESTRAINT.

TRADE-MARK. A symbol, emblem, or mark, which a tradesman puts upon or attaches in some way to the goods he manufactures or has caused to be manufactured, so that they may be identified and known in the market. Brown, Trade-Marks, 53–93. The wrapper in which goods are put up may have the trade-mark stamped on it, but the design of the wrapper itself (a peculiar box, tin-pail, or bright-colored paper) cannot be converted into a trade-mark; 14 Blatch. 128.

It may be in any form of letters, words, vignettes, or ornamental design. Newly-coined words may form a trade-mark; Brown, Trade-Marks, 151. But a mere geographical name cannot be so used. The word "Lackawanna," which is the name of a region of country, cannot by combination with the word "coal," make a trade-mark, because every one who mines coal in Lackawanna has a right to say that his product is Lackawanna coal. But any fraudulent use of a geographical name will be restrained in equity. In the case of the Akron Cement Co., the plaintiffs manufactured cement at Akron, in New York, and sold it under the name of "Akron Cement," the defendants made the same sort of cement at Syracuse and labelled it "Onondaga Akron Cement," etc. The court held that though all the world had a right to manufacture cement at Akron and call it Akron Cement, yet the action of the defendants in calling their cement made at Syracuse, Akron Cement, was a fraud on the plaintiffs and on the public, and should accordingly be restrained; 13 Wall. 311; 49 Barb. 588; Brown, Trade-Marks, 123.

The ownership of trade-marks is generally considered as a right of property; Upton, Trade-Marks, 10. It is on this ground that equity often protects by injunction against their infringement. In such cases proof of fraud is not necessary, the mere fact of violating a right of property being a sufficient reason for the exercise of equitable jurisdiction; 1 De G. J. & S. 185. At law the proper remedy is an action for deceit; and here proof of fraud is necessary. But equity will not interfere by injunction except in aid of a legal right; and if the fact of a plaintiff's property in a trade-mark or of the defendant's interference with it appears at all doubtful, the plaintiff will be left to first establish his case by an action at law; 4 E. D. Sm. 387; Brown, Trade-Marks, 23.

If goods derive their chief value from the personal skill of the adopter of the trade-mark, he will not be allowed to assign it; 1 H. & M. 271.

A man can always put his own name on his own goods, notwithstanding that another of the same name already manufactures and sells the same goods. In other words, a man cannot make a trade-mark out of his name alone. But no one can use in connection with his own name devices or symbols which have become the property of another person of the same name. Thus an injunction to restrain the use of the words "Burgess Essence of Anchovies," was refused, although there was another person named Burgess who made essence of anchovies. But an injunction was granted to restrain the use of the words "Burgess Fish Sauce Warehouse late of 107 Strand," which the court held had become the peculiar property of the first Burgess; 17 E. L. & E. 257; 12 Am. Rep. 410. A man will be restrained from using his own name fraudulently; 22 L. J. Ch. 675; 3 B. & C. 541.

The *trade-name* of a firm, a corporate name, and the name of a publication, though not strictly trade-marks, are nevertheless a species of property of the same nature as trade-marks, and will be protected in like manner; 21 Am. L. Reg. 644; 33 Am. Rep. 335; 9 *id.* 331. See NAME.

So a tradesman may adopt a fictitious name, and sell his goods under it as a trade-mark, and the property right he thus acquires in the fanciful name will be protected; 6 Thomp. & C. 133.

No property can be acquired in words, marks, or devices which denote the mere nature, kind, and quality of articles; 17 Barb. 608; 2 Sandf. 599; 101 U. S. 51; L. R. 17 Eq. 29.

Thus "snow-flake" as applied to bread and crackers and "rye and rock" as applied to a liquor were held to be descriptions. But "insurance oil" as applied to an illuminating, non-explosive oil was held to be a valid trade-mark; 46 N. Y. 542; 39 Am. Rep. 286, 290.

In the examination of conflicting trade-marks the courts will judge as would the public. Mere variations of arrangement, with secondary additions and omissions, will justify an injunction; and while there may be striking differences between two trade-marks, yet if in the last made there is an ingenuity which would deceive, the court will interfere; 18 Beav. 164; 10 Beav. 297.

A party may affect his right to a trade-mark by non-use, by a forbearance in suing protectively, and by adopting a new one. But the question of abandonment is always a question of intention; Brown, Trade-Marks, 536. Equity, however, will not in general refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits; 31 Law Times, 285; 45 L. Jour. pt. 1, 505.

As it is often difficult to prove exactly when a certain trade-mark was adopted, Congress provided for the registration of trade-marks in the patent office, and for the punishment of the fraudulent use, sale, and counterfeiting of them; 16 Stat. at L. 198; 19 *id.* 141. This legislation has been declared unconstitutional, because a trade-mark is not a writing or invention, and because the acts in question applied to all commerce, and were not limited to trade-marks used only in commerce between the states or with foreign nations, or with the Indian tribes; 100 U. S. 82; 13 Am. L. Rev. 390. But although no indictments can be maintained under these acts, yet registration under them will be good evidence in state courts of the adoption of a trade-mark. The act of March 3, 1881, is supposed to avoid the constitutional difficulty by providing for the registration of trade-marks only when used in foreign commerce, or in commerce with the Indian tribes; 21 Am. L. Reg. 648.

Trade-mark treaties.—The United States has entered into numerous trade-mark treaties. Those with Germany and Russia declare that the citizens of each country shall enjoy in the other the same protection as native citizens. The treaties with Austria, Belgium, and France forbid the people of either country from counterfeiting the trade-marks of the other, and give to the injured merchant the same action for damages that he would have if he were a citizen of the country where the imitation is committed. The treaty with Great Britain provides that the citizens of each party shall have in the possessions of the other the same rights as native citizens, "or as are now granted or may hereafter be granted to the citizens of the most favored nation."

The treaties with Germany and Russia require no legislation on the part of the United States to carry them into effect. But the treaties with Austria, Belgium, France, and England can hardly be carried out unless Congress has power to legislate on the subject of trade-marks; Brown, Trade-Marks, 557.

See, generally, Brown, Upton, Coddington, and Sebastian, on Trade-Marks.

TRADER. One who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. The *quantum* of dealing is immaterial, when an intention to deal generally exists; 3 Stark. 56; 2 C. & P. 135; 1 Term, 572. The principal question is whether the person has the intention of getting a living by his trading; if this is proved, the extent or duration of the trading is not material; 3 Camp. 233.

Questions as to who is a trader most frequently arise under the bankrupt laws; and the most difficult among them are those cases where the party follows a business which is not that of buying and selling principally, but in which he is occasionally engaged in purchases and sales.

A farmer who, in addition to his usual business, occasionally buys a horse not calculated for his usual occupation, and sells him again to make a profit, and who in the course of two years had so bought and sold five or six horses, two of which had been sold, after he had bought them, for the sake of a guinea profit, was held to be a trader; 1 Term, 537, n.; 1 Price, 20. Another farmer, who bought a large quantity of potatoes, not to be used on his farm, but merely to sell again for a profit, was also declared to be a trader; 1 Stra. 513. See 5 B. & P. 78; 11 East, 274.

A butcher who kills only such cattle as he has reared himself, is not a trader, but if he buy them and kill and sell them with a view to profit, he is a trader; 4 Burr. 21, 47.

A brickmaker who follows the business for the purpose of enjoying the profits of his real estate merely is not a trader; but when he buys the earth by the load or otherwise, and manufactures it into bricks and sells them with a view to profit, he is a trader; 7 East, 442; 3 C. & P. 500; Mood. & M. 263; 2 Rose, 422; 2 Gl. & J. 183; 1 Bro. C. C. 173.

One who is engaged in the manufacture and sale of lumber is a trader; 1 B. R. 281; so is one engaged in buying and selling goods for the purpose of gain, though but occasionally; 2 *id.* 15; but the keeper of a livery stable is not; 3 N. Y. Leg. Obs 282; nor is one who buys and sells shares; 2 Ch. App. 466.

TRADES UNIONS. A combination of workmen in the same or like trades, associated to maintain, and, if possible, enlarge their rights and privileges of whatever kind. The English Trades Union Act of 34 & 35 Vict. c. 31, provides that the purposes of any trades union shall not by reason merely that they are in restraint of trade be deemed unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, and shall not by reason merely, as aforesaid, be unlawful so as to render void or voidable any agreement or trust. Provisions are also made for the registration and for registered offices, of trades unions; Whart. Dict. See CONSPIRACY; STRIKE.

TRADITIO BREVIS MANUS (Lat.). **In Civil Law.** The delivery of a thing by the mere consent of the parties; as, when Peter holds the property of Paul as bailee, and afterwards he buys it, it is not necessary that Paul should deliver the property to Peter and he should re-deliver it to Paul; the mere consent of the parties transfers the title to Paul. 1 Duverg. n. 252; 21 Me. 231; Pothier, Pand. lib. 50, CDLXXIV.; 1 Bouvier, Inst. n. 944.

TRADITION (Lat. *trans*, over, *do*, *dare*, to give). **In Civil Law.** The act by which a thing is delivered by one or more persons to one or more others.

The delivery of possession by the proprietor with an intention to transfer the property to the receiver. Two things are, therefore, requisite in order to transmit property in this way: the *intention* or *consent* of the former owner to transfer it, and the *actual delivery* in pursuance of that intention.

Tradition is either real or symbolical. Real tradition takes place where the *ipsa corpora* of movables are put into the hands of the receiver. *Symbolical tradition* is used where the thing is incapable of real delivery, as, in immovable subjects, such as lands and houses, or such as consist *in jure* (things incorporeal), as, things of fishing, and the like. The property of certain movables, though they are capable of real delivery, may be transferred by symbol. Thus, if the subject be under lock and key, the delivery of the key is considered as a legal tradition of all that is contained in the repository. Cujas, Observations, liv. 11, ch. 10; Inst. 2. 1. 40; Dig. 41. 1. 9; Erskine, Inst. 2. 1. 10. 11; La. Civ. Code, art. 2452 *et seq.* See DELIVERY; SYMBOLICAL DELIVERY.

TRAFFIC. Commerce; trade; sale or exchange of merchandise, bills, money, and the like.

TRAFFIC RATES. Unjust discriminations by a common carrier exist where two or more persons desire identical or very similar transportation services to be performed for each of them by such carrier, and he charges one or more of such persons a higher price, or affords to them inferior facilities of transportation, than he charges or gives to the other of such persons; 16 Am. L. Rev. 818. The question is not merely whether the service or the price is absolutely unequal in the narrowest sense, but also whether the inequality is unreasonable and injurious. A certain inequality of terms, facilities, or accommodations may be reasonable, and, therefore, not an infringement of the common right; 52 N. H. 430.

Variations in the quantity of transportation service warrant corresponding variations in the prices chargeable for it; 16 Am. L. Rev. 821: as where the shipper furnishes his own cars; 1 Nev. & Mac. 63; or where by reason of gradients or otherwise, the cost of carriage is greater on one part of a line than on the other; 2 Nev. & Mac. 39, 105.

A discrimination resting exclusively upon the amount of freight supplied by the respective shippers will not be sustained; 12 Fed. Rep. 311, per Baxter, Circ. J.; but it may be if the amount is great enough to enable the company to perform the service at less expense.

A carrier may contract to carry cattle at lower rates, on condition of being liable only for negligence; 25 W. R. 63; and extra fare may be charged to passengers who pay their fare upon the cars; 30 N. Y. 505; 46 Ind. 293; 53 Me. 279; provided the company has afforded reasonable opportunity to passengers to purchase tickets before entering the cars; 38 Ind. 116; 43 Ill. 364; but the extra fare must itself be reasonable in amount; 43 Ill. 176; 34 N. H. 230. See TICKET.

A carrier cannot discriminate in favor of another carrier, or any of the public; 62 Penn. 218; nor between different localities; 67 Ill. 11; but see 47 Penn. 341 (*per* Strong, J., as to a discrimination in favor of domestic articles).

It has been said, *obiter*, that a company might make discriminations between intermediate and terminal traffic on the ground of competition at the terminal point, 1 Nev. & Mac. 103; but it appears that no case has decided that competition is *per se* a valid reason for reducing rates, even to the public; 16 Am. L. Rev. 836; see 67 Ill. 11.

When an unjust discrimination in prices is shown to exist, the common carrier guilty of it will be enjoined by a court of chancery not to continue it; and one who has been unjustly discriminated against may recover the excessive freights he has paid by an action at law; 16 Am. L. Rev. 839 (where this subject is fully treated). See also 15 *id.* 186.

TRAITOR. One guilty of treason. See TREASON.

TRAITOROUSLY. In Pleading. A technical word, which is essential in an indictment for treason in order to charge the crime, and which cannot be supplied by any other word or any kind of circumlocution. Having been well laid in the statement of the treason itself, it is not necessary to state every overt act to have been traitorously committed.

See Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 6); 1 East, Pl. Cr. 115; 2 Hale, Pl. Cr. 172, 184; 4 Bla. Com. 307; 3 Inst. 15; Cro. Car. 37; 4 Hargrave, St. Tr. 701; 2 Ld. Raym. 870; 2 Chitty, Cr. Law, 104, note (*b*).

TRAMP. One who roams about from place to place, begging or living without labor or visible means of support; a vagrant. Many of the states have recently adopted suitable legislation upon the subject, corresponding to the English vagrant acts. A single act of vagrancy is sufficient, according to the laws of Massachusetts, 1880; New York, 1880, and North Carolina, 1879. Females, minors, and blind persons are expressly excepted from the acts of some of the states, as New York, Delaware, North Carolina, and Nebraska. The object of these statutes is accomplished by arresting offenders and setting them to work on municipal improvements, or hiring them out to private employers, for a limited time, in Delaware for a month, for which they receive food, lodging, and reasonable wages. For entering a dwelling house, kindling a fire in a public highway or on private land without the owner's permission, for carrying dangerous weapons, or doing or threatening to do any injury to any one or to his property, they shall be guilty of a misdemeanor, punishable by imprisonment. See 1 N. Y. Laws, 1880, 296, ch. 176, § 1. See VAGRANT.

TRANSACTION (from Lat. *trans* and *ago*, to carry on). **In Civil Law.** An agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their difference, by mutual consent, in the manner which they agree on. In Louisiana this contract must be reduced to writing. La. Civ. Code, art. 3038.

Transactions regulate only the differences which appear to be clearly comprehended in them by the intentions of the parties, whether they be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them. La. Civ. Code, art. 3040.

To transact, a man must have the capacity to dispose of the things included in the transaction. 1 Domat. Lois Civiles, 1, 13, 1; Dig. 2. 15. 1; Code, 2. 4. 41. In the common law this is called a compromise. See COMPROMISE.

TRANSCRIPT. A copy of an original writing or deed.

TRANSFER. (Lat. *trans*, over, *fero*, to bear or carry). The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter.

As to the transfer of stocks, see STOCK.

TRANSFEREE. He to whom a transfer is made.

TRANSFERENCE. In Scotch Law. The name of an action by which a suit which was pending at the time the parties died is transferred from the deceased to his representatives, in the condition in which it stood formerly. If it be the pursuer who is dead, the action is called a transference *active;* if the defender, it is a transference *passive.* Erskine, Inst. 4. 1. 32.

TRANSFEROR. One who makes a transfer.

TRANSGRESSION (Lat. *trans*, over, *gressus*, a stepping). The violation of a law.

TRANSHIPMENT. In Maritime Law. The act of taking the cargo out of one ship and loading it in another.

When this is done from necessity, it does not affect the liability of an insurer on the goods; 1 Marsh. Ins. 166; Abbott, Shipp. 240. But when the master transhipps goods without necessity, he is answerable for the loss of them by capture by public enemies; 1 Gall. 443.

TRANSIRE. In English Law. A warrant for the custom-house to let goods pass; a permit. See, for a form of a *transire*, Hargrave, Law Tr. 104.

TRANSITORY ACTION. An action the cause of which might have arisen in one place or county as well as another.

In general, all personal actions, whether *ex contractu;* 5 Taunt. 25; 6 East, 352; 2 Johns. Cas. 335; 2 Caines, 374; 3 S. & R. 500; 1 Chitty, Pl. 243; or *ex delicto;* 1 Chitty, Pl. 243; are transitory.

Such an action may at common law be brought in any county which the plaintiff elects; but, by statute, in many states of the United States provision is made limiting the right of the plaintiff in this respect to a county in which some one or more of the parties has his domicil.

TRANSITUS (Lat.). A transit. See STOPPAGE IN TRANSITU.

TRANSLATION. The reproduction in one language of what has been written or spoken in another.

In pleading, when a libel or an agreement written in a foreign language must be averred, it is necessary that a translation of it should also be given.

In evidence, when a witness is unable to speak the English language so as to convey his ideas, a translation of his testimony must be made. In that case an interpreter should be sworn to translate to him, on oath, the questions propounded to him, and to translate to the court and jury.

See INTERPRETER.

The bestowing of a legacy which had been given to one, on another: this is a species of ademption; but it differs from it in this, that there may be an ademption without a translation, but there can be no translation without an ademption. Bacon, Abr. *Legacies* (C).

The transfer of property; but in this sense it is seldom used. 2 Bla. Com. 294.

In Ecclesiastical Law. The removal from one place to another; as, the bishop was translated from the diocese of A to that of B. In the civil law, translation signifies the transfer of property. Clef des Lois Rom.

See COPYRIGHT.

TRANSMISSION (Lat. *trans*, over, *mitto*, to send). **In Civil Law.** The right which heirs or legatees may have of passing to their successors the inheritance or legacy to which they were entitled, if they happen to die without having exercised their rights. Domat, liv. 3, t. 1, s. 10; 4 Toullier, n. 186; Dig. 50. 17. 54; Code, 6. 51.

TRANSPORTATION (Lat. *trans*, over, beyond, *porto*, to carry). **In English Law.** A punishment inflicted by virtue of sundry statutes: it was unknown to the common law. 2 H. Blackst. 223. It is a part of the judgment or sentence of the court that the party shall be transported or sent into exile. 1 Chitty, Cr. Law, 789; Princ. of Pen. Law, c. 4, § 2.

TRAVAIL. The act of child-bearing.

A woman is said to be in her travail from the time the pains of child-bearing commence until her delivery; 5 Pick. 63; 6 Me. 460.

In some states, to render the mother of a bastard child a competent witness in the prosecution of the alleged father, she must have accused him of being the father during the time of her travail; 1 Root, 107 (a case of maintenance); 2 Mass. 443; 6 Me. 460; 3 N. H. 135. But when the state prosecutes, the mother is competent although she did not accuse the father during her travail; 1 Day, 278.

TRAVELLING. See Rogers, Wrongs and Rights of a Traveller; SUNDAY.

TRAVERSE (L. Fr. *traverser*, to turn over, to deny). To deny; to put off.

In Civil Pleading. To deny or controvert any thing which is alleged in the previous pleading. Lawes, Pl. 116. A denial. Willes, 224. A direct denial in formal words: "Without this, that, etc." (*absque hoc*). 1 Chitty, Pl. 523, n. *a*. A traverse may deny all the facts alleged; 1 Chitty, Pl. 525; or any particular material fact; 20 Johns. 406.

A *common traverse* is a direct denial, in common language, of the adverse allegations, without the *absque hoc*, and concluding to the country. It it not preceded by an inducement, and hence cannot be used where an inducement is requisite; 1 Saund. 103 *b*, n. 1.

A *general traverse* is one preceded by a general inducement and denying all that is last before alleged on the opposite side, in general terms, instead of pursuing the words of the allegation which it denies; Gould, Pl. vii. 5, 6. Of this sort of traverse the replication *de injuria sua propria absque tali causa*, in answer to a justification, is a familiar example; Bacon, Abr. *Pleas* (H 1); Steph. Pl. 171; Gould, Pl. c. 7, § 5; Archb. Civ. Pl. 194.

A *special traverse* is one which commences with the words *absque hoc*, and pursues the material portion of the words of the allegation which it denies; Lawes, Pl. 116. It is regularly preceded by an inducement consisting of new matter; Gould, Pl. c. 7, §§ 6, 7; Steph. Pl. 188. A special traverse does not complete an issue, as does a common traverse; 20 Viner, Abr. 339; Yelv. 147, 148; 1 Saund. 22, n. 2.

A traverse upon a traverse is one growing out of the same point or subject-matter as is embraced in a preceding traverse on the other side; Gould, Pl. c. 7, § 42, n. It is a general rule that a traverse well intended on one side must be accepted on the other. And hence it follows, as a general rule, that there cannot be a traverse upon a traverse if the first traverse is material. The meaning of the rule is that when one party has tendered a material traverse the other cannot leave it and tender another of his own to the same point upon the inducement of the first traverse, but must join in that first tendered; otherwise the parties might alternately tender traverses to each other in unlimited succession, without coming to an issue; Gould, Pl. c. 7, § 42. The rule, however, does not apply where the first traverse is immaterial, nor where it is material if the plaintiff would thereby be ousted of some right or liberty which the law allows; Poph. 101; F. Moore, 350; Hob. 104; Cro. Eliz. 99, 418; Comyns, Dig. *Pleader* (G 18); Bacon, Abr. *Pleas* (H 4).

In Criminal Practice. To put off or delay the trial of an indictment till a succeeding term. More properly, to deny or take issue upon an indictment. 4 Bla. Com. 351.

TREASON. In Criminal Law. This word imports a betraying, treachery, or breach of allegiance; 4 Bla. Com. 75. In England, treason was divided into high and petit treason. The latter, originally, was of several forms, which, by 25 Edw. III. st. 5, c. 2, were reduced to three: the killing, by a wife, of her husband; by a servant, of his master; and the killing of a prelate by an ecclesiastic owing obedience to him. These kinds of treason were abolished in 1828. In America they were unknown; here treason means high treason.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war against them, or in adhering to their enemies, giving them aid or comfort. By the same article of the constitution, no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

By the same article of the constitution, no "attainder of treason shall work corruption of blood except during the life of the person

attainted." Every person owing allegiance to the United States who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason; R. S. § 5331. The penalty is death, or, at the discretion of the court, imprisonment at hard labor for not less than five years and a fine of not less than ten thousand dollars; and every person convicted of treason is rendered incapable of holding any office under the United States; R. S. § 5332.

The term *enemies*, as used in the constitution, applies only to subjects of a foreign power in a state of open hostility with us. To constitute a "levying of war" there must be an assemblage of persons with force and arms to overthrow the government or resist the laws. All who aid in the furtherance of the common object of levying war against the United States, in however minute a degree, or however remote from the scene of action, are guilty of treason; 4 Sawy. 457, per FIELD, J.

Treason may be committed against a state; 1 Story, 614; 11 Johns. 549.

See, generally, 3 Story, Const. 39, p. 667; Sergeant, Const. c. 30; United States *vs.* Fries, Pamph.; 1 Tucker, Bla. Com. App. 275, 276; 3 Wilson, Law Lect. 96; Foster, Disc. (1); Burr's Trial; 4 Cra. 126, 469; 1 Dall. 35; 2 *id.* 246, 355; 3 Wash. C. C. 234; 1 Johns. 553; 11 *id.* 549; Comyns, Dig. *Justices* (K); 1 East, Pl. Cr. 37–158; 23 Law Reporter, 597, 705; Bish. Cr. Law; 20 Wall. 92; 16 *id.* 147; 92 U. S. 202; 93 *id.* 274.

TREASURE TROVE. Found treasure.

This name is given to such money or coin, gold, silver, plate, or bullion, which, having been hidden or concealed in the earth, or other private place so long that its owner is unknown, has been discovered by accident. Should the owner be found, it must be restored to him; and in case of not finding him, the property, according to the English law, belongs to the king. In the latter case, by the civil law, when the treasure was found by the owner of the soil he was considered as entitled to it by the double title of owner and finder; when found on another's property, one-half belonged to the owner of the estate and the other to the finder; when found on public property, it belonged one-half to the public treasury and the other to the finder. Leçons du Dr. Rom. §§ 350–352. This includes not only gold and silver, but whatever may constitute riches: as vases, urns, statues, etc.

The Roman definition includes the same things under the word *pecunia;* but the thing found must have a commercial value; for ancient tombs would not be considered a treasure. The thing must have been hidden or concealed in the earth, and no one must be able to establish his right to it. It must be found by a pure accident, and not in consequence of search; Dalloz, Dict. *Propriété*, art. 3, s. 3.

According to the French law, le trésor est toute chose cachée ou enfouie, sur laquelle personne ne peut justifier sa propriété, et qui est découverte par le pur effet du hasard. Code, Civ. 716. See 4 Toullier, n. 34. See, generally, 20 Viner, Abr. 414; 7 Comyns, Dig. 649; 1 Brown, Civ. Law, 237; 1 Bla. Com. 295; Pothier, Traité *du Droit de Propriété*, art. 4.

TREASURER. An officer intrusted with the treasures or money either of a private individual, a corporation, a company, or a state.

It is his duty to use ordinary diligence in the performance of his office, and to account with those whose money he has.

TREASURER OF THE UNITED STATES. This officer is appointed by the president by and with the advice and consent of the senate. Before entering on the duties of his office, the treasurer is required to give bond, with sufficient sureties, approved by the secretary of the treasury and the first comptroller, in the sum of one hundred and fifty thousand dollars, payable to the United States, with condition for the faithful performance of the duties of his office and for the fidelity of the persons by him employed.

His principal duties are—to receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the secretary of the treasury, countersigned by either comptroller and recorded by the register; to take receipts for all moneys paid by him; to render his account to the first comptroller quarterly, or oftener if required, and transmit a copy thereof, when settled, to the secretary of the treasury; to lay before each house, on the third day of every session of congress, fair and accurate copies of all accounts by him from time to time rendered to and settled with the first comptroller, and a true and perfect account of the state of the treasury; to submit at all times to the secretary of the treasury and the comptroller, or either of them, the inspection of the moneys in his hands. R. S. §§ 301–311.

TREASURY. The place where treasure is kept; the office of a treasurer. The term is more usually applied to the public than to a private treasury. See DEPARTMENT.

TREASURY NOTES. The treasury notes of the United States payable to holder or to bearer at a definite future time are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character. Where such a paper is overdue a purchaser takes subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity; 21 Wall. 138. See, also, 57 N. Y. 573; s. c. 15 Am. Rep. 534.

TREATY. A compact made between two or more independent nations with a view to the public welfare. Treaties are for a perpetuity, or for a considerable time. Those matters which are accomplished by a single act and are at once perfected in their execution are called agreements, conventions, and pactions.

Personal treaties relate exclusively to the persons of the contracting parties, such as family alliances, and treaties guaranteeing

the throne to a particular sovereign and his family. As they relate to the persons, they expire of course on the death of the sovereign or the extinction of his family.

Real treaties relate solely to the subject-matters of the convention, independently of the persons of the contracting parties, and continue to bind the state although there may be changes in its constitution or in the persons of its rulers. Vattel, Law of Nat. b. 2, c. 12, §§ 183–197; Boyd's Wheat. Int. Law, § 29.

On the part of the United States, treaties are made by the president, by and with the consent of the senate, provided two-thirds of the senators present concur. Const. art. 2, s. 2, n. 2.

No state shall enter into any treaty, alliance, or confederation; Const. art. 1, s. 10, n. 1; nor shall any state, without the consent of congress, enter into any agreement or compact with another state or with a foreign power; *id.* art. 1, sec. 10, n. 2; 3 Story, Const. § 1395.

A treaty is declared to be the supreme law of the land, and is, therefore, obligatory on courts; 1 Cra. 103; 1 Wash. C. C. 322; 1 Paine, 55; whenever it operates of itself without the aid of a legislative provision; but when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule of the court; 2 Pet. 314. It need hardly be said that a treaty cannot change the constitution or be held valid if it be in violation of that instrument. The effect of treaties and acts of congress, when in conflict, is not settled by the constitution. But the question is not involved in any doubt as to its solution. A treaty may supersede a prior act of congress, and an act of congress may supersede a prior treaty; and this is true both of treaties with Indians and foreign nations; *per* Swayne, J., in 11 Wall. 620; so in 8 Op. Atty.-Gen. 354. A treaty changes the pre-existing laws, and must be so regarded by the courts; 1 Cra. 37; 6 Op. Atty.-Gen. 291.

As affecting the rights of contracting governments, a treaty is binding from the date of its signature, and the exchange of signatures has a retroactive effect, confirming the treaty from its date; but a different rule prevails when the treaty operates on individual rights; 9 Wall. 32.

The law of the interpretation of treaties is substantially the same as in the case of other contracts; Woolsey, Int. Law, 185.

See Story, Const.; Sergeant, Const. Law; 4 Hall, L. J. 461; Wheat. 161; 3 Dall. 199; 1 Kent, *165, *284; see 3 Law Mag. & Rev., 4 series, 91 (On the Obligation of Treaties).

TREATY OF PEACE. A treaty of peace is an agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and regulate the manner in which it is to be restored and supported. Vattel, b. 4, c. 2, § 9.

TREBLE COSTS. In English Practice. The taxed costs and three-fourths the same added thereto. It is computed by adding one-half for double costs, and in addition one-half of one-half for treble costs. 1 Chitty, Bail, 137; 1 Chitty, Pr. 27.

In American Law. In Pennsylvania the rule is different: when an act of assembly gives treble costs, the party is allowed three times the usual costs, with the exception that the fees of the officers are not to be trebled when they are not regularly or usually payable by the defendant; 2 Rawle, 201.

And in New York the directions of the statute are to be strictly pursued, and the costs are to be trebled; 2 Dunl. Pr. 731.

TREBLE DAMAGES. In actions arising *ex contractu*, some statutes give treble damages; and these statutes have been liberally construed to mean actually treble damages: for example, if the jury give twenty dollars damages for a forcible entry, the court will award forty dollars more, so as to make the total amount of damages sixty dollars; 4 B. & C. 154; M'Clel. 567. See PATENT.

The construction on the words *treble damages* is different from that which has been put on the words *treble costs*. See 6 S. & R. 288; 1 Browne, Penn. 9; 1 Cow. 160, 175, 584; 8 *id.* 115.

TREBUCKET. The name of an engine of punishment, said to be synonymous with *tumbrel*.

TREE. A woody plant, which in respect of thickness and height grows greater than any other plant.

Trees are part of the real estate while growing and before they are severed from the freehold; but as soon as they are cut down they are personal property.

Some trees are timber-trees, while others do not bear that denomination. See TIMBER; 2 Bla. Com. 281.

Trees belong to the owner of the land where they grow; but if the roots go out of one man's land into that of another, or the branches spread over the adjoining estates, such roots or branches may be cut off by the owner of the land into which they thus grow; Rolle, 394; 3 Bulstr. 198; Viner, Abr. *Trees* (E), *Nuisance* (W 2); 1 Suppl. to Ves. Jr. 138; 2 Suppl. Ves. Ch. 162, 448; 6 Ves. Ch. 109.

When the roots grow into the adjoining land, the owner of such land may lawfully claim a right to hold the tree in common with the owner of the land where it was planted; but if the branches only overshadow the adjoining land, and the roots do not enter it, the tree wholly belows to the owner of the estate where the roots grow; 1 Ld. Raym. 737. See 1 Pick. 224; 6 N. H. 430; 7 Conn. 125; 11 Co. 50; Hob. 310; 2 Rolle, 141; 5 B. & Ald. 600; Washb. Easem.;

Code Civ. art. 671; Pardessus, *Tr. des Servitudes*, 297; Dalloz, Dict. *Servitudes*, art. 3, § 8; F. Moore, 812; Plowd. 470; 5 B. & C. 897. When the tree grows directly on the boundary-line, so that the line passes through it, it is the property of both owners, whether it be marked as a boundary or not; 12 N. H. 454.

TRESAILE, or **TRESAYLE**. The grandfather's grandfather. 1 Bla. Com. 186.

TRESPASS. Any misfeasance or act of one man whereby another is injuriously treated or damnified. 3 Bla. Com. 208; 7 Conn. 125.

Any unlawful act committed with violence, actual or implied, to the person, property, or rights of another.

Any unauthorized entry upon the realty of another to the damage thereof.

The word is used oftener in the last two somewhat restricted significations than in the first sense here given. In determining the nature of the act, neither the amount of violence or the intent with which it is offered, nor the extent of the damage accomplished or the purpose for which the act was committed, are of any importance: since a person who enters upon the land of another without leave, to lead off his own runaway horse, and who breaks a blade of grass in so doing, commits a trespass; 2 Humphr. 325; 6 Johns. 5.

It is said that *some* damage must be committed to make an act a trespass. It is undoubtedly true that damage is required to constitute a trespass *for which an action will lie;* but, so far as the tort itself is concerned, it seems more than doubtful if the mere commission of an act affecting another, without legal authority, does not constitute trespass, though until damage is done the law will not regard it, inasmuch as the law does not regard trifles.

The distinction between the different classes of trespass is of importance in determining the nature of the remedy.

A trespass committed with force is said to be done *vi et armis;* one committed by entry upon the realty, *by breaking the close.*

In Practice. A form of action which lies to recover damages for the injury sustained by the plaintiff, as the immediate consequence of some wrong done forcibly to his person or property, against the person committing the same.

The action lies for *injuries to the person* of the plaintiff: as, by assault and battery, wounding, imprisonment, and the like; 9 Vt. 352; 6 Blackf. 375.

It lies, also, for forcible injuries to the person of another, whereby a direct injury is done to the plaintiff in regard to his rights as parent, master, etc.; 2 Aik. 465; 2 Caines, 292; 8 S. & R. 36. It does not lie for mere non-feasance, nor where the matter affected was not tangible.

The action lies for *injuries to personal property*, which may be committed by the several acts of unlawfully striking, chasing if alive, and carrying away to the damage of the plaintiff, a personal chattel; 1 Wms. Saund. 84, nn. 2, 3; Fitzh. N. B. 86; Cro. Jac. 362; of which another is the owner and in possession; 2 Root, 209; 5 Vt. 97; and for the removal or injury of inanimate personal property; 12 Me. 122; 13 Pick. 139; 5 Johns. 348; of which another has the possession, actual or constructive; 21 Pick. 369; 13 Johns. 141; 1 N. H. 110; 4 J. J. Marsh. 18; 2 Bail. So. C. 466; 4 Munf. 444; 6 Blackf. 136; 4 Ill. 9; 6 W. & S. 323; without the owner's assent. A naked possession or right to immediate possession is sufficient to support this action; 1 Term, 480; 7 Johns. 535; 5 Vt. 274; 1 Penn. 238; 17 S. & R. 251; 11 Mass. 70; 11 Vt. 521; 1 Ired. 163; 10 Vt. 165. See TRESPASSER.

The action lies also for *injuries to the realty* consequent upon entering without right upon another man's land (breaking his close). The inclosure may be purely imaginary; 3 Bla. Com. 209; 1 D. & B. 371; but reaches to the sky and to the centre of the earth; 19 Johns. 381.

The plaintiff must be in possession with some title; 5 East, 485; 9 Johns. 61; 1 N. & M'C. 356; 10 Conn. 225; 6 Rand. 8, 556; 4 Watts, 377; 4 Pick. 305; 4 Bibb, 218; 2 Hill, So. C. 466; 1 Harr. & J. Md. 295; 31 Penn. 304; 5 Harr. Del. 320; 11 Ired. 417; though mere title is sufficient where no one is in possession; 2 Ala. 229; 1 Wend. 466; 1 Vt. 485; 8 Pick. 333; 4 D. & B. 68; as in case of an owner to the centre of a highway; 4 N. H. 36; 1 Penn. 336; see 17 Pick. 357; and mere possession is sufficient against a wrong-doer; 9 Ala. 82; 1 Rice, 368; 23 Ga. 590; see 22 Pick. 295; and the possession may be by an agent; 3 M'Cord, 422; but not by a tenant; 8 Pick. 235; 1 Hill, So. C. 260; see 13 Ind. 64; other than a tenant at will; 15 Pick. 102.

An action will not lie unless some damage is committed; but slight damage only is required; 2 Johns. 357; 4 Mass. 266.

Some damage must have been done to sustain the action; 2 Bay, 421; though it may have been very slight: as, breaking glass; 4 Mass. 140.

The action will not lie where the defendant has a justification sufficient to excuse the act committed, though he acted without authority from the owner or the person affected; 8 Law Rep. 77. See JUSTIFICATION; TRESPASSER. Accident may in some cases excuse a trespass; 7 Vt. 62; 4 M'Cord, 61; 12 Me. 67.

The declaration must contain a concise statement of the injury complained of, whether to the person, personal or real property, and it must allege that the injury was committed *vi et armis* and *contra pacem*. See CONTINUANDO.

The plea of not guilty raises the general issue, and under it the defendant may give in evidence any facts which show that the property was not in possession of the plaintiff rightfully as against the defendant at the time of the injury, or that the injury was not committed by the defendant with force.

Other matters must, in general, be pleaded

specially. See TRESPASS QUARE CLAUSUM. Matters in justification, as, authority by law; 3 Hill, N. Y. 619; 4 Mo. 1; defence of the defendant's person or property, taking a distress on premises other than those demised, etc.; 1 Chitty, Pl. 439; custom to enter; 4 Pick. 145; right of way; 7 Mass. 385; etc., must be specially pleaded.

Judgment is for the damages assessed by the jury when for the plaintiff, and for costs when for the defendant.

TRESPASS DE BONIS ASPORTATIS (Lat. *de bonis asportatis*, for goods which have been carried away).

In Practice. A form of action brought by the owner of goods to recover damages for unlawfully taking and carrying them away. 1 Me. 117.

It is no answer to the action that the defendant has returned the goods; 1 Bouvier, Inst. n. 36 (H).

TRESPASS FOR MESNE PROFITS. A form of action supplemental to an action of ejectment, brought against the tenant in possession to recover the profits which he has unlawfully received during the time of his occupation. 3 Bla. Com. 205; 4 Burr. 1668. The person who actually received the profits is to be made defendant, whether defendant to the ejectment or not; 11 Wheat. 280. It lies after a recovery in ejectment; 5 Cow. 33; 11 S. & R. 55; or entry; 6 N. H. 391; but not trespass to try title; Const. 102; 1 M'Cord, 264; and the judgment in ejectment is conclusive evidence against the defendant for all profits which have accrued since the date of the demise stated in the declaration in ejectment; 1 Blackf. 56; 2 Rawle, 49; but suit for any antecedent profits is open to a new defence, and the tenant may plead the statute of limitations as to all profits accruing beyond the period fixed by law; 3 Sharsw. Bla. Com. 205, n.; 2 Root, 440.

TRESPASS ON THE CASE. The form of action by which a person seeks to recover damages caused by an injury unaccompanied with force or which results indirectly from the act of the defendant. It is more generally called, simply, case. See CASE.

TRESPASS QUARE CLAUSUM FREGIT (Lat. *quare clausum fregit*, because he had broken the close). The form of action which lies to recover damages for injuries to the realty consequent upon entry without right upon the plaintiff's land.

Mere possession is sufficient to enable one having it to maintain the action; 12 Wend. 488; 14 Pick. 297; 3 A. K. Marsh. 331; 1 Harr. N. J. 335; 22 Me. 350; 5 Blackf. 465; 1 Hawks, 485; 7 Gill & J. 321; see 1 Halst. 1; except as against one claiming under the rightful owner; 6 Halst. 197; 6 N. H. 9; 2 Ill. 181; 7 Mo. 333; 3 Metc. Mass. 239; and no one but the tenant can have the action; 13 Me. 87; 19 Wend. 507; 9 Vt. 383; except in case of tenancies at will or by a less secure holding; 8 Pick. 333; 15 *id.* 102; 7 Metc. Mass. 147; 1 Dev. 435.

The action lies where an animal of the defendant breaks the plaintiff's close, to his injury; 7 W. & S. 367; 31 Penn. 328.

TRESPASS VI ET ARMIS (Lat. *vi et armis*, with force and arms). The form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property; 2 Const. 294. It is distinguished from case in this, that the injury in case is the indirect result of the act done. See CASE.

TRESPASS TO TRY TITLE. The name of the action used in South Carolina for the recovery of the possession of real property and damages for any trespass committed upon the same by the defendant.

It was substituted by the act of 1791 in place of the action of ejectment, and is in form an action of trespass *quare clausum fregit*, with the single exception that upon the writ of *capias ad respondendum* and the copy writ a notice must be indorsed that "the action is brought to try the title as well as for damages." The action must be brought in the name of the real owner of the land; and he can only recover on the strength of his own title, and not on the weakness of his adversary's. It is usual to appoint one or more surveyors, who furnish at the trial a map or plot of the land in dispute; and with reference to that the verdict is rendered by the jury. A trespass must be proved to have been committed by the defendant or his agent; and the plaintiff, if he recovers at all, is entitled to a verdict for the value of the rent down to the time of the trial. The judgment for the plaintiff is only for the damages; but upon that he is entitled to a writ of *habere facias possessionem*.

TRESPASSER. One who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another.

Any act which is injurious to the property of another renders the doer a trespasser, unless he has authority to do it from the owner or custodian; 14 Me. 44; 5 Blackf. 237; 8 N. H. 220; 18 Pick. 110; or by law; 2 Conn. 700; 3 Binn. 215; 10 Johns. 138; 6 Ohio, 144; 12 Ala. 257; 1 N. H. 339; 13 Me. 250; 6 Ill. 401; 1 Humphr. 272; and in this latter case any defect in his authority, as, want of jurisdiction by the court; 11 Conn. 95; 3 Cow. 206; defective or void proceedings; 16 Me. 33; 12 N. H. 148; 12 Vt. 661; 2 Dev. 370; misapplication of process; 6 Monr. 296; 14 Me. 312; 17 Vt. 412; renders him liable as a trespasser.

So, too, the commission of a legal act in an illegal manner, as, the execution of legal process illegally; 2 Johns. Cas. 27; 5 Me. 291; 6 Pick. 455; abuse of legal process; Breese, 143; 16 Ala. 67; exceeding the authority conferred by the owner; 13 Me. 115; or by law; 13 Mass. 520; 10 S. & R. 399; 17 Vt. 609; renders a man a trespasser.

In all these cases, where a man begins an act which is legal by reason of some author-

ity given him, and then becomes a trespasser by subsequent acts, he is held to be a trespasser *ab initio* (from the beginning); *q. v.*

A person may be a trespasser by ordering such an act done as makes the doer a trespasser; 14 Johns. 406; 16 Ov. 13; 10 Pick. 543; or by subsequently assenting, in some cases; 1 Rawle, 121; 1 B. Monr. 96; or assisting, though not present; 2 Litt. 240.

TRESPASSER AB INITIO. A term applied to denote that one who has commenced a lawful act in a proper manner, has performed some unlawful act, or some lawful act in an unlawful manner, so connected with the previous act that he is to be regarded as having acted unlawfully from the beginning. See 6 Carpenters' Case, 8 Co. 146; s. c. 1 Sm. L. C. *216; 5 Taunt. 198; 7 Ad. & E. 176; 11 M. & W. 740; 15 Johns. 401. See AB INITIO.

TRET. An allowance made for the water or dust that may be mixed with any commodity. It differs from *tare*, *q. v.*

TRIAL. In Practice. The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. 4 Mas. 232.

"Trial," as used in the acts of congress of July 27, 1866, and March 2, 1867, appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and "final hearing," in contradistinction to hearings upon interlocutory matters, the hearing of a cause upon its merits by a judge sitting in equity; 112 Mass. 343; 19 Wall. 214.

Trial by certificate is a mode of trial allowed by the English law in those cases where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averments or information of persons in such station as affords them the most clear and complete knowledge of the truth.

As, therefore, such evidence, if given to a jury, must always be conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely; 3 Bla. Com. 333; Steph. Pl. 122.

Trial by grand assize is a peculiar mode of trial allowed in writs of right. See ASSIZE; GRAND ASSIZE.

Trial by inspection or examination is a form of trial in which the judges of the court, upon the testimony of their own senses, decide the point in dispute.

This trial takes place when, for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it,—who are properly called in to inform the conscience of the court in respect of dubious facts; and, therefore, when the fact from its nature must be evident in the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on its judgment alone. For example, if a defendant pleads in abatement of the suit that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies, in this case the judges shall determine by inspection and examination whether he be plaintiff or not; 9 Co. 30; 3 Bla. Com. 331; Steph. Pl. 123.

Judges of courts of equity frequently decide facts upon mere inspection. The most familiar examples are those of cases where the plaintiff prays an injunction on an allegation of piracy or infringement of a patent or copyright; 5 Ves. Ch. 709; and the cases there cited. And see 2 Atk. 141; 2 B. & C. 80; 4 Ves. 681; 2 Russ. Ch. 385; 1 Ves. & B. 67; Cro. Jac. 230; 1 Dall. 166.

Trial by jury is that form of trial in which the facts are determined by twelve men impartially selected from the body of the county. See JURY.

To insure fairness, this mode of trial must be in public: the parties to the suit, or, in a criminal trial, the prisoner, must be present; but the continuance of the trial and the taking of testimony during the brief absence of the prisoner from the court-room on business connected with the trial, has been held not to be error; 25 Alb. L. J. 303; 43 N. Y. 1. See PRESENCE. Prisoners may be manacled during the trial, at the discretion of the court; 1 So. Law Jour. 348; although it has been rarely done in modern times; and any reasonable means may be taken to insure the safety of the prisoner; but his counsel must be allowed free access to him at the trial. See 15 Am. L. Rev. 809. The trial is conducted by selecting a jury in the manner prescribed by the local statutes, who must be sworn to try the matter in dispute according to law and the evidence. Evidence is then given by the party on whom rests the *onus probandi* or burden of the proof: as the witnesses are called by a party they are questioned by him, and after they have been examined, which is called an examination in chief, they are subject to a cross-examination by the other party as to every part of their testimony. Having examined all his witnesses, the party who supports the affirmative of the issue closes; and the other party then calls his witnesses to explain his case or support his part of the issue; these are in the same manner liable to a cross-examination.

In case the parties should differ as to what is to be given in evidence, the judge must decide the matter, and his decision is conclusive upon the parties so far as regards the trial; but *bills of exceptions* may be taken; see BILL OF EXCEPTIONS; Wells, Law & F.; motion in arrest of judgment made, or

other proper means adopted, so that the matter may be examined before another tribunal. When the evidence has been closed, the counsel for the party who supports the affirmative of the issue then addresses the jury, by recapitulating the evidence and applying the law to the facts and showing on what particular points he rests his case. The opposite counsel then addresses the jury, enforcing in like manner the facts and the law as applicable to his side of the case; to which the other counsel has a right to reply. It is then the duty of the judge to sum up the evidence and explain to the jury the law applicable to the case; this is called his charge. See CHARGE; Thompson, Ch. Jury. The jurors then retire to deliberate upon their verdict, and, after having agreed upon it, they come into court and deliver it in public.

In case they cannot agree, they may, in cases of necessity, be discharged; but it is said in capital cases they cannot be. See DISCHARGE OF A JURY; JEOPARDY.

A trial by jury in criminal cases does not essentially differ from the trial of a civil action; but the accused is entitled to some privileges in the selection of jurors who are to try him, in the former case, which do not exist in the latter. Of these the right of challenge, or of taking exception to the jurors, is much the most extensive. See CHALLENGE. He has a right to be distinctly informed of the nature of the charge against him, with a copy of the indictment. He is also entitled to a list of the jurors who are to pass upon his case, and of the names of the witnesses who will testify, a certain number of days before the trial. And the jury must deliberate and decide upon the principle that every man is to be presumed innocent until he is proved to be guilty; and, as a necessary consequence, they cannot convict him if they have any reasonable doubt of his guilt. See Worthington, Juries; Archb. N. P; Graham & W. New Trials; 3 Bla. Com. c. 22; 15 S. & R. 61; DUE PROCESS OF LAW; JURY.

Trial at nisi prius. Originally, a trial before a justice in eyre. Afterwards, by Westm. 2, 13 Edw. I. c. 30, before a justice of assize; 3 Bla. Com. 353. See NISI PRIUS. At nisi prius there is, generally, only one judge, sometimes more. 3 Chitty, Gen. Pr. 39. In the United States, a trial before a single judge.

Trial by the record. This trial applies to cases where an issue of *nul tiel record* is joined in any action. If on one side a record be asserted to exist, and the opposite party deny its existence under the form of traverse, that there is no such record remaining in court, as alleged, and issue be joined thereon, this is called an issue of *nul tiel record;* and the court awards, in such a case, a trial by inspection and examination of the record. Upon this the party affirming its existence is bound to produce it in court on a day given for the purpose, and if he fail to do so, judgment is given for his adversary.

The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue; and the parties cannot put themselves upon the country; Steph. Pl. 122; 2 Bla. Com. 330.

Trial by wager of battel. In the old English law, this was a barbarous mode of trying facts, among a rude people, founded on the supposition that heaven would always interpose and give the victory to the champions of truth and innocence. This mode of trial was abolished in England as late as the stat. 59 Geo. III. c. 46, A.D. 1818. It never was in force in the United States. See 3 Bla. Com. 337; 1 Hale, Hist. Com. Law, 188. See a modern case, 1 B. & Ald. 405. See WAGER OF BATTEL.

Trial by wager of law. This mode of trial has fallen into complete disuse; but, in point of law, it seems in England to be still competent in most cases to which it anciently applied. The most important and best-established of these cases is the issue of *nil debet*, arising in action of debt on simple contract, or the issue of *non detinet*, in an action of detinue. In the declaration in these actions, as in almost all others, the plaintiff concludes by offering *his suit* (of which the ancient meaning was *followers* or witnesses, though the words are now retained as mere form) to prove the truth of his claim. On the other hand, if the defendant, by a plea of *nil debet* or *non detinet*, deny the debt or detention, he may conclude by offering to establish the truth of such plea "*against* the plaintiff and his suit, in such manner as the court shall direct." Upon this the court awards the wager of law; Co. Ent. 119 *a;* Lilly, Ent. 467; 3 Chitty, Pl. 479; and the form of this proceeding, when so awarded, is that the defendant brings into court with him eleven of his neighbors and for himself makes oath that he does not owe the debt or detain the property alleged; and then the eleven also swear that they believe him to speak the truth; and the defendant is then entitled to judgment; 3 Bla. Com. 343; Steph. Pl. 124. Blackstone compares this mode of trial to the canonical purgation of the catholic clergy, and to the decisory oath of the civil law. See OATH, DECISORY; WAGER OF LAW.

Trial by witnesses is a species of trial by witnesses, or *per testes*, without the intervention of a jury.

This is the only method of trial known to the civil law, in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but it is very rarely used in the common law, which prefers the trial by jury in almost every instance.

In England, when a widow brings a writ of dower and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is in favor of the widow, and, for greater expedition, allowed to be tried by

witnesses examined before the judges; and so, says Finch, shall no other case in our law; Finch, Law, 423. But Sir Edward Coke mentions others: as, to try whether the tenant in a real action was duly summoned; or, the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues. And, in every case, Sir Edward Coke lays it down that the affirmative must be proved by two witnesses at least; 3 Bla. Com. 336.

Trial at bar. A species of trial now seldom resorted to, and, as to civil causes, abolished by the Judicature Act, 1875, was one held before all the judges of one of the supreme courts of Westminster, or before a quorum representing the full court. The celebrated case of Reg. *vs.* Castro, otherwise Tichborne *vs.* Orton, L. R. 9 Q. B. 350, was a trial at bar; Brown, Dict. The rules of English practice in trials in the high court of justice will be found in the Judicature Act, 1875, Ord. xxxvi., amended by rules of the court of Dec. 1, 1875. 2 Tidd's Pr. 747; 1 Archbold, Pr. 374.

TRIAL LIST. A list of cases marked down for trial for any one term.

TRIBUNAL. The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction. The jurisdiction which the judges exercise.

The term is Latin, and derives its origin from the elevated seat where the tribunes administered justice.

TRIBUNAUX DE COMMERCE. In French Law. Certain courts composed of a president, judges and substitutes, which take cognizance of all cases between merchants, and of disagreements among partners. Appeals lie from them to the courts of justice. Brown, Dict.

TRIBUTE. A contribution which is sometimes raised by the sovereign from his subjects to sustain the expenses of the state. It is also a sum of money paid by one nation to another under some pretended right. Wolff, § 1145.

TRINEPOS (Lat.). **In Roman Law.** Great-grandson of a grandchild.

TRINEPTIS (Lat.). Great-granddaughter of a grandchild.

TRINITY HOUSE. See ELDER BRETHREN.

TRINITY SITTINGS. See LONDON AND MIDDLESEX SITTINGS.

TRINITY TERM. In English Law. One of the four terms of the courts: it begins on the 22d day of May and ends on the 12th of June. Stat. 11 Geo. IV., and 1 Will. IV. c. 70. It was formerly a movable term. See TERM.

TRINODA NECESSITAS (Lat.). The threefold necessary public duties to which all lands were liable by Saxon law,—viz., for repairing bridges, for maintaining castles or garrisons, and for expeditions to repel invasions. In the immunities enumerated in kings' grants, these words were inserted, "*exceptis his tribus, expeditione, pontis et arcis constructione.*" Kennett, Paroch. Antiq. 46; 1 Bla. Com. 263.

TRIORS. In Practice. Persons appointed according to law to try whether a person challenged to the favor is or is not qualified to serve on the jury. They do not exceed two in number, without the consent of the prosecutor and defendant, or unless some special case is alleged by one of them, or when only one juror has been sworn and two triors are appointed with him. Co. Litt. 158 *a*; Bacon, Abr. *Juries* (E 12).

The method of selecting triors is thus explained. Where the challenge is made to the first juror, the court will appoint two indifferent persons to be triors; if they find him indifferent, he shall be sworn and join the triors in determining the next challenge. But when two jurors have been found impartial and have been sworn, then the office of the triors will cease, and every subsequent challenge will be decided upon by the jurymen. If more than two jurymen have been sworn, the court may assign any two of them to determine the challenges. To the triors thus chosen no challenges can be admitted.

The triors examine the juryman challenged, and decide upon his fitness; 3 Park. Cr. Cas. 467; 5 Cal. 347; 1 Mich. 451; 10 Ired. 295. Their decision is final. They are liable to punishment for misbehavior in office; 4 Sharws. Bla. Com. 353, n. 8; 1 Chitty, Cr. Law, 549; 15 S. & R. 156; 21 Wend. 509; 2 Green, N. J. 195. The office is abolished in many of the states, the judge acting in their place; 23 Ga. 57; 43 Me. 11.

The lords also chosen to try a peer, when indicted for felony, in the court of the Lord High Steward, *q. v.*, are called triors. Moz. & W.

TRIPARTITE. Consisting of three parts: as, a deed *tripartite*, between A of the first part, B of the second part, and C of the third part.

TRIPLICATIO (Lat.). **In Civil Law.** The reply of the plaintiff (*actor*) to the rejoinder (*duplicatio*) of the defendant (*reus*). It corresponds to the surrejoinder of common law. Inst. 4. 14; Bracton, l. 5, t. 5, c. 1.

TRITAVUS (Lat.). **In Roman Law.** The male ascendant in the sixth degree. For the female ascendant in the same degree the term is *tritavia*. In forming genealogical tables this convenient term is still used.

TRITHING (Sax. *trithinga*). The third part of a county, consisting of three or four hundreds.

A court within the circuit of the trithing, in the nature of a court-leet, but inferior to the county court. Camd. 102. The ridings of Yorkshire are only a corruption of try-

things. 1 Bla. Com. 116: Spelm. Gloss. 52; Cowel.

TRIUMVIRI CAPITALES, or **TREVIRI**, or **TRESVIRI** (Lat.). **In Roman Law.** Officers who had charge of the prison, through whose intervention punishments were inflicted. Sallust, *in Catilin.* They had eight lictors to execute their orders. Vicat, Voc. Jur.

TRIVIAL. Of small importance. It is a rule in equity that a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. 4 Bouvier, Inst. n. 4237. See 4 Johns. Ch. 183; 4 Paige, Ch. 364. See MAXIMS, *De minimis, etc.*

TRONAGE. In English Law. A customary duty or toll for weighing wool: so called because it was weighed by a common *trona*, or beam. Fleta, lib. 2, c. 12.

TROVER (Fr. *trouver*, to find). **In Practice.** A form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property.

The action was originally an action of trespass on the case where goods were *found* by the defendant and retained against the plaintiff's rightful claim. The manner of gaining possession soon came to be disregarded, as the substantial part of the action is the *conversion* to the defendant's use; so that the action lies whether the goods came into the defendant's possession by *finding or otherwise*, if he fails to deliver them upon the rightful claim of the plaintiff. It differs from *detinue* and *replevin* in this, that it is brought for damages and not for the specific articles; and from *trespass* in this, that the injury is not necessarily a forcible one, as trover may be brought in any case where trespass for injury to personal property will lie; but the converse is not true. In case possession was gained by a trespass, the plaintiff by bringing his action in this form waives his right to damages for the taking, and is confined to the injury resulting from the conversion; 17 Pick. 1; 17 Me. 434; 7 T. B. Monr. 209.

The *action lies* for one who has a *general* or absolute property; Bull. N. P. 33; 2 Hill, So. C. 587; 25 Me. 220; 7 Ired. 418; 23 Ga. 484; 22 Mo. 495; together with a right to immediate possession; 1 Ry. & M. 99; 22 Pick. 585; 15 Wend. 474; 6 Blackf. 470; 9 Yerg. 262; 1 Brev. 495; 4 D. & B. 323; 5 Penn. 466; 11 Ala. 859; 42 Me. 197; 19 N. H. 419; as, for example, a vendor of property sold upon condition not fulfilled; 2 Brev. 324; 1 Meigs, 76; 19 Vt. 371; as to the effect of an intervening lien, see 7 Term, 12; 2 Cr. M. & R. 659; 1 Wash. C. C. 174; 1 Hayw. 193; 15 Mass. 242; 6 S. & R. 300; 2 N. H. 319; 6 Wend. 603; or a *special* property, including actual possession as against a stranger; 2 Saund. 47; 1 B. & Ad. 159; 6 Johns. 195; 12 *id.* 403; 13 Wend. 63; 15 Mass. 242; 2 N. H. 66, 319; 11 Vt. 351; 4 Blackf. 395; as, for example, a sheriff holding under rightful process; 1 Pick. 232, 389; 9 *id.* 164; 1 N. H. 289; 7 Johns. 32; 4 Vt. 81; 12 Me. 328; 2 Murph. 19; a mortgagee in possession; 5 Cow. 323; 6 Harr. & J. 100; 3 Brev. 68; and see 12 N. H. 382; 31 Ala. N. S. 447; 23 Conn. 70; a simple bailee, 15 Mass. 242; Wright, Ohio, 744; or even a finder merely; 9 Cow. 670; 2 Ala. 320; 3 Bibb, 284; 3 Harr. Del. 608; and including lawful custody and a right of detention as against the general owner of the goods or chattels; 2 Taunt. 268; 8 Wend. N. Y. 445; 3 Blackf. 419; 2 Rich. 13. An executor or administrator is held an absolute owner by relation from the death of the decedent; 2 Greenl. Ev. § 641; 9 Metc. 504; 2 Ga. 119; 1 Rice, 264, 285; 3 Sneed, 484; and he may maintain an action for a conversion in the lifetime of the decedent; T. U. P. Charlt. 261; 1 Root, 289; 6 Mass. 394; and is liable for a conversion by the decedent; 1 Hayw. 21, 308, 362.

The property affected must be some personal chattel; 3 S. & R. 513; 3 N. H. 484; 2 D. Chipm. 116; specifically set off as the plaintiff's; 4 B. & C. 948; 6 *id.* 360; 3 Pick. 38; 7 Ired. 370; 5 Jones, No. C. 16; 20 Vt. 144; including title deeds; 2 Yeates, 537; a copy of a record; Hardr. 111; 11 Pick. 492; money, though not tied up; 4 Taunt. 24; 4 E. D. Smith, 162; negotiable securities; 4 B. & Ald. 1; 3 B. & C. 45; 3 Johns. 432; 1 Root, 125, 221; 1 Pick. 503; 3 Vt. 99; 5 Blackf. 419; 27 Ala. N. S. 228; animals *feræ naturæ*, but reclaimed; 10 Johns. 102; trees and crops severed from the inheritance; 1 Term, 55; 3 Mo. 137, 393; 7 Cow. 95; 15 Mass. 204; 8 Penn. 244; 4 Cal. 184. It will not lie for property in custody of the law; 9 Johns. 381; if rightfully held; see 2 Ala. 576; 1 Add. Penn. 376; or to which the title must be determined by a court of peculiar jurisdiction only; 1 Cam. & N. 115; see 14 Johns. 273; or where the bailee has lost the property, or had it stolen, or it has been destroyed by want of due care; 2 Ired. 98. See CONVERSION.

There must have been a conversion of the property by the defendant; 5 T. B. Monr. 89; 8 Ark. 204. And a waiver of such conversion will defeat the action; 20 Pick. 90. For what constitutes a conversion, see CONVERSION; also an article on Conversion by Purchase in 15 Am. L. Rev. 363; and on Demand and Refusal in 6 So. L. Rev. 822.

The declaration must state a rightful possession of the goods by the plaintiff; Hempst. 160; must describe the goods with convenient certainty, though not so accurately as in detinue; Bull. N. P. 32; 5 Gray, 12; must formally allege a finding by the defendant, and must aver a conversion; 12 N. Y. 313. It is not indispensable to state the price or value of the thing converted; 2 Wash. Va. 192.

The plea of not guilty raises the general issue.

Judgment when for the plaintiff is that he recover his damages and costs, or, in some states, in the alternative, that the defendant

restore the goods or pay, etc.; 19 Ga. 579; when for the defendant, that he recover his costs. The measure of damages is the value of the property at the time of the conversion, with interest; 17 Pick. 1; 7 T. B. Monr. 209; 38 Me. 174; 26 Ala. N. S. 213; 21 Barb. 92; 30 Vt. 307; 19 Mo. 467.

TRUCE. In International Law. An agreement between belligerent parties by which they mutually engage to forbear all acts of hostility against each other for some time, the war still continuing. Burlamaqui, N. & P. Law, pt. 4, c. 11, § 1.

Truces are of several kinds: *general*, extending to all the territories and dominions of both parties; and *particular*, restrained to particular places: as, for example, by sea, and not by land, etc. *Id.* part 4, c. 11, § 5. They are also *absolute*, *indeterminate*, and *general*; or *limited* and *determined* to certain things: for example, to bury the dead. *Ib. idem.* See 1 Kent, 159; Halleck, Int. Law, 654; Wheaton. Int. Law, 682.

During the continuance of a truce, either party may do within his own territory or the limits prescribed by the armistice, whatever he could do in time of peace, *e. g.* levy and march troops, collect provisions, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged; but neither party can do what the continuance of hostilities would have prevented him from doing, *e. g.*, repair fortifications of a besieged place; and all things, the possession of which was especially contested when the truce was made, must remain in their antecedent places; Vattel, Dr. des Gens. §§ 245, 251; Boyd's Wheat. Int. Law, § 403.

TRUCE OF GOD (Law L. *treuza Dei*; Sax. *treuge* or *trewa*, from Germ. *treu*; Fr. *trêve de Dieu*). In the middle ages, a limitation of the right of private warfare introduced by the church. This truce provided that hostilities should cease on holidays, from Thursday evening to Sunday evening of each week, the whole season of Advent and Lent, and the octaves of great festivals. The penalty for breach of the truce was excommunication. The protection of this truce was also extended constantly to certain places, as, churches, convents, hospitals, etc., and certain persons, as, clergymen, peasants in the field, crusaders, and, in general, all defenceless persons. It was first introduced into Acquitaine in 1041, and into England under Edward the Confessor. 1 Rob. Charles V. App. n. xxi.

TRUE BILL. In Practice. Words indorsed on a bill of indictment when a grand jury, after having heard the witnesses for the government, are of opinion that there is sufficient cause to put the defendant on his trial. Formerly the indorsement was *Billa vera* when legal proceedings were in Latin; it is still the practice to write on the back of the bill *Ignoramus* when the jury do not find it to be a true bill; the better opinion is that the omission of the words a true bill does not vitiate an indictment; 11 Cush. 473; 13 N. H. 488. See 5 Me. 432; GRAND JURY.

TRUST. A right of property, real or personal, held by one party for the benefit of another.

A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formerly applied to uses; 10 Johns. 506. A trust is a use not executed under the statute of Hen. VIII.; 3 Md. 505. The words *use* and *trust* are frequently used indifferently; see 3 Jarm. Wills, 531.

The party holding is called the *trustee*, and the party for whose benefit the right is held is called the *cestui que trust*, or, using a better term, the *beneficiary*.

Sometimes the equitable title of the beneficiary, sometimes the obligation of the trustee, and, again, the right held, is called the trust.

But the right of the beneficiary *is in* the trust; the obligation of the trustee *results from* the trust; and the right held is the *subject-matter* of the trust. Neither of them is the trust itself. All together they constitute the trust.

An equitable right, title, or interest in property, real or personal, distinct from its legal ownership.

A personal obligation for paying, delivering, or performing any thing where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those intrusted.

An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence; 4 Kent, 295; 2 Fonbl. Eq. 1; 1 Saunders, Uses and Tr. 6; Cooper, Eq. Pl. Introd. 27; 3 Bla. Com. 431.

The Roman *fidei-commissa* were, under the name of uses, first introduced by the clergy into England in the reign of Richard II. or Edward III., and while perseveringly prohibited by the clergy and wholly discountenanced by the courts of common law, they grew into public favor, and gradually developed into something like a regular branch of law, as the court of chancery rose into importance and power. For a long time the beneficiary, or *cestui que trust*, was without adequate protection; but the statute of uses, passed in 27 Henry VIII., gave adequate protection to the interests of the *cestui que trust*. Prior to this statute the terms use and trust were used, if not indiscriminately, at least without accurate distinction between them. The distinction, so far as there was one, was between passive uses, where the feoffee had no active duties imposed on him, and active trusts, where the feoffee had something to do in connection with the estate. The statute of uses sought to unite the seisin with the use, making no distinction between uses and trusts, the result being that, by a strict construction, both uses and trusts were finally taken out of its intended operation and were both included under the term trust. The statute was passed in 1538; but trusts did not become settled on their present basis till Lord Nottingham's time, in 1676; 2 Wash. R. P. Index, *Trust*; 1 Greenl. Cruise, Dig. 338.

A late writer shows clearly the distinction between the *fidei commissa* and a trust, that in the former there was no separation of the equitable and legal title, but there was simply a request, which afterwards became a duty imposed upon the *gravatus* to convey the inheritance to another person, either immediately or after a certain event; whereas, in the trust, the perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time. Besides the *fidei commissa* arose out of testamentary dispositions; whereas English trusts, until the statute of Wills, were created only by conveyances *inter vivos;* Bisp. Eq. § 50; see 15 How. 367.

Active or *special trusts* are those in which the trustee has some duty to perform, so that the legal estate must remain in him or the trust be defeated.

Express trusts are those which are created in express terms in the deed, writing, or will. The terms to create an express trust will be sufficient if it can be fairly collected upon the face of the instrument that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as marriage settlements, terms for years, mortgages, assignments for the payment of debts, raising portions, or other purposes; and in wills and testaments, when the bequests involve fiduciary interests for private benefit or public charity. They may be created even by parol; 6 W. & S. 97; except so far as forbidden by the Statute of Frauds.

Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties. The term is used in this general sense, including *constructive* and *resulting* trusts (*q. v.*), and also in a more restricted sense, excluding those classes.

Constructive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. Such trusts have not, technically, any element of fraud in them; Bisp. Eq. § 91. Under this branch of trusts it has been said that "wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated." Note by Judge Hare to 1 Lead. Cas. Eq. 62. The rule as to such trusts applies not only to persons standing in a direct fiduciary position towards others, such as trustees, attorneys, etc., but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise: as against partners (4 Seld. 236); tenants in common (72 Penn. 442); mortgagees (43 Mo. 231), etc.; Bisp. Eq. § 93.

A trustee who buys at his own sale, even if public, will still be considered, at the option of the *cestui que trust*, a trustee; see 1 Lead. Cas. Eq. 248. This is not upon the ground of fraud, but of public policy; see 13 Allen, 419. So if a person obtains from a trustee trust property without paying value for it, although without notice of the trust, he will in such case be held a trustee by construction; Bisp. Eq. § 95. And in case of a contract for the sale of land, equity considers the vendor as a trustee of the legal title for the purchaser; *ibid.*

Implied trusts do not come within the Statute of Frauds; 66 Penn. 237.

A *passive* or *dry* or *simple* trust is one which requires the performance of no duty by the trustee to carry out the trust, but by force of which the mere legal title rests in the trustee.

As to *executory* and *executed trusts*, see those titles.

Trusts may also be distinguished as *public* and *private* trusts. The former are constituted for the benefit either of the public at large or some particular portion of it answering to a particular description; while the latter are those wherein the beneficial interest is vested absolutely in one or more individuals who are, or may be within a certain time, definitely ascertained. Bisp. Eq. § 59.

A trust arises when property has been conferred upon one person and accepted by him for the benefit of another. The former is a trustee, and holds the legal title, and the latter is called the *cestui que trust*, or beneficiary. In order to originate a trust, two things are essential,—*first*, that the ownership conferred be connected with a right, or interest, or duty for the benefit of another; and, *second*, that the property be accepted on these conditions.

The modern trust includes not only those technical *uses* which were not executed by the Statute of Uses, but also equitable interests which never were considered uses, and did not therefore fall within the provisions of this statute. These equitable interests, in common with the unexecuted uses, received the name of trusts; Bisp. Eq. § 52; see 7 De G. M. & G. 422. The Statute of Uses provided that where one was seized to the use of another, the *cestui que use* should be deemed to be in lawful seizin and possession of the same estate in the land itself as he had in the use; *ibid.*

A trust which at the time of its creation is a passive trust will be executed by this statute, although the word *trust* instead of *use* is employed. But where a trust which has once been active becomes passive, such a trust is not necessarily executed by the statute. If the mere fact that the trustee had active duties to perform was the only circumstance that prevented the statute from ope-

rating, the trust will be executed when the active duties have ceased. But if the non-execution of the trust by the statute did not originally and solely depend upon the activity of the trust, the fact that the trust has ceased to be active will not of itself cause the statute to apply; but the trustee is then bound to convey the legal estate at the request of the *cestui que trust;* and after a great lapse of time, and in support of long-continued possession on the part of the person holding the beneficial interest, such a conveyance will be presumed; Bisp. Eq. § 55.

In Pennsylvania the courts have regarded some trusts *not* to be active which in England would have been considered active, and have held (59 Penn. 396) that whenever the entire beneficial interest is in the *cestui que trust*, there is no reason why the trust should not be considered as actually executed. No formal conveyance to him is necessary, though it will be decreed in order to dissipate a useless cloud upon the title. These subjects have of late years been very frequently investigated in that state. See Bisp. Eq.; Husb. Marr. Women.

When active duties are to be performed by the trustee, they will, generally, not be executed; Bisp. Eq. § 56; 5 Wall. 119, 168; though when there was a separate use for a *feme sole* not in contemplation of marriage, it was held that as this separate use was void, the trust fell, although the trustee had active duties to perform; 70 Penn. 201.

Before the Statute of Frauds, 29 Car. II. c. 3, §§ 7, 9, a trust, either in regard to real or personal estate, might have been created by parol as well as by writing. The statute required all trusts as to real estate to be in writing; 4 Kent, 305; Adams, Eq. 27; 5 Johns. 1; 15 Vt. 525.

No particular form of words is requisite to create a trust. The court will determine the intent from the general scope of the language; 10 Johns. 496; 4 Kent, 305.

The facts, however, to warrant the inference of a trust, must be more than loose and general declarations; but, on the other hand, parol declarations will not be received to contradict the inference of a trust in land fairly deducible from written declarations; 5 Johns. Ch. 2.

A trust, as to personal property, may be proved by parol evidence; 1 Bail. Ch. So. C. 510; 1 Hare, 158; Adams, Eq. 28; 3 Bla. Com. 431. A *cestui que trust* cannot, generally, hold the beneficial enjoyment of property free from the rights of his creditors; 1 Sm. L. C. 119; though a limitation over to another in case of the insolvency of the *cestui que trust*, is valid; Bisp. Eq. 61; 5 Wall. 441. But in Pennsylvania it is settled that the interest of the *cestui que trust* may be exempted from liability for his debts; 2 Rawle, 33; 7 W. & S. 19; 86 Penn. 276; see, also, 21 Conn. 8; 11 Gratt. 570; 42 Mo. 45; Bisp. Eq. § 61; 91 U. S. 716.

If a trustee dies, or fails or refuses to execute or accept the trust, or no trustee is named, the trust does not for that reason fail. It is a settled rule that the court of chancery will provide a trustee or attend to the execution of the trust; 2 Vern. 97; 4 Ves. Ch. 108; 10 Sim. 256; Adams, Eq. 36.

Trusts are interpreted by the ordinary rules of law, unless the contrary is expressed in the language of the trust; 15 Ind. 269; 3 Des. 256. Most of the states have special legislation upon the subject, making the systems of the different states too various for fuller development here.

The rules for the devolution of equitable estates are the same as those for the descent of legal titles; and fall under the operation of the various intestate acts; Bisp. Eq. § 60. If the legal title to real estate cannot be taken by an alien, the beneficial ownership cannot be enjoyed by him; 1 Beav. 79; 5 How. 270. In some states, as New York, Michigan, and Louisiana, the operation of trusts has been much narrowed; Bisp. Eq. § 56.

See 4 Kent, 290–295; Hill, Trustees; Lewin, Perry, Trusts; Greenleaf, Cruise, Dig.; Washburn, Real Prop.; Story, Eq. Jur.; Spence, Eq. Jur.; Adams, Bispham, Eq.; EXECUTED TRUSTS; EXECUTORY TRUSTS; PRECATORY WORDS; RESULTING TRUSTS; TRUSTEE.

TRUSTEE. A person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.

One to whom property has been conveyed to be held or managed for another.

To a certain extent, executors, administrators, guardians, and assignees are trustees, and the law of trusts so far is applicable to them in their capacity of trustees; Hill, Trust. 49.

Trusts are not strictly cognizable at common law, but solely in equity; 16 Pet. 25.

Any reasonable being may be a trustee. The United States or a state may be a trustee; 15 How. 367. So may a corporation; 7 Wall. 1; Perry, Trusts, § 42.

A trustee after having accepted a trust cannot discharge himself of his trust or responsibility by resignation or a refusal to perform the duties of the trust; but he must procure his discharge either by virtue of the provisions of the instrument of his appointment, or by the consent of all interested, or by an order of a competent court; 4 Kent, 311; 11 Paige, Ch. 314.

Trustees are not allowed to speculate with the trust-property, or to retain any profits made by the use of the same, or to become the purchasers upon its sale. See TRUST. If beneficial to the parties in interest, the purchase by the trustee may be retained or confirmed by the court. And the trustee may be compelled to account for and pay over to the *cestui que trust* all profits made by any use of the trust property; 4 Kent, 438; 2 Johns. Ch. 252; 4 How. 503.

A court of equity never allows a trust to fail for want of a trustee; 5 Paige, Ch. 46; 6 Whart. 571; 5 B. Monr. 113; 2 How. 188.

Whenever it becomes necessary, the court will appoint a new trustee, and this though the instrument creating the trust contain no power for making such appointment. The power is inherent in the court; 7 Ves. Ch. 480; 2 Sandf. Ch. 336; 1 Beav. 467. So the court may create a new trustee on the resignation of the former trustee; 11 Paige, Ch. 314; 3 Barb. Ch. 76; Hill, Trust. 190.

The mere naming a person trustee does not constitute him such. There must be an acceptance, express or implied. See 14 Wall. 139. But if the person named trustee does not wish to be held responsible as such, he should, before meddling with the duties of a trustee, formally disclaim the trust; 7 Gill & J. 157; 1 Pick. 370; Hill, Trust. 214.

Ordinarily, no writing is necessary to constitute the acceptance of even a trust in writing; 12 N. H. 432.

The duties of trustees have been said, in general terms, to be; "to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui que trust*." Bisp. Eq. § 138.

He must take possession of the trust property, and call in debts, and convert such securities as are not legal investments. Personal securities are not legal investments although the investment was made by the testator himself; 40 N. Y. 76; 18 Penn. 303; unless, by the terms of the trust, they are allowed; Bisp. Eq. § 139.

He will not be liable for the failure of a bank in which he has deposited trust funds, unless he has permitted them to be there for an unreasonable length of time; 29 Beav. 211; but he must not mix them with his own funds; 8 Penn. 431; 41 Ala. 709.

A trustee should not invest trust funds in trade or speculation; nor in bank stock, or stock of public companies; 4 Barb. 626; 18 Penn. 303; but see 9 Pick. 446; he may invest in mortgages.

A recent writer has deduced the following rules as to investments by trustees (see 13 Am. L. Reg. N. S. 210). Where there is no express power of sale in the instrument creating a trust, and none is necessarily implied, and the discretion of the trustee is the sole restriction upon investments, he will generally be protected where he has acted *bona fide* and with reasonable diligence and prudence. But in a state where the trustee is protected from loss which may arise from certain specified and so-called legal investments, the rule is much more stringent, and extraordinary care and diligence are required of the trustee as well as bona fides, and it is dangerous to invest trust funds in any other securities than those thus indicated.

But where there is no express power of sale given, and where none such can necessarily be implied from the nature of the trustee's duties, the only safe means of changing an insecure investment left so by the creator of the trust, is to make the change under the direction of the proper court, and if done without such authority, the trustee will be liable to the *cestui que trust* for breach of trust.

Where there is no such power of sale and the trustee leaves unchanged an investment made by the testator and loss ensues, he will generally be protected if acting with bona fides, even in cases where, if there had been a power of sale and he had neglected to sell, he would have been liable under the first rule laid down above.

The office and duties of trustees being matters of personal confidence, they are not allowed to delegate these powers unless such a power is expressly given by the authority by which they were created; and where one of several trustees dies, the trust, as a general rule, in the United States, will devolve on the survivor, and not on the heirs of the deceased; Hill, Trust. 175; 2 Moll. 276; 3 Mer. 412; 11 Paige, Ch. 314; but a trustee may appoint an agent where it is usual to do so in the ordinary course of business; 10 Penn. 285; 8 Cow. 543.

While the law allows any person named as trustee to disclaim or renounce, he cannot, if he has by any means accepted and entered upon the trust, rid himself of the duties and responsibilitis after such acceptance, except by a legal discharge by competent authority, 4 Johns. Ch. 136; 11 Paige, Ch. 314; 1 My. & K. 195.

The trustee is in law generally regarded as the owner of the property, whether the same be real or personal; Hill, Trust. 229. Yet this rule is subject to material qualifications when taken in connection with the doctrines of powers and uses, and the legislation of the several states; 2 Atk. 223; 1 How. 134; 4 Kent, 321; Cruise, Dig. tit. 12, c. 1, § 25; Sugd. Pow. 174; Hill, Trust. 229–239.

The quality and continuance of the estate of a trustee will be determined by the purpose and exigency of the trust, rather than by the phraseology employed in the description of the estate conveyed; and, therefore, if the language be that the estate goes to the trustee and his heirs, it may be limited to a shorter period if thereby the purposes of the creation of the trust are satisfied; 8 Hare, 156; 4 Denio, 385; 2 Exch. 593; 11 B. Monr. 233.

Where there are several trustees, they are considered to hold as joint-tenants, and on the death of any one the property remains vested in the survivor or survivors; and on the death of the last, the property, if personal (at common law), went to the heir or personal representative of the last-deceased trustee. But the rule as to trust-property going to heirs and executors is changed in most of the states, so that in theory the court of chancery assumes the control and it appoints a new trustee on the decease of former trustees; 13 Sim. 91; 4 Kent, 311; 11 Paige, Ch. 13; 10 Mo. 755; 16 Ves. Ch. 27.

Each trustee has equal interest in and control over the trust estate; and hence, as a general rule, they cannot (as executors may) act or bind the trust separately, but must act jointly; 4 Ves. Ch. 97; 3 Ark. 384; 8 Cow. 544; 20 Me. 504; 11 Barb. 527.

A trustee is, generally, not responsible for the conduct of his co-trustee; see 2 Lead. Cas. Eq. 858, 865; where several trustees join in a receipt, *primâ facie*, all will be considered to have received the money, but one of them may show that he did not in fact receive the money, but joined in the receipt for conformity; Bisp. Eq. § 146. A trustee who stands by and sees a fraud on the trust committed by his co-trustee, will be held responsible for it; 17 Penn. 268.

A trustee may come into equity to obtain advice and assistance in the execution of his trust; Hill, Trust. 298.

One trustee may be held responsible for losses which he has *enabled* a co-trustee to cause, though there was no actual participation by him; 18 Ohio, 509; 5 How. 233; 10 Penn. 149; 3 Sandf. Ch. 99.

Where the legal estate is vested in trustees, all actions at law relative to the trust-property must be brought in their name, but the trustee must not exercise his legal powers to the prejudice of a *cestui que trust*, and third persons must take notice of this limitation of the legal rights of a trustee; 2 Vern. 197; Hill, Trust. 503.

Where there are several trustees, all must concur in any business of the trust; otherwise if it be a public trust, where the acts of a majority are binding; Bisp. Eq. § 147.

The trustee (and also his personal representatives to the extent of any property received from the trustee) is responsible in suit for any breach of trust, and will be compelled to compensate what his negligence has lost of the trust estate. He is not only chargeable with the principal and income of the trust-property he has received, but is liable for an amount equal to what, with good management, he might have received; and this includes interest on a sum he has needlessly allowed to remain where it earned no interest; 11 Ves. Ch. 60; 2 Beav. 430; 4 Russ. 195; 2 Johns. Ch. 62; 1 Bradf. Surr. 325.

See COMMISSIONS; Tud. L. Cas. R. P. 497 (trusts for accumulation); 49 N. Y. 76 (as to investment in government bonds and real estate); also an article on Trustees as Tort-feasors, in 14 Am. L. Rev. 36, and 15 *id.* 159.

TRUSTEE PROCESS. A means of reaching goods, property, and credits of a debtor in the hands of third persons, for the benefit of an attaching creditor.

It is a process, so called, in the New England states, and similar to the garnishee process of others. It is a process given by statute 15 of the statutes of Massachusetts. All goods, effects, and credits so intrusted or deposited in the hands of others that the same cannot be attached by ordinary process of law, may by an original writ or process, the form of which is given by the statute, be attached in whose hands or possession soever they may be found, and they shall, from the service of the writ, stand bound and be held to satisfy such judgment as the plaintiff may recover against the principal defendant; Cushing, Trustee Pr. 2.

The trustees on sueing out and service of the process, according to statute, and its entry in court, may come into court and be examined on oath as to property of the principal in their hands. If the plaintiff recovers against the principal, and there are any trustees who have not discharged themselves under oath, he shall have execution against them; Cushing, Trustee Pr. 4; 2 Kent, 497, n.

TRUTH. The actual state of things.

In giving his testimony, a witness is required to tell the truth, the whole truth, and nothing but the truth; for the object in the examination of matters of fact is to ascertain truth.

In actions for slander and libel, the truth of the statements may be given in evidence in some cases. The matter has been made the subject of statutory regulation. See Heard, Libel & S.; LIBEL.

TUB. In Mercantile Law. A measure containing sixty pounds of tea, and from fifty-six to eighty-six pounds of camphor. Jacob, Law Dict.

TUB-MAN. In English Law. A barrister who has a pre-audience in the exchequer, and also one who has a particular place in court, is so called.

TUG. A steam vessel built for towing; practically synonymous with *towboat*. Tugs are subject to the ordinary rules of navigation touching collisions. Where a schooner was being towed by a tug lashed to her port side, the fact that the schooner had a pilot on board, did not make the tug the mere servant of the schooner, so as to exempt the tug from responsibility; 11 Fed. Rep. 319; 93 U. S. 302.

As to whether tugs are common carriers, see Lawson, Contr. of Carriers, p. 3, n.; TOWBOAT.

TUMBREL. An instrument of punishment made use of by the Saxons, chiefly for the correction of scolding women by ducking them in water, consisting of a stool or chair fixed to the end of a long pole.

In Domesday it is called *cathedra stercoris*, and is described as *cathedra in quo rixose mulieres sedentes aquis demergebantur*, and seems to be no other than what has more recently been called a ducking or cucking stool. Bracton writes it *tymborella*, of which perhaps tumbrel is a corruption. It was sometimes also called a *trebucket*, from the stool or bucket in which the prisoner was placed when put down into the water being fixed to the end of a tree or piece of timber. Lord Coke, however, says it properly signifies a dung-cart, and that every lord of a leet or market ought to have a pillory and tumbrel, and that the leet could be forfeited for the want of either.

This antique punishment was also inflicted upon bakers, brewers, and other transgressors of the sumptuary laws, who were placed upon such a stool and immerged *in stercore*—that is, in filthy water. By a statute of Henry III., in the year 1250, entitled the statute of the pillory and

tumbrel, a baker or brewer offending against the assize of bread or of malt shall suffer bodily punishment; that is, a baker in the pillory and a brewer to the tumbrel, *pistor patiatur collistrigium braciatrix trebucetum.*

The last attempt on record, by legal process, seems to have been on the 27th of April, 1745, of which we find the following account in the London Evening Post of that day. "Last week a woman that keeps the Queen's Head alehouse, at Kingston in Surrey, was ordered by the court to be ducked for scolding, and was accordingly placed in a chair and ducked in the river Thames, under Kingston bridge, in the presence of two thousand or three thousand people." The statute authorizing such punishments was finally repealed by a statute of 1 Vict., in 1837.

TUMULTUOUS PETITIONING. Under stat. 13 Car. II., st. 1, c. 5, this was a misdemeanor, and consisted in more than twenty persons signing any petition to the crown or either house of parliament for the alteration of matters established by law in church or state, unless the contents thereof had been approved by three justices, or the majority of the grand jury at assizes or quarter sessions. No petition could be delivered by more than ten persons. 4 Bla. Com. 147; Moz. & W.

TUN. A measure of wine or oil, containing four hogsheads.

TUNGREVE (Sax. *tungaraeva, i. e. villæ præpositus*). A reeve or bailiff. Spelman, Gloss.; Cowel.

One who in estates, which we call manors, sustains the character of master, and in his stead disposes and arranges every thing. *Qui in villis (quæ dicimus maneriis) domini personam sustinet, ejusque vice omnia disponit atque moderatur.*

TURBARY. In English Law. A right to dig turf; an easement.

TURN or **TOURN.** See SHERIFF'S TOURN.

TURNED TO A RIGHT. This phrase means that a person whose estate is divested by usurpation cannot expel the possessor by mere entry, but must have recourse to an action, either possessory or droitural; 3 Steph. Com. 390, n.; 3 Bla. Com. 191; Moz. & W.

TURNKEY. A person under the superintendence of a jailer, whose employment is to open and fasten the prison-doors and to prevent the prisoners from escaping.

It is his duty to use due diligence; and he may be punished for gross neglect or wilful misconduct in permitting prisoners to escape.

TURNPIKE. A gate set across a road, to stop travellers and carriages until toll is paid for passage thereon. In the United States, turnpike-roads are often called turnpikes: just as mail-coach, hackney-coach, stage-coach, are shortened to mail, hack, and stage. Encyc. Am. See TURNPIKE ROAD.

TURNPIKE-ROAD. A road or highway over which the public have the right to travel upon payment of toll, and on which the parties entitled to such toll have the right to erect gates and bars to insure its payment. 6 M. & W. 428; 1 Railw. Cas. 665; 22 E. L. & E. 113; 16 Pick. 175.

Turnpike-roads are usually made by corporations under legislative authority; and, the roads being deemed a public use, such corporations are usually armed with the power to take private property for their construction, upon making just compensation. In the execution of this power, they are bound to a strict compliance with the terms upon which it is given, and are subject to the rules which govern the exercise of the right of eminent domain under the constitutions of the several states; 7 Dana, 81; 3 Humphr. 456; 6 Ohio, 15; 10 *id.* 396; 25 Penn. 229; 18 Ga. 607; 19 *id.* 427. In estimating the damages to be awarded for lands taken for a turnpike-road, the rule is to allow the value of the land and its improvements, deducting therefrom the benefits from the road and the additional value given by it to the remaining property; 20 Penn. 91. The legislature may authorize the conversion of an existing highway into a turnpike-road; 11 Vt. 198; 18 Conn. 32; 3 Barb. 159; 4 Humphr. 467; without any pecuniary equivalent to the owner of the fee, such road still remaining a public highway; 2 Ohio St. 419. Under the power to take land for this purpose, the corporation may take land for a toll-house and a cellar under it and a well for the use of the family of the toll-keeper; 9 Pick. 109. A turnpike road being a highway, any obstruction placed thereon renders the author of it liable as for a public nuisance; 16 Pick. 175; 8 Wend. 555.

Turnpike companies, so long as they continue to take toll, are bound to use ordinary care in keeping their roads in suitable repair, and for any neglect of this duty are liable to action on the case for the damages to any person specially injured thereby; 6 Johns. 90; 7 Conn. 86; 11 Wend. 597; 11 Ohio, 197; 6 N. H. 147; 10 Pick. 35; 9 Penn. 20; 5 Ind. 286; 11 Vt. 531; 24 *id.* 480; 1 Spencer, 323; and to an indictment on the part of the public; 11 Wend. 597; 10 Yerg. 525; 4 Ired. 16; 10 Humphr. 97; 26 Ala. N. S. 88; 1 Harr. N. J. 222; 9 Barb. 161; 2 Gray, 58.

The law of travel upon turnpike-roads is the same as upon ordinary roads, except as regards the payment of tolls. If there be any ambiguity in the authority granted to a turnpike company to take toll, it will be construed rather in favor of the public than of the grantee: 2 B. & Ad. 792; 2 Mann. & G. 134. Travellers are liable for toll though they avoid the gates; 2 Root, 524; 10 Vt. 197; but not for travel between the gates without passing the same; 2 B. Monr. 30; 10 Ired. 30; 11 Vt. 381. Exemptions from toll are construed most liberally in favor of the community; Ang. Highw. § 359.

A road or turnpike laid out by an individual or by the selectmen of the town to facilitate

the evasion of toll by travellers upon a turnpike-road will entitle the turnpike company to an action on the case for the damages, or to an injunction ordering the same to be closed; 10 N. H. 133; 18 Conn. 451; 8 Humphr. 286; 1 Johns. Ch. 315; 12 Barb. 553. And see 4 Johns. Ch. 150. And such company is entitled to compensation for the injury to their franchise by a highway which intersects their road at two distinct points and thereby enables travellers to evade the payment of tolls, though such highway be regularly established by the proper authorities to meet the necessities of public travel; 1 Barb. 286. But see 2 N. H. 199; 10 *id.* 133; 12 La. An. 649.

If a turnpike company abuses its powers, or fails to comply with the terms of its charter, it is liable to be proceeded against by *quo warranto* for the forfeiture of its franchise; 23 Wend. 193, 223, 254; 1 Zabr. 9; 2 Swan, 282.

TURPIS CAUSA (Lat.). A base or vile consideration, forbidden by law, which makes the contract void: as, a contract the consideration of which is the future illegal cohabitation of the obligee with the obligor.

TURPITUDE (Lat. *turpitudo*, from *turpis*, base). Every thing done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude.

TUTELA (Lat.). A power given by the civil law over a free person to defend him when by reason of his age he is unable to defend himself. Women by the civil law could only be tutors of their own children. A child under the power of his father was not subject to tutelage, because not a free person, *caput liberum*. D. lib. 26, tit. 1, ff. *de tutelis;* Inst. lib. 1, tit. 13, *de tutelis;* Inst. lib. 3, tit. 28, *de obligationibus quæ ex quasi cont. nascuntur*. Novellæ, 72. 94. 155. 118.

Legitima tutela was where the tutor was appointed by the magistrate. Leg. 1, D. ff. *de leg. tut.*

Testamentaria tutela was where the tutor was appointed by will. D. lib. 26, tit. 2, ff. *de testament. tut.;* C. lib. 5, tit. 28, *de testament. tut.;* Inst. lib. 1, tit. 14, *qui testamento tutores dari possunt.*

TUTELAGE. See TUTELA.

TUTEUR OFFICIEUX. In French law, a person whose duties are analogous to those of a guardian in English law; he must however, be over fifty years of age, and appointed with the consent of the parents, or, in their default, of the *conseil de famille*, and is only appointed for a child over fifteen years of age.

TUTEUR SUBROGE. In French law, the title of a second guardian appointed for an infant under guardianship; his functions are exercised in case the interests of the infant and his principal guardian conflict. Code Nap. 420; Brown, Dict.

TUTOR. In Civil Law. One who has been lawfully appointed to the care of the person and property of a minor.

By the laws of Louisiana, minors under the age of fourteen years, if males, and under the age of twelve years, if females, are, both as to their persons and their estates, placed under the authority of a tutor. La. Civ. Code, art. 263. Above that age, and until their majority or emancipation, they are placed under the authority of a curator. *Id.*

TUTOR ALIENUS (Lat.). **In English Law.** The name given to a stranger who enters upon the lands of an infant within the age of fourteen, and takes the profits.

He may be called to an account by the infant and be charged as guardian in socage; Littleton, s. 124; Co. Litt. 89 *b*, 90 *a*; Hargrave, Tracts, n. 1.

TUTOR PROPRIUS (Lat.). The name given to one who is rightly a guardian in socage, in contradistinction to a *tutor alienus*.

TUTORSHIP. The power which an individual, *sui juris*, has to take care of the person of one who is unable to take care of himself. Tutorship differs from curatorship. See PROCURATOR; PROTUTOR.

TUTRIX (Lat.). A woman who is appointed to the office of a tutor.

TWELFHINDI. The highest rank of men in the Saxon government, who were valued at 1200*s*. For any injury done to them, satisfactien was to be made according to their worth. Cowel; Whart. Dict.

TWELVE TABLES, LAWS OF THE. Laws of ancient Rome, composed in part from those of Solon and other Greek legislators, and in part from the unwritten laws and customs of the Romans.

These laws first appeared in the year of Rome 303, inscribed on ten plates of brass. The following year two others were added, and the entire code bore the name of the Laws of the Twelve Tables. The principles they contained were the germ of all the Roman law, the original source of the jurisprudence of the greatest part of Europe.

See a fragment of the Law of the Twelve Tables in Coop. Justinian, 656; Gibbon, Rome, c. 44; Maine, Anc. L. 14, 33; CODE.

TWELVEMONTH, in the singular, includes the whole year, but in the plural, twelve months of twenty-eight days each; 6 Co. 62; 2 Bla. Com. 140, n.; Bish. Writt. Laws, 97.

TWICE IN JEOPARDY. See JEOPARDY.

TWYHINDI. The lower order of Saxons, valued at 200*s*. Cowel. See TWELFHINDI.

TYBURN TICKET. In English Law. A certificate given to the prosecutor of a felon to conviction.

By the 10 & 11 Will. III. c. 23, the original proprietor or first assignee of such certificate is exempted from all and all manner of parish and ward offices within the parish or

ward where the felony shall have been committed; Bacon, Abr. *Constable* (C).

TYRANNY. The violation of those laws which regulate the division and the exercises of the sovereign power of the state. It is a violation of its constitution.

TYRANT. The chief magistrate of the state, whether legitimate or otherwise, who violates the constitution to act arbitrarily, contrary to justice. Toullier, tit. prél. n. 32.

The terms tyrant and usurper are sometimes used as synonymous, because usurpers are almost always tyrants; usurpation is itself a tyrannical act, but, properly speaking, the words usurper and tyrant convey different ideas. A king may become a tyrant, although legitimate, when he acts despotically; while a usurper may cease to be a tyrant by governing according to the dictates of justice.

This term is sometimes applied to persons in authority who violate the laws and act arbitrarily towards them. See DESPOTISM.

U.

UBERRIMA FIDES (Lat. most perfect good faith). A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made; for example, in the case of insurance, the insured must observe the most perfect good faith towards the insurer. 1 Story, Eq. Jur. § 317; 3 Kent, 283.

UDAL. Allodial. See ALLODIUM.

UKAAS, UKASE. The name of a law or ordinance emanating from the czar of Russia.

ULLAGE. In Commercial Law. The amount wanting when a cask on being gauged is found only partly full.

ULNAGE. Alnage. See ALNAGER.

ULTIMATUM (Lat.). The last proposition made in making a contract, a treaty, and the like: as, the government of the United States has given its *ultimatum*, has made the last proposition it will make to complete the proposed treaty. The word also means the result of a negotiation, and it comprises the final determination of the parties concerned in the object in dispute.

ULTIMUM SUPPLICIUM (Lat.). The last or extreme punishment; the penalty of death.

ULTIMUS HÆRES (Lat.). The last or remote heir; the lord. So called in contradistinction to the *hæres proximus* and the *hæres remotior*. Dalr. Feud. Pr. 110.

ULTRA VIRES (Lat.). The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation.

A term used to express the action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it was instituted. 13 Am. L. Rev. 632.

This doctrine is of modern growth; its appearance dates from about the year 1845, being first prominently mentioned in 10 Beav. 1 and 11 C. B. 775; see Green's Brice, *Ultra Vires*, vii.

In 22 N. Y. 291, it is said: "There are three classes of cases in England in which the question of *ultra vires* arises, viz., 1st, cases in which one or more of the shareholders seeks to restrain the officers of the corporation from engaging in transactions unauthorized by the charter; 2d, actions brought by third persons against corporations, to enforce their contracts, in which the defence relied upon is, that in making the contract the corporation exceeded its corporate powers; and 3d, similar actions in which the defence is that the directors had exceeded, not the powers conferred upon the entire corporation by law, but those conferred by the shareholders upon the directors by deed." It is said that the true and primary meaning of the doctrine is, that a corporation has certain powers only, and that it can be bound only when acting within the limits of these powers; Green's Brice, *Ultra Vires*, 35. When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, etc.; 63 N. Y. 68. A corporate act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose; or, with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or, with reference to some specific purpose, when it is not authorized to perform it for that purpose, though fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose; 43 Iowa, 48. See 35 L. J. Ch. 156; 125 Mass. 333; 37 Cal. 543.

As a general rule, such acts are void, and impose no obligation upon the corporation al-