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-

though they assume the form of contracts; inasmuch as all persons dealing with a corporation, especially in the state or country in which and under whose laws it was created, are chargeable with notice of the extent of its chartered powers. It is otherwise as to laws imposing restraints upon it not contained in its charter where the contract is made or the transaction takes place without the limits of the state or country under whose laws the corporation exists; 8 Barb. 233.

If, however, the corporation receives any money or other valuable consideration under such a transaction or contract, it is not doubted that upon rescinding or repudiating the act or contract under which it was paid or delivered it could be recovered back in an appropriate action; 14 Penn. 81.

So, too, the artificial body—the corporation—is liable to be proceeded against by *quo warranto* for the usurpation of powers in its name by its officers and agents, and its charter may be taken away as a penalty for permitting such acts—the defence of a want of power to bind the corporation not being available in such cases, since it would lead to entire corporate irresponsibility; Morawetz, Priv. Corp. § 649; 1 Blackf. 267.

Among the rules laid down by a recent writer as the leading principles of this doctrine are these: A corporation has all the capacities for engaging in transactions and for management which are given it expressly by its charter, etc., or impliedly given it by reasonable implication from the language thereof. Capacities or powers for management may be given by wide general language. Beyond these powers, they have no capacities or powers, and cannot legally or validly engage in other transactions.

Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom. As long as the transaction remains executory, it is established that it cannot be enforced. But if it be executed, though in England it cannot be enforced or sued on, yet in the United States there seems some doubt whether the corporation will be allowed to set up the defence of *ultra vires*. In both countries, however, unquestionably the corporation must account for benefits derived. Special proceedings, in themselves *ultra vires*, will sometimes be upheld as having been rendered necessary by unexpected circumstances. Any party to an *ultra vires* transaction may set up the defence thereof, and any one corporator may call upon the courts to restrain the corporation from engaging therein; Green's Brice, *Ultra Vires*, 41–43.

In the United States the defence of *ultra vires* interposed against a contract wholly or in part executed has very generally been looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defence; in others the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases, the doctrine of estoppel *in pais* has been applied to exclude the defence. The courts may be said, generally, to be tending towards the doctrine—certainly so far as business corporations are concerned—that corporations are to be held liable upon executed contracts, where the contracts involved are not expressly or by necessary implication prohibited by their charters or the general law; Judge Green's note to Brice, *Ultra Vires*, 729.

There is said to be a tendency of the courts, based upon the strongest principles of justice, to enforce contracts against corporations, although in entering into them they have exceeded their chartered powers, where they have received the consideration and the benefit of the contract; 13 Am. L. Rev. 654, citing 55 Ill. 413; 7 Wall. 392; 98 U. S. 621. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong; 96 U. S. 258. The executed dealings of corporations should be allowed to stand for and against both parties, when good faith so requires; 22 N. Y. 258, 494; 63 N. Y. 62. Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains but the payment by the corporation of the consideration, it will not be allowed to set up that the contract was *ultra vires;* 83 Penn. 160. Corporations should be restricted so far as courts can, in the exercise of their powers, limit them; but the plea is not a gracious one, that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it.

It has been held *ultra vires* for a railway company to guarantee to the shareholders of a steam packet company a dividend upon their paid-up capital; 10 Beav. 1; to engage in the coal trade; 6 Jur. N. S. 1006; for a company to assume the debt of another; 34 Vt. 144; or to make or indorse accommodation paper; 11 Ind. 104; or to engage as surety for another in a business in which it has no interest; 26 Barb. 568; for one railroad company to unite with another like company, and both conduct their business under one management; 21 How. 441; or to run a line of steamboats in connection with its road; 39 Mo. 451; but a railway company may contract to carry beyond its own lines; 54 Penn. 77; 45 N. Y. 525; 96 U. S. 258; but see 22 Conn. 502. Where a corporation is incompetent to take real estate, a conveyance to it is only voidable; Morawetz, Corp. § 117. A railroad company has implied authority to erect a refreshment room; L. R. 7 Eq. 116; a corporation authorized to erect a market has authority to purchase land for that purpose; Dill. Mun. Corp. § 372; where

a corporation had authority to keep steam vessels for the purposes of a ferry, they could use these vessels, when otherwise unemployed, for excursion trips; 30 Beav. 40; 11 Allen, 326. Corporations generally have authority to borrow money to carry out the objects for which they were created, and to execute their obligations therefor; Field, Corp. § 249; including irredeemable bonds; 21 Am. L. Reg. N. S. 713; they may, generally, by virtue of implied powers, make promissory notes; 13 Am. L. Rev. 641; 15 Wall. 566; 35 N. Y. 505; 46 Ala. 98. Where a railroad company, without legislative authority, leased its road to three persons, for twenty years, this was held *ultra vires;* 101 U. S. 71. A railroad company cannot guarantee the expenses of a musical festival, though the guarantee be signed by a majority of the directors with the reasonable belief that the festival would increase the proper business of the company; 131 Mass. 258; the same ruling applies to a company organized to manufacture and sell organs; *ibid.*

It is said to be now well settled that a power granted to a corporation to engage in certain business carries with it the authority to act precisely as an individual would act in carrying on such business, and that it would possess for this purpose the usual and ordinary means to accomplish the objects of its creation, in the same manner as though it were a natural person; Field, Corp. § 271.

The result of the English authorities is, that corporations,—certainly those for commercial purposes, and probably all corporations to which the doctrine applies,—have by implication all capacities and powers which, being reasonably incidental to their enterprise or operations, are not forbidden, either expressly by their constating instruments or by necessary inference therefrom; Green's Brice, *Ultra Vires*, 40. The American decisions seem to be tending towards this doctrine; *id.* note *a.* *Prima facie*, all the contracts of a corporation are valid, and it lies in those who impeach any contract to make out that it is avoided; 3 Macq. 382. Corporations are presumed to contract within their powers; 96 U. S. 267.

A court of equity, at the suit of the stockholders of the corporation, will restrain the commission of acts beyond the corporate power, by injunction operating upon the individual officers and directors as well as the corporation. This is now an acknowledged head of equity jurisdiction; Redf. Railw. 400; 6 *id.* 289; 18 Wall. 626; 10 Beav. 1; 12 *id.* 339; creditors have the same right in this respect as stockholders; 13 Am. L. Rev. 659.

Acquiescence for any considerable time in the exercise of excessive powers, after they come to the knowledge of the stockholders, would, however, be a decisive objection to such a remedy; 19 E. L. & E. 7.

In regard to municipal corporations, the rule is stricter against the validity of *ultra vires* contracts. See 19 Wall. 468; Dill. Mun. Corp. §§ 381, 749.

It has been said that a corporation is liable for the negligence and other torts of its agents and servants, even when related to and connected with the acts of the corporation that are *ultra vires;* even if done in the execution of usurped powers and of purposes clearly *ultra vires;* 13 Am. L. Rev. 658; but as to whether a corporation is liable for such wrongs by its agents as are beyond the scope of corporate authority, see L. R. 2 Q. B. 534; 7 H. & N. 172; 47 N. Y. 122.

See Green's Brice, *Ultra Vires;* Field, Angell & A. on Corp.; and articles in 16 Am. L. Reg. N. S. 513, and 13 Am. L. Rev. 632; Cooley, Torts, 119; Morawetz, Priv. Corp.

ULTRONEUS WITNESS. In Scotch Law. A witness who offers his testimony without being regularly cited. The objection only goes to his credibility, and may be removed by a citation at any time before the witness is sworn. See Bell, Dict. *Evidence.*

UMPIRAGE. The decision of an umpire. This word is used for the judgment of an umpire, as the word award is employed to designate that of arbitrators.

UMPIRE. A person selected by two or more arbitrators who cannot agree as to the subject-matter referred to them, for the purpose of deciding the matter in dispute. Sometimes the term is applied to a single arbitrator selected by the parties themselves; Kyd, Awards, 6, 75, 77; Cald. Arb. 38; Dane, Abr. Index; 3 Viner, Abr. 93; Comyns, Dig. *Arbitrament* (F); 4 Dall. 271, 432; 4 Scott, N. S. 378. The jurisdiction of the umpire and arbitrators cannot be concurrent: if the arbitrators make an award, it is binding; if not, the award of the umpire is binding; T. Jones, 167. If the umpire sign the award of the arbitrators, it is still their award, and *vice versâ;* 6 Harr. & J. 403. Arbitrators may appoint an umpire after their term of service has expired, if the time is not gone within which the umpire was to make his award; 2 Johns. 57. Subsequent dissent of the parties, without just cause, will have no effect upon the appointment; but they should have notice; 11 East, 367; 12 Metc. 293; 1 Harr. & J. 362, n. If an umpire refuse to act, another may be appointed *toties quoties;* 11 East, 367. See 2 Saund. 133 *a*, note.

An umpire has not the privilege of reviewing the declarations of the tribunals of a country as to the intrepretation of its laws: as, where a competent tribunal in the United States has decided that a foreigner has been duly naturalized; Morse, Citizenship, 79, 86.

UNA VOCE (Lat.). With one voice; unanimously.

UNALIENABLE. Incapable of being sold.

Things which are not in commerce, as, public roads, are in their nature unalienable. Some things are unalienable in consequence

of particular provisions in the law forbidding their sale or transfer: as, pensions granted by the government. The natural rights of life and liberty are unlienable.

UNANIMITY (Lat. *unus*, one, *animus*, mind). The agreement of all the persons concerned in a thing, in design and opinion.

Generally, a simple *majority* of any number of persons is sufficient to do such acts as the whole number can do: for example, a majority of the legislature can pass a law; but there are some cases in which unanimity is required: for example, a traverse jury composed of twelve individuals cannot decide an issue submitted to them unless they are unanimous.

UNCERTAINTY. That which is unknown or vague. See CERTAINTY.

UNCIA TERRÆ (Lat.). This phrase often occurs in charters of the British kings, and denotes some quantity of land. It was twelve *modii*, each *modius* possibly one hundred feet square. Mon. Angl. tom. 3, pp. 198, 205.

The twelfth part of the Roman *as*. Dess. Dict. du Dig. *As*. The *as* was used to express an integral sum: hence *uncia* for one-twelfth of any thing, commonly one-twelfth of a pound, *i.e.* an ounce. *Id.;* 2 Sharsw. Bla. Com. 462, note m.

UNCLE. The brother of a father or mother. See AVUNCULUS; PATRUUS.

UNCONSCIONABLE BARGAIN. A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. 4 Bouv. Inst. n. 3848. See USURY.

UNCONSTITUTIONAL. That which is contrary to the constitution. See CONSTITUTIONAL.

UNCORE PRIST (L. Fr. still ready). **In Pleading.** A plea or replication that the party pleading is still ready to do what is required. Used in connection with the words *tout temps prist*, the whole denotes that the party always has been and still is ready to do what is required, thus saving costs where the whole cause is admitted, or preventing delay where it is a replication, if the allegation is made out. 3 Bla. Com. 303.

UNDE NIHIL HABET. See DOWER.

UNDEFENDED. A term sometimes applied to one who is obliged to make his own defence when on trial, or in a civil cause. A cause is said to be undefended when the defendant makes default, in not putting in an appearance to the plaintiff's action; in not putting in his statement of defence; or, in not appearing at the trial either personally or by counsel, after having received due notice. Lush's Prac. 548-9; Judicature Act, 1875; Moz. & W.

UNDER AND SUBJECT. Words frequently used in conveyances of land which is subject to a mortgage, to show that the grantee takes subject to such mortgage. See MORTGAGE; 27 Am. L. Reg. N. S. 337, 401.

UNDERLEASE. An alienation by a tenant of a part of his lease, reserving to himself a reversion: it differs from an assignment, which is a transfer of all the tenant's interest in the lease. 3 Wils. 234; W. Blackst. 766. And even a conveyance of the *whole* estate by the lessee, reserving to himself the rent, with a power of re-entry for non-payment, was held to be not an assignment, but an underlease; 1 Stra. 405. In Ohio it has been decided that the transfer of a part only of the lands, though for the whole term, is an underlease; 2 Ohio, 216. In Kentucky, such a transfer, on the contrary, is considered as an assignment; 4 Bibb, 538. See LEASE; ASSIGNMENT.

UNDERLIE THE LAW. In Scotch criminal procedure, an accused person, in appearing to take his trial, is said "to compear and underlie the law." Moz. & W.

UNDER-SHERIFF. See SHERIFF.

UNDERTAKING. An engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other; a promise. 5 East, 17; 2 Leon. 224; 4 B. & Ald. 595. It does not necessarily imply a consideration; 3 N. Y. 335.

UNDER-TENANT. One who holds by virtue of an underlease. See SUB-TENANT.

UNDERTOOK. Assumed; promised.

This is a technical word which ought to be inserted in every declaration of assumpsit charging that the defendant undertook to perform the promise which is the foundation of the suit; and this though the promise be founded on a legal liability or would be implied in evidence. Bacon, Abr. *Assumpsit* (F); 1 Chitty, Pl. 88, note p.

UNDER-TUTOR. In Louisiana. In every tutorship there shall be an under-tutor whom it shall be the duty of the judge to appoint at the time letters of tutorship are certified for the tutor.

It is the duty of the under-tutor to act for the minor whenever the interest of the minor is in opposition to the interest of the tutor; La. Civ. Code, art. 300, 301; 1 Mart. La. N. S. 462; 9 Mart. La. 643; 11 La. 189; Pothier, Des Personnes, partie prém. tit. 6, s. 5, art. 2. See PROCURATOR; PRO-TUTOR; TUTEUR SUBROGÉ.

UNDERWRITER. The party who agrees to insure another on life or property, in a policy of insurance. He is also called the insurer.

The title is almost exclusively confined to insurers of marine risks, and is derived from the method of obtaining such insurance formerly in vogue, usually as follows: A premium having been agreed upon between the insured and an insurance broker, a statement

of such premium and of the ship or cargo, and the voyage or time, was written at the head of a sheet which was laid on the broker's table. Then such merchants as were willing to insure such property on such terms subscribed their names to the statement above mentioned, stating the amount they were willing to insure; and so on until the desired amount of insurance was obtained. 1 Pars. Mar. Ins. 14. For the liability of underwriters, see AVERAGE; INSURANCE; LLOYDS; MARINE INSURANCE; RISKS AND PERILS; TOTAL LOSS.

UNDIVIDED. Held by the same title by two or more persons, whether their rights are equal as to value or quantity, or unequal.

Tenants in common, joint-tenants, and partners hold an undivided right in their respective properties until partition has been made. The rights of such owner of an undivided thing extend over the whole and every part of it, *totum in toto, et totum in qualibet parte.* See PARTITION; PER MY ET PER TOUT.

UNDUE INFLUENCE. That degree of improper influence exercised by one standing in a confidential, fiduciary, or other relation towards another, as will invalidate a gift, a will, or a contract, made by the latter to the advantage of the former. "The principle runs through all the various relations where, from disparity of years, intellect, or knowledge, one of the parties . . . has an ascendency, which prevents the other from exercising an unbiased judgment. It may therefore apply as between parent and child, guardian and ward, husband and wife, counsel and client; 2 Hagg. 187; 15 Beav. 278, 299; 57 Ill. 186; . . . or wherever weakness, ignorance, or an implicit reliance on the good faith of another gives an occasion for an abuse of influence; 9 Hare, 540; 17 Ohio, 484, 505; Note to Huguenin *vs.* Baseley, 2 L. C. Eq. 1193." As a rule, equity will afford relief in all transactions in which "influence has been acquired and abused, in which confidence has been betrayed;" 7 H. L. Cas. 750. For cases which were held *not* to fall under the doctrine of Huguenin *vs.* Baseley, *supra*, see 4 Ir. Ch. 330; 101 Mass. 494; Bisp. Eq. 231 *et seq.* The influence to invalidate a will must be such as in some degree to destroy free agency; not merely that produced by natural affection, or a wish to please another; see 1 Cox, 355.

Under English statutes, any person using "undue influence," to induce any one to vote or refrain from voting, at an election, is guilty of a misdemeanor and forfeits £50; 21 & 22 Vict. c. 87; Whart. Dict.

UNGELD. An outlaw. Toml.

UNICA TAXATIO (Lat.). The ancient language of a special award of *venire*, where of several defendants one pleads, and one lets judgment go by default, whereby the jury who are to try and assess damages on the issue are also to assess damages against the defendant suffering judgment by default. Lee, Dict.

UNIFORMITY OF PROCESS. In English Law. An act providing for uniformity of process in personal actions in his majesty's courts of law at Westminster, 2 Will. IV. c. 39, 23d May, 1832; 3 Chit. Stat. 494. The improved system thus established was more fully amended by the Common Law Procedure Acts of 1852, 1854, and 1860, and by the Judicature Acts of 1873 and 1875. 3 Steph. Com. 490; Moz. & W.

UNILATERAL CONTRACT. In Civil Law. When the party to whom an engagement is made makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance. La. Civ. Code, art. 1758; Code Nap. 1103. A loan of money and a loan for use are of this kind. Pothier, Obl. part 1, c. 1, s. 1, art. 2; Leç. Elémen. § 781.

In the Common Law. According to Professor Langdell, every binding promise not in consideration of another promise is a unilateral contract. For example, simple-contract debts, bonds, promissory notes, and policies of insurance. A bilateral contract, which consists of two promises given in exchange for and consideration of each other, becomes a unilateral contract when one of the promises is fully performed; Langdell, Sum. Cont. § 183.

UNINTELLIGIBLE. That which cannot be understood.

When a law, a contract, or will is unintelligible, it has no effect whatever. See CONSTRUCTION.

UNIO PROLIUM (Lat. union of offspring). A species of adoption used among the Germans, which takes place when a widower having children marries a widow who also has children. These parents then agree that the children of both marriages shall have the same rights to their succession as those which may be the fruits of their marriage. Leç. Elém. § 187.

UNION. A popular term for the United States of America: as, the Union must and shall be preserved

UNITED STATES COMMISSIONERS. Each circuit court of the United States may appoint, in different parts of the district for which it is held, as many discreet persons as it may deem necessary, who shall be called "commissioners of the circuit court," and shall exercise the powers which are or may be conferred upon them; R. S. § 627.

These officers are authorized to hold to security of the peace, and for good behavior arising under the constitution and laws of the United States; R. S. § 727.

They have also the power to carry into ef-

fect, according to the true intent and meaning thereof, the award or arbitration, or decree of any consul, vice-consul, or commercial agent, to sit as judges or arbitrators in such differences as may arise between the captains and crews of vessels, application for the exercise of such power being first made by petition of such consul, etc.; R. S. § 728.

They have power also to take bail and affidavits when required or allowed in any circuit or district court of the United States; R. S. § 945.

They may imprison or bail offenders; R. S. § 1010; may discharge poor convicts imprisoned; R. S. § 1042; may administer oaths and take acknowledgments; R. S. § 1778; may institute proceedings under the civil rights laws; R. S. §§ 1982, 1984; may issue warrants for the arrest of foreign seamen, in case of dispute or desertion; R. S. § 4079; may summon the master of a vessel in cases of seamen's wages; may apprehend fugitives from justice; R. S. § 5270.

The district court of the United States may appoint commissioners before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States may be sworn; and such oaths so taken are as effectual as if taken before the judge in open court; R. S. § 570.

The court of claims has power to appoint commissioners, before whom examinations may be made upon oath of witnesses touching all matters pertaining to claims; R. S. §§ 1071, 1080.

UNITED STATES OF AMERICA. The nation occupying the territory between British America on the north, Mexico on the south, the Atlantic Ocean and Gulf of Mexico on the east, and the Pacific Ocean on the west; and including the territory of Alaska in the extreme northwest of the American continent; being the republic whose organic law is the constitution adopted by the people of the thirteen states which declared their independence of the government of Great Britain on the fourth day of July, 1776.

When they are said to constitute one nation, this must be understood with proper qualifications. Our motto, *E pluribus unum*, expresses the true nature of that composite body which foreign nations regard and treat with in all their communications with our people. No state can enter into a treaty, nor make a compact with any foreign nation, nor grant letters of marque or reprisal. Art. 1, § 10; art. 4, § 4. To foreigners we present a compact unity, an undivided sovereignty. No state can do a national act nor legally commit the faith of the Union.

In our inter-state and domestic relations we are far more a complex body. In these we are for some purposes one. We are so as far as our constitution makes us one, and no further; and under this we are so far a unity that one state is not foreign to another. Art. 4, § 2. A constitution, according to the original meaning of the word, is an organic law. It includes the organization of the government, the grant of powers, the distribution of these powers into legislative, executive, and judicial, and the names of the officers by whom these are exercised. And with these provisions a constitution, properly so called, terminates. But ours goes further. It contains restrictions on the powers of the government which it organizes.

The writ of *habeas corpus*, the great instrument in defence of personal liberty against the encroachment of the government, shall not be suspended but in case of rebellion or invasion, and when the public safety requires it. No bill of attainder or *ex post facto* law shall be passed; no money shall be drawn from the treasury where there is not a regular appropriation; no title of nobility shall be granted; and no person holding office shall receive a present from any foreign government. Art. 1, § 9. To these, which are in the original constitution, may be added the *eleven* first amendments. These, as their character clearly shows, had their origin in a jealousy of the powers of the general government. All are designed more effectually to guard the rights of the people, and would properly, together with the restrictions in the original constitution, have a place in a bill of rights. Any act or law of the United States in violation of these, with whatever formality enacted, would be null and void, as an *excess* of power.

The restrictions on state sovereignty, besides those which relate to foreign nations, are that no state shall coin money, emit bills of credit, make any thing but gold and silver a tender in the payment of debts, pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. These prohibitions are absolute. In addition to these restrictions, the results of the rebellion of 1861–1865 caused the adoption of the 13th, 14th, and 15th amendments, which lay still further restrictions upon the power of the states, so far as relates to slavery and the regulation of the right of suffrage. The 13th amendment provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to its jurisdiction, and confers power upon congress to enforce this article by appropriate legislation; the 14th amendment provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and defines who shall be so considered; the 15th amendment specifically provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude.

Without the consent of congress no state shall lay any duties on imports or exports, or any duty on tonnage, or keep troops or ships of war in time of peace, or enter into any agreement or compact with another state, or engage in war unless actually invaded, or in imminent danger of being so.

What constitutes a duty on exports or imports has been a matter of frequent litigation in the supreme court. It has been finally decided that the term "import" as used in the constitution does not refer to articles imported from one state to another, but only to articles imported from foreign states; 8 Wall. 123; but the prohibition contained in those provisions of the constitution which ordain that congress shall have power to regulate commerce with foreign nations and among the several states; that no state shall levy any imposts or duties on imports or exports; that the citizens of each state shall be entitled to all the immunities and privileges of citizens of the several states, have been construed together by the supreme court; and various statutes

of the different states have been declared unconstitutional because they violated them. Thus a statute allowing an additional fee to port-wardens for every vessel entering a port; 6 Wall. 31; a tax on passengers introduced from foreign countries; 7 How. 286; a tax on passengers going out of a state; 6 Wall. 35; a tax levied upon freight brought into or through one state into another; 15 Wall. 232; a tonnage tax on vessels entering the harbors of a state, either from foreign or domestic ports; 12 Wall. 204; 19 *id.* 581; 20 *id.* 577; 100 U. S. 434; have all been so decided. It is said that wherever subjects, in regard to which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of congress. But the mere grant of the commercial power to congress does not forbid the states from passing laws to regulate pilotage. The power to regulate commerce includes various subjects, upon which there should be some uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not so in the latter class; 12 How. 297.

Whatever these restrictions are, they operate on all states alike, and if any state laws violate them, the laws are void; and without any legislation of congress the supreme court has declared them so; 6 Cra. 100; 4 Wheat. 122, 518; 16 How. 304; cases *supra;* Cooley, Const. Lim. 729.

The United States have certain powers, the principal of which are enumerated in art. 1, § 8, running into seventeen specific powers. Others are granted to particular branches of the government: as, the treaty-making power to the president and senate. These have an equal effect in all the states, and so far as an authority is vested in the government of the Union or in any department of it, and so far as the states are prohibited from the exercise of certain powers, so far in our domestic affairs we are a unity.

Within these granted powers the sovereignty of the United States is supreme. The constitution, and the laws made in pursuance of it, and all treaties, are the supreme law of the land. Art. 6. And they not only govern in their words, but in their meaning. If the sense is ambiguous or doubtful, the United States, through their courts, in all cases where the rights of an individual are concerned, are the rightful expositors. For without the authority of explaining this meaning the United States would not be sovereign.

In these matters, particularly in the limitation put on the sovereignty of the states, it has been sometimes said that the constitution executes itself. This expression may be allowed; but with as much propriety these may be said to be laws which the people have enacted themselves, and no laws of congress can either take from, add to, or confirm them. They are rights, privileges, or immunities which are granted by the people, and are beyond the power of congress or state legislatures; and they require no law to give them force or efficiency. The members of congress are exempted from arrest, except for treason, felony, and breach of the peace, in going to and returning from the seat of government. Art. 1, § 6. It is obvious that no law can affect this immunity. On these subjects all laws are purely nugatory, because if they go beyond or fall short of the provisions of the constitution, that may always be appealed to. An individual has just what that gives him,—no less and no more. It may be laid down as a universal rule, admitting of no exception, that when the constitution has established a disability or immunity, a privilege or a right, these are precisely as that instrument has fixed them, and can be *neither augmented nor curtailed* by any act or law either of congress or a state legislature. We are more particular in stating this principle because it has sometimes been forgotten both by legislatures and theoretical expositors of the constitution.

It has been justly thought a matter of importance to determine from what source the United States derive their authority. 4 Wheat. 402. When the constitution was framed, the people of this country were not an unformed mass of individuals. They were united into regular communities under state governments, and to these had confided the whole mass of sovereign power which they chose to intrust out of their own hands. The question here proposed is whether our bond of union is a compact entered into by the states, or the constitution is an organic law established by the people. To this question the preamble gives a decisive answer: *We, the people*, ordain and establish this constitution. The members of the convention which formed it were indeed appointed by the states. But the government of the states had only a *delegated power*, and, if they had an inclination, had no authority to transfer the allegiance of the people from one sovereign to another. The great men who formed the constitution were sensible of this want of power, and recommended it to the people themselves. They assembled in their own conventions and adopted it, acting in their original capacity as individuals, and not as representing states. The state governments are passed by in silence. They had no part in making it, and, though they have certain duties to perform, as, the appointment of senators, are properly not parties to it. The people in their capacity as sovereign made and adopted it; and it binds the state governments without their consent. The United States as a whole, therefore, emanates from the people, and not from the states, and the constitution and laws of the states, whether made before or since the adoption of that of the United States, are subordinate to it and the laws made in pursuance of it.

It has very truly been said that out of the mass of sovereignty intrusted to the states was carved a part and deposited with the United States. But this was taken by the people, and not by the states as organized communities. The people are the fountain of sovereignty. The whole was originally with them as their own. The state governments were but trustees acting under a derived authority, and had no power to delegate what was delegated to them. But the people, as the original fountain, might take away what they had lent and intrust it to whom they pleased. They had the whole title, and, as absolute proprietors, had the right of using or abusing,—*jus utendi et abutendi.*

A consequence of great importance flows from this fact. The laws of the United States act directly on individuals, and they are directly and not mediately responsible through the state governments. This is the most important improvement made by our constitution over all previous confederacies. As a corollary from this, if not more properly a part of it, the laws act only on states through individuals. They are supreme over persons and cases, but do not touch the state; they act through them; 1 Wheat. 368. If a state passes an *ex post facto* law, or passes a law impairing the obligation of contracts, or makes any thing but gold or silver a tender in payment of debts, congress passes no law which touches the state: it is sufficient that these laws are void,

and when a case is brought before the court, it, without any law of congress, will declare them void. They give no person an immunity, nor deprive any of a right. Again: should a state pass a law declaring war against a foreign nation, grant letters of marque and reprisal, arm troops or keep ships of war in time of peace, individuals acting under such laws would be responsible to the United States. They might be treated and punished as traitors or pirates. But congress would and could pass no law against the state; and for this simple reason, because the state is sovereign. And it is a maxim consecrated in public law as well as common sense and the necessity of the case, that a sovereign is answerable for his acts only to his God and to his own conscience.

The constitution and laws made in pursuance of it,—that is, laws within their granted powers,—and all treaties, are the supreme law of the land, art. 6; and the judicial power, art. 3, § 1, gives to the supreme court the right of interpreting them. But this court is but another name for the United States, and this power necessarily results from their sovereignty; for the United States would not be truly sovereign unless their interpretation as well as the letter of the law governed. But this power of the court is confined to cases brought before them, and does not embrace principles independent of these cases. They have no power analogous to that of the Roman prætor of declaring the meaning of the constitution by edicts. Any opinion, however strongly expressed, has no authority beyond the reasoning by which it is supported, and binds no one. But the point embraced in the case is as much a part of the law as though embraced in the letter of the law or constitution, and it binds public functionaries, whether of the states or United States, as well as private persons; and this of necessity, as there is no authority above a sovereign to which an appeal can be made.

Another question of great practical importance arose at an early period of our government. The natural tendency of all concentrated power is to augment itself. Limitations of authority are not to be expected from those to whom power is intrusted; and such is the infirmity of human nature that those who are most jealous when out of power and seeking office are quite as ready practically to usurp it as any other. A general abrogation commonly precedes a real usurpation, to lull suspicion if for no other purpose. When the constitution was new, and before it had been fully considered, this diversity of opinion was not unnatural, and was the subject of earnest argument, but is, we think, now settled, and rightly, both on technical reasoning and on that of expediency. The question is between incidental and constructive or implied powers. The government of the United States is one of delegated power. No general words are used from which a general power can be inferred. Incidental and implied are sometimes used as synonymous; but in accurate reasoning there is a plain distinction between them, and the latter, in common use, comes nearer to constructive than to incidental.

The interpretation of powers is familiar to courts of justice, as a great part of landed property in England and much in this country is held under powers. A more frequent example is that of common agency, as every agent is created by a power. Courts whose professed object is to carry into effect the intentions of parties have, on this subject, established general rules. Among these no one is more immovably fixed than this, that the interpretation is strict and not liberal. 2 Kent, 617; 4 *id.* 330. But this strictness does not exclude incidental powers. These are included in a general and express power, both in the common and technical use of language. To take a familiar example. A merchant of Philadelphia or Boston has a cargo of tea arrive at New York, and by letter authorizes his correspondent to sell it. This is the whole extent of the power. But it necessarily and properly includes that of advertising, of removing and exhibiting the goods, etc. But it would not authorize the sale of sugar, a horse, and much less a store or real estate. These powers are not incidental to the general power, nor included in it. Or we may take an example directly from the constitution itself. The United States has power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." This includes the power to create and appoint all inferior officers and to do all subordinate acts necessary and proper to execute the general power: as, to appoint assessors, collectors, keepers and disbursers of the public treasures. Without these subordinate powers the general power could not be executed. And when there is more than one mode by which this general power may be executed, it includes all. The agent is not confined to any one, unless a particular mode is pointed out. 4 Wheat. 410. All that the constitution requires is that it should be necessary and proper. One consequence of this doctrine is that there must be a power expressly granted as a stock to bear this incidental power, or otherwise it would be ingrafted on nothing.

A constructive power is one that is inferred, not from an express power, but from the general objects to be obtained from the grant, and, perhaps, in private powers sometimes from the general language in which they are granted. The broad distinction between them may be illustrated by two cases that came before the United States Court. The first is one we have already quoted, 4 Wheat. 317. The question in that case was whether the act incorporating the Bank of the United States was constitutional, or whether it lay beyond the limits of the delegated powers and was, therefore, merely void as usurped or an excess of power. The authority to create a corporation is nowhere expressly given, and if it exists it must be sought as incidental to some power that is specifically granted. The court decided that it was incidental to that of laying taxes as a keeper and disburser of the public treasure. This power could be executed only by the appointment of agents; and the United States might as well create an agent for receiving, keeping, and disbursing the public money as appoint a natural person or an artificial one already created. In the case of Osborn *vs.* The United States Bank, 9 Wheat. 859, the general question was presented again, and reargued, and the court reaffirmed their former decision, but, more distinctly than before, adding an important qualification. They might not only create an artificial person, but clothe it with such powers and qualities as would enable it with reasonable convenience to perform its specific duties. The taxes are collected at one end of the country and paid out at another, and the bank instead of removing the specie might pay it where collected, and repay themselves by purchasing a bill of exchange in another place, and this could be conveniently and economically done only by a power of dealing in exchange generally, which when reduced to its last analysis is merely buying specie at one place and paying for it at another. It is in this way, and this only, that the bank got

its general power of dealing in exchange,—that it is essential and proper to enable it to perform its principal duty, that of transferring the funds of the United States. Thus, the authority to create a bank is incidental to that of receiving, keeping, and paying out the taxes, and is comprehended under the specific power. The argument is principally derived from Hamilton's report on a bank, which proved satisfactory to Washington, as that of Chief-Justice Marshall has to the public at large.

This is very different from a constructive power which is inferred not as included in any special grant, but from the general tenor of the power and the general objects to be obtained. The objects of the constitution are stated in the preamble, and they are to promote the common weal. But this is followed by the grant of specific powers. And it is the dictate of common sense as well as technical reasoning that this object is to be obtained by the due exercise of these powers. Where these fall short, none are granted; and if they are inadequate, the same consequence follows. No one would infer from a power to sell a ship one to sell a store, though the interest of the principal would thereby be promoted. The general power to regulate commerce is useful, and it is given, and it may be carried to its whole extent by having incidental powers ingrafted upon it. A general power to regulate the descent and distribution of intestate estates and the execution and proof of wills would be on many accounts useful, but it is not granted. The utility of a power is never a question. It must be expressly granted, or incidental to an express power,—that is, necessary and proper to carry into execution one expressly granted,—*or it does not exist.*

The other illustrative case is that of 16 Pet. 539-674. It will be found on a careful examination that in this a constructive power only is claimed. The only point involved in the case was the constitutionality of the statute of Pennsylvania under which Prigg was indicted as a kidnapper. The court decided this to be unconstitutional; and here its judicial functions properly terminated. But to arrive at this conclusion it was deemed necessary to determine that the general power of arresting and returning fugitives from labor and service was intrusted to the United States. It was not pretended that this power was expressly given, nor that it was incidental to any that was expressly given,—that is, conducive or proper to the execution of such a power. The court say that "in the exposition of this part of the constitution we shall limit ourselves to the considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature." 16 Pet. 610. They do not, as in McCulloch's case, quote the express authority to which this is incidental; but a general argument is offered to prove that this power is most safely lodged with the United States, and that, therefore, it has been placed there *exclusively.* If the canon of criticism which we have endeavored to establish, and which is generally admitted, is correct, the existence of such a power cannot be inferred from its utility.

It will be seen, also, that this case stands in strong contrast with that of Martin *vs.* Hunter, 1 Wheat. 304-326, in which the opinion was delivered by the same judge. This was on the validity of the twenty-fifth section of the judiciary act, authorizing an appeal from a final judgment of a state court to the supreme court of the United States; and perhaps in no case has the extent of the powers granted by the constitution been more fully and profoundly examined. In this case the court say that "the government of the United States can claim no powers which are not granted by the constitution; and the powers actually granted must be such as are *expressly given, or given by necessary implication;*"—that is, as the reasoning of the court in the whole opinion proves, such as are included in the express powers, and are necessary and proper to carry them into execution. Such was the uniform language of the court whenever this question was presented previously to the rebellion. The doctrine as now held, however, is somewhat broader, finding its exposition in the decision of the supreme court in the Legal Tender Cases; 12 Wall. 457. It is there said that it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantial powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Before any act of congress can be held to be unconstitutional, the court must be convinced that the means adopted were not appropriate or conducive to the execution of any or all of the powers of congress, or of the government,—not appropriate in any degree; and of the degree, the court is not to judge, but congress.

We have seen that the constitution of the United States and the laws made in pursuance of it are the supreme law of the land, and that of the true meaning of these the supreme court, which is nothing else than the United States, is the rightful expositor. This necessarily results from their sovereignty. But the United States government is one of delegated powers; and nothing is better established, both by technical reasoning and common sense, than this,—that a delegate can exercise only that power which is delegated to him. All acts beyond are simply void, and create no obligation. It is a maxim also of constitutional law that the powers of sovereignty not delegated to the United States are reserved to the states. But in so complex an affair as that of government, controversies will arise as to what is given and what is reserved,—doubts as to the dividing line. When this is the case, who is to decide? This is a difficulty which the convention did not undertake to settle.

To avoid all controversy as far as possible, the plainest words in granting powers to the United States were used which the language affords. Still further to preclude doubts, the convention added, at the close of the seventeen powers expressly given, this clause: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States or in any department or officer thereof." Art. 1, § 8. This clause contains no grant of power. But in the Articles of Confederation, which was a compact between the states as independent sovereignties, the word EXPRESSLY was used; and a doubt troubled congress how far incidental powers were included. Articles of Confederation, art. 2. This clause was introduced to remove that doubt. It covered incidental, but not constructive, powers.

Strange as it may appear, both those who wished larger powers granted to the United States, and, in the language of that day, thought that things must be worse before they could be better, and those who honestly feared that too much power was granted, fixed their eyes on this clause; and perhaps no part of the constitution gave

greater warmth to the controversy than this. To disarm the designing and counteract the fears of the timid, the tenth amendment was offered by the friends of the constitution. But so jealous were parties of each other that it was offered in the convention of Massachusetts by Governor Hancock, who favored and had the confidence of the opposition, though it was in the handwriting of Mr. Parsons, afterwards chief-justice. Life of Chief-Justice Parsons. That amendment is in these words: "The powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively, or the people." Were the words of the original constitution and the amendment both stricken out, it would leave the true construction unaltered. Story, Const. § 1232. Both are equally nugatory in fact; but they have an important popular use. The amendment formally admits that certain rights are reserved to the states, and these rights must be sovereign.

We have seen that, within their limited powers, the United States are the natural expositors of the constitution and laws; that when a case affecting individual rights arises, the supreme court stands for the United States, and that they have the sole right to explain and enforce the laws and constitution. But their power is confined to the facts before them, and they have no power to explain them in the form of an edict to affect other rights and cases. Beyond these powers the states are sovereign, and their acts are equally unexaminable. Of the separating line between the powers granted and the powers withheld, the constitution provides no judge. Between sovereigns there can be no common judge, but an arbiter mutually agreed upon. If that power is given to one party, that may draw all power to itself, and it establishes a relation not of equal sovereignties, but of sovereign and subject. On this subject the constitution is silent. The great men who formed it did not undertake to solve a question that in its own nature could not be solved. Between equals it made neither superior, but trusted to the mutual forbearance of both parties. A larger confidence was placed in an enlightened public opinion as the final umpire; and not until the war of the rebellion was this conflict between the two sovereignties finally settled by the *ultima ratio regum*. The status of the states and their political rights under the constitution have been considered at large by the supreme court in the case of Texas *vs.* White, 7 Wall. 700. The student of constitutional law will find in the opinion of the court a masterly discussion of the delicate question of the relations of the state and federal governments. It is there held that authority to suppress rebellion is found in the constitutional power to suppress insurrection, and carry on war; authority to provide for the restoration of state governments under the constitution when suspended and overthrown is derived from the obligation of the United States to guarantee to every state in the Union a republican form of government. The unity of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to be perpetual; and when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained "to form a more perfect union." But the perpetuity and indissolubility of the Union by no means imply the loss of distinct and individual existence, or of the right of self-government by the states. On the contrary, it may, not unnecessarily, be said that the preservation of the states and the maintenance of their government are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states.

UNITY. An agreement or coincidence of certain qualities in the title of a joint-estate or an estate in common.

In a joint-estate there must exist four unities: that of *interest*, for a joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life and the other for years: that of *title*, and, therefore, their estates must be created by one and the same act; that of *time*, for their estates must be vested at one and the same period, as well as by one and the same title; and, lastly, the unity of *possession:* hence joint-tenants are seised *per my et per tout*, or by the *half* or *moiety* and by *all:* that is, each of them has an entire possession as well of every *parcel* as of the *whole*. 2 Bla. Com 179; Co. Litt. 188.

Coparceners must have the unities of interest, title, and possession.

In tenancies in common, the unity of possession is alone required; 2 Bla. Com. 192. See ESTATE IN COMMON; ESTATE OF COPARCENARY; ESTATE OF JOINT-TENANCY; TENANT; Tud. L. Cas. R. P. 876.

UNITY OF POSSESSION. This term is used to designate the possession by one person of several estates or rights. For example, a right to an estate to which an easement is attached, or the dominant estate, and to an estate which an easement incumbers, or the servient estate, in such case the easement is extinguished; 3 Mas. 172; Poph. 166; Latch, 153. And see Cro. Jac. 121. But a distinction has been made between a thing that has its being by prescription, and one that has its being *ex jure naturæ:* in the former case unity of possession will extinguish the easement; in the latter, for example, the case of a watercourse, the unity will not extinguish it; Pothier, Contr. 166.

By the Civil Code of Louisiana, art. 801, every servitude is extinguished when the estate to which it is due and the estate owing it are united in the same hands. But it is necessary that the whole of the two estates should belong to the same proprietor; for if the owner of one estate only acquires the other in part or in common with another person, confusion does not take effect. See MERGER.

UNIVERSAL AGENT. One appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an agency may potentially exist; but

it is difficult to conceive of its practical existence, since it puts the agent completely in the place of the principal; Story, Ag. § 21.

UNIVERSAL LEGACY. In Civil Law. A testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease. La. Civ. Code, art. 1606; Code Civ. art. 1003; Pothier, Donations testamentaires, c. 2, s. 1, § 1.

UNIVERSAL PARTNERSHIP. The name of a species of partnership by which all the partners agree to put in common all their property, *universorum bonorum*, not only what they then have, but also what they shall acquire. Pothier, Du Contr. de Société, n. 29.

In Louisiana, universal partnerships are allowed: but property which may accrue to one of the parties after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining the property aforesaid, is void. La. Civ. Code, art. 2829–2834. See PARTNERSHIP.

UNIVERSAL REPRESENTATION. In Scotch Law. The heir universally represents his ancestor, *i.e.* is responsible for his debts. Originally, this responsibility extended only to the amount of the property to which he succeeded; but afterwards certain acts on the part of the heir were held sufficient to make him liable for all the debts of the ancestor. Bell, Dict. *Passive Titles.*

UNIVERSITAS JURIS (Lat.). **In Civil Law.** A quantity of things of various kinds, corporeal and incorporeal, taken together as a whole, *e.g.* an estate. It is used in contradistinction to *universitas facti*, which is a whole made up of *corporeal* units. Mackeldey, Civ. Law, § 149.

UNIVERSITAS RERUM (Lat.). **In Civil Law.** Several things not mechanically united, but which, taken together, in some legal respects are regarded as one whole. Mackeldey, Civ. Law, § 149.

UNIVERSITY. The name given to certain societies or corporations which are seminaries of learning where youth are sent to finish their education. Among the civilians, by this term is understood a corporation.

UNIVERSITY COURT. See CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES.

UNJUST. That which is done against the perfect rights of another; that which is against the established law; that which is opposed to a law which is the test of right and wrong. 1 Toul. tit. prél. n. 5; Aust. Jur. 276, n.; Hein. Leç. El. § 1080.

UNKNOWN. When goods have been stolen from some person unknown, they may be so described in the indictment; but if the owner be really known, an indictment alleging the property to belong to some person unknown is improper. 2 East, Pl. Cr. 651; 1 Hale, Pl. Cr. 512; 8 C. & P. 773; 12 Pick. 174.

In an indictment, where the name of the defendant is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison; 7 Ired. 27; but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, will be insufficient; R. & R. 489. The practice is to indict the defendant by a specific name, as, John No-name, and if he pleads in abatement, to send in a new bill, inserting the real name, which he then discloses, by which he is bound. This course is in some states prescribed by statute; 5 Iowa, 484. So matters of fact not vital to the accusation, may be proximately described; 53 N. H. 484; 125 Mass. 387, 394. See Whart. Cr. Pl. & Pr. §§ 104, 111, 156. See INDICTMENT.

UNLAGE (Sax.). An unjust law. Cowel.

UNLAW. In Scotch Law. A witness was formerly inadmissible who was not worth the king's *unlaw*,—*i. e.* the sum of £10 Scots, then the common fine for absence from court and for small delinquencies. Bell, Dict.

UNLAWFUL. That which is contrary to law.

There are two kinds of contracts which are unlawful,—those which are void, and those which are not. When the law expressly prohibits the transaction in respect of which the agreement is entered into, and declares it to be void, it is absolutely so; 3 Binn. 533. But when it is merely prohibited, without being made void, although unlawful it is not void; 12 S. & R. 237; 8 East, 236; 3 Taunt. 244. See CONDITION; VOID.

UNLAWFUL ASSEMBLY. In Criminal Law. A disturbance of the public peace by three or more persons who meet together with an intent mutually to assist each other in the execution of some unlawful enterprise of a private nature, with force and violence. If they move forward towards its execution, it is then a rout; and if they actually execute their design, it amounts to a riot; 4 Bla. Com. 140; Hawk. Pl. Cr. c. 65, s. 9; Comyns, Dig. *Forcible Entry* (D 10); Viner, Abr. *Riots, etc.* (A).

UNLAWFULLY. In Pleading. This word is frequently used in indictments in the description of the offence: it is necessary when the crime did not exist at common law, and when a statute, in describing an offence which it creates, uses the word; 1 Mood. C. C. 339; but is unnecessary whenever the crime existed at common law and is manifestly illegal; 1 Chit. Cr. L. *241; 2 Rolle, Abr. 82; Bac. Abr. *Indictment* (G 1); 1 Ill. 199; 2 *id.* 120; L. R. 2 Cr. Cas. Res. 161.

UNLIQUIDATED DAMAGES. Such damages as are unascertained. In general, such damages cannot be set off. No interest will be allowed on unliquidated damages; 1

Bouv. Inst. n. 1108. See LIQUIDATED DAMAGES.

UNQUES (L. Fr.). Still; yet. This barbarous word is frequently used in pleas: as, Ne unques executor, Ne unques guardian, Ne unques accouple; and the like.

UNSEATED LAND. A phrase used in Pennsylvania to designate uncultivated land subject to taxation. A tract of land ceases to be unseated as soon as it is actually occupied with a view to permanent residence; 7 W. & S. 248; 5 Watts, 382. See 1 Pennypacker (Pa.) 57.

UNSEAWORTHY SHIP. A ship-owner's warranty of seaworthiness implies that his vessel is in a fit condition to proceed on the voyage for which she is chartered with safety to her cargo and crew. Unseaworthiness may arise from lack of necessary charts, nautical instruments, cordage, sails, anchors, or provisions; from defect or rottenness in timbers; if a steamer, from defective or insufficient machinery; or from being under-manned; Foard, Merch. Shipp. 339-350; Flanders, Shipp. 62-84.

See SEAWORTHINESS.

UNSOLEMN WAR. That war which is not carried on by the highest power in the states between which it exists, and which lacks the formality of a declaration. Grotius, de Jure Bel. et Pac. l. 1, c. 3, § 4. A formal declaration to the enemy is now disused, but there must be a formal public act proceeding from the competent source: with us, it has been said, it must be an act of congress; 1 Kent, 55.

UNSOUND MIND, UNSOUND MEMORY. These words have been adopted in several statutes, and sometimes indiscriminately used, to signify not only lunacy, which is periodical madness, but also a permanent adventitious insanity as distinguished from idiocy. 1 Ridg. P. C. 518; 3 Atk. 171.

The term *unsound mind* seems to have been used in those statutes in the same sense as insane; but they have been said to import that the party was in some such state as was contradistinguished from idiocy and from lunacy, and yet such as made him a proper subject of a commission to inquire of idiocy and lunacy; Shelf. Lun. 5; Ray, Med. Jur. prél. § 8; 8 Ves. 66; 12 *id.* 447; 19 *id.* 286; 1 Beck, Med. Jur. 573; Coop. Ch. Cas. 108. INSANITY.

UNSOUNDNESS. See SOUNDNESS.

UNTIL. When a charter continues the incorporation of a company until a day named, *until* is exclusive in its meaning, unless the context show that the contrary is intended; 17 N. Y. 502; 120 Mass. 94; Ang. & A. Corp. § 778 *a*.

UNWHOLESOME FOOD. Food not fit to be eaten; food which if eaten would be injurious.

Although the law does not, in general, consider a sale to be a warranty of goodness of the quality of a personal chattel, yet it is otherwise with regard to food and liquor when sold for consumption; 1 Rolle, Abr. 90, pl. 1, 2. See ADULTERATION; HEALTH.

UPLIFTED HAND. When a man accused of a crime is arraigned, he is required to raise his hand, probably in order to identify the person who pleads. Perhaps for the same reason when a witness adopts a particular mode of taking an oath, as, when he does not swear upon the gospel, but by Almighty God, he is requested to hold up his hand.

UPPER BENCH. The king's bench was so called during Cromwell's protectorate, when Rolle was chief-justice. 3 Bla. Com. 202.

URBAN SERVITUDES. All servitudes are established either for the use of houses or for the use of lands. Those of the first kind are called urban servitudes, whether the buildings to which they are due be situated in the city or in the country. Those of the second kind are called rural servitudes.

The principal kinds of urban servitudes are the following: the right of support; that of drip; that of drain, or of preventing the drain; that of view or of lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls, or of preventing them from being raised; that of passage; and that of drawing water. See 3 Toullier, 441; La. Civ. Code, arts. 710, 711.

URBS (Lat.). **In Civil Law.** A walled city. Often used for *civitas.* Ainsworth, Dict. It is the same as *oppidum*, only larger. *Urbs*, or *urbs aurea*, meant Rome. Du Cange. In the case of Rome, *urbs* included the suburbs. Dig. 50. 16. 2. pr. It is derived from *urbum*, a part of the plough by which the walls of a city are first marked out. Ainsworth, Dict.

URE. Custom, habit. Toml.

USAGE. Uniform practice.

This term and custom are now used interchangeably, though custom seems to have been originally confined to local usages immemorially existing; Browne, Us. & Cust. 13.

A usage must be established; that is it must be known, certain, uniform, reasonable, and not contrary to law; but it may be of very recent origin; 3 Wash. C. C. 150; 5 Binn. 287; 9 Pick. 426; 4 B. & Ald. 210; 3 Duer, 264; 15 How. 539; 69 Penn. 374; 80 Ill. 493; 49 N. Y. 464.

The usages of trade afford ground upon which a proper construction may be given to contracts. By their aid the indeterminate intention of parties and the nature and extent of their contracts arising from mere implications or presumptions, and acts of an equivocal character may be ascertained; and the meaning of words and doubtful expressions may become known; 13 Pick. 182; 2 Sumn. 569; 2 Gill & J. 136; 5 Wheat. 326; 2 C. & P. 525; 1 Caines, 45; 1 N. & M'C. 519; 5 Ohio, 436; 6 Pet. 715; 15 Ala. 123; 26

Vt. 136; 13 Wis. 198; 15 Ark. 491; 67 N. Y. 338; 25 Me. 401.

Modern English cases incline to extend the functions of usages, but in America the authorities vary greatly; Lawson, Us. & Cust. 25; 7 E. & B. 266; 32 Vt. 616; 15 Mich. 206; 2 Sumn. 377; 10 W. N. C. Pa. 347.

See CUSTOM; Lawson, Browne, Us. & Cust.

USANCE. In Commercial Law. The time which, by usage or custom, is allowed in certain countries for the payment of a bill of exchange. Pothier, Contr. du Change. n. 15.

The time of *one*, *two*, or *three* months after the date of the bill, according to the custom of the places between which the exchanges run.

Double or treble is double or treble the usual time, and half usance is half the time. Where it is necessary to divide a month upon a half usance (which is the case when the usance is for one month or three), the division, notwithstanding the difference in the length of the months, contains fifteen days. Byles, Bills, *80, *205.

USE. A confidence reposed in another, who was made tenant of the land, or terre tenant, that he would dispose of the land according to the intention of the *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. Plowd. 352; Gilb. Uses, 1; Cornish, Uses, 13; Saund. Uses, 2; Co. Litt. 272 *b;* 1 Co. 121; 2 Bla. Com. 328.

A right in one person, called the *cestui que use*, to take the profits of land of which another has the legal title and possession, together with the duty of defending the same and of making estates thereof according to the direction of the *cestui que use.*

Uses have been said to have been derived from the *fidei commissa* of the Roman law; but see TRUST. It was the duty of a Roman magistrate, the prætor *fidei commissarius*, whom Bacon terms the particular chancellor for uses, to enforce the observance of this confidence. Inst. 2. 23. 2. They were introduced into England by the ecclesiastics in the reign of Edward III., before 1377, for the purpose of avoiding the statutes of mortmain; and the clerical chancellors of those times held them to be *fidei commissa*, and binding in conscience. To obviate many inconveniences and difficulties which had arisen out of the doctrine and introduction of uses, the Statute of 27 Henry VIII. c. 10, commonly called the Statute of Uses, or, in conveyances and pleadings, the statute for transferring uses into possession, was passed. It enacts that "when any person shall be seised of lands, etc. to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc. of and in the like estate as they have in the use, trust, or confidence; and that the estates of the persons so seised to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus executes the use,—that is, it conveys the possession to the use, and transfers the use to the possession, and, in this manner, making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity; 2 Bla. Com. 333.

A modern use has, therefore, been defined to be an estate of right which is acquired through the operation of the statute of 27 Henry VIII. c. 10; and which, when it may take effect according to the rules of the common law, is called the legal estate, and when it may not is denominated a use, with a term descriptive of its modification; Cornish, Uses, 35.

The common-law judges decided, in the construction of this statute, that a use could not be raised upon a use; Dy. 155 (A); and that on a feoffment to A and his heirs to the use of B and his heirs in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that as the statute mentioned only such persons as were *seised* to the use of others, it did not extend to a term of years, or other chattel interests, of which a termer is not seised but only possessed. Bacon, Law Tr. 335; Poph. 76; Dy. 269; 2 Bla. Com. 336. The rigid literal construction of the statute by the courts of law again opened the doors of the chancery courts; 1 Madd. Ch. Pr. 448.

Uses and trusts are often spoken of together by the older and some modern writers, the distinction being those trusts which were of a permanent nature and required no active duty of the trustee being called uses; those in which the trustee had an active duty to perform, as, the payment of debts, raising portions, and the like, being called *special* or *active* trusts, or simply trusts; 1 Spence, Eq. Jur. 448.

For the creation of a use, a consideration either *valuable*, as, money, or *good*, as relationship in certain degrees, was necessary; 3 Swanst. 591; 7 Co. 40; 17 Mass. 257; 4 N. H. 229, 397; 14 Johns. 210. See RESULTING USE. The property must have been *in esse*, and such that seisin could be given, Crabb, R. P. § 1610; Cro. Eliz. 401. Uses were alienable, although in many respects resembling choses in action, which were not assignable at common law; 2 Bla. Com. 331: when once raised, it might be granted or devised in fee, in tail, for life, or for years; 1 Spence, Eq. Jur. 455.

The effect of the Statute of Uses was much restricted by the construction adopted by the courts: it practically resulted, it has been said, in the addition of these words, *to the use*, to every conveyance; Will. R. P. 133. The intention of the statute was to destoy the estate of the feoffee to use, and to transfer it by the very act which created it to the *cestui que use*, as if the seisin or estate of the feoffee, together with the use, had, *uno flatu*, passed from the feoffor to the *cestui que use.* A very full and clear account of the history and present condition of the law of uses is given by Professor Washburn, 2 Real Prop. 91–156, which is of particular value to the American student. See, as to a use upon a use, Tudor, Lead. Cas. on Real Prop. 335. Consult, also, Spence, Eq. Jur.; Bispham, Eq.; Cornish, Uses; Bac. Law Tr.; Greenl. Cruise, Dig.; see CHARITABLE USES; TRUSTS.

In its untechnical sense, the word use has been variously construed; 20 Ind. 398; 59 Me. 582; 107 Mass. 290, 324; 11 Rich. 621;

thus, "to use a port" means to enter it, so as to derive advantage from its protection; 48 N. Y. 624.

In Civil Law. A right of receiving so much of the natural profits of a thing as is necessary to daily sustenance. It differs from usufruct, which is a right not only to use, but to enjoy. 1 Bro. Civ. Law, 184.

USE AND OCCUPATION. When a contract has been made, either by express or implied agreement, for the use of a house or other real estate, where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent in an action of assumpsit for use and occupation; 2 Aik. 252; 7 J. J. Marsh. 6; 4 Day, 228; 13 Johns. 240, 297; 4 Hen. & M. 161; 15 Mass. 270; 10 S. & R. 251. This is under the Stat. of Westm. 2.

The action for use and occupation is founded not on a privity of estate, but on a privity of contract; 3 S. & R. 500; therefore it will not lie where the possession is tortious; 2 N. & M'C. 156; 3 S. & R. 500; 6 N. H. 298; 6 Ohio, 371; 14 Mass. 95. It will lie for the occupation of land in another state; 3 S. & R. 502. See Jacks. & G. Landl. & T. 178.

USEFUL. That which may be put into beneficial practice.

The Patent Act of Congress of July 8, 1870, sect. 6, in describing the subjects of patents, mentions "new and *useful* art," and "new and *useful* improvement." To entitle the inventor to a patent, his invention must, to a certain extent, be beneficial to the community, and not be for an unlawful object, or frivolous, or insignificant; 1 Mas. 182; 1 Pet. C. C. 322; Baldw. 303; 14 Pick. 217; Paine, 203. See PATENT.

USER. The enjoyment of a thing.

USES, STATUTE OF. See TRUSTS; USES.

USHER. This word is said to be derived from *huissier*, and is the name of an inferior officer in some English courts of law. Archb. Pr. 25. The office of usher of the court of chancery was abolished is 1852.

USQUE AD MEDIUM FILUM VIÆ (Lat.). To the middle thread of the way. See AD MEDIUM FILUM; 7 Gray, 22.

USUCAPTION, or USUCAPION (Lat. *usucaptio*, or *usucapio*). **In Civil Law.** The manner of acquiring property in things by the lapse of time required by law.

It differs from prescription, which has the same sense, and means, in addition, the manner of acquiring and losing, by the effect of time regulated by law, all sorts of rights and actions. Merlin, Répert. *Prescription;* Ayliffe, Pand. 320; Vattel, b. 2, c. 2, § 140. See PRESCRIPTION.

USUFRUCT. In Civil Law. The right of enjoying a thing the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.

Perfect usufruct is of things which the usufructuary can enjoy without altering their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied; as, a house, a piece of land, animals, furniture, and other movable effects.

Imperfect or quasi usufruct is of things which would be useless to the usufructuary if he did not comsume and expend them or change the substance of them: as, money, grain, liquors. In this case the alteration may take place; Pothier, Tr. du Douaire, n. 194; Ayliffe, Pand. 319; Pothier, Pand. tom. 6, p. 91.

USUFRUCTUARY. In Civil Law. One who has the right and enjoyment of a usufruct.

Domat, with his usual clearness, points out the duties of the usufructuary, which are—to *make an inventory* of the things subject to the usufruct, in the presence of those having an interest in them; to *give security* for their restitution when the usufruct shall be at an end; *to take good care* of the things subject to the usufruct; *to pay all taxes* and claims which arise while the thing is in his possession as a ground-rent; and to keep the thing in repair at his own expense. Lois Civ. liv. 1, t. 11, s. 4. See ESTATE FOR LIFE.

USURA MARITIMA. See FOENUS NAUTICUM.

USURPATION. Torts. The unlawful assumption of the use of property which belongs to another; an interruption or the disturbing a man in his right and possession. Toml.

According to Lord Coke, there are two kinds of usurpation: *first*, when a stranger, without right, presents to a church and his clerk is admitted; and, *second*, when a subject uses a franchise of the king without lawful authority. Co. Litt. 277 *b*.

In Governmental Law. The tyrannical assumption of the government by force, contrary to and in violation of the constitution of the country.

USURPED POWER. In Insurance. An invasion from abroad, or an internal rebellion, where armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable. These words cannot mean the power of a common mob; 2 Marsh. Ins. 390. By an article of the printed proposals which are considered as making a part of the contract of insurance, it is provided that "no loss of damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

USURPER. One who assumes the right of government by force, contrary to and in violation of the constitution of the country. Toul. Droit Civ. n. 32.

USURY. The excess over the legal rate charged to a borrower for the use of money. Originally, the word was applied to all inte-

rest reserved for the use of money; and in the early ages taking such interest was not allowed. In the later Roman law usury was sanctioned; and it is said that taking usury was not an offence at common law; Tyler, Usury, 64; but see Ord. Usury, 17.

Unless there is a law limiting the rate of interest that can be charged for money, there can be no usury; 31 Ark. 484.

"The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise, but none have been allowed to prevail. Courts have been astute in getting at the true intent of the parties and giving effect to the statute;" 62 N. Y. 346. Thus the supreme court of Vermont decided where the lender obtained from the borrower, before the loan was made, a release under seal of all claims and demands against himself, that the borrower might recover back usurious interest, on the ground that the release, to be effective, must be free from the element of pressure; 15 C. L. J. 341; 72 Penn. 54.

There must be a loan in contemplation of the parties; 7 Pet. 109; 1 Iowa, 252; 14 N. Y. 93; 6 Ind. 232; and if there be a loan, however disguised, the contract will be usurious, if it be so in other respects. Where a loan was made of depreciated bank-notes, to be repaid in sound funds, to enable the borrower to pay a debt he owed, dollar for dollar, it was considered as not being usurious; 1 Meigs, 585. The *bonâ fide* sale of a note, bond, or other security at a greater discount than would amount to legal interest is not *per se* a loan, although the note may be indorsed by the seller and he remains responsible; 9 Pet. 103; 1 Iowa, 30; 6 Ohio St. 19; 29 Miss. 212; 10 Md. 57. But if a note, bond, or other security be made with a view to evade the laws of usury, and afterwards sold for a less amount than the interest, the transaction will be considered a loan; 15 Johns. 44; 12 S. & R. 46; 6 Ohio St. 19; 4 Jones, No. C. 399; and a sale of a man's own note indorsed by himself will be considered a loan. It is a general rule that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction; 7 Pet. 109; 10 Md. 57. On the other hand, when the contract was originally usurious, and there is a substitution by a new contract, the latter will generally be considered usurious; 15 Mass. 96.

There must be a contract for the return of the money at all events; for if the return of the principal with interest, or the principal only, depend upon a contingency, there can be no usury; 21 Am. L. Reg. N. S. 715; 1 Wall. 604; but if the contingency extend only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury if he receive interest beyond the amount allowed by law; but see these cases. Where the principal is put to hazard in insurances, annuities, and bottomry, the parties may charge and receive greater interest than is allowed by law in common cases, and the transaction will not be usurious; Ord, Usury, 23, 39, 64; 2 Pet. 537. See 18 Wall. 375.

To constitute usury, the borrower must not only be obliged to return the principal at all events, but more than lawful interest: this part of the agreement must be made with full consent and knowledge of the contracting parties; 3 B. & P. 154. When the contract is made in a foreign country, the rate of interest allowed by the laws of that country may be charged, and it will not be usurious, although greater than the amount fixed by law in this; Story, Confl. of Laws, § 292. Parties may contract for interest according to the place of the contract or the place of performance; 1 Wall. 298; 12 *id.* 226; 64 N. C. 33. Where there is no agreement made, the law of the place of the contract governs, in the absence of any intent to evade the usury laws; 57 Ga. 370; 72 N. Y. 472; 32 Ind. 16. A note made, dated, and payable in New York, without intent of maker that it should be elsewhere discounted, if negotiated in another state at a rate of interest lawful there, but excessive in New York, is usurious; 77 N. Y. 573.

To constitute usury, both parties must be cognizant of the facts which make the transaction usurious; 44 Barb. 521; but a mistake in law will not protect the parties; 9 Mass. 49; though a miscalculation will, it seems; 2 Cow. 770. An agreement by a mortgagor to pay taxes on the mortgage debt is not necessarily usurious; 24 Md. 62; nor is a clause in a bill of exchange, providing attorney fees for collection; 34 Ind. 149; and so of a mortgage; 30 Iowa, 131; S. C. 6 Am. Rep. 663.

A *bona fide* sale by one person of a bond of another, at an exorbitant rate of discount, is not illegal; 3 Stockt. 362. A sale of a note or mortgage for less than its face, with a guarantee of payment in full, is not usurious; 35 Barb. 484; nor is a contract to pay a bushel and a half of corn within a year, for the loan of a bushel; 12 Fla. 552. An agreement to pay interest on accrued interest is not invalid; 10 Allen, 32; 55 N. Y. 621; S. C. 14 Am. Rep. 352; but it has been held that compounding interest on a note is usurious; 76 N. C. 314.

The ordinary commissions allowed by the usages of trade may be charged without tainting a contract with usury; but it must plainly appear that the commissions are charged for other services, and are not merely a device to evade the law; 2 Pat. & H. 110. Commission may be charged by a merchant for accepting a bill; 18 Ark. 456; but a commission charged in addition to interest for advancing money is usurious; 12 La. An. 660. Where a banker discounts a bill payable in a distant place, he may charge the usual rate of exchange on that place; but if such charge be an excess of the usual rate it will be considered a device to cover usurious interest; 3 Ind. 53; see 93 U. S. 344.

Where the payment of usurious interest depends upon the will of the borrower, as, where he may discharge himself from it by prompt payment of the principal, it is considered in the light of a penalty, but does not make the contract usurious; 6 Cow. 653. Where a gratuity is given to influence the making of a loan, it will be considered usurious; 7 Ohio St. 387. Where a bank which by its charter is prohibited from making loans at over six per cent. makes one at seven, such a contract being prohibited, the courts will not assist the bank in enforcing it; 26 Barb. 595. The burden of proof is on the person pleading usury; 22 Ga. 193; and where the contract is valid on its face, affirmative proof must be made that the agreement was corruptly made to evade the law; 97 U. S. 13. Where parties exchange their notes for mutual accommodation, and both or either are sold at a higher than the legal rate, they are usurious; Hill & D. 65.

The common practice of reserving the interest on negotiable paper at the time of making the loan, although its effect is to cause the borrower to pay more than the legal rate, is very ancient, having been practised by the Athenian bankers, and is sanctioned by law; Sewell, Banking.

The offence of taking usury is not condoned by the absence of *intent* to violate the statute; 50 N. Y. 437; but see 20 Wisc. 407.

The one who has contracted to pay usury may set up the defence; 55 Ind. 341; 17 Kans. 355; and so may his privies; 49 N. Y. 636; 47 Ala. 362; and his surety; 39 Ind. 106; but see 50 Vt. 105; 35 N. J. 285; or a guarantor; 20 Me. 28; but one who buys an equity of redemption cannot set up the defence against the mortgage; 24 N. J. Eq. 120; nor can a second mortgagee set up usury as a defence to a prior mortgage; 17 Kans. 355; but see 26 Ind. 94; 59 Barb. 239. A usurer cannot take advantage of his own usury to avoid his contract; 33 N. Y. 31.

The defence of usury must be supported by clear proof; 57 Ill. 138; 36 Wisc. 390; which may be extrinsic to the contract; 9 Pet. 418; an express agreement for usury need not be proved; 2 Pick. 145.

Congress has adopted the following legislation on this subject for the government of national banks: Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, or territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. 3d June, 1864, § 30, R. S. § 5197.

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious action occurred. 3d June, 1864, § 30, R. S. 5198. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association is located, having jurisdiction in similar cases. 18th Feb. 1875, c. 80, v. 18, R. S. § 5198.

National banks may take the rate of interest allowed by the state to natural persons generally, and a higher rate, if state banks of issue are authorized by the laws of the state to take it; 18 Wall. 409.

If no rate of interest is established by the laws of the state, national banks are prohibited from charging more than seven per cent. interest. This is also the law where the state law expressly forbids a corporation to interpose the defence of usury to any action; 11 Blatch. 243. It is now conclusively settled that the penalty declared in sec. 30 of the act of 1864 for the exaction by a national bank of usurious interest is superior to and exclusive of any state penalty. Congress, which is the sole judge of the necessity for the creation of national banks, having brought them into existence, the states can exercise no control over them, or in any wise affect their operation, except so far as it may see proper to permit; 91 U. S. 29; 72 Penn. 209; 78 *id.* 228; 44 Ind. 298; 115 Mass. 539; *contra*, 57 N. Y. 100. A national bank is not justified in charging a usurious rate of interest because the statutes of the state permit usurious interest to be taken only by certain specified banks; 11 Bank. Mag. 787. The party entitled to recover may have judgment for twice the amount of all interest which he has paid within two years next preceding the date of beginning suit; 64 N. Y. 212. See Morse, Bk. 562, 565; Ball, Nat. Banks, p. 194, and Note.

See, generally, Comyns, Dig.; Bacon, Abr.; Lilly, Reg.; Dane, Abr.; Petersdorff, Abr.; Viner, Abr.; 1 Pet. Index; Sewell, Morse, Banking; Ball, Nat. Banks; Blydenburg, Tyler, Ord, Usury; 7 Wait, Act. & Def.; Parsons, Notes & Bills; INTEREST.

UTAH. One of the territories of the United States. The act establishing the ter-

ritory was approved Sept. 9, 1850. The territory consists of that portion of the territory of the United States "bounded west by the state of California, on the north by the territory of Oregon, on the east by the summit of the Rocky Mountains, on the south by the thirty-seventh parallel of north latitude." It is provided in the organic act that the United States may divide the territory into two or more territories in such manner and at such times as congress shall deem convenient and proper, or may attach any portion thereof to any other state or territory of the United States. The distribution of powers under the act is precisely the same as in the case of New Mexico. See NEW MEXICO.

UTERINE (Lat. *uterus*). Born of the same mother.

UTFANGTHEF. The right of a lord to punish a thief dwelling out of his liberty, and committing theft without the same, if taken within the jurisdiction of the manor. Cowel.

UTI POSSIDETIS (Lat. as you possess). **In International Law.** A phrase used to signify that the parties to a treaty are to retain possession of what they have acquired by force during the war. Boyd's Wheat. Int. Law, 627.

UTRUBI. In Scotch Law. An interdict as to movables, by which the colorable possession of a *bonâ fide* holder is continued until the final settlement of a contested right: corresponding to *uti possidetis* as to heritable property. Bell, Dict.

UTTER. In Criminal Law. To offer; to publish.

To utter and publish a counterfeit note is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be *passed* in order to complete the offence of uttering; 2 Binn. 338. It seems that reading out a document, although the party refuses to show it, is a sufficient uttering; Jebb, Cr. Cas. 282. See Leach, 251; Russ. & R. 113; Rosc. Cr. Ev. 301. The merely showing a false instrument with intent to gain a credit, when there was no intention or attempt made to pass it, it seems, would not amount to an uttering; Russ. & R. 200. And where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor, for the purpose of inspection only, in order, by fraudulently representing himself as a person who had paid his poor-rates, to induce the prosecutor to advance money to a third person for whom the defendant proposed to become a surety for its repayment, this was held to be an uttering within the statute; 2 Den. Cr. Cas. 475. And the rule there laid down is that a using of the forged instrument in some way, in order to get money or credit upon it, *or by means of it*, is sufficient to constitute an uttering.

The word *uttering*, used of notes, does not necessarily import that they are transferred as genuine; the terms include any delivery of a note for value (as by a *sale* of the notes as spurious) to another with the intent that they should be passed upon the public as genuine; 1 Abb. U. S. 135 (West. Dist. of Mich.).

The offence of uttering is complete when a forged instrument is offered; it need not be accepted; 2 Bish. Cr. L. § 605; 48 Mo. 520. Recording a forged deed is uttering it; 27 Mich. 386; so is bringing suit on a forged paper; 20 Gratt. 733. The legal meaning of the word *utter* is in substance to *offer;* Bish. Cr. L. § 607.

UTTER BARRISTER. In English Law. Those barristers who plead without the bar, and are distinguished from benchers, or these who have been readers and who are allowed to plead within the bar, as the king's council are. See BARRISTER.

UXOR (Lat.). **In Civil Law.** A woman lawfully married.

V.

VACANCY. A place which is empty. The term is principally applied to cases where the office is not filled.

By the constitution of the United States, the president has the power to fill vacancies that may happen during the recess of the senate. See TENURE OF OFFICE; OFFICE; RESIGNATION; 1 So. L. Rev. N. S. 184.

VACANT POSSESSION. A term applied to an estate which has been abandoned by the tenant: the abandonment must be complete in order to make the possession vacant, and, therefore, if the tenant have goods on the premises it will not be so considered; 2 Chitty, Bail. 177; 2 Stra. 1064; Comyn, Landl. & T. 507, 517.