

EXECUTOR DE SON TORT

Const. U.S.; Wilson, Legislative Government; Farrand; Willoughby; Watson; Dicey, Constitution; Judicial Power; Legislative Power; President of the UNITED States.

EXECUTOR DE SON TORT. One who attempts to act as executor without lawful authority.

A person who, without any authority, intermeddles with the estate of a decedent and does such acts as properly belong to the office of executor or administrator, thereby becoming a sort of quasi executor, though only for the purpose of being sued or made liable for the assets with which he has intermeddled. *Grace v. Seibert*, 235 111. 100, 85 N. E. 30S, 22 L. R. A. (N. S.) 301; and such executor, having assumed a representative character, cannot deny it, and therefore suffers all the liabilities of an executor with out acquiring the rights or privileges of such office; *id.*

If a stranger takes upon him to act as ex- ecutor without any just authority (as, by intermeddling with the goods of the de- ceased, and many other transactions), he is called in law an executor of his own wrong, de son tort; 2 Bla. Com. 507; *Bacon v. Par- ker*, 12 Conn. 213; *Wilbourn v. Wilbourn*. 48 Miss. 38; 14 E. L. & Eq. 510; *Johnston v. Duncan*, 3 Litt. (Ky.) 1G3, 14 Am. Dec. 54; *White v. Cooper*, 3 Pa. 130; *Brown v. Wal- ter*, 58 Ala. 310; *Barron v. Burney*, 38 Ga. 2U4. If a man kill the cattle of the testator, or take his goods to satisfy a debt, or collect money due him, or pay out such money, or carry on his business, or take possession of his house, etc., he becomes an executor de son tort. Where a person with whom a will had been left filed it, but took out no letters with the will annexed, or any other legal au- thority to administer on the estate, he be- came an executor de son tort; *Morrow v. Cloud*, 77 Ga. 114.

But a stranger may perform many acts in relation to a testator's estate without be- coming liable as executor de son tort. Such are locking up his goods for preservation, burying the deceased in a manner suitable to his fortune, paying for the funeral expenses and those of the last sickness, making an inventory of his property to prevent loss or fraud solely, feeding his cattle, milking his cows, repairing his houses, etc. Such acts are held to be offices of kindness and charity; *Magner v. Ryan*, 10 Mo. 10G; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622. Nor does paying the debts of the deceased with one's own money make one an executor de son tort; *Carter v. Bobbins*, 8 Rich. (S. G.) 20; *Bogue v. Watrous*, 59 Conn. 217. 22 Atl.31. Nor does one become executor (/■ son tort by obtaining payment of a debt from an executor de son tort; 65 L. T. N. S. 709. The fact that a widow has taken possession of community property is not sufficient to authorize suit against her on a note of her deceased husband; *Vela v. Guerra*. 7" 595, 12 S. W. 1127. As to what acts will der a person so liable, see *Godolphin*, Orph. Leg. 91 ; 1 Wn Abr.

561; Bull. X. 1'. is; Cum. Dig. Administra- tion (C 3); *Rattoon v. Overacker*, S .1 (N. Y.) 120; In re Huffs Estate, 15 S. & EL (Pa.) 30; *White v. Mann*. 2-; Me ::<;i ; *Chandler v. Davidson*, >; Blackf. (Ind.) An executor de son tort is Liable only f<>r such assets as come into his bands, 8 not liable for not reducing a sion ; *Kinard's Adm'r v. Young*, 2 Rich. Eq. i s. G i 2 17; *Roumfort v. McAlarney*, I 193. And it has been held that he is only liable to the rightful administrator; *Mulr v. Trustees of Orphan House*. 3 Barb. <'h. (X. r.) !77; *Brown v. Walter*, 58 Ala. ."1". B I see *Hansford v. Elliott*. Leigh (Va. Swift v. Martin, 10 Mo. A.]). 488; which imply that he is

also Liable to the heir at law. He cannot be sued except for fraud, and he must be sued as executor; • Buck* minster v. Ingham, Brayt (Vt.) n<'»: Fran- cis v. Welch. ."3 N. C. 215; Nass v. Van- SWearingen, 10 S. & B. (Pa.) 144; Brown's Ex'rs v. Durbin'a Adm'r, 5 .7. J. Marsh. (Ky.) 170. But in general he is liable to all the trouble of an executorship, with none of its profits. And the law on this head to have been borrowed from the civil-law doctrine of pro hcerede gestio. See lb • ins. Antiq. Syntagma, lib. 2, tit. 17, § 16, p. 468.

An executor de son tort Is an executor only for the purpose of being sued, and not for the purpose of suing; Francis v. Welch, 33 N. C. 2in. lie is sued as if rightful e: tor. But if he flefi ods as such he becomes thereby also an executor de son tort; Lawes, Pl. i0O, note: Davis v. Connelly's Ex'rs. 1 B. Monr. (Ky.) 13G; Gregory's Ex'rs v. Forrester, 1 McCord. Ch. (S. 0.) 318; Hill

Henderson, 13 Smedes & M. (Id Norfolk's Ex'r v. Cantt, 2 II. & .7. (Md.) 435. When an executor de son tort takes out let- ters of administration, his acts are Legalized, and are to be viewed in the same light as if he had been rightful administrator when the goods came into bis hands: Magner v. Ryan, 19 Mo. 196; Shillaber v. Wyman. 1." Mas<. 325; Rattoon v. Overacker, s Johns. (N. 1.) 126. Bui see. CONtra, Clements v. Swain. 2 N. II. 475. A voluntary sale by an I tor dc son tort Confers only the same title on the purchaser that he himself had: 6 i:\cli. 164; 20 B. I- & Eg, 146; tar] "liter v. Going, 20 Ala. 587; Meigan v. McDonough, 10 Watts (Pa.) 287. It is held that in regard to land no man can be an executor dc ton tort; Green v. Dewit, 1 Rdot (Conn.) 183; Nass v. Van- swearingen, 7 s. & lb (Pa.) 192; id.. 10 S. & R. i l'a. i 141. In Arkansas it is said that there is no such thing as a te chn i c a l exi dc son tort: Barasien v. Odum, 17 Ark. 122: Bust v. Wither ingtou, id. 129

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Missouri; Rozelle v. Harmon, 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 1ST. See, on this subject, Smith v. Porter, 35 Me. 287 ; Leach v. Pillsbury, 15 N. H. 137 ; Grave's Adm'r v. Poage, 17 Mo. 91 ; Hardy v. Thomas, 23 Miss. 544, 57 Am. Dec. 152; Josey v. Rogers, 13 Ga. 478; Woolfork's Adm'r v. Sullivan, 23 Ala. 548, 58 Am. Dec. 305 ; Simonton v. Mc- Lane's Adm'r, 25 Ala. 353; Morrison v. Smith. 44 N. C. 399; Walworth v. Ballard, 12 La'. Ann. 245 ; Lee v. Wright, 1 Rawle (Pa.) 149; Schoul. Ex'rs & Adm'rs § 184.

EXECUTORS AND ADMINISTRATORS. The person or persons to whom is committed the administration of the estates of decedents, the first being that of a person named in a will to execute its provisions, the latter that of the officer designated under the law to administer the estate of one who has died intestate.

An executor is one to whom another man commits by his last will the execution of that will, and testament. 2 Bla. Com. 503. A person to whom a testator by his will commits the execution, or putting in force, of that instrument and its codicils. Fonbl. Rights and Wrongs 307. See Letters Testamentary; HAERES.

An administrator is a person authorized to manage and distribute the estate of an in- testate, or of a testator who has no executor. In South African law the term is used as equivalent to trustee.

An administrator is merely the agent or trustee of the estate of the decedent, acting under the immediate direction of the law prescribing his duties, regulating his conduct and limiting his powers; *Collamore v. Wilder*, 19 Kan. 67.

Administration. The management of the estate of an intestate, or of a testator who has no executor. 2 Bla. Com. 494; 1 Williams, Ex. 401. The term is applied broadly to denote the management of an estate by an executor, and also the management of estates of minors, lunatics, etc., in those cases where trustees have been appointed by authority of law to take charge of such estates in place of the legal owners.

No administration is necessary where there are no creditors and the heirs divide the assets in kind or otherwise by mutual agreement; *McCracken v. McCaslin*, 50 Mo. App. 85; *Cadmus v. Jackson*, 52 Pa. 307; *Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574; or where the property of the intestate is exempt; *Rivera v. R. Co. (Tex.)* 149 S. W. 223; or where the widow is sole legatee and all debts and expenses are paid; *Block v. Butt*, 41 Ind. App. 487, 84 N. E. 357; or where persons in interest settle their rights outside of the probate court; *Prichard v. Mulhall*, 140 Ia. 1, 118 N. W. 43; and in some states, such settlement, without administration, is authorized by statute; *Rogan v. Arnold*, 233 111. 19, 84 N. E. 58.

The controlling place of administration is the domicile of the testator; *Higgins v. Eaton*, 188 Fed. 938.

The right of administration is a valuable one and not to be taken away, except as provided by statute; *Williams v. Williams*, 24 App. D. C. 214.

Originally in England the crown claimed the right of administering the personal property of intestates and exercised it by its ministers, or granted it as a franchise to lords of manors or others and afterwards to prelates, who greatly abused the trust, until, under the Statute of Westminster II, the ordinary was bound to pay the debts of the deceased so far as his goods would extend, but still the ecclesiastical persons who were entrusted with the duty, appropriated large portions of them upon the pretext of pious uses, until they were required by Stat. 31 Edw. III. c. 11, § 1, to grant administration to "the next of kin and most lawful friends

of the dead person intestate," who were held accountable in the common-law court as executors were. The administration of personal estates then became assimilated to carrying out the provisions of wills, and the function of the ecclesiastical courts was merely the grant of letters and the supervision of their execution. Next, under 21 Hen. VIII., the ordinary could appoint the widow or next of kin, or both, at his discretion. The jurisdiction in England was taken away from the ecclesiastical court by Stat. 20 & 21 Vic. c. 77, and vested in a judge of probate. The court of probate is now part of the Probate, Divorce and Admiralty Division of the High Court of Justice.

In the United States, what is known as probate jurisdiction is exercised generally by courts known as probate courts held by surrogates, judges of probate, registers of wills, etc.

There are various kinds of administration :
Ad colligendum. That which is granted for collecting and preserving goods about to perish (*bona peritura*). The only power over these goods is under the form prescribed by statute.

Ancillary. That which is subordinate to the principal administration taken out in another state or country where there are assets; *Appeal of Barry*, 88 Pa. 131; *Stevens v. Gaylord*, 11 Mass. 256; *Rosenthal v. Renick*, 44 Ill. 202; *Trimble v. Dzieduz-yiki*, 57 How. Pr. (N. Y.) 208. In the absence of a statute allowing it (as in some states) an administrator in one state cannot sue as such in another, unless ancillary letters are taken out; *Noonan v. Bradley*, 9 Wall. (U. S.) 394, 19 L. Ed. 757; and this may be done by amendment after the bill is filed; *Black v. Henry G. Allen Co.*, 42 Fed. 618, 9 L. R. A. 433. One who is both ancillary and domiciliary administratrix of the

same estate cannot be called on, in one jurisdiction, to account for assets received in

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the other; *Hamilton v. Carrington*, 41 S. C. 385, 19 S. E. 616.

Executors in the state of testator's domicile are not bound, under the full faith and credit clause, by a decree of the court of another state against an administrator c. t. a., in a case submitted to arbitration before the testator's death; *Brown v. Fletcher's Estate*, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966.

GfBterorum. That which is granted as to the residue of an estate, which cannot be administered under the limited power already granted; 4 Hagg. Eccl. 382, 3SG; 4 M. & G. 398; 1 Curt. Eccl. 28G.

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

Cum testamento annexo. That which is granted where no executor is named in the will, or where the one named dies, or is incompetent or unwilling to act. Such an administrator must follow the statute rules of distribution, except when otherwise directed by the will; *Ex parte Brown*, 2 Bradf. (N. Y.) 22; *Farwell v. Jacobs*, 4 Mass. 634; *Stacy v. Thrasher*, G How. (U. S.) 59, 12 L. Ed. 337. The residuary legatee is appointed such administrator rather than the next of kin; *Estate of Donnelly*, 2 Phil. (Pa.) 54; *Thornton v. Winston*, 4 Leigh (Va.) 152; 2 Add. 352.

De bonis non. That which is granted when the first administrator dies before having fully administered. The person so appointed has in general the powers of a common administrator; Bacon, Abr. Executors, B, 1; Rolle, Abr. 907; Matthews v. Douthitt, 27 Ala. 273, 62 Am. Dec. 765 ; State v. Porter. 9 Ind. 342; Thomas v. Stanley, 4 Sneed (Tenn.) 411; Watson v. Jacobs, 29 Vt. 170; Johnson v. Bank, 11 Md. 412 ; Coffin v. Heath, 6 Mete. (Mass.) 78; Wiggin v. Swett, 6 Mete. (Mass.) 198, 39 Am. Dec. 716; Prusa v. Everett, 78 Neb. 250, 110 N. W. 571; Prusa v. Everett, 78 Neb. 251, 113 N. W. 571.

A residuary legatee has sufficient interest in an estate to request the appointment of an administrator d. b. n. to collect debts, whether it will make the estate solvent or not ; Mallory's Appeal from Probate. 62 Conn. 215, 25 Atl. 109.

De bonis non cum testamento annexo
That which is granted when an executor dies leaving a part of the estate unadministered. Comyns, Dig. Adm. B, 1 ; Ellmaker's Estate, 4 Watts (Pa.) 34, 38, 39. It cannot be based on a will made in a foreign country if invalid there because of defective execution; Coleman's Estate, 13 Pa. Co. Ct. 81.

Durante absentia. That which subsists during the absence of the executor and until he has proved the will. In England, by statute, such an administration is raised during the absence of the executor, and is not determined by the executor's dying abroad; 4

Hagg. Eccl. 360; 3 Bos. & P. 26; see Willing v. Willing, 5 Rawle (Pa.) 264.

Durante minori (State). That which is granted when the executor is a minor. It

continues until the minor attains his lawful age to act, which at common law is seventeen years; 5 Coke 29. When an infant is sole executor, the statute, s. 6 provides that probate shall not be granted to him until his full age of twenty-one years, and that adm. cum test. <int> shall be granted in the mean time to his guardian or other suitable person. A similar statute provision exists in most of the United States. This administrator may collect assets, pay debts, sell bona peritura, and perform such other acts as require immediate attention. He may sue and be sued; Bacon, Abr. executor, B, 1; Cro. Eliz. 718; 2 Bla. Com. 503; 5 Coke 29; Taylor v. Barron, 5 N. 11. 484, 493.

Where there are no creditors or heirs of age, the tutor of minor heirs has a right to take possession of succession property and administer their interests in it; Succession of Bourgeois, 43 La. Ann. 247, 9 South. 34.

Foreign administration. That which is exercised by virtue of authority properly conferred by a foreign power.

The general rule in England and the United States is that letters granted in one jurisdiction, give no authority to sue or be sued in another jurisdiction, though they may be ground for new probate authority; 5 Ves. 44; Blackstone v. Miller, 15 U. S. 1 Sup. Ct. 277, 47 L. Ed. 439; Doe v. M-Farland, 9 Cra. (U. S.) 151, 3 L. Ed. 687; Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. Ed. 589; Perkins v. Williams, 2 Root (Conn.) 462; Dangerfield's Ex'x v. Thurston's Heirs, 8 Mart. (N. S.) [La.] 232; McCullough v. Young, 1 Binn. (Pa.) 63; Matthews v. Douthitt, 17 Ala. 273, 62 Am. Dec. 765; Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128; State v. Price, 21 Mo. 434; Cocke v. Finley, 29 Miss. 127; Dickinson v. M'Vraw, 1 Rand. (Va.) 158; AUsup v. Allsup's Heirs.

Hi Yerg. (Tenn.) 283; Stearns v. Burnham,
 5 GreenL (Me.) 201, 17 Am. Dec. 228; Tay-
 lor v. Barron, 35 N. H. 484; Wood v. Gold,
 4 McLean ('. '."77, Fed. Caa, No. 17. 'MT :
 Vaughan v. Northup, 15 Pet (U. S.) 1. i"
 L. Ed. 639; Hid v. Tucker. 13 How. (U. S.)
 i;,s. ii l. Ed. 223; Black v. Allen Co., 42
 Fed. 618, 9 L. R. A. 4:;;; Farrington v. Trust
 Co., 9 N. Y. Supp. 433. Hence, when persons
 are domiciled and die in one country as A.
 and have personal property in another as B,
 the authority must be had in B, but exer-
 cised according to the laws of A: Story,
 Confl. Laws 23, 117; Leach v. Pillsbury. 15
 X. II. 137; Spraddling v. Pipkin. 15 Mo. 118;
 Williams v. Williams, 5 Md. 467 ; Ex parte
 McComb, 4 Bradf. (N. V. i 151; King v. U.
 s., -J7 Ct Cl. 529; Rutherford v. U. S., 27
 Ct. CL 539; and see Domii n.

There is no legal privity between admin-

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istrators in different states; nor between
 executors of a will in one state and adminis-
 trators c. t. a. in another ; Wilson v. Ins. Co.,
 164 Fed. 817, 90 C. C. A. 593, 19 L. R. A. (N.
 S.) 553. The principal administrator is to
 act in the intestate's domicil, and the ancil-
 lary is to collect claims and pay debts in the
 foreign jurisdiction and pay over the surplus
 to his principal ; Pond v. Makepeace, 2 Mete.
 (Mass.) 114; 3 Hagg. EccL 199; Jones v.
 Marable, 6 Humph. (Tenn.) 116; Lawrence
 v. Kitteridge, 21 Conn. 577, 56 Am. Dec. 385 ;
 Stokely's Estate, 19 Pa. 476 ; Riley v. Riley,
 3 Day (Conn.) 74, 3 Am. Dec. 260; The
 Boston, 1 Blatchf. & H. 309, Fed. Cas. No.
 1,669; Kilpatrick v. Bush, 23 Miss. 199; 2
 Curt. Eccl. 241; Cariniciael v. Ray, 1 Rich.
 (S. C) 116.

Payment to an ancillary administrator is no bar to a suit by the administrator of the domicile ; *Maas v. Bank*, 36 Misc. 154, 72 N. Y. Supp. 1068; nor is it a defence to a prior action by the domiciliary administrator in another state, of which the defendant had knowledge before payment ; *Steele v. Ins. Co.*, 160 N. Y. 703, 57 N. E. 1125. For other cases see 15 Harv. L. Rev. 412. But in Quebec a foreign administrator is recognized; 12 Harv. L. Rev. 287; as well as foreign guardians and receivers, and this rule is said to be satisfactory in operation; *id.*, citing *Lafleur*, Confl. L.

An administrator appointed in Michigan cannot sue a resident of New York in the United States circuit court in that state when he had not taken out letters of administration in New York ; *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112.

But some courts hold that the probate of a will in a foreign state, if duly authenticated, dispenses with the necessity of taking out new letters in their state ; *Lancaster v. McBryde*, 27 N. C. 421 ; *Gray v. Patton*, 2 B. Monr. (Ky.) 12; *Rice v. Jones*, 4 Call (Va.) S9; *Vaughan v. Northup*, 15 Pet. (U. S.) 1, 10 L. Ed. 639; *Ives v. Allyn*, 12 Vt. 589; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

Where a deceased plaintiff was domiciled in another state, an executor appointed in the domicile will be preferred to a temporary administrator appointed in the state of the forum, as the new party ; *Norman v. Goode*, 113 Ga. 121, 38 S. E. 317.

It has been held that possession of property may be taken in a foreign state, but a suit cannot be brought without taking out letters in that state ; *Watt's Ex'rs v. Shepard*, 2 Ala. 429 ; *Trotter v. White*, 10 Smedes

& M. (Miss.) 607; *Suarez v. City of New York*, 2 Sandf. Ch. (N. Y.) 173. In Arizona suit may be brought upon a foreign judgment without taking out new letters of administration; *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555. See Conflict of Laws.

For the purpose of administration, the situs of a debt is the domicile of the debtor

and not the place where the evidence of the debt is located; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109, 63 N. E. 255; *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90, where it was said that in this respect certificates of stock do not differ from other choses in action. The situs, as property, of corporate stock owned by a non-resident decedent is within the county where the corporate property is or where the corporation has its principal place of business; *In re Arnold*, 114 App. Div. 244, 99 N. Y. Supp. 740.

Pendente lite. That which is granted pending the controversy respecting an alleged will or the right of appointment. An officer of the court is appointed to take care of the estate only till the suit terminates; 2 P. Will. 589; 1 Hagg. Eccl. 313; *Bergin v. McFarland*, 26 N. H. 533; *Fisk v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128; *Barksdale v. Cobb*, 16 Ga. 13; *Cole v. Wooden*, 18 N. J. L. 15. He may maintain suits, but cannot distribute the assets; 1 Ball & B. 192; *Cain v. Warford*, 7 Md. 282; *Appeal of Patton*, 31 Pa. 465; *Rogers v. Dively*, 51 Mo. 193.

Public. That which the public administrator performs. This is in many of the states by statute in those cases where persons die intestate, without leaving any who are entitled to apply for letters of administration; *Ferrie v. Public Administrator*, 3

Bradf. (N. Y.) 151; Public Adm'rs v. Burdell, 4 id. 252.

In many states there is provision of law for the appointment of a public administrator whose duty it is to administer upon the estate of any person found dead within his jurisdiction. Such officer is competent to administer on the estate within his county of any decedent irrespective of the place of his death ; In re Richardson's Estate, 120 Cal. 344, 52 Pac. 832 ; and such administrator has no authority to refuse to enter upon or to continue the administration of an estate, which by law he should administer. He cannot retain the office and choose for himself which of its duties he will perform; State v. Kennedy, 73 Mo. App. 384.

The authority of a public administrator to take charge of an estate cannot be collaterally questioned; Dunn v. German-American Bank, 109 Mo. 90, 18 S. W. 1139 ; Weir v. Monahan, 67 Miss. 434, 7 South. 291.

Special. That which is limited either in time or in power. Such administration does not come under the statutes of 31 Edw. III. c. 11, and 21 Hen. VIII. c. 5, on which the modern English and American laws are founded. A judgment against a special administrator binds the estate ; 1 Sneed 430 ; although there is no property but merely a right of action, and if there is delay in granting the administration, a special administrator might be appointed where immediate settlement could be made; Groce v. Helm, 91 Mich. 450, 51 N. W. 1106. In the

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United States, administration is a subject

charged upon courts of civil jurisdiction. A multiplicity of statutes defines the powers of such courts in the various states. The public officer authorized to delegate the trust is called surrogate, judge of probate, register of wills, etc. In some states, these courts are of special jurisdiction, while in others the power is vested in county courts.

Death of the intestate must have taken place, or the court will have no jurisdiction. Probate proceedings on the estate of a person who is not dead are void; *Fay v. Costa*, 2 Cal. App. 241, 83 Pac. 275; *Steele's Unknown Heirs v. Belding* (Tex.) 14 S. W. 592. A decree of the court is prima facie evidence of his death, and puts the burden of disproof upon the party pleading in abatement; 3 Term 130; *Munro v. Merchant*, 26 Barb. (N. Y.) 383; *Barkaloo's Adm'r v. Emerick*, 18 Ohio 268.

Estates of absentees. Statutes authorizing administration on the estate of an absentee after a fixed period, as if he were dead, have been held void as a deprivation of property without due process of law; *Carr v. Brown*, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 7S Am. St. Rep. 855; *Lavin v. Bank*, 1 Fed. 641, 18 Blatchf. 1; *Clapp v. Houg*, 12 N. D. 600, 98 N. W. 710, 65 L. R. A. 757, 102 Am. St. Rep. 589; *Savings Bank of Baltimore v. Weeks*, 103 Md. 001, 64 Atl. 295, 6 L. R. A. (N. S.) 690; *Selden v. Kennedy*, 104 Va. 826, 52 S. E. 635, 4 L. R. A. (N. S.) 944, 113 Am. St. Rep. 1076, 7 Ann. Cas. 879; in the absence of a statute; *Scott v. McNeal*, 154 U. S. 49, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Springer v. Shavender*, US N. C. 53, 23 S. E. 976, 54 Am. St. Rep. 708; *Devlin v. Com.*, 101 Pa. 273, 47 Am. Rep. 710; subsequently a statute was passed in Pennsylvania and held constitutional; *Cunnius v. School Dist*, 206 Pa. 469, 56 Atl. 16, 98 Am. St. Rep. 790; this judgment was affirmed in 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas.

1121, where the court distinguished the case from that in 154 U. S., supra, upon the ground that in the former case there was no statute, and that in the present one, a statute having been passed and the period of absence being fixed and not unreasonably brief, it was valid and not open to the objection of want of due process of law ; and similar statutes have been held valid; *Bartan v. Kimmerley*, 165 Ind. 109, 76 N. E. 250, 112 Am. St. Rep. 252; *Roderigas v. Savings Inst*, 63 N. Y. 460. 20 Am. Rep. 555, which appeared for a time to stand alone and was frequently referred to as having been decided by a mere majority of the court. The same statute was held invalid by the federal court in *Lavin v. Savings Bank*, 18 Blatchf. 1, 1 Fed. 641. So far as the federal constitution is concerned, the Pennsylvania case in *Cunnius v. School Dist.*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, would seem to settle the question, at least so far Bouv.— 72

as to determine that such statute is obnoxious to the XIVth Amendment of the federal constitution. So far as the constitutions are concerned the case appears by the above citations, in Maryland is put mainly upon the ground that the act contained no provision

that before the distribution of the property of the absentee, security should be given for its refund if he should prove to be alive.

Appointment of executor.
 (b) as to the Letters of Administration. The appointment of executors and administrators is made upon application to the proper officer having jurisdiction, in some states by a petition filed by a citation to the interested parties, served upon them or published according to

law. Any one of such interested parties may appear and show cause against the appointment. In other states the appointment is made without notice, upon proof to the probate officer of the jurisdictional facts. The evidence of appointment which is delivered to the appointee is termed, in the case of administrators, Letters of Administration, and in the case of executors, Letters Testamentary. In either case the letters certify that there is given to the executor or administrator, as the case may be, full power of administration of the goods, chattels, rights, and credits which were of the deceased, and the person appointed is required to make an inventory and file the same, to pay the debts of the deceased so far as the property will extend, in the legal order of payment, and render a true and just account of his transactions in the administration of the trust. In respect to all matters relating thereto, there is little or no difference in the law relating to letters of administration or letters testamentary. The grant of such letters is a judicial act and recorded as such, and the letters themselves should be duly authenticated under the seal of the court; Schoul. Ex. & Ad. § 50. For the form of letters, see Smith, Prob. Pract. App.; Witxel v. Pierce, 116 Ga. 112.

In most of the states it is provided by law that both executors and administrators shall be required to give bond before receiving their letters from the probate authority. Such requirements have been held to impose on the executors and administrators no new duties, but their effect is merely to give additional remedy to creditors, Legatees, and distributees; Eaton v. Benefield, 2 Blackf. (Ind.) 52. In some jurisdictions it is quite usual to find a provision in the will dispensing with the giving of the bond by the executors and such indication of the will of the testator is respected. It has been held, however, that a provision of a will that the

executor may act without executing a bond is at all times subject to the control of the courts; *Busch v. Rapp*, 63 S. W. 1121, 23 Ky. L. Rep. 605. One who is not interested in

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the assets of the estate can raise no question as to the sufficiency or legality of the bond which has been accepted; *Jones v. Smith*, 120 Ga. 442, 48 S. E. 134. The failure of an administrator to give a bond is ground for removal; *Toledo, St. L. & K. C. R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199; but the fact that an executor's bond is invalid, is no ground for his removal; *Barricklow v. Stewart*, 31 Ind. App. 446, 68 N. E. 316.

Executors and administrators are charged with a trust, and liable for the want of due care such as prudent men exercise in managing their own affairs; *State v. Dickson*, 213 Mo. 66, 111 S. W. 817; *In re Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

The grant of letters has been held to be prima facie evidence of all the essential jurisdictional facts; *Davis v. Swearingen*, 56 Ala. 31; but it is generally considered that the probate court, in granting letters of administration does not adjudicate that the person is dead, but that letters shall be granted to the applicant; *Carroll v. Carroll*, 60 N. Y. 121, 19 Am. Rep. 144; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; and the letters are not legal evidence of the death; *Mutual Ben. Life Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. Ed. 314. Letters of administration upon the estate of a person who is in fact alive have no validity or effect as against him; *Scott v. McNeal*, 154 U. S. 34,

14 Sup. Ct. 1108, 38 L. Ed. 896.

As to the grant of letters of administration upon the estate of a person presumed to be dead, see *supra*.

A grant of letters which includes two estates under one administration would be irregular and objectionable, but it has been held not to be void ; *Grande v. Herrera*, 15 Tex. 533 ; the letters should be signed by the judge or other probate officer ; *Succession of Carlon*, 26 La. Ann. 329; *Matthews v. Joyce*, 85 N. C. 258; and they are not void though the seal of the court is affixed in the wrong place ; *Sbarp v. Dye*, 64 Cal. 9, 27 Pac. 759.

Letters testamentary and of administration are, according to their terms and extent, conclusive as to personal property while they remain unrevoked. They cannot be questioned in a court of law or of equity, and cannot be impeached, even by evidence of fraud or forgery. Proof that the testator was insane, or that the will was forged, is inadmissible ; 12 Ves. 295; *Broderick's Will*, 21 Wall. (U. S.) 503, 22 L. Ed. 599 ; *Hall v. Woodman*, 49 N. H. 295 ; *Appeal of Hegarty*, 75 Pa. 503 ; *Inhabitants of Dublin v. Chadbourn*, 16 Mass. 433; *Jackson v. Le Grange*; 19 Johns. (N. Y.) 356, 10 Am. Dec. 237; *Irwin v. Seriber*, 18 Cal. 499 ; *Carroll v. Carroll*, 60 N. Y. 123, 19 Am. Rep. 144 ; *Moore's Estate v. Moore*, 33 Neb. 509, 50 N. W. 443; *O'Connor v. Higgins*, 113 N. Y. 511, 21 N. E. 184 ; *Robinson v. Epping*, 24 Fla. 237, 4 South. 512. But if the

nature of the plea raise the issue, it may be shown that the court granting the supposed letters had no jurisdiction, and that its action is therefore a nullity ; 3 Term 130 ; see *Knox v. Nobel*, 77 Hun 230, 25 N. Y. Supp. 355 ; or that the seal attached to the sup-

posed probate has been forged, or that the letters have been revoked, or that the testator is alive ; In re Huff's Estate, 15 S. & R. (Pa.) 42 ; Griffith v. Frazier, 8 Cra. (U. S.) 9, 3 L. Ed. 471; Jochumsen v. Bank, 3 Allen (Mass.) 87 ; Duncan v. Stewart, 25 Ala. 408, 00 Am. Dec. 527 ; Harwood v. Wylie, 70 Tex. 53S, 7 S. W. 71S9. Where an executor qualified and acted for many years under his appointment,, he will not be allowed to dispute the recitation in his appointment that citation to the heirs was issued and served ; In re Moore, 95 Cal. 34, 30 Pac. 106.

Though the probate court has exclusive jurisdiction of the grant of letters, yet where a legacy has been obtained by fraud, or the probate has been procured by fraud on the next of kin, a court of equity would hold the legatee or wrong-doer as bound by a trust for the party Injured ; Wms. Ex. 552. While a court of equity cannot remove an executor ; Mannhardt v. Staats Zeitung Co., 90 111. App. 315 ; it may restrain him from acting, though such restraint will incidentally prevent him from performing his duties as executor; Bentley v. Dixon, 60 N. J. Eq. 353, 46 Atl. 6S9 ; and even take the estate out of his hands and place it in the custody of a receiver ; Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. 593.

Letters may be revoked by the court which made the grant, or on appeal to a higher tribunal, reversing the decision by which they were granted. Special or limited administration will be revoked on the occasion ceasing which called for the grant. An executor or administrator will be removed when the letters were obtained improperly; Wms. Ex. 571.

Of their effect in a state other than that in which legal proceedings were instituted.

In view of the rule of the civil law, that *personalia sequuntur personam*, certain ef-

fect has been given by the comity of nations to a foreign probate granted at the place of the domicile of the deceased, in respect to the personal assets in other states. At common law, the *lex loci rei sitae* governs as to real estate, and the foreign probate has no validity; but as to personalty the law of the domicile governs both as to testacy and intestacy. It is customary, therefore, on a due exemplification of the probate granted at the place of domicile, to admit the will to probate, and issue letters testamentary, without requiring original or further proof.

A foreign probate at the place of domicile has in itself no force or effect beyond the jurisdiction in which it was granted, but on its production fresh probate will be granted thereon in all other jurisdictions where assets

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are found. This is the general rule, but is liable to be varied by statute, and is so varied in some of the states of the United States.

Letters testamentary or of administration confer no power beyond the limits of the state in which they are granted, and do not authorize the person to whom they are issued to maintain any suit in the state or federal courts in any other state; *Johnson v. Powers*, 109 U. S. 150, 11 Snp. Ct. 525, 35 L. Ed. 112; *Wilkins v. Ellett*, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; the executor or administrator has therefore, as such, no right of control over property in another state or country; *Mansfield v. Turpin*, 32 Ga. - *Upton v. Adam's Ex'rs*, 27 Ind. 432; *Wood v. Gold*, 4 McLean 577; Fed. Cas. No. 17,947; *Lewis v. McMillen*, 41 Barb. (N. Y.) 431; *Carmichael v. Ray*, 40 N. C. 305; he cannot

interfere with assets, collect or discharge debts, control lands, sue or be sued ; Schoul. Ex. & Ad. § 173. The principle is, that a grant of power to administer the estate of a decedent operates only as of right within the jurisdiction which grants the letters, and in order that a foreign representative may exercise any such function he must be clothed with authority from the jurisdiction into which he comes, and conform to the requirements imposed by local law ; Moore v. Fields, 42 Pa. 4G7; Beckham v. Wittkowski, 64 N. C. 464 ; Trice v. Morris, 5 McLean, 4, Fed. Cas. No. 11,414; Bell's Adm'r v. Nichols, 38 Ala. 678 ; Graveley v. Graveley, 25 S. C. 1, 60 Am. Rep. 478; Laurence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 30 L. Ed. 130 ; Duchesse d'Auxy v. Porter, 41 Fed. 68; Reynolds v. McMuilen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386. In most, probably all, of the states there is statutory provision, either for the grant of ancillary letters or for authorizing and regulating suits by foreign executors and* administrators. In many of them these officers, properly qualified abroad, are permitted to sue for and recover local assets without other qualification, within the new jurisdiction, than putting on record their authority as conferred by the home jurisdiction, and such authority must be strictly followed. In many of the states there is authority to sue and defend without ancillary administration ; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct 503, 37 L. Ed. 279; Banta v. Moore, 15 N. J. Eq. 97; Marrett v. Babb'S Ex'r, 1)1 Ky. 88, 15 S. W. 4; Lewis v. Adams. 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Tver v. Moiling Co., 32 S. C. 59S, 10 S. E. 1007 ; and this rlght to sue has been extended to a foreign corporation duly authorized to act in its own jurisdiction ; Deringer's Adm'r v. Deringer's Adm'r, 5 Roust (Del.) 410, 1 Am. St. Rep. 150; in some statutes there is express authority to defend suits; Moss v. Rowland, 3 Bush (Ky.) 505; but it has been held that statutory authority to sue does not imply

capacity to be sued; *Jones v. Lamar*, 77 Ga.

149 ; nor to sue for intestate lands where
they were in the hands

of an administrator; *Fairchild v.*

Hagel, 54 Ark. 01, 14 S. W. 1102; but I
for the grant administration; *Gib-*

son v. i. 195 ; where DO suit is

by a foreign executor or administra-
tor has been permitted to remove
property and carry it away for the purp
administration; *Petersen v. _ X. Y.*

21, ss Am. i ' ■■-. 298 . I .
Minn. 242, 47 N. YV. 790, 11 L. K. A. II
Namara v. McNamara, 01* Ga. -
Rusco, 46 < "mi. 370 ; and in
local administration payment to
representative is recognized; *Wilkins .*
lett, 108 L. S. 256, 2 Sup. Ct 641, 27 L. Ed.

Wyman v. Halstead, 109 O. 8. I

Sup. Ct 117. 27 L. Ed. 1068; *Parsons v. Ly-*
man. 20 X. Y. 103.

The latter may assign choses in action be-
longing to the estate, and the assignee may
sue thereon in his own name in another state.
unless prevented by its laws respecting 8
months from so doing; *Wilkins v. Ellett* 10S
P. S. 256, 2 Sup. Ct 841, 27 L. Ed. 718; *Camp-*
bell v. Brown, 64 Ia. 425, 20 N. YV. 745, 52
Am. Rep. 446; *Solinsky v. Bank*, ^2 Tex. 244,
17 S. W. 10."ii : *Petersen v. Lank*. 32 N. Y. 21.
88 Am. Dec. 298; he may also sue in a
state on a judgment there recovered; *Tal-*
mage v. Chapel. If, Mass. 71; *Biddle v. Wil-*
kins, 1 Pet. (U. S.) 686, 7 L. Ed. 315 ; *Trecoth-*
ick v. Austin, 4 Mas. it;. Fed. Cas. No. 14,164;

Barton v. Higgins, 41 Md. 539; or he may sue in his individual capacity in another state, on a judgment recovered by him in his official capacity in his own state, *liftman v. Thornton*. 107 Mo. 500, 17 S. \Y. 979, 16 L. R. A. 410; *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555; and upon a contract made with himself as suit a foreign executor or administrator may sue: *Barrett v. Barrett*. S Greenl. (Me.) 346; *Im Yal v. Marshall*. 30 Ark. 230; *Sto. Confl. L. H* 513 516 The term foreign as applied to exe ators and administrators refers to the jurisdiction from which their authority is derived and not to residence; *Frigate v. Moore*, 86 Ya. 1045, 11 S. E. L063, 19 Am St. Rep. B26; *Bopper v. <■. L25 N. V. 400, 26 N. B. 457, 12 I* R. A. 237*. The estate of a I person is

substantially one estate, in which those entitled to the residue are interested as a whole, even though situated in various jurisdictions, and although each distinct part of it must be settled in the jurisdiction by which letters were granted whether for the purpose of ancillary or principal administration; *Schoul. Br. ft Ad. § 17 1*; ordinarily it is the practice to appoint the person appointed executor or administrator at the domicile of the deceased as the person to whom ancillary letters will be granted; *In re Blancan. 4 Redf. <N. Y.) 151*; *Whart. Contl. L. | 608*; but there is no privity between persons appointed in differ-

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ent jurisdictions whether they be different or the same, and the executor or administrator in one state is not concluded in a subsequent suit by the same plaintiff in another state against a person having administration on the estate of the deceased ; *Johnson v. Pow-*

ers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112 ; Braithwaite v. Harvey, 14 Mont. 20S, 36 Pac. 38, 27 L. R. A. 101, 43 Am. St. Rep. 625 ; Jones v. Jones, 39 S. C. 247, 17 S. E. 5S7, 802. But a different rule has been applied where different executors are appointed by the will in different states, and they are held to be in privity with each other, and a judgment against those in one state is evidence against those in another; Hill v. Tucker, 13 How. (U. S.) 45S, 14 L. Ed. 223 ; Goodall v. Tucker, . 13 How. (U. S.) 469, 14 L. Ed. 227.

When any surplus remains in the hands of a foreign or ancillary appointee after the discharge of all debts in that jurisdiction,, it is usually, as a matter of comity, ordered to be paid over to the domiciliary appointee ; Wright v. Phillips, 56 Ala. 69; 50 L. J. Ch. 740; and in his hands becomes applicable to debts, legacies, and expenses; Schoul. Ex. & Ad. § 174. It is the policy of the law with respect to these matters to encourage the spirit of comity in subordination to the rights of local creditors who are considered to be entitled to the benefit of assets within their own jurisdiction, rather than to be driven to the assertion of their claims in a foreign state or country; id.; but see Lex Fori.

As a general rule it is the duty of the principal personal representative to collect and make available to the estate all such assets as are available to him consistently with foreign law ; 4 M. & W. 171 ; 1 Cr. & J. 157 ; even to the extent of seeing that foreign letters are taken out for the collection of foreign assets; or of collecting and realizing upon property and debts so far as it may be done by him, without resort to a foreign jurisdiction; Trecothick v. Austin, 4 Mas. 33, Fed. Cas. No. 14,164 ; In re Butler, 38 N. Y. 397 ; Merrill v. Ins. Co., 103 Mass. 245, 4 Am. Rep. 548; but the domestic representative is not to be held in this respect to too onerous a responsibility with respect to foreign prop-

erty which he cannot realize by virtue of his appointment. See Sto. Confl. L. § 514 a; Schoul. Ex. & Ad. § 175. It is the policy of the courts to sustain, if possible, even irregular acts of executors or administrators done in good faith and without detriment of the estate; *Duffy v. McHale* (R. I.) 85 Atl. 36.

There is some difference of opinion as to whether a voluntary surrender of assets to the domiciliary representative protects the debtor against claims made by virtue of an administration within his own jurisdiction. The United States supreme court, supported by the current of American authority, maintains that, as between the states such payment or delivery of assets is sufficient to dis-

charge the local debtor in the absence of local administration ; *U. S. v. Cox*, 18 How. (U. S.) 104, 15 L. Ed. 299 ; *Wilkins v. Ellett*, 9 Wall. (U. S.) 740, 19 L. Ed. 586 ; *Wilkins v. Ellett*, 10 S. U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; *Hatchett v. Berney*, 65 Ala. 39; *Ramsay v. Ramsay*, 97 111. App. 270; *In re Williams' Estate*, 130 Ia. 553, 107 N. W. 608; *Maas v. Bank*, 176 N. Y. 377, 68 N. E. 658, 9S Am. St. Rep. 6S9 ; *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111; *Gardiner v. Thorndike*, 183 Mass. 82, 66 N. E. 633; *Maas v. Bank*, 176 N. Y. 377, 68 N. E. 65S, 98 Am. St. Rep. 6S9 (where it was also held that failure to inquire whether a resident administrator had been appointed was negligence sufficient to charge a bank making payment with the knowledge which inquiry would have furnished). But, as a rule, the power of the executor or administrator is confined to the state appointing ; *In re Crawford's Estate*, 6S Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648. The domiciliary administrator will sometimes be recognized *ex comitate* by courts of another state; *State v. Fulton* (Tenn.) 49 S. W. 297. The English doctrine is otherwise; *Whart.*

Confl. L. 626 ; Sto. Confl. L, 515 a. See Dicey, Confl. L. ch, X. (c), ch. XVII. (B), with Moore's American notes. So, by agreement of the parties, he was allowed to become a party in his representative capacity; *Ellis v. Ins. Co.*, 100 Tenn. 177, 43 S. W. 766; though it was held that he should not sue in New York for the wrongful death of his intestate without taking out ancillary letters; *Dodge v. North Hudson*, 188 Fed. 489.

Executors. An executor is, as above defined, a person charged with the administration of the estate of one who leaves a will.

Lord Hardwicke, in 3 Atk. 301, says, "The proper term in the civil law, as to goods, is *heres testamentarius*; and executor is a barbarous term, unknown to that law." And again, "What we call executor and residuary legatee is, in the civil law, universal heir." *Id.* 300.

The word executor, taken in its broadest sense, has three acceptations. 1. Executor *a lege constitutus*. He is the ordinary of the diocese. 2. Executor *ab episcopo constitutus* or executor *dativus*; and that is he who is called an administrator to an intestate. 3. Executor *a testatore constitutus*, or executor *testamentarius* ; and that is he who is usually meant when the term executor is used. 1 Wms. Ex. 185. See Ordinary.

The power of an executor under modern probate law is derived not so much from the will of the testator as from the appointment of the court and the powers conferred upon it by law; *Lamb v. Helm*, 56 Mo. 420. While he is a trustee in the broadest sense, he is not such in the general acceptance of the term ; *In re Hibbler*, 78 N. J. Eq. 217, 78 Atl. 188, affirmed *In re Hibbler's Estate*, 79 N. J. Eq. 230, 81 Atl. 1133.

If the executor be legally competent and accepts the trust, it is the duty of the probate court to grant letters testamentary to

him ; *Clark v. Patterson*, 214 111. 533, 73 N. E. 806, 105 Am. St Rep. 127, where it was said

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that legally competent meant of legal age, sound mind and memory and not convicted of crime.

One should not be appointed an executor pending a suit by him on a claim against tin-estate; *Cogswell v. Hall*, 183 Mass. 575, 67 N. E. 638. The renunciation of an executor may be by oral statement in open court; *In re Baldwin's Will*, 27 App. Div. 506, 50 X. V. Supp. 872. Where one declines the appointment and another person is appointed, the former has no legal right thereafter ; *Briggs v. Probate Court*, 23 R. I. 125, 50 Atl. 335.

A general executor is one who is appointed to administer the whole estate, without any limit of time or place, or of the subject-matter.

A rightful executor is one lawfully appointed by the testator, by his will. Deriving his authority from the will, he may do most acts before he obtains letters testamentary; but he must be possessed of them before he can declare in an action brought by him as such ; 1 P. Wms. 768 ; Wms. Ex. 173.

An instituted executor is one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors.

A substituted executor is a person appointed executor if another person who has been appointed refuses to act.

An example will show the difference between an instituted and a substituted executor. Suppose a man makes his son his executor, but if he will not act he appoints his brother, and if neither will act, his cousin: here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, the cousin in the third degree, and so on. See Swinb. Wills, pt. 4, s. 19, pi. 1.

An executor de son tort is one who, without lawful authority, undertakes to act as executor of a person deceased. See Executor de son Tort.

A special executor is one who is appointed or constituted to administer either a part of the estate, or the whole for a limited time, or only in a particular place.

An executor to the tenor is a person who is not directly appointed by the will an executor, but who is charged with the duties which appertain to one: as, "I appoint A B to discharge all lawful demands against my will;" 3 Thill. Eccl. 116; 1 Eccl. 374; Swinb. Wills 247; Wentw. Ex. pt. 4, s. 4, p. 230; [1S92] Prob. 227, 380; 66 Law T. N. S. 3S2.

Qualification. Generally speaking, all persons who are capable of making wills, and many others besides, may be executors; 2 Bla. Com. 503. The king may be an executor. So may a corporation sole. So may a corporation aggregate; Toller, Exec. 30; Schoul. Ex. & Ad. 32. So may an alien, if he be not an alien enemy residing abroad or unlawfully continuing in the country. See McGregor v. McGregor, 3 Abb. Dec. (N. Y.) 92. So may married women and infants; and even infants unborn, or en ventre sa mere, may be

executors; 1 Dane, Abr. c. 29 a 2, § 3; Swift v. Duffield, 5 s. & R. (Pa.) 40. But in Ei

land an infant cannot act solely as executor

until his full age of twenty-* Mean-

while, his guardian or some other person act for him as administrator cum testamento annexo; *Christopher v. Cox*, 25 Miss. 162; *Schoul. Dom. Bel.* § 416; Administration, it was held that a married woman cannot be executrix without her husband's consent; *Appeal of Stewart*, 50 Me. 300; *English's Ex'r v. McNair's Adm'rs*, 4 Ala. 40; and that a man by marrying an executrix be in

her right, and was liable to account as such; 2 Atk. 212; *Lindsay v. Lindsay's Adm'rs*, 1 Des. (S. C.) 150.

Persons attainted, outlaws, insolvents, and persons of bad moral character may be qualified as executors, because they act en autre droit and it was the choice of the testator to appoint them; 6 Q. B. 57; *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515; *Sill v. McKnight*, 7 W. & S. (Pa.) 214; 3 Salk. 162. It is the duty of the court, when a will has been proven, to grant letters testamentary to the person named in it upon application, if he is not disqualified by statute; *Holladay v. Holladay*, 16 Or. 147, 19 Pac. 81. Poverty or insolvency is no ground for refusing to qualify an executor; but an insolvent executor may be compelled to give security; *Longberger's Estate*, 148 Pa. 56, 114 Atl. 120. In some states a bond is required from executors, similar to or identical with that required from administrators. The testator may, by express direction, exempt from the obligation of giving a bond with sureties any trustees whom he appoints or directs to be appointed, but not his executor, unless permitted to do so by state statute; because the creditors of the estate must look to the funds in the executor's hands.

Idiots and lunatics cannot be executors;

and an executor who becomes non compos may be removed; 1 Salk. 36. In Massachusetts, when any executor shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the judge of probate may remove him : Thayer v. Homer, 11 Mete. (Mass.) 104. A drunkard may perform the office of executor; Berry v. Hamilton, 12 B. Monr. (Ky.) 191, 54 Am. D 515; Sill v. McKnight, 7 W. & S. (Pa.) 244; but in some states, as Massachusetts and Pennsylvania, there are statutes providing for his removal.

Appoiutmoit. Executors can be appoint only by will or codicil; but the word "exe u- tor" need not be used. He may be appointed and designated, by committing to his char| those duties which it is the province of an executor to perform; 3 Phill Eccl. 118; Myers v. Daviess, 10 B. Monr. 394; Ex parte McDonnell. 2 Bradf. Surr. (N. Y.) 32; State v. Watson, 2 Speers (S. C.) 97; Carpenter v. Cameron, 7 Watts (Pa.) 51. Even a direction

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to keep accounts will, in the absence of any thing to the contrary, constitute the person addressed an executor. A testator may project his power of appointment into the future and exercise it after death through an agent pointed out by name or by his office; Bishop v. Bishop, 56 Conn. 208, 14 Atl. 808.

The appointment of an executor may be absolute, qualified, or conditional. It is absolute when he is constituted certainly, immediately, and without, any restriction in regard to the testator's effects or limitation in point of time; Toller, Ex. 36. It may be qualified as to the time or place wherein, or

the subject-matters whereon, the office is to be exercised ; 1 Will. Ex. 204. Thus, a man may be appointed executor, and his term made to begin or end with the marriage of testator's daughter ; or his authority may be limited to the state: or to one class of property, as if A be made executor of goods and chattels in possession, and B of choses in action ; Swinb. Wills, pt. 4, s. 17, pi. 4 ; 3 Phill. Eccl. 424. Still, as to creditors, three limited executors all act as one executor, and may be sued as one; Cro. Car. 293. Finally, an executor may be appointed conditionally, and the condition may be precedent or subsequent. Such is the case when A is appointed in case B shall resign. Godolphin, Orph. Leg. pt. 2, c. 2, § 1. As to appointment, see *Manning v. Leighton*, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684 ; 39 Sol. J. 228, 244.

Removal. An executor who fails to keep proper accounts or to render any account for a long period, who retains the trust funds mixed with his own and who makes improper investments, should be dismissed ; *Simon's Estate*, 155 Pa. 215, 26 Atl. 424 ; but failure to account is not compulsory ground of removal ; *Cosby v. Weaver*, 107 Ga. 761, 33 S. E. 656; and the mere delay of an executor to convert real estate into personalty when the same has increased in value, is not such misconduct as to warrant his removal ; *Wilcox v. Quinby*, 65 Hun 621, 20 N. Y. Supp. 5. He may be removed, however, where he has any conflicting personal interest ; *Putney v. Fletcher*, 148 Mass. 247, 19 N. E. 370.

Assignment. An executor cannot assign his office. In England, if he dies having proved the will, his own executor becomes also the original testator's executor. But if he dies intestate, an administrator de bonis non of the first testator succeeds to the executorship. And an administrator de bonis non succeeds to the executorship in both these events, in the United States generally, wher-

ever a trust is annexed to the office of executor; *Hendren v. Colgin*, 4 Munf. (Va.) 231; *Patterson v. High*, 43 N. C. 52; *Vance v. Vance*, 17 Me. 204 ; *In re Van Wyck*, 1 Barb. Ch. (N. Y.) 565; *Lott v. Meacham*, 4 Fla. 144.

Acceptance. The appointee may accept or refuse the office of executor; 3 Phill. Eccl.

577 ; *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33 ; *Williams v. Cushing*, 34 Me. 370; *Leavitt v. Leavitt*, 65 N. H. 102, 18 Atl. 920. His acceptance may be implied by acts of authority over the property which evince a purpose of accepting, and by any acts which would make him an executor de son tort, which see. So his refusal may be inferred from his keeping aloof from all management of the estate ; *Van Home v. Fonda*, 5 Johns. Ch. (N. Y.) 3SS ; *Ayres v. Weed*, 16 Conn. 291 ; *Marr v. Peay*, 6 X. C. 85, 5 Am. Dec. 521 ; *Ralston's Estate*, 158 Pa. 645, 28 Atl. 139. But he cannot be compelled to accept and qualify or renounce in some formal manner ; *Cable v. Cable*, 76 la. 163, 40 N. W. 700. If one of two or more appointees accepts, and- the other declines or dies, or becomes insane, he becomes sole executor ; *Croft v. Steele*, 6 Watts (Pa.) 373. An administrator de bonis non cannot be joined with an executor.

Acts before probate. The will itself is the sole source of an executor's title. Probate is the evidence of that title. See *Wolfe v. Underwood*, 97 Ala. 375, 12 South. 234 ; *Clapp v. Stoughton*, 10 Pick. (Mass.) 463; *Shirley v. Healds*, 34 N. H. 407. Before probate, an executor may do nearly all the acts which he can do after. He can receive payments, discharge debts, collect and recover assets, sell bank-stock, give or receive notice of dishonor, initiate or maintain proceedings in bankruptcy, sell or give away goods and chattels,

and pay legacies. And when he has acted before probate he may be sued before probate ; 6 Term 295 ; *Rand v. Hubbard*, 4 Mete. (Mass.) 252. He may commence, but he cannot maintain, suits before probate, except such suits as are founded on his actual possession ; 3 C. & P. 123 ; *Hutchins v. Adams*, 3 Greenl. (Me.) 174 ; *Strong v. Perkins*, 3 N. H. 517; 2 Atk. 285. So in some states he cannot sell land without letters testamentary ; *Kerr v. Moon*, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; or transfer a mortgage; *Cutter v. Davenport*, 1 Pick. (Mass.) 81, 11 Am. Dec. 149 ; or remain in his own state and sue by attorney elsewhere ; *Hutchins v. Bank*, 12 Mete. (Mass.) 423 ; or indorse a note so as to be sued, in some states; *Stearns v. Burnham*, 5 Greenl. (Me.) 261, 17 Am. Dec. 228; *Thompson v. Wilson*, 2 N. H. 291. And see *Harper v. Butler*, 2 Pet. (U. S.) 239, 7 D. Ed 410; *Byles*, Bills 40; *Story*, Pr. Notes 304; *Story*, Bills 250; *Horn v. Johnson*, 87 Ga. 44S, 13 S. E. 633.

Co-executors. Co-executors are regarded in law as one individual ; and hence, in general, the acts of one are the acts of all ; *Com. Dig. Administration* (B, 12) ; *Gates v. Whetstone*, 8 S. C. 244, 28 Am. Rep. 284; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268 ; *Viele v. Keeler*, 129 N. Y. 190, 29 N. E. 78. Hence the assent of one executor to a legacy is sufficient, and the sale or gift of one is the sale or gift of all. So a payment by or to

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one is a payment by or to all ; *Herald v. Harper*, 8 Blackf. (Ind.) 170; *Hoke's Ex'rs v. Fleming*, 32 N. C. 263 ; *Adair v. Brimmer*, 74 N. Y. 539 ; a release by one binds all ; *Devling v. Little*, 26 Pa. 502. But each is liable

only for the assets which have come into his own hands; *Douglass v. Satterlee*, 11 Johns. (N. Y.) 21. So he alone who is guilty of tort or negligence is answerable for it, unless his co-executor has connived at the act or helped him commit it; *Estate of Sanderson*, 74 Cal. 199, 15 Pac. 753. An executor is not liable for a devastavit of his co-executor; *Anderson v. Earle*, 9 S. C. 460. A power to sell land, conferred by will upon several executors, must be executed by all who proved the will; *Wasson v. King*, 19 N. C. 262. But if only one executor consents to act, his sale under a power in the will would be good, and such refusal of the others may be in pais; *Cro. Eliz. SO*; *Ross v. Clore*, 3 Dana (Ky.) 195; *Herrick v. Carpenter*, 92 Mich. 440, 52 N. W. 747. If the will gives no direction to the executors to sell, but leaves the sale to the discretion of the executors, all must join. But see less strict rules in *Miller v. Meetch*, 8 Pa. 417; *Meakings v. Cromwell*, 2 Sandf. (N. Y.) 512; *Taylor v. Morris*, 1 N. Y. 341. Where all the executors must unite to make a valid conveyance, no valid contract to convey can be made by a part of them; *Crowley v. Hicks*, 72 Wis. 539, 40 N. W. 151. One executor cannot bind his co-executors by a confession of judgment without their consent; *Karl v. Black's Ex'rs*, 2 Pittsb. (Pa.) 19. On the death of one or more of several joint executors, their rights and powers survive to the survivor; *Bac. Abr. Executor (D)*; *Shepp. Touchst.* 4S4.

Administrator. The appointment of an administrator is required in the case of one who dies intestate.

The appointment of the administrator must be lawfully made with his consent, and by an officer having jurisdiction. If an improper administrator be appointed, his acts are not void ab initio, but are good, usually, until his power is rescinded by authority. But they are void if a will had been made, and a com-

petent executor appointed under it; *Griifith v. Frazier*, 8 Cra. (U. S.) 23, 3 L. Ed. 471; 1 Dane, Abr. 556-561; *Beers v. Shannon*, 73 N. Y. 292. But, in general, anybody may be administrator who can make a contract. An infant cannot; *McGooch v. McGooch*, 4 Mass. 348; a feme covert may at common law with her husband's permission; 4 Bac. Abr. 67; *In re Gyger's Estate*, 65 Pa. 311; *English's Ex'r v. McNair's Adm'rs*, 34 Ala. 40. Improvident persons, drunkards, gamblers, and the like are in some states disqualified by statute; *McMahon v. Harrison*, (i N. Y. 443.

Failure to apply for administration within the time prescribed is a waiver by the party entitled to it under the statute; *In re Sprague's Estate*. 125 Mich. 357, 84 N. W. 293; and the right of a creditor to be ap-

pointed administrator as "particular creditor" is waived by his signing a petition for the appointment of another person; *In re Sullivan's Estate*, 25 Wash. 43

The formalities and requisites to

valid appointments as to a

defective proceedings, etc., are widely various in the different states, if letters appear to have been unduly granted, or to an unfaithful person, they will be revoked: *v. Dial*, 12 Tex. 100; *Jeroms v. Jerom Barb.* (X. T.) 24; *Many v. Mare*, 10 Met. (Mass.) 370; as they may be where it appears that the estate has been wasted or mismanaged; *Taylor v. Taylor*, 154 Ill. App. - The personal property of a decedent appropriated to the payment of his debts, so far as required, and must be first resorted to by creditors. And by statutes, courts may grant an administrator power to sell, lease, or mortgage land, when the personal estate of the

deceased is not sufficient to pay his debts; *Ferguson v. Broome*, 1 Bradf. (N. Y.) 10; *Farrington v. King*, 1 Bradf. (N. Y.) 11; *Renwick v. Renwick*, 1 Bradf. (X. Y.) 11; *Matheson's Heirs v. Hearin*, L. » Ala. 210; In the estate of *Godfrey*, 4 Mich. 30S; *Weed v. Edmonds*, 4 Ind. 46S; *McCoy v. Morrow*, 18 111. 519, 68 Am. Dec. 57S. The court may direct lands to be sold in order to pay taxes levied against decedent's property; *Sales v. I grove* (Ky.) 25 S. W. 594.

Persons holding certain relations to the intestate are considered as entitled to an appointment to administer the estate in established order of precedence; *Bradley v. Bradley*, 3 Redf. (X. Y.) 11.

Order of appointment. — First in order of appointment. — The husband has his wife's personal property, and takes out administration upon her estate. But in some states it is not granted to him unless he is to receive the property eventually. So the widow can ordinarily claim sole administration, though in the discretion of the Judge it may be refused her, or she may be joined with another; 2 Ida. Com. 504; *Stearns v. Fiske* 1 X Pick. (Mass.) 26; *Edelen v. Edelen*, 1 < Md. 52; *Jones v. Bitter's Adm'r*, 56 Ala. 270; *Beaumont's Estate*, 2 Pa. Dist B. 111. The widow is entitled to preference though she was not living with her husband at the time; *Boss' Estate*, 13 Pa. Co. Ct. R. 601.

Persons next in order of appointment are the next of kin. Kinship is usually computed by the civil-law rule. The English order, which is adopted in some states, is: first, husband or wife; second, sons or daughters; third, grandsons or granddaughters; fourth, great-grandsons or great-granddaughters; fifth, father or mother; sixth, brothers or sisters; seventh, grandparents; eighth, uncles, aunts, nephews, nieces, etc.; 1 P. Will. 41; li Add. Eccl. 352; *Succession of Sloane*, 12 La. Ann.

610; 2 Kent 514; Davis v. Swearingen, 56 Ala. 539.

In New York the order is, the widow ; the

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children; the father; the brothers; the sisters ; the grandchildren ; any distributee being next of kin ; McCosker v. Golden, 1 Bradf. (N. T.) 64; Peters v. Public Adm'r, 1 Bradf. (N. Y.) 200; In re Com'rs of Emigration; 1 Bradf. (N. Y.) 259.

When two or three are in the same degree, the probate judge may decide between them ; and in England he is usually guided by the wishes of the majority of those interested. This discretion, however, is controlled by certain rules of priority as to persons of equal grades, which custom or statute has made. Males are generally preferred to females, though from no superior right. Elder sons are preferred to younger, usually, and even when no doctrine of primogeniture subsists. So solvent persons to insolvent, though the latter may administer. So business men to others. So unmarried to married women. So relations of the whole blood to those of the half blood. So distributees to all other kinsmen. As between kindred of equal degree a son will be preferred to a daughter ; In re Hill's Estate, 55 N. J. Eq. 764, 37 Atl. 952 ; and although generally men of the same degree are preferred to women, a niece is preferred to a grand-nephew, being one degree nearer; In re Hawley's Estate, 37 Misc. 667, 76 N. Y. Supp. 461. The next of kin having the right of administration and not desiring to exercise it may nominate another in his stead, who shall be nominated if fit and suitable under the same rules which would

be applied to the next of kin himself; *In re Wooten's Estate*, 114 Tenn. 289, 85 S. W. 1105 ; a non-resident may be an administrator; *Fulgham v. Fulgham*, 119 Ala. 403, 24 South. 851 ; *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134.

The appointment in all cases is voidable when the court did not give a chance to all parties to come in and claim it.

Third in order of appointment. — Creditors (and, ordinarily, first the largest one) have the next right; 67 Law T. (N. S.) 503. A creditor has no right of administration if there are next of kin ; *In re Barr's Estate*, 3S Misc. 355, 77 N. Y. Supp. 935 ; but if there be no widow and next of kin, a creditor is entitled to administration ; *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146. To prevent fraud, a creditor may be appointed when the appointee of the two preceding classes does not act within a reasonable time. A creditor may make oath of his account to prove his debt, but no rule establishes the size of the debt necessary to be proved before appointment ; *Arnold v. Sabin*, 1 Cush. (Mass.) 525. After creditors, any suitable person may be appointed. Generally, consuls administer for deceased aliens ; and this is sometimes provided by treaties, which see.

Where all the persons applying for appointment are equally qualified, and competent, the court must appoint the one having a prior

right under the statute, and it has no discretion ; *In re Nickals*, 21 Nev. 462, 34 Pac. 250.

Co-administrators, in general, must be joined in suing and in being sued ; but, like executors, the acts of each, in the delivery, gift, sale, payment, possession, or release of the intestate's goods, are the acts of all, for they

have joint power ; Bac. Abr. Exec. C. 4 ; Com. Dig. Administration (B, 12) ; 1 Dane, Abr. 3S3; Saunders' Heirs v. Saunders' Ex'rs, 2 Litt. (Ky.) 315; Turner's Ex'rs v. Wilkins, 56 Ala. 173. If one is removed by death, or otherwise, the whole authority is vested in the survivor ; Lewis' Ex'rs v. Brooks, 6 Yerg. (Tenn.) 167; Treadwell v. Cordis, 5 Gray (Mass.) 341 ; Shippen's Heirs v. Clapp, 29 Pa. 265. Each is liable only for the assets which have come into his hands, and is not liable for the torts of others except when guilty of negligence or connivance; 2 Ves. 267; Appeal of Jones, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282 ; Hall v. Carter, 8 Ga. 3S8 ; Smith's Ex'rs v. Chapman's Ex'r, 5 Conn. 19; Appeal of Hengst, 24 Pa. 413; Boudereau v. Montgomery, 4 Wash. C. C. 186, Fed. Cas. No. 1,694 ; Banks v. Wilkes, 3 Sandf. Ch. (N. Y.) 99 ; Atcheson v. Robertson, 3 Rich. Eq. (S. C.) 132, 55 Am. Dec. 634.

A note payable to two administrators for a debt due the estate may be transferred by the endorsement of one ; Mackay v. St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881 ; a surviving administrator has full power to act alone; Saul v. Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.

Powers and Duties of an Executor or Administrator. The duty of an administrator is in general to do the things set forth in his bond ; and for this he is generally obliged to give security ; Baldwin v. Buford, 4 Yerg. (Tenn.) 20; Colwell v. Alger, 5 Gray (Mass.) 67.

The duties of an executor are the same, so far as concerns the collection of the assets and up to the point at which the estate is ready for distribution. It is then to be disposed of, if an administrator, according to law, and if an executor, pursuant to the will. See *infra*.

An executor or administrator, coming into possession of property by virtue of his position, is estopped, while in possession, from disputing the title of his intestate or testator ; *Wiseman v. Swain* (Tex.) 114 S. W. 145.

Duties. They may be thus summarized. Those of an executor and administrator are alike except so far as those of the former spring from the will.

First. He must be responsible for the burial of the deceased in a manner suitable to the estate; 2 Bla. Com. 508. But no unreasonable expenses will be allowed, nor any unnecessary expenses if there is any danger of the estate proving insolvent; 2 C. & P. 207; *Barclay's Estate*, 2 W. N. C. (Pa.) 447; *Succession of Hearing*, 28 La. Ann. 149 ; Pat-

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terson v. Patterson, 59 N. Y. 582, 17 Am. Rep. 384. The estate and not the widow is liable for funeral expenses ; *Compton v. Lancaster* (Ky.) 114 S. \V. 260; but she may ordeí the interment on a scale proportionate to the financial condition of the deceased and the estate will be liable; *Wagoner Undertaking Co. v. Jones*, 134 Mo. A pp. 101, 114 S. W. 1049. See Funeral Expenses.

Second. The executor must prove the will, and take out letters testamentary, and an administrator must procure his letters of administration; see *supra*. In England, there are two ways of proving a will, — in common form, and in form of law, or solemn form. In the former, the executor propounds the will, — i. c. presents it to the registrar, in the absence of all other interested parties. In the latter, all parties interested are sum-

moned to show cause why probate should not be granted.

Third. Ordinarily, he must make an inventory of personal property at least, and, in some states, of real estate also; *Griswold v. Chandler*, 5 N. H. 492; *Freeman v. Anderson*, 11 Mass. 190; *Bourne v. Stevenson*, 58 Me. 499; *Pursel v. Pursel*, 14 N. J. Eq. 514. This duty rests on executors and not on adult legatees; *Mills v. Smith*, 65 Hun 619, 19 N. Y. Supp. 854.

Fourth. He must give notice of his appointment in the statute form, and should advertise for debts and credits; *Gilbert's Adm'r v. Little's Adm'r*, 2 Ohio St. 156; but the giving or not giving it does not affect the statute of limitations, nor does the failure to publish, affect a creditor who did not present his claim; *McMillan v. Hayward*, 94 Cal. 357, 29 Pac. 774.

Fifth. He must collect the goods and chattels, and the claims inventoried, with reasonable diligence. And he is liable for a loss by the insolvency of a debtor, if it results from his gross delay; *Long's Estate*, 6 Watts (Pa.) 46; *Dean v. Rathbone's Adm'r*, 15 Ala. 328.

Sixth. The personal effects he must deal with as the will directs, and the surplus must be turned into money and divided as if then- were no will. The safest method of sale is a public auction.

Seventh. He must collect the outstanding claims and convert property into money; 2 Kent 41." ; *Pailey v. Dilworth*, 10 Smedley & M. (Miss) 101, 48 Am. Dec. 760; 1 Mylne & C. S; *Evans v. Rglehart*, 6 (Jill & J. (Md.) 171; *Bogart v. Van Velsor*, 4 Edw. Oh. (N. Y.) 718; *Moore v. Hamilton*, 4 Fla. 112; *Smyth v. Burns' Adm'rs*, 25 Miss. 422; *Weyer v. Bank*, 57 Ind. 198; *Roumfort v. McAlar-*

ney, 82 Pa. 193; but he cannot occupy or lease the lands of the estate, or receive rents or profits therefrom, as these descend to the heir; Estate of Merkel, 131 Pa. 584, 18 Atl. 931.

Eighth. He must keep the money of the estate safely, but not mixed with his own,

or he may be charged Interest on it. 11«- Ls also charged when he has mil funds or let them lie idle, provided a want of ordinary prudence is proved against him; Hammond v. Hammond, - i h. < Md. i

::•!<; Sullivan v. Winthrop, 1 Sumo, H Cas. No.

tees, 2 Rand. (Va. I J. L 109; Darrell v. Ed< a, 3 i •< 241, 4 Am. Dec. 613; Appeal <.f ^3 Pa. 258; In re Myers, i;i N. V. i X. E. 135. When a debtor is ap] ecutor of the creditor's will, equity will presume that the debt has been paid, and will i reat it as an asset In ti ('row v. Conant, '.)»<> Mich 247, 51 N. W. 450, 30 Am. St Rep. 427. And generally, In! is to be charged on all money re an executor and not applied to the U

lie; McOaw v. Blewitt, Bailey, Bq. is. 0.) 98; Arnetl v. Linney, 16 N. C. 369; Thompson v. Sanders' Heirs, <"» J. J. Marsh. (Ky.) *.H: Lloyd's Estate, 82 Pa. 143 Good's Estate, 150 Pa. 301, 24 Atl. 624. Put an executor cannot Ik- charged with i:. on money allowed him for commission; Brinton's Estate, 10 Pa. 408; he Is not charge- able with compound interest; Appeal of

Light, 24 Pa. 180. Where in have

been made contrary to the requirements

of the will, on personal security, they are the executor's risk, and he must answer personally for any loss; *Brewster v. Den* 48 X. J. Eq. 559, 2: Atl. 271. See [NT] Investments.

Ninth. He must be at all times ready to account to the proper authorities, and must actually file an account at the end of the year generally prescribed by statute. The burden of proving items of a discharge in an accounting is upon the accountant; *Brewster v. Demarest*, 48 X. J. Eq. 559, 2: Atl. 271.

Tenth. He must pay the debts and legacies in the order required by law. There is no universal order of payment adopted in the United States; but debts of the last illness and the funeral are preferred debts everywhere; *Bacon, Abr. Ex. l. 2* : 2 Kent 416; *Lawson's Adm'rs v. Hansborough*, 11 B. Monr. (Ky.) 117; *Move v. Albritton*. 42 X. 1 Burruss v. Fisher, 23 Miss. 228; *Johnston v. Morrow*, 28 X. J. Eq. 327; *Chapman v. Barnes*, 2 Ill. App. 184.

Next to these, as a general rule, debts due the state or the United States are preferred. This priority of the United States only extends to the net proceeds of the property of the deceased, and therefore the necessary expenses of the administration are first paid. The act of burial and its accompaniments may be done by third parties, who have a preferred claim therefor, if reasonable; :: *Nev. A. M.* 512; 8 Ad. ft E. 348; U. S. *gleston*. 4 Sawy. 199, Fed. Caa No. 15,027. a Claim for costs recovered by a creditor in an action to establish his claim is entitled to priority over the debts of the estate ; In

re Randell's Estate, 8 N. Y. Supp. 652. If the administrator pays debts of a lower degree first, he will be liable out of his own estate in case of a deficiency of assets ; 2 Kent 419. If he pays decedent's debts from his own funds he is entitled to repayment from the proceeds of lands originally liable for such debt; Doty v. Cox (Ky.) 22 S. W. 321.

A valid claim against an estate cannot be defeated on the ground that the estate had been settled before the claim was filed ; Ury v. Bush, 85 Ia. 608, 52 N. W. 666.

Powers. The authority of the executor or administrator dates from the moment of death; Com. Dig. Administration (B, 10) ; 2 W. Bla. 602 ; 10 Ad. & El. 212. When once probate is granted, his acts are good until formally reversed by the court; 3 Term 125; Appeal of Peebles, 15 S. & R. (Pa.) 39. In some states he has power over both real and personal estate ; Goodwin v. Jones, 3 Mass. 514, 3 Am. Dec. 173; Stearns v. Stearns, 1 Pick. (Mass.) 157. In the majority, he has power over the real estate only when expressly empowered by the will, or when the personal estate is insufficient ; see *infra*.

His power is that of a mere trustee, who must apply the goods for such purposes as are sanctioned by law ; 4 Term 645 ; 9 Co. 88; Co. 2d Inst. 236; Warfield v. Brand's Adm'r, 13 Bush (Ky.) 77; Ferris v. Van Vechten, 9 Hun (N. Y.) 12. The personal representative has the legal title to the choses in action of the deceased, and may transfer, discharge, or compound them as if he were the absolute owner; Curry v. Peebles, 83 Ala. 225, 3 South. 622 ; Kahl v. Schob-er, 35 N. J. Eq. 461 ; and having at common law absolute power of disposal of the personal effects, he may compromise any claim ; Olston v. R. Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915. But

where an executor pledged goods belonging to an estate, not holding himself out to act as executor, and the pledgee having no notice that he was such, no title passed and the pledgee was required to surrender the goods; [1912] 1 Ch. 451.

In order that he may be enabled to reduce them to possession the executor or administrator acquires a property in the assets of the intestate. As to what constitutes assets, see Assets, and for a definition of "asset," within the administration laws, see *Louisville & N. R. Co. v. Herb*, 125 Tenn. 408, 143 S. W. 1138.

His right is not a personal one, but an incident to his office ; *Weeks v. Gibbs*, 9 Mass. 74; *Dawes v. Boylston*, 9 Mass. 352, 6 Am. Dec. 72; *Hillman v. Stephens*, 16 N. Y. 278. He owns all his intestate's personal property from the day of death, and for any cause of action accruing after that day may sue in his own name; *Patchen v. Wilson*, 4 Hill (N. Y.) 57; *Manwell v. Briggs*, 17 Vt. 176; *Cullen v. O'Hara*, 4 Mich. 132; *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013. This hap-

pens by relation to the day of death ; *Hutchins v. Bank*, 12 Mete. (Mass.) 425; 7 Jur. 492; *Shirley v. Healds*, 34 N. H. 407. An administrator is a trustee, who holds the legal property but not the equitable. If he is a debtor to the estate, and denies the debt, he may be removed ; but if he inventories it, it is cancelled by the giving of his bond ; *Stevens v. Gaylord*, 11 Mass. 268.

He may declare, whenever the money when received will be assets ; and he may sue on a judgment once obtained, as if the debt were his own. He may summon supposed debtors or holders of his intestate's property to account, and has the right to an

investigation in equity. He may bind the estate by arbitration ; *Kendall v. Bates*, 35 Me. 357 ; *Appeal of Peters*, 38 Pa. 239. He may assign notes, etc. See *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Griswold v. Clark*, 28 Vt. 661; *Miller v. Henderson*, 10 N. J. Eq. 320; *Patterson v. Edwards*, 29 Miss. 70; *Thomas v. Reister*, 3 Ind. 369; *Walker v. Craig*, 18 Ill. 116; *Shoenberger's Ex'rs v. Sav. Inst*, 28 Pa. 459; *Morris' Ext v. Duke's Adm'r*, 2 Patt. & H. (Va.) 462. Nearly all debts and actions survive to the administrator. But he has no power over the firm's assets, as to which his intestate was a partner, until the debts are paid ; *Thomson v. Thomson*, 1 Bradf. (N. Y.) 24; he should merely refer in his inventory to the intestate's interest in the partnership without attempting to give the items of property, as he can have no control over it until the affairs of the partnership are settled; *Loomis v. Armstrong*, 63 Mich. 355, 29 N. W. 867.

At common law the executor or administrator has no power over real estate ; *Ryder v. Lyon*, 85 Conn. 245, 82 Atl. 573 ; *Wilson v. Hamilton*, 9 S. & R. (Pa.) 431; *Livingston v. Bird*, 2 Root (Conn.) 438; *Egerton's Adm'r v. Conklin*, 25 Wend. (N. Y.) 224; *Sorrell v. Ham*, 9 Ga. 55; *Smith v. Smith's Adm'r*, 27 N. J. Eq. 445 ; *Hankins v. Kimball*, 57 Ind. 42 ; nor is the probate even admissible as evidence that the instrument is a will, or is an execution of a power to charge land ; *Wms. Ex.* 562. By statute, in some states, the probate is made prima facie or conclusive evidence as to realty ; *Brown v. Wood*, 17 Mass. 68; *Fortune v. Buck*, 23 Conn. 1; *Darby v. Mayer*, 10 Wheat. (U. S.) 470, 6 L. Ed. 367; *Jones v. McKee*, 3 Pa. 498, 45 Am. Dec. 661 ; *Singleton v. Singleton*, 8 B. Monr. (Ky.) 340; *Lewis' Heirs v. His Executor*, 5 La. 388. In some states the probate is made after the lapse of a certain time conclusive as to realty; *Tarver v. Tarver*, 9

Pet. (U. S.) 180, 9 L. Ed. 91; Appeal of Hegarty, 75 Pa. 512; Bailey v. Bailey, 8 Ohio, 246; Hardy v. Hardy's Heirs, 26 Ala. 524 ; Parker's Ex'rs v. Brown's Ex'rs, 6 Gratt. (Va.) 564; Kenyon v. Stewart, 44 Pa. 189. Land in England under the Land Title

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and Transfer Act of 1897 goes to the executor or administrator.

The administrator has no interest in the decedent's real estate unless the personal property is insufficient to pay debts and expenses; Pratt v. Millard, 154 Mich. 112, 117 N. W. 552; and an executor has, ordinarily, no power to sell land unless it is expressly given or necessarily implied in the will ; Hanson v. Hanson, 149 Ia. 82, 127 N. W. 1032; but one to whom all the testator's residuary estate is devised, "in trust to receive, hold, invest and reinvest," has, by implication, power to sell real estate ; Powell v. Wood, 149 N. C. 235, 62 S. E. 1071.

The will may direct the executor to sell lands to pay debts, but the money resulting is usually held to be equitable assets only ;

9 B. & C. 459; Haskell v. House. 3 Brev. (S. C.) 242; Speed's Ex'r v. Nelson's Ex'r, 8 B. Monr. (Ky.) 499; Smith v. Knoebel, 82 111. 392 ; Lindley v. O'Reilly, 50 N. J. L. 036, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802 ; but the title and right of possession to the land remain in the heirs until the sale, and they are the proper parties to maintain ejectment; Cohea v. Jemison, 08 Miss. 510,

10 South. 46; but see Smathers v. Moody, 112 N. C. 791, 17 S. E. 532; and to collect the

rents; Appeal of Pennsylvania Co. for Insurance on Lives & Granting Annuities, 168 Pa. 431, 32 Atl. 25, 47 Am. St. Rep. 593. In equity, the testator's intention will be regarded as to whether the surplus fund, after a sale of the real estate and payment of debts, shall go to the heir; 1 Wins. Ex. 555, Am. note.

Chattels real pass to the executor or administrator, and such is the interest of the tenant of a farm from year to year; In re Ring's Estate, 132 Ia. 216, 109 N. W. 710. But the wife's chattels real, unless taken into possession by her husband during his lifetime, do not pass to his executor; 1 Wins. Ex. 579, n; In re Hind's Estate, 5 Wbart. (Pa.) 138, 34 Am. Dec. 542; Pitts v. Curtis, 4 Ala. 350; Wade v. Grimes, 7 How. (Miss.) 425. The husband's act of possession must effect a complete alteration in the nature of the joint interest of husband and wife in her chattels real, or they will survive to her.

Chattels personal pass to the executor; Harris v. Meyer, 3 Redf. (N. Y.) 150; Kalil v. Schober, 35 N. J. Eq. 461; Highnote v. White, 67 Ind. 596; Beecher v. Buckingham, 15 Conn. 110, 44 Am. Dec. 550. Such are emblements; Brooke, Abr. Emblements; Bevans v. Briscoe, 4 H. & J. (Md.) 139; Kesler v. Cornelison, 98 N. C. 383, 3 S. E. 839; but see Wright v. Watson, 9 Ala. 536, 11 South. 634. Heirlooms and fixtures go to the heir; and as to what are fixtures, see Fixtures, and 1 Wms. Ex. 615; 2 Sm. L. Cas., 9th Am. ed. 1450; Crosw. Ex. & Ad. 352. The widows separate property and paraphernalia go to her. For elaborate collections of cases on the effect of nuptial contracts about property

upon the executor's right, see 1 Wins. Ex.

•660, Am. note 2 : 2 note 1 ; I

Lead. < las. 65, I >on I Lom n trtit

the donee at once, and not to the

Miirdock v. McDowell, 1 Nott & M

237, 9 Am. Dec. (Jb4 ; Mich.

r;i. ,;»»; Jtorjkwoud v. Wiggin, 16 Gr

(<•.; ; Hatch v. Atkinson.

Dec. 464.

An executor may sell terms fi>r years, and may even make a good title against a legatee, unless the sale be fraudulent he may underlet a term. He may indorse a promissory note or a bill payable to tl tator or his order; Miller v. 1 & S. (Miss.j (iM. The rule that i have no power to confess judgment . applicable to offers of judgments to firm creditors, by a firm coini>o.sed of a surviving member and the executor of a deceased member, conducting the interests of the de< therein; Columbus Watch Co. v. Hodcnpyl, 01 Hun 557, 10 N. Y. Supp. 337; but they may compromise claims; BacoD v. Crandon, 15 Pick. (.Mass.) 7'.) : Chase v. Bradley. 26 .Me. 531; or submit matters in dispute to arbitration; Wills v. Rand's Adm'rs, 41 Ala. L98i Wood v. Tunnicliff, 7 1 N. Y. .;s. without the sanction of the probate court, he has no power to bind the estate by contract, even for the necessities of infant devisees; K^scoe v. McDonald, 91 Mich. 270, 51 N. W. 939. His right to employ counsel depends upon the right to litigate; In re Riviere's Estate, 8 Cal. App. 773, 98 Pac. 40.

^\\ife's chases. In general, choses in action given to the wife either before or after marriage survive to her. provided her husband have not reduced them to possession before

his death. A promissory note given to the wife during coverture comes under this rule in England; 12 M. & W. 355; 7 Q. B. 864; but not so in this country generally; Jones' Adm'r v. Warren's Adm'r. 4 Liana (Ky.) Fourth Ecclesiastical Society in Middletown v. Mather, 15 Conn. 587; Savage v. King, 17 Me. 301. Mere intention to reduce into possession is not a reduction, nor is a mere appropriation of the fund; . "> \Y-. 515; Petrie v. Clark, 11 S. & R, (Pa.) ::77. 14 Am. Pec <;::<;; In re Hinds' Estate, 5 Whart. (Pa.) L38, 34 Am. Dec. 542; Wardlow v. Tray's Adm'r, 2 Hill. Eq. (S. C.) 644; Pitts v. Curtis, 4 Ala. 350; Curry v. Fulkinson's El'rs, 14 Ohio Km.

A statutory right of a husband to sue for a Chose in action of his wife without administration is confined to the cases expressly declared by the statute and will not be extended by construction; Ferguson v. B 6 App. D. C. 525.

When the same persons are both executors and trustees, and as executors have paid the debts and passed their final account, they no longer hold the assets as executors but as trustees; [1913] A. C. 7> - .. But where the same person was appointed executor and tes-

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tainentary trustee, and he qualified as executor, but gave no undertaking as trustee and secured no order for his discharge as executor, and he had failed to file current accounts until compelled to render a final account, it was held that his relation as executor remained and that the court was empowered to direct the final accounting; In re Roach's Estate, 50 Or. 179, 92 Pac. 118.

Suits by or against Executors and Administrators. 1. By. In general, a right of action founded on a tort or malfeasance dies with the person. But personal actions founded upon any obligation, contract, debt, covenant, or other duty to be performed, survive, and the executor may maintain them ; Cowp. 375; 1 Wms. Saund. 216, n. See Brannock v. Stocker, 76 Ind. 573; 5 B. & Ad. 78. By statutes in England and the United States this common-law right is much extended. An executor may now have trespass, trover, etc., for injuries done to the intestate during his lifetime. Except for slander, for libels, and for injuries inflicted on the person, executors may bring personal actions, and are liable in the same manner as the deceased would have been; 2 Brod. & B. 102; Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 17 ; Kennerly v. Wilson, 1 Md. 102 ; Tait v. Parkman, 15 Ala. 253; Martin v. Baker, 5 Blackf. (Ind.) 232; Rice's Heirs v. Spotswood's Heirs, 6 T. B. Monr. (Ky.) 40, 17 Am. Dec. 115; Backus' Adm'rs v. McCoy, 3 Ohio 211, 17 Am. Dec. 555 ; Hagarty v. Morris, 2 W. N. C. (Pa.) 154. See Coleman v. Woodworth, 28 Cal. 567; Manwell v. Briggs, 17 Vt. 176; Richardson v. R. Co., 98 Mass. 85. Should his death have been caused by the negligence of any one, they may bring an action for the benefit of the family in some states. Executors may also sue for stocks and annuities, as being personal property. A right of action for the breach of a parol contract for the sale of land survives to the executors; Irwin v. Hamilton, 6 S. & R. (Pa.) 208. So they may sue for an insurance policy.

The courts of New Jersey will enforce the Pennsylvania statute giving a right of action to the widow of one who dies of injuries inflicted by the wrongful act of another, that statute not being repugnant to the policy of the former state; but such an action cannot

be brought in New Jersey by the personal representative of the deceased, as required by the laws of that state in similar cases; *Lower v. Segal*, 59 N. J. L. 66, 34 Atl. 945.

For actions accruing after the testator's death, the executor may sue either in his own name or as executor. This is true of actions for tort, as trespass or trover, actions on contract and on negotiable paper ; 3 Nev. & M. 391 ; *Patchen v. Wilson*, 4 Hill (N. Y.) 57 ; *Williams v. Moore*, 9 Pick. (Mass.) 432 ; *Hailley v. Wheeler*, 49 N. C. 159. So he may bring replevin in his own name ; *Branch v. Branch*,

6 Fla. 314; and so, in short, wherever the money, when recovered, will be assets, the executor may sue as executor ; *Flower's Ex'rs v. Garr*, 20 Wend. (N. Y.) 668 ; *Sheets v. Pabody*, 6 Blackf. (Ind.) 120, 38 Am. Dec. 132 ; *Biddle v. Wilkins*, 1 Pet. (U. S.) 686, 7 L. Ed. 315. See *Pope's Heirs v. Boyd's Adm'x*, 22 Ark. 535 ; *Linsenbigler v. Gourley*, 56 Pa. 166, 94 Am. Dec. 51. An executor cannot recover in ejectment without producing the will ; *Mays v. Killen*, 56 Ga. 527 ; *Horn v. Johnson*, 87 Ga. 448, 13 S. E. 633.

2. Against. An action of trespass quare clausum f regit survives against the executor; *McCallion v. Gegan*, 9 Phila. (Pa.) 240. So also in causes of action wholly occurring after the testator's death, the executor is liable individually; *Kerchner v. McRae*, 80 N. C. 219. The actions of trespass and trover do not survive against the executors of deceased defendants. But the action of replevin does. The general rule is that causes of action ex contractu survive, while those ex delicto do not. "Executors and administrators are the representatives of the personal property of the deceased and not of his wrongs except so far as the tortious act complained of was beneficial to his estate;" 2 Kent 416.

As an administrator merely stands in place of the deceased, and does not represent creditors, he cannot file a bill to set aside a conveyance in fraud of creditors, the right to do so being in the creditors defrauded ; Hoyt v. Northup, 256 111. 604, 100 N. E. 164.

The statute prescribes a fixed time for settling estates within which the executor or administrator cannot be sued, or compelled to file an account, unless he waives the right; Moses v. Jones, 2 Nott & McC. (S. C.) 259; Baggott v. Boulger, 2 Duer (N. Y.) 160. If he makes payments erroneously, supposing the estate to be solvent, he may recover them, it being a mistake of fact; Walker v. Bradley, 3 Pick. (Mass.) 261; Swope v. Chambers, 2 Gratt. (Va.) 319.

As to whether an executor or administrator is bound to plead the statute of limitation, the decisions are not uniform. That he is not bound to do so is held in Hodgdon v. White, 11 N. H. 208; Wiggins v. Lovering's Adm'r, 9 Mo. 202; Semmes v. Magruder, 10 Md. 242; Batson v. Murrell, 10 Humph. (Tenn.) 301, 51 Am. Dec. 707; Conway's Ex'r v. Reyburn's Ex'rs, 22 Ark. 290 ; Chambers v. Fennemore's Adm'r, 4 Harr. (Del.) 368; Appeal of Ritter, 23 Pa. 95; Barnawell v. Smith, 58 N. C. 168; Woods v. Irwin, 141 Pa. 278, 21 Atl. 603, 23 Am. St. Rep. 282 ; In re Baumhover's Estate, 151 Ia. 146, 130 N. W. 817 ; but a different rule applies when the personal estate is insufficient to pay the debts and a resort to the realty is necessary ; Pollard v. Scaers' Adm'r, 28 Ala. 484, 65 Am. Dec. 364. That it is his duty to plead the statute is held in Patterson v. Cobb, 4 Fla. 481 (and if he does not he is liable for a devastavit); Tunstall v. Pollard's Adm'r, 11

Leigh (Va.) 1; Matter of Milligan's Estate, 112 App. Div. 373, 98 N. Y. Supp. 480. But the executor was held bound by a waiver of the statute contained in the will; Glassell v. Glasseli 147 Cal. 510, 82 Pac. 42. If one co-administrator declines to plead it, the other may do so; Scull v. Wallace's Ex'rs, 15 S. & R. (Pa.) 231, and if the administrator does not plead it, the next of kin may do so ; In re Clarke's Estate, 1 Phila. (Pa.) 350; or a creditor interested in the estate; Smith v. Pattie, 81 Va. 654. The bar of the statute having attached to a claim against an estate, it cannot be waived by an acknowledgment of the debt by the personal representative; Lee's Adm'r v. Downey, 68 Ala. 98; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; Burnett v. Noble, 5 Redf. Sur. (N. T.) 69 ; Seig v. Acord's Ex'r, 21 Gratt. (Va.) 365, 8 Am. Rep. 605. And the executor or administrator cannot waive the statute as against a claim in his own favor; Grinned v. Baxter, 17 Pick. (Mass.) 383; In re Brown's Estate, 77 Misc. 507, 137 N. Y. Supp. 978 ; Clayton v. Dinwoodey, 33 Utah 251, 93 Pac. 723, 14 Ann. Cas. 926; or the next of kin may set in up; Willcox v. Smith, 26 Barb. (N. Y.) 316. He is, in some states, chargeable with interest, first, when he receives it upon assets put out at interest; second, when he uses them himself: third, when he has large sums paid him which he ought to have put out at interest; Griswold v. Chandler, 5 N. H. 497; Wyman v. Hubbard. 13 Mass. 232; but he is not liable where he has funds which he holds pending legal proceedings to determine the rights of the remaindermen; In re Howard's Estate, 3 Misc. 170, 23 N. Y. Supp. 836. In some cases of need, as to relieve an estate from sale by a mortgagee, he may lend the estate money and charge interest thereon ; Jennison v. Hapgood, 10 Pick. (Mass.) 77. The widow's support is usually

decreed by the judge. But the administrator is not liable for the education of infant children, or for mourning-apparel for relatives and friends of the deceased: *Johnson v. "Corbett*, 11 Paige Ch. (N. Y.) 265;. *Appeal of Flint ham*, 11 S. & R. (Pa.) 16.

The liability is in general measured by the amount of assets. On his contracts he may render himself liable personally, or as administrator merely, according to the terms of the contract which he makes; 7 B. & C. 450; *Murrell v. Wright*, 78 Tex. 519, 15 S. W. 156. But to make him liable personally for contracts about the estate, a valid consideration must be shown; 3 Sim. 543; 2 Brod. & B. loo. And, in general, assets or forbearance will form the only consideration; 5 My. & C. 71; *Bank of Troy v. Topping & Holme*, 13 Wend. (N. Y.) 557. But a bond of itself imports consideration ; and hence a bond given by administrators to submit to arbitration is binding upon them personally ; *Ten Eyck v. Vanderpoel*, 8 Johns. (N. Y.) 120; *Robinson v. Lane*, 14 Smedes & M. (Miss.)

101 . He may compromise a suit brought for the widow and next of kin, for the death of te ; *Washington v. I* (6 111.

49, 26 X. E. 653. !:. be ii uot liable

when he has acted in good faith, and that degree of caution which prudent men exhibit in the conduct of their own afl
In re *Bosio's Estate*, "J Ashm. (Pa.) 4.;?.

An administrator cannot ratify decedent's void transactions, nor make any conl for him; *Smith v. Brennan*, 62 MI X. W. 892, 4 Am. St. Rep. 867.

An administrator is liable for torts and for gross negligence in managing his

tate's property. This species of misconduct is called in law a devastavit; *Cartwright v. Cartwright*, 4 Illyn. (Tenn.) 134; *Je v. Yarborough*, 16 N. C. 516; *in re Holladay's Estate*, 15 Or. 168, 22 Pac. 750. Such diligence in collecting debts or debts; *In re Merkel's Estate*, 131 Pa. 584, 18 Atl. an unnecessary sale of property at a discount; *Pinckard v. Woods*, 5 Gratt (Va.) 140; paying undue funeral expenses; 1 B. & Ad. 200; and the like mismanagements. So he may be liable for not laying out assets for the benefit of the estate, or for turning the money to his own profit or advantage. In such cases he is answerable for both principal and interest. In England he may be charged with increased interest for money withheld by fraud; 1 Cox, Ch. 113; 4 Ves. 620; and he is sometimes made liable with compound interest in this country; *Jennison v. Hapgood*, 10 Pick, 1 Mass.) 77. Finally, a refusal to account for funds, or an unreasonable delay in accounting, raises a presumption of a wrongful use of them; *Johnson v. Beauchamp*, 5 Dana (Ky.) 70; *Evans v. Iglehart*, 6 Gill & J. (Md.) 186. [If he receives rents and profits of land for a long period without accounting, he is liable to the heirs for the reasonable rental value of the land for the entire period; *Shuffler v. Turner*, 111 X. C. 297, 10 S. E. 417.

Where real estate is sold by executor-co-executor, the sale is voidable at the instance of those interested in the estate; *In re Richard's Estate*, 154 Cal. 475, 98 Pac. 528. One executor may sue another where questions arise between the latter and the estate, jeopardizing the rights of pari interest: *Monmouth Inv. Co. v. Means*, 101 Fed. 159, 80 O. C. A. 527.

After the debts have been paid and the final account passed, and a legacy ordered paid, an action will lie against the executor to recover it; *Anderson v. Patty*, 168 Ill.

App. 151.

An insolvent bank cannot sue an ex. •
for an assessment on the stock of In-
dent, which was levied after a final decree
for the distribution of the estate: Union Sav-
Ings Ban* of San Jose v. De Laveaga, 150
Cal. 395, 81 Pac. 54.

Distribution. The distribution or disposal
of the estate by an executor is as directed

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by the will. The administrator must distrib-
ute the residue among those entitled to it,
under direction of the court and according
to law; Lamb v. Carroll, 28 N. C. 4; Appeal
of Stewart, 86 Pa. 149; Appeal of Kline, 86
Pa. 363; Marshall v. Hitchcock, 3 Redf. (N.
Y.) 461. But if he recognizes a claim as
proper to be paid, and subsequently finds
that there is no legal foundation for it, it is
not binding upon the estate; Webster v. Le
Compte, 74 Md. 249, 22 Atl. 232. And even
after action brought against him by a credi-
tor he may apply the assets in payment of
the debt of another creditor; 24 Q. B. Div.
364.

The great rule is, that personal property
is regulated by the law of the domicile. The
rights of the distributees vest as soon as the
intestate dies, but cannot be sued for till the
lapse of the statute period of distribution.
See 118th Novel of Justinian, Cooper's trans.
393 : Distribution ; Conflict of Laws.

Compensation. An executor cannot pay
himself. His compensation must be ordered
by the court; Collins v. Tilton, 58 Ind. 374.

Faithful service by an executor is a condition to the right of commissions. Misappropriation of funds may forfeit the right; *In re Clauser's Estate*, 84 Pa. 51.

Commissions are not allowed on a legacy given in trust to an executor; *Westerfield v. Westerfield*, 1 Bradf. Surr. (N. Y.) 198; *Ames v. Downing*, 1 Bradf. Surr. (N. Y.) 321. Reasonable expenses are always allowed an executor; *Thacher v. Dunham*, 5 Gray (Mass.) 26; *Wilson v. Bates*, 28 Vt. 765; *Ord v. Little*, 3 Cal. 287; *Noel v. Harvey*, 29 Miss. 72. When one of two co-executors has done nothing, he should get no commission; *White v. Bullock*, 20 Barb. (N. Y.) 91. Where a stranger was appointed administrator, upon his statement that his service would be gratuitous, he should not be allowed commissions; *Hilton v. Hilton's Adm'r*, 109 S. W. 905, 33 Ky. L. Rep. 276. In England, executors cannot charge for personal trouble or loss of time, and can only be paid for reasonable expenses.

An administrator receives no compensation in England; 3 Mer. 24; but in this country he is paid in proportion to his services, and all reasonable expenses are allowed him; *Appeal of Culbertson*, 84 Pa. 303. Additional allowance may be made where extraordinary services have been rendered; *In re Moore's Estate*, 96 Cal. 522, 31 Pac. 584. An administrator cannot pay himself. His compensation must be ordered by the court; *Collins v. Tilton*, 58 Ind. 374. If too small a compensation be awarded him, he may appeal; *Jewett v. Woodward*, 1 Edw. Ch. (N. Y.) 195; *Edelen v. Edelen*, 11 Md. 415; *Ord v. Little*, 3 Cal. 287; *Andrew's Ex'rs v. Andrew's Adm'rs*, 7 Ohio St. 143; *Fowler v. Lockwood*, 3 Redf. (N. Y.) 465. Allowance by a probate court cannot be impeached in a court of equity unless fraud or deception

has been practiced ; *Smith v. Worthington*, 53 Fed. 977, 4 C. C. A. 130. He cannot buy the estate, or any part of it, when sold by a common auctioneer to pay debts ; but he may when the auctioneer is a state officer, and the sale public and bona fide; *Toler's Adm'r v. Toler*, 2 Patt. & H. (Va.) 71; *Weeks v. Gibbs*, 9 Mass. 75 ; *Babbitt v. Doe*, 4 Ind. 355; *Barrington v. Alexander*, 6 Ohio St. 189.

Federal Jurisdiction. Matters of pure probate are not within the jurisdictions of courts of the United States ; but where a state law gives citizens of the state, in an action or suit inter partes, the right to question the probate of a will, federal courts, at the suit of citizens of other states or aliens will enforce such remedies; *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct 727, 50 D. Ed. 101.

The possession of a state court which will exclude the exercise of power by the federal court, and vice versa, must be the possession of some thing, corporeal or incorporeal, which has been taken under the dominion of the court. A controversy or inquiry is not such a thing, and the pendency of a suit or proceeding in one court, involving a question, controversy, or inquiry, is no bar to the exercise of jurisdiction in the determination of the same question, etc., in the other ; *Ball v. Tompkins*, 41 Fed. 486; *American Baptist Home Mission Society v. Stewart*, 192 Fed. 976; *Byers v. McAuley*, 149 U. S. 008, 13 Sup. Ct. 906, 37 L. Ed. 867.

The right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law and the public administrator is entitled to administer the estate of an Italian subject dying and leaving an estate in California, in preference to the Italian Consul General, who claimed

the right under treaty ; In re Ghio's Estate, 157 Cal. 552, 108 Pac. 516, 37 L. R. A. (N. S.) 549, 137 Am. St. Rep. 145, affirmed in *Rocca v. Thompson*, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, where the question whether it is within the treaty-making power to provide for administration upon the estates of foreigners dying within a state, by the consul of their country, was suggested but not discussed or decided. See Treaty.

See Schouler; Williams; Croswell, Exrs. and Admrs. ; Woerner, Law of Adm. ; 2 Lawson, Rights & Rem. 889-1008; Holmes, Executors in Early English Law, 3 Sel. Essays in Anglo-Amer. L. H. 736 (9 Harv. L. R. 42) ; Caillemer, The Executor in England and on the Continent, id. 746.

EXECUTORY. Performing official duties; contingent; also, personal estate of a deceased ; whatever may be executed, — as, an executory sentence or judgment.

EXECUTORY CONSIDERATION. Something which is to be done after the promise

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EXECUTORY DEVISE

is made, for which it is the legal equivalent. See Consideration.

EXECUTORY CONTRACT. One in which some future act is to be done: as, where an agreement is made to build a house in six months, or to do any act at a future day. See Contract; Performance.

An agreement to sell and convey land, which is not a conveyance, operating as a present transfer of legal estate and seisin, is wholly executory, though it contains the words "grant, bargain and sell;" and produces no effect upon the estates and titles of the parties; and creates no lien or charge on the land itself; *Simpson v. Breckenridge*, 32 Pa. 257; *Stewart's Adm'rs v. Lang*, 37 Pa. 201, 78 Am. Dec. 414; *Watson v. Coast*, 35 W. Va. 403, M S. E. 249.

EXECUTORY DEVISE. Such a limitation of a future estate in lands or chattels as the law admits in case of a will, though contrary to the rules of limitation in conveyances at common law.

It is a limitation by will of a future estate or interest in ' lands or chattels. In *re Brown's Estate*, 38 Pa. 294.

By the executory devise no estate vests at the death of the deviser or testator, but only on the future contingency. It is only an indulgence to the last will and testament which is supposed to be made by one in *opinio mori*. When the limitation by devise is such that the future interest falls within the rules of contingent remainders, it is a contingent remainder, and not an executory devise. 4 Kent 257 ; 3 Term 763.

If a particular estate of freehold be first devised, capable in its own nature of supporting a remainder, followed by a limitation which is not immediately connected with, or does not immediately commence from, the expiration of the particular estate of freehold, the latter limitation cannot take effect as a remainder, but may operate as an executory devise: e. g., if land be devised to A for life, and after his decease to B in fee, B takes a (vested) remainder, because his estate is immediately connected with, and commences on, the limitation of A's estate. If land be limited to A for life, and one year after his decease to B in fee, the limitation to B is not such a one as will be a remainder, but may

operate as an executory devise. *Fearne, Cont. Rem.* 399. If land be limited to A for life, and after his decease to B and his heirs, with a proviso that if B survive A and die, without issue of his body living at his decease ; then to C and his heirs, the limitation to B, etc., prevents an immediate connection of the estate limited to C with the life estate of A, and prevents its commencement on the death of A. It must operate, if at all, as an executory devise ; *Butler's note (c) to Fearne, Cont. Rem.* 397. If a chattel interest be bequeathed for life, with remainder over, this latter disposition cannot take effect as a remainder, but may as an executory devise, or more properly bequest ; *id.* 407.

An executory devise differs from a remainder In three very material respects:

First. It needs no particular estate to support It.
Second. By it a fee-simple or other less estate may be limited on a fee-simple. Third. By it a remainder may be limited of a chattel interest after a particular estate for life created In the same.

The first Is a case of freehold commencing in futuro. A makes a devise of a future estate on a certain contingency, and till the contingency happens does not dispose of the fee-simple, but leaves It to descend to his heirs at law. 1 T. Raym. 82 ; 1 Salk. 226; 1 L.utw. 798.

The second case Is a fee upon a fee. A devises to A and his heirs forever, which is a fee-simple, and

then, in case A dies, before he Is twenty-one years of age, to B and his heirs. *Cro. Jac.* 590 ; 10 *Mod.* 420.

The third case: a limitation in a term of years after a life estate. A grants a term of one thousand years to B for life, remainder to C. The common law regards the term for years as swallowed up in the grant for life, which, being a freehold, is a greater estate, and the grantee of such a term for

life could alien the whole. A similar limitation In a will may take effect, however, as an executory bequest; *Scott v. Price*, 2 S. & R. (Pa.) 59, 7 Am. Dec. 629; *Logan v. Ladson's Ex'r*, 1 Des. (S. C.) 271 ; *Clifton v. Halg's Ex'rs*, 4 Des. (S. C.) 330.

It is not a mere possibility, but a substantial Interest, and in respect to its transmissibility stands on the same footing with a contingent remainder; *Medley v. Mitchell*, 81 Va. 268.

In order to prevent perpetuities, the rule has been adopted that executory interests must be so limited that from the time of their limitation they will necessarily vest in right (not necessarily in possession) at a period not exceeding that occupied by the life or lives of a person or persons then living, or in ventre matris, and the minority of any person or persons born or in ventre matris prior to the decease of, such first named person or persons, or at a period not exceeding that occupied by the life or lives of such first named person or persons, and an absolute term of twenty-one years afterwards, or within, or at the expiration of an absolute term of twenty-one years without reference to any life. For example, lands are devised to such unborn son of a feme covert as shall first reach the age of twenty-one years. The utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son. Such an executory devise is therefore good. If, however, such limitation had been to the first unborn son who shall attain the age of twenty-five years, the rule against perpetuities would be infringed and the limitations bad ; *Smith, Ex. Int.* 391; 2 Bla. Com. 174.

An executory devise limited after an indefinite failure of issue is bad as leading to a perpetuity; 4 Kent 273; and so of an executory bequest, but the courts are in the

latter case much less apt to construe limitations as contemplating a definite failure of issue ; 4 Kent 281 ; 1 P. Wins. 663 ; Gray, Perpet. 212.

An executory devise is generally indestructible by any alteration in the i out of or after which it is limited. But if it is limited on an estate tail the tenant in tail can bar it, as well as the entail, by common recovery or by deed enrolled, etc., where such deed is by statute given the force, and effect of a common reco Butler's note to Fearn, Cont Rem. 662; Wins. R_ P. 319.

EXECUTORY ESTATES. Interests which depend for their enjoyment upon some subsequent event or contingency. Such estate

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EXECUTORY TRUSTS

may be an executory devise, or an executory remainder, which is the same as a contingent remainder, because no present interest passes.

EXECUTORY PROCESS {Via Executory). In Louisiana, a process which can be resorted to in two cases, namely : 1. When the right of the creditor arises from an act importing confession of judgment, and which contains a privilege or mortgage in his favor. 2. When the creditor demands the execution

of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. Code of Practice, art. 732.

EXECUTORY TRUSTS. A trust is called executory when some further act is requisite to be done by the author of the trust to give it its full effect. See Bisph. Eq. 31; Lewin, Tr. 144.

The distinction between executed and executory trusts is well settled; *Dennison v. Goehring*, 7 Pa. 177, 47 Am. Dec. 505 ; though once doubted in England; 1 Ves. 142; but see 2 Ves. 323. The test is said to be : Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is? or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? per Lord St. Leonards, Ld. Ch., in 4 H. L. Cas. 210; see *Tillinghast v. Coggeshall*, 7 R. I. 353; Bisph. Eq. 86.

In the case of articles made in contemplation of marriage, and which are, therefore, preparatory to a settlement, so in the case of a will directory of a future conveyance to be made or executed by the trustees named therein, it is evident that something remains to be done. The trusts are said to be executory, because they require an ulterior act to raise and perfect them : i. e. the actual settlement is to be made or the conveyance to be executed. They are instructions, rather than complete instruments, in themselves.

The court of chancery will, in promotion of the supposed views of the parties or the testator and to support their manifest intention, give to the words a more enlarged

and liberal construction than in the case of legal limitations or trusts executed ; 1 Fonbl. Eq. b. 1; White, Lead. Cas. 18. Where a voluntary trust is executory and not executed, if it could not be enforced at law because it is a defective conveyance, it is not helped in favor of a volunteer in a court of equity; *Minturn v. Seymour*, < Johns. Ch. (N. Y.) 498, 500; *Acker v. Phoenix*, 4 Paige, Ch. (N. Y.) 305; *Dawson v. Dawson*, 16 N. C. 93, 18 Am. Dec. 573. But where the trust, though voluntary, has been executed in part, it will be sustained or en-

forced in equity ; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Dennison v. Goehring*, 7 Pa. 175, 178, 47 Am. Dec. 505. *White, Lead. Cas.* 17(3; Yes. 056; 18 id. 140; 1 K^{en} 551; 3 Beav. 238.

EXECUTORY USES. Springing uses which confer a legal title corresponding to an executory devise.

Thus, when a limitation to the use of A in fee is defeasible by a limitation to the use of B to arise at a future period, contingency, or event, these contingent or springing uses differ herein from an executory devise: there must be a person seized to such uses at the time the contingency happens, else they can never be executed by the statute. Therefore, If the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever ; 1 Co. 134, 138 ; *Cro. Eliz.* 439 ; whereas by an executory devise the freehold itself is transferred to the future devisee. In both cases, a fee may be limited after a fee ; 10 Mod. 423.

EXECUTRIX. A woman who has been appointed by will to execute such will or testament. See Executoe.

EX ECU TRY. In Scotch Law. The mov-

able estate of a person dying, which goes to his nearest of kin. So called as falling under the distribution of an executor. Bell, Diet.

EXEMPLARY DAMAGES. See Measure of Damages.

EXEMPLIFICATION. A perfect copy of a record or office-book lawfully kept, so far as relates to the matter in question. See, generally, 1 Stark. Ev. 151 ; 1 Phill. Ev. 307 ; Mills v. Duryee, 7 Cra. (U. S.) 481, 3 L. Ed. 411; Drummond v. Magruder, 9 Cra. (U. S.) 122, 3 L. Ed. 677; Hampton v. M'Connel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378; Baker v. Field, 2 Yeates (Pa.) 532; Ellmore v. Mills, 2 N. C. 359 ; Smith v. Blagge, 1 Johns. Cas. (N. Y.) 238; Schaben v. U. S., 6 Ct. Cl. 230; Thomas v. Stewart, 92 Ind. 246; Cox v. Jones, 52 Ga. 438. As to the mode of authenticating records of other states, see Foreign' Judgments.

EXEMPLUM (I/at.). In Civil Law. A

copy. A written authorized copy. Used also in the modern sense of example: *ad exemplum constituti singulares non trahi* (exceptional things must not be taken for examples). Calv. Lex. Exempli gratia, for the sake of example. Abb. e. g.

EXEMPTION. The right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent.

In general, the sheriff may seize and sell all the property of a defendant which he can find, except such as is exempted by the common law or by statute. The common law was very niggardly of these exceptions: it allowed only the necessary wearing apparel; and it was once holden that if a defendant had two gowns the sheriff might

sell one of them; Comb. 356. But in mod-

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em times, with perhaps a prodigal liberality, a considerable amount of property, both real and personal, is exempted from execution by the statutes of; the Bi states; L9 Am. L. Keg. 1; 4 So. L. Rev. N. s, 1; In re Radway, 3 Hughes 609, Fed. Oas. No. 11,523; Carlton v. Watts, 82 N. C. 212; Mapp v. Long, 62 Ga. 568; Singletary v. Singletary, 31 La. Ann. 374; Rutledge v. Rutledge, 8 Bax. (Tenn.) 33; Creath v. Dale, 69 Mo. 41; Vandeshorst v. Bacon, 38 Mich. 669, 31 Am. Rep. 32 S ; Murphy v. Harris, 77 Cal. 194, 19 Pac. 377 ; In re Robb, 99 Cal. 202, 33 Pac. 890, 37 Ani. St. Rep. 48; Carter v. Davis, 6 Wash. 327, 33 Pac. 833; Bean v. Ins. Co., 54 Minn. 366, 56 N. W. 127; Hamberger v. Marcus, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719; and there is now hardly a state or nation which has not by statute made certain exemptions designed as a protection for the family ; Woodward v. Murray, 18 Johns. ' (N. Y.) 403; and such statutes are to be liberally construed; Butner v. Bowser, 104 Ind. 259, 3 N. E. 889; Kuntz v. Kinney, 33 Wis. 510 ; Good v. Fogg, 01 111. 449, 14 Am. Rep. 71 ; Carty v. Drew, 4(5 Yt. 346; Allison v. Brookshire, 38 Tex. 199; Seeley v. Gwillim, 40 Conn. 100. Some of the exemptions are the following: household furniture; Towns v. Pratt, 33 N. II.

345, 66 Am. Dec. 726 ; *Tanner v. Billings*, 18 Wis. 163, 86 Am. Dec. 755; *Dunlap v. Edgerton*, 30 Vt. 224 ; *Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480 ; *Ileidenheimer v. Blumenkron*, 56 Tex. 308; tools of trade; *Atwood v. De Forest*, 19 Conn. 513 ; *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430 ; *Boston Belting Co. v. Ivens & Co.*, 2S La. Ann. 695 ; *Wicker v. Comstock*, 52 Wis. 315, 9 N. W. 25; work horses; *Tishomingo Sav. Inst. v. Young*, 87 Miss. 473, 40 South. 9, 3 L. R. A. (N. S.) 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776; *Forsyth v. Bower*, 54 Cal. 639; *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476 ; *Steele v. Lyford*, 59 Yt. 230, S Atl. 736 (but this will not include high bred horses used for pleasure and to drive to and from business; *Tishomingo Sav. Inst. v. Young*, 87 Miss. 473, 40 South. 9, 3 L. R. A. [N. S.] 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776) : the interest of a legatee in lauds, until the court has held it to be a charge on such, although the legacy is given with a view that it shall be such a charge ; *Hiscock v. Fultou*, 63 Hun 621, 17 N. Y. Supp. 408; curtesy initiate ; *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; property held in trust; *Mosher v. Neff*, 33 Neb. 770, 51 X. W. 138; the bridge of a public corporation; *Overton Bridge Co. v. Means*, ::; Neb, 857, 51 X. W. 2P>, 29 Am. St. Rep. 514; blackberries while growing; *Sparrow v. Pond*, 19 Minn. 412, 52 N. W. 36, 16 L. R. A. 103, 32 Am. St. Hep. 571; trade-mark, apart from the articles it has served to identify; *Prince Mfg. Co. v. Paint Co.*. 20 X. Y. Supp. 462; a vendor's lieu reserved for the purchase price Bouv.— 73

of lands conveyed; *Willis & Bro. v. - inervill Civ. App.* '■■ 9, 22 - ; W.

the interest of a ccatui under a

trust Tor main I l support ; Bn

v. Raynolds, 59 Fed. 92; a. :;7"; U

interest of the grantor in property trail
ferred in fraud of cred v.

Perkins, MI X. Y. l, 35 N. I
emption laws are inapplicable I

i citizen to the Onib
Howell, 9 Fed. 674,
rj. S. 280, 1 Sup. i

Exemption laws are not a pan •
tract; they are part of the remedy and sub-
ject to the law of the forum ; I I.
& P. Ry. Co. v. Sturm. 174 F. S. 710, 17 S
Ct. 797, 43 L. Ed. 1 1 1 I : Mineral Point R.
Co. v. Barron, 83 111. 365 : Carson v. 1:
S8 Tenn. 646, 13 S. W. 588, 8 L. R. A. 412, 17
Am. St. Rep. 921; Conley v. Chilcote, S,
Ohio St. 320; Albrecht v. Treitschke, 17 Neb.
205, 22 N. W. 418; Moore v. R. Co., 43 la.
385; Broadstreet v. Clark, 65 la. '7<>. 22 N.
W. 919; Stevens v. Frown, 20 W. \a. 4:.".
That a debt is exempt from judicial pr<
in the state where it was created will not
make it exempt in another jurisdiction. The
exemption does not follow the debt as an
incident thereto ; Chicago, R. I. & P. Ry. Co.
v. Sturm, 174 U. S. 710, 17 Sup. Ct. m, 4:;
L. Ed. 1144.

See, generally, Bankruptcy ; Distress ;
Execution ; Homestead ; Family ; Tools ;
Tax.

EXEMPTS. Persons who are not bound
by law, but excused from the performance
of duties imposed upon others.

By act of congress Feb. 24, 1864, it was enacted
that such persons as were rejected as physically or
mentally unfit for the service, all persons actually
in the military or naval service of the United Stat. -

at the time of the draft, and all persons who had served in the military or naval service two years during the then war and been honorably discharged therefrom, and no others, were exempt from enrolment and draft under said act, and act of congress. March 3, 1SG3.

EXEQUATUR (Lat). In French Law.

A Latin word which was, in the ancient practice, placed at the bottom of a Judgment emanating from another tribunal, and was a permission and authority to the officer to execute it within the jurisdiction of the jud.L'e who put it below the judgment

We have something of the same kind in our practice. When a warrant for the arrest of a criminal is issued by a justice of the peace of one county, and he flies into another, a justice of the county may indorse the warrant, and then the ministerial officer may execute It in such county. This is called backing a warrant.

In International Law. An official receipt of a consul or commercial agent made by the foreign department of the state to which he is accredited, authorizing him to exercise his power. He cannot act without it, may be refused or revoked at the pleasure of the same government 3 Chit. Com. Law 56; 3 M. & S. 290; 5 Pardessus,

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EXHIBIT

n. 1445 ; Twiss, Law of Nations ; 1 Halleck, Int. Law 351.

EXERCITOR MARIS (Lat). In Civil Law. One who fits out and equips a vessel, whether he be the absolute or qualified owner, or even a mere agent. Emerigon, Mar. Loans, c. 1, s. 1. We call him exercitor to whom all the returns come. Dig. 14. 1. 1. 15; 14. 1. 7; 3 Kent 161; Molloy, de Jur. Mar. 243.

The managing owner, or ship's husband. These are the terms in use in English and American laws, to denote the same as exercitor maris. See Ship's Husband.

EXERCITORIA ACTIO (Lat). In Civil Law. An action against a managing owner {exercitor maris), founded on acts of the master. 3 Kent 161 ; Vicat, Voc. Jur.

EXFESTUCARE (Lat). To abdicate; to resign by passing over a staff. Du Cange. To deprive one's self of the possession of lands, honors, or dignities, which was formerly accomplished by the delivery of a staff or rod. Said to be the origin of the custom of surrender as practised in England formerly in courts baron. Spelman, Gloss. See also, Vicat, Voc. Jur. ; Calvinus, Lex.

EXH/EREDATIO (Lat). In Civil Law. A disinheriting. The act by which a forced heir is deprived of his legitimate or legal portion. In common law, a disherison. Occurring in the phrase, in Latin pleadings, ad exliwredationem (to the disherison), in case of abatement

EXH/ERES (Lat). In Civil Law. One disinherited. Vicat, Voc. Jur.; Du Cange.

EXHIBERE (Lat). To present a thing corporeally, so that it may be handled. Vicat, Voc. Jur. To appear personally to

conduct the defence of an action at law.

EXHIBIT. To produce a thing publicly, so that it may be taken possession of and seized. Dig. 10. 4. 2.

To file of record. Thus, it is the practice in England in personal actions, when an officer or prisoner of the king's bench is defendant, to proceed against such defendant in the court in which he is an officer, by exhibiting, that is, filing, a bill against him. Steph. Pl. 52, n. {I}; 2 Sellon, Pr. 74; Newell v. State, 2 Conn. 38.

A paper or writing proved on motion or other occasion.

A supplemental paper referred to in the principal instrument, identified in some particular manner, as by capital letter, and generally attached to the principal instrument. 1 Stra. 674; 2 P. Wms. 410; Gresl. Eq. Ev. 98.

A paper referred to in, and filed with the bill, answer, or petition in a suit in equity, or with a deposition. Brown v. Redwyne, 16 Ga. 68.

In the absence of a positive statutory provision, exhibits properly identified need not

be attached to the deposition in connection with which they are offered in evidence; Toby v. R. Co., 98 Cal. 490, 33 Pac. 550. It has been held that the exhibits filed with a petition form no part thereof, and cannot be considered in determining its sufficiency on demurrer; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19 ; and if the exhibit is not the foundation for the cause of action or of the defence, it will not be considered ; Barnes v. Mowry, 129 Ind. 568, 28 N. E. 535.

Documents and other things, produced by a witness on cross-examination and marked for identification, are not before the court unless offered and admitted ; *Byerley v. Sun Co.*, 181 Fed. 138.

EXHIBITANT. A complainant in articles of the peace. 12 Ad. & E. 599.

EXHIBITION. In Scotch Law. An action for compelling the production of writings. See *Discoveey*.

EXHUMATION. The exhumation of a body should be ordered, if at all, only on a strong showing that, without its examination, a fraud is likely to be accomplished which an insurance company has exhausted every other legal means of exposing; *Granger's Life Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446. Disinterment may be compelled by public authorities whenever conditions become such as that the public health is threatened, or in the interest of justice; *Gray v. State*, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; or for the purpose of ascertaining whether a crime has been committed ; *People v. Fitzgerald*, 105 N. Y. 146, 11 N. E. 375, 59 Am. Rep. 483 ; or where an examination may disclose facts which prove an accused person innocent of crime; *Gray v. State*, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

Such an order was refused in *Moss v. State*, 152 Ala. 30, 44 South. 598, because it appeared that two reputable physicians, available at the trial, had examined the body before burial. There is said to be no law requiring a court, at the prisoner's request, but at the expense of the state, to order the body to be exhumed in order to furnish him with evidence; *Salisbury v. Com.*, 79 Ky. 425. In *Com. v. Grether*, 204 Pa. 203, 53 Atl. 753, the court refused to set aside a convic-

tion of murder in the first degree because the district attorney and not the coroner had caused the body to be exhumed. In an insurance case, exhumation was ordered, to obtain evidence bearing on the question of suicide ; the marshal was directed to exhume the body and the court appointed a pathologist and a chemist to make the examination ; it was held, also, that such order could be made only in a case where the widow was a party ; *Mutual Life Ins. Co. of New York v. Griesa*, 156 Fed. 398. The right to make the order, in an insurance case, was recognized in *People v. Fitzgerald*, 105 N. Y. 146, 11 N.

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E. 378, 59 Am. Rep. 483; *Grangers Life Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 440; but in the latter case the order was refused on the ground of delay. See 22 L. R. A. (N. S.) 513, note.

EXIGENDARY. In English Law. An officer who makes out exigents.

EXIGENT, EXIGI FACIAS. See Outlawry; *Cora. v. Hagerman*, 2 Va. Gas. 244; *Fit/h. N. B.* 23G; *Rawle, Exmoor* 55. See *Appeal of Coleman*, 75 Pa. 450.

EXIGENT LIST. A phrase used to indicate a list of cases set down for hearing upon various incidental and ancillary motions

and rules.

EXIGENTER. An officer who made out exigents and proclamations. Cowell. The office is now abolished. Holthouse.

EXIGIBLE. Demandable; that which may be exacted.

EXILIUM (Lat). In Old English Law. Exile. Setting free or wrongly ejecting bond-tenants. Waste is called exilium when bondmen (servi) are set free or driven wrongfully from their tenements. Co. Litt. 536. Destruction; waste. Du Cange. Any species of waste which drove away the inhabitants, into exile, or had a tendency to do so. Bac. Abr. Waste (a) ; 1 Reeve, Hist. Eng. Law 386.

EX IST IM ATI (Lat). The reputation of a Roman citizen. The decision of arbiters.

Vicat, Voc. Jur.; 1 Mackeldey, Civ. Law § 123.

EXISTING. The force of this word is not necessarily confined to the present. Thus a law for regulating "all existing railroad corporations" extends to such as are incorporated after as well as before its passage, unless exception is provided in their charters; Indianapolis & St. L. R. Co. v. Blackraan, 03 111. 117; Lawrie v. State, 5 Ind. 525 ; Fox v. Edwards, 38 Ia. 215.

EXIT WOUND. The wound made in coming out by a weapon which has passed through the body or any part of it 2 Beck. Med. Jur. 119.

EX IT US (Lat.). An export duty. Issue, child, or offspring. Rent or profits of land.

In Pleading. The issue or the end, ter-

minal ion or conclusion, of the pleadings; so called because an issue brings the pleadings to a close. 3 Bla. Cora. 314.

EX LEX (Lat.). An outlaw. Spelraan, Gloss.

EXOINE. In French Law. An act or instrument in writing which contains the reasons why a party in a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. Pothier, l'rocCd. Crini., s. 3, art. 3. See Essoin.

EXONERATION. The taking off a burden or duty. The usual use of the word is in the rule in the distribution of an Intest estate that the debts which he himself contracted and for which he mortgaged his land as security, shall be paid out of the real estate in exoneration of the real.

But when the | with

the payment of a mortgage on the tin.

Intestate buys it, and the purchase made

subject to it, the personal estate is not in that case to be applied in exoneration of the real estate; 2 Pow. Mortg. 780; Hurt v. Reeves, 5 Hayw. (Tenn.) 57; Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. V. I. 229, 8 Am. Dec. 492; 1 n. *64G; Appeal of Birst, 92 Pa. 49L

But the rule for exonerating the real estate out of the personal does not apply against specific or pecuniary legatees, nor the widow's right to paraphernalia, and, with reason, not against the interest of others; 2 Ves. 64; 1 P. Wins. 693; 3 id. 367. See 26 Beav. 522; Appeal of Clery. 35 Pa.

54; *Canfield v. Bostwick*, 21 Conn. 55a

Like the right of contribution between those equally liable for the same debt, the right of exoneration exists between debtors successively liable. A surety who discharges an obligation is entitled to look to the principal for reimbursement, and to invoke the aid of a court of equity for this purpose and a subsequent surety, who, by the terms of the contract, is responsible only in the case of the default of the principal and a prior surety, may claim exoneration at the hands of either; *Bisph. Eq. § 331*; 3 *Pom. Eq. Jur. § 1416*.

As to exoneration of simple contract debts, see 1 *Sm. L. Cas.*, 9th Am. ed. 614.

EXONERATUR (Lat.). In Practice. A short note entered on a bail-piece, that the bail is exonerated or discharged in consequence of having fulfilled the condition of his obligation, made by order of the court or of a judge upon a proper cause being shown. See *Recognizance*.

EXPATRIATION. The voluntary act of abandoning one's country and becoming the citizen or subject of another.

The right of expatriation is the right of a person to transfer his allegiance from the country of which he is a citizen to another country.

This right has been much discussed. The question has been settled in the United States by the act of July 27, 1868, which declares the right of expatriation to be the inherent right of all people, disavows the claim made by foreign states that naturalized American citizens are still the subjects of such states, and extends to such naturalized citizens, while in foreign countries, the same protection accorded to native-born citizens.

K. s. §s v.'t'.>. 2000. Tins declaration comprehends our own citizens as well as those of

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other countries ; 14 Op. Att'y. Gen. 295. Since the passage of this act, the United States has entered into treaties with nearly all the nations of Europe by which the contracting powers mutually concede to subjects and citizens the right of expatriation on conditions and under qualifications. And in case of conflict between the above act of congress and any treaty, it would seem the treaty must be held paramount; Morse, Citizenship § 179. See Treaty. To be legal, the expatriation must be for a purpose which is not unlawful nor in fraud of the duties of the emigrant at home.

Most foreign governments permit their citizens to become naturalized in other countries, but generally upon condition of the prior fulfilment of military service. Hershey 243-244. In Switzerland the consent of the canton is required, and a like rule exists in Japan; Meilli, Intern. C. & C. 121.

A citizen may acquire in a foreign country commercial privileges attached to his domicil, and be exempted from the operation of commercial acts embracing only persons resident in the United States or under its protection. See Dohictl; Naturalization.

See also Miller, Const. U. S. 255, 297 ; Murray v. The Charming Betsy, 2 Cra. (U. S.) 120, 2 L. Ed. 208; 2 Kent 36; Grotius, b. 2, s. 5, s. 24; Puffendorff, b. 8, c. 11, ss. 2, 3; Vattel, b. 1, c. 19, ss. 218, 223, 224, 225 ; U. S. v. Gillies, 1 Pet. C. C. 161, Fed. Cas. No. 15,-200 ; Ainslie v. Martin, 9 Mass. 461 ; 21 Am. L. Reg. 77 ; 11 id. 447 ; 3 Can. L. T. 463, 511 ; 25 Law Mag. & Rev. 124 ; Lawrence's Wheat. Int. L. 891.

By act of March 2, 1907, a citizen who is naturalized in any foreign state is expatriated; also a naturalized citizen who has resided two years in his native state or five years in any other foreign state, except upon presenting satisfactory evidence to a diplomatic or consular agent under the rules of the state department, and no citizen can be expatriated in time of war.

A Pennsylvania court, following her constitution framed by Franklin, first declared the right of expatriation an original and indefeasible right of man. Baldwin's Modern Political Institutions 241, citing Murray v. McCarty, 2 Munf. (Va.) 393; Wharton's State Trials 652.

For the doctrine of the English courts on this subject, see 1 Barton, Conv. 31, note; Vaugh. 227, 281 ; 7 Co. 16 ; Dy. 2, 224, 298 &, 300 b; 2 P. Wms. 124; 1 Hale, Pl. Cr. 68; 1 Wood, Conv. 382; Westl. Priv. Int. Law; Story, Confl. Laws; Cockburn, Nationality. See Alien; Naturalization.

EXPECTANCY. Contingency as to possession. That which is expected or hoped for. Frequently used to imply an estate in expectancy.

Estates are said to be in possession when the person having the estate is in actual enjoyment of that in which his estate subsists, or in expectancy,

when the enjoyment is postponed, although the estate or interest has a present legal existence.

A bargain in relation to an expectancy is» in general, considered invalid, unless the proof of good faith is strong ; 2 Ves. 157 ; 1 Bro. C. C. 10; Jeremy, Eq. Jur. 397; McCall's Adm'r v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335.

But it is well settled in equity that a deed which purports to convey property, which is in expectancy or to be subsequently acquired, or which is not the subject of grant at law, though inoperative as a grant or conveyance, will be upheld as an executory agreement, and enforced according to its intent, if supported by a valid consideration, whenever the grantor is in a condition to give it effect; per Strong, J., in Bayler v. Com., 40 Pa. 37, 43, 80 Am. Dec. 551; Varick v. Edwards, 11 Paige (N. Y.) 290; McWilliams v. Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654; Bailey v. Hoppin, 12 R. I. 560, 508 ; 10 H. L. Cas. 189, 211 ; East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96 ; Ruple v. Bindley, id. 296 ; Fritz's Estate, 160 Pa. 156, 28 Atl. 642 ; Hudson v. Hudson, 222 111. 527, 78 N. E. 917 ; Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819; Betts v. Harding, 133 Ia. 7, 109 N. W. 1074 ; Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748. So it is said that an estate in expectancy, though contingent, is a fair subject of contract, and an agreement by an expectant heir in respect thereto, fairly made upon valuable considerations, will be enforced in equity; Parsons v. Ely, 45 111. 232; Varick v. Edwards, 1 Hoffm. Ch. (N. Y.) 382; McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434; a mere agreement to appropriate the money when received from a legacy will not operate as an assignment of it; Appeal of Wylie, 92

Pa. 196. An executory agreement between the husbands of two expectant legatees to divide equally what should be left to either of them has been enforced; 2 P. Wms. 182; 2 Sim. 183. Such assignments are prohibited by statute in California ; Cal. Civ. Code 700, 1045 ; In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437 ; and in Louisiana ; Succession of Jacobs, 104 La. 447, 29 South. 241; and in some states have been held unenforceable; thus an attempted conveyance by heirs-apparent of their interest in the property of an ancestor, even with the latter's consent, has been held void; Wheeler's Ex'rs v. Wheeler, 2 Mete. (Ky.) 474, 74 Am. Dec. 421; McCall's Adm'r , v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 206, 56 Am. St. Rep. 335 ; on the ground that it is essential to the legal validity of the thing sold that it have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of a sale or assignment; Spears v. Spaw, 118 S. W. 275, 25 L. R. A. (N. S.) 436; and

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on the ground that, as no one can be the heir of a living person, a transaction based on the idea of a future right to the succession of a living person is devoid of <■■■
eration and can have no effect, notwithstanding the agreement is valid under the law of

a foreign state where it was made ; *Cox v. Von Ahlefeldt*, 105 La. 543, 30 South. 175.

An assignment without consideration by a married woman of an expectant interest in her father-in-law's estate, which was contingent upon her surviving her husband, in order to secure her husband's indebtedness, is not valid at law, although, when based upon a sufficient consideration, it might be enforced in equity when the interest became vested in the assignor ; *In re Baeder's Estate*, 224 Pa. 452, 73 Atl. 915; and see, to the same effect, *Bayler v. Com.*, 40 Pa. 37, 80 Am. Dec. 551.

That a grant by an expectant is simply a covenant to convey ; 1 P. Wms. 357 (Lord Chancellor Hardwicke) ; *McDonald v. McDonald*, 58 N. C. 211, 75 Am. Dec. 434; and that chancery will give effect to the assignment of an expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance as soon as the assignor has the power to perform it; are held too well established to be disregarded; *McDonald v. McDonald*, 58 N. C. 211, 75 Am. Dec. 434; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. 366, 3 Am. Rep. 596. Such a sale may be enforced as against the heir through the doctrine of estoppel springing from his covenants contained in the deed of assignment; *Johnson v. Johnson*, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748, citing *Steele v. Frierson*, 85 Tenn. 430, 3 S. W. 049; *Bohon v. Bohon*, 78 Ky. 408; *Somes v. Skinner*, 3 Pick. (Mass.) 52; *Robertson v. Wilson*, 38 N. H. 48; *House v. McCormick*, 57 N. Y. 310; *Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182; followed and approved; *Jerauld v. Dodge*, 127 Ind. 600, 25 N. E. 186; *Fairbanks v. Williamson*, 7 Greenl. (Me.) 96; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84; *Rosenthal v. Mayhugh*, 33 Ohio St 155.

The general doctrine is undoubtedly to

treat such an assignment as a contract enforceable in equity, but Pomeroy considers it inadequate ; 3 Pom. Eq. Jur. § 1257, n. 2 ; and prefers the theory that it is an actual transfer of the ownership of an equitable property right which ripens into an absolute title ; id. § 1271.

Equity will, in general, relieve a party from unequal contracts for the sale or pledge of expectancies, as they are in fraud of the ancestor. See 2 P. Wms. 152; 2 Sim. is.;. 192; 5 id. 524; 1 Sto. Eq. Jur. § 342. But relief will be granted only on equitable terms; for he who seeks equity must do equity ; id.

In dealing with such cases, the rule applied by courts of equity is, as laid down in *Chesterfield v. Janssen*, to scrutinize them

carefully according to the circumstances of each; 2 Ves. Sr. 125; and, if upon inadequate consideration, or otherwise fraudulent, they will be relieved against and wholly or partially set aside; id.; 1 L. Cas. in Eq. 77::; 2 Pom. Eq. Jur. § 953, and note, where the cases are collected.

In a leading English case the principle is thus stated: "The court will relieve 'expectant heirs' against bargains relating to their reversionary or expectant Interest in cases of undervalue, of weakness due to or poverty, and of the absence of independent advice. But all these circumstances must co-exist in order to entitle them to relief ;" L. R. 8 Ch. 484. In that case it was held that the repeal of the usury laws in England has not altered the doctrine by which the court of chancery affords relief against improvident and extravagant bargains. In the opinion Lord Selborne directed attention to the fact that concealment was

usually a feature of these cases, but agreed with Lord St Leonards that it was not an indispensable condition of equitable relief; Sugd. Vend. & Pur., 11th ed. 310; dii: as to this point, with Lord Brougham ; '1 Myl. & K. 456. The independent advice of a father seems to rebut the presumption of fraud; 2 App. Cas. 814; but old age or youth increases it; 2 Giff. 157; 4 D. J. & S or poverty and ignorance; L. R. 10 CL 40 Ch. D. 312. In the first of those two cases, Jessel, M. R., thus defined the term "expectant heir" : "The phrase is used not in its literal meaning, but as including one who has either a vested remainder, or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason, merely, of the expectation of a devise or bequest on account of the services, or presumed affection of his ancestor or relation. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen. So that the doctrine not only included the class mentioned, who in some popular sense might be called 'expectant heirs,' but also all remaindermen and reversioners."

The principle has been held to include younger sons of peers; 15 Ch. D. 679. As to what is a reversionary interest for this purpose, see 11 Eq. 265, 276; L. R. 10 CL - 542; and as to what is independent advice, see 10 Eq. 641, in which the borrower, though accompanied by a friend who was a solicitor but did not act as such, or know the terms of the contract, was held not to have independent advice.

Undervaluation is not alone a sufficient ground for | aside a contract, convey-

ance, or mortgage of a reversion, otherwise

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fair; Stat. 31 Vict. c. 4; 2 Ch. Cas. 13G; 35 Beav. 570; 32 L. J. Ch. 201.

By the civil law, such contracts are held *contra bonos mores*, and they are forbidden in general terms; Code 2, 3, *de pactis* 30; and in the French code it is forbidden to sell the succession of a living person, even with his consent; art. 1600; the same is the rule of the Italian code; art 1460; and of that of Austria ; § 879.

As to expectancy of life, see Life Tables.

See, generally, 2 Lead. Cas. in Eq., 4th Am. ed. 1530, 1559, 1605; 3 Pom. Eq. Jur. ch. 8, sec. 3; Brett, L. Cas. Mod. Eq. 3d ed. 69, n. ; 9 Harv. L. Rev. 476 ; Catching Babgain ; Post Obit.

EXPECTANT. Contingent as to enjoyment.

EXPEDITATION. A cutting off the claws or ball of the fore-feet of mastiffs, to prevent their running after deer ; a practice for the preservation of the royal forests. Cart, de For. c. 17; Spelman, Gloss.; Cowell. See Cotjbt of Regabd.

EXPENDITORS. Paymasters. Those who expend or disburse certain taxes. Especially the sworn officer who supervised the repairs of the banks of the canals in Romney Marsh. Cowell.

EXPENS/E LITIS (Lat). Expenses of the suit; the costs, which are generally allowed to the successful party.

EXPERTS (Lat experti, instructed, proved by experience). Persons selected by the court or parties in a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinions. Merlin, Rupert.

Witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue.

Persons professionally acquainted with the science or practice in question. Strickl. Ev. 408. Persons conversant with the subject-matter on questions of science, skill, trade, and others of like kind. Best, Ev. § 346.

The qualification of a witness as an expert is largely within the discretion of the trial judge; *Mutual Fire Ins. Co. of New York v. Alvord*, 61 Fed. 752, 9 C. C. A. 623; *Ballard v. R. Co.*, 126 Pa. 141, 19 Atl. 35; *Sloevich v. Ins. Co.*, 108 N. Y. 61, 14 N. E. 802; *City of Fort Wayne v. Coombs*, 107 Ind. 84, 7 N. E. 743. Such a witness may be asked whether the examination made by him was superficial or otherwise; *Northern Pac. R. Co. v. Umlin*, 158 U. S. 271, 15 Sup. Ct. 840, 69 L. Ed. 977; he need not be engaged in his profession, it is sufficient that he has studied it; *Tullis v. Kidd*, 12 Ala. 648.

Dealers in precious stones are not competent to testify to the uses of imitation precious stones; *Lorsch v. U. S.*, 119 Fed. 476.

One who has been a practicing physician for

eight years is competent to testify as an expert whether a death was caused by arsenic, though he never had a case of arsenical poisoning; *State v. Kammel*, 23 S. D. 465, 122 N. W. 420.

Experts alone can give an opinion based on facts shown by others, assuming them to be true; *State v. Potts*, 100 N. C. 457, 6 S. E. 657.

"It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better understand and appreciate it than the jury ; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study and experience may be supposed to have more skill and knowledge than jurors of average intelligence may generally be presumed to have ; " *Ferguson v. Hubbell*, 97 N. Y. 511, 49 Am. Rep. 544 ; and not only may they testify to facts but they may give their opinions on them as experts ; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 429, 24 N. E. 179. The practical result of the rule admitting such testimony is far from satisfactory ; its principal defect being that such witnesses are usually called because their known theories are understood to support the fact which the party calling them wishes to prove ; *Grigsby v. Water Co.*, 40 Cal. 405. "They come," says Lord Campbell, speaking of scientific witnesses, "with a bias on their minds to support the cause in which they are embarked, and hardly any weight should be given to their evidence ; " 10 Cl. & F. 154. It is said to be generally safer to take the judgments of unskilled jurors than the hired and biassed opinions of experts ; *Ferguson*

v. Hubbell, 97 N. Y. 511, 49 Am. Rep. 544.

A jury is not bound by the opinions of experts on an issue of insanity ; U. S. v. Chisholm, 149 Fed. 284 ; Mitchell v. State, 6 Ga. App. 554, 65 S. E. 326 ; but should form their own judgment from all the proof in the case ; U. S. v. Chisholm, 153 Fed. 808. It has been said that they "are generally mere arguments in behalf of the side calling them" ; Ideal Stopper Co. v. Seal Co., 131 Fed. 249, 65 C. C. A. 436; and such testimony is frequently characterized by the courts as of little value; American Middlings Purifier Co. v. Christian, 3 Bann. & A. 42, Fed. Cas. No. 307; King v. Cement Co., 6 Fish. 336, Fed. Cas. No. 7,798 ; L. R. 6 Ch. Div. 415, n.

On the other hand, the necessity of such testimony in certain classes of cases, particularly those involving patent law, is thus set forth in 3 Rob. Pat. § 1012:

"Notwithstanding the strictures passed upon expert testimony by many jurists on each side of the Atlantic, and the truth of the assertions by which these censures have been justified, it is still certain that in most patent cases expert evidence is, and must always be, indispensable. That the expert is consulted before he is summoned as a witness ; that when his opinion is unfavorable to the party who consults him he is not produced in court, at least

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on that side of the case ; that when called as a witness his testimony is expected to support, and generally does support, the claims of the liti. whose behalf he is presented,— are no doubt true ; but this is only what occurs in every other trial where counsel have properly prepared their case. The error lies with those who ascribe judicial functions to the patent-expert, and demand of him such freedom from partisanship as the exercise of judicial powers requires. That there are experts in other departments of affairs upon whose opinion the court is forced to rely as the foundation of its own judgments, because incapable of forming an opinion for itself, and that such experts consequently fill the places of judges and should be beyond the influence and control of parties, must be conceded. But such is not the case with patent-experts, whose opinion is received in evidence only in connection with the reasons on which it is based, and is to be accepted or rejected by the jury according to their own view of its fallacy or truth. The patent-expert, considered in his real character, is an explorer, gifted with unusual powers of discernment and apprehension ; a chronicler, trained to preserve the recollection of the essential attributes of things ; an expositor, fitted to embody those essential attributes in accurate and intelligible language ; a monitor, able to suggest the conclusions which follow from the premises he has described. His relation to the jury is not unlike that which counsel sustain to the court, as guides to a correct decision of the issues severally confided to their judgments,— the one pointing out facts and applying them in support of the claims advanced by his employer, as the other produces his authorities and applies them to the maintenance of his claims of law."

Such assistance, it is suggested, it would not be wise in any tribunal to undervalue or reject ; 3 Rob. Pat. § 1012.

The fact that the opinions of experts in patent cases are often diametrically opposite does not necessarily discredit their testimony but merely emphasizes the fact that

their opinions are to be regarded as opinions, merely, and a decision rendered between them; *Conover v. Roach*, 4 Fish. 12, Fed. Cas. No. 3,125. A patent expert is in effect an "auxiliary counsel" who argues upon the law and the facts; *Steam-Gauge & Lantern Co. v. Mfg. Co.*, 28 Fed. G18.

The practice of introducing a large number of expert witnesses in patent causes is not to be commended, one competent witness on each side being usually sufficient to insure a full and fair elucidation of what is recondite in the case; *American Stove Co. v. Foundry Co.*, 15S Fed. 978, 86 C. C. A. 1S2. While expert evidence is not conclusive on the jury ; *Many v. Sizer*, 1 Fish. 17, Fed. Cas. No. 9,05G ; and is to be judged by the same standards as ordinary evidence; *May v. Fond du Lac County*, 27 Fed. 691; *Carter v. Baker*, 4 Fish. 404, Fed. Cas. No. 2,472, 1 Sawyer 512; *Page v. Ferry*, 1 Fish. 298, Fed. Cas. No. 10,662; and to be accorded by the jury such weight as they see fit; *Johnson v. Koot*, 1 Fish. 351, Fed. Cas. No. 7,411; *Allen v. Hunter*, McLean 303, Fed. Cas. No. 225; *Brooks v. Jenkins*, 3 McLean 432, Fed. Cas. No. 1,-953; it is nevertheless of great value in patent cases; *French v. Rogers*. 1 Fish. 133, Fed. Cas. No. 5,103; *Carr v. Rice*, 1 Fish. i9S, Fed. Cas. No. 2,440; *Morris v. Barrett*, I Fish. 461, Fed. Cas. No. 9,827; *Parker v.*

Stiles, 5 McLean 44, Fed- Cas. No. II
Allen v. Limit. :: Sto. 742 , JIM;

Brooks v. Jenkins, 3 McLean 432, Fed. Cas. No. 1,953.

It has been held that, without explanatory evidence, the defense of anticipation will not be considered in a patent ease, where it is supported by priur patei machinery; *Bell v. MacKinnon*, 148

7'J C. C. A. 163.

The value of such testimony depends upon the skill, not the number; Blatchford v. Burroughs, 175 U.S. 513, 4 McLean 70, Fed. Cas. No. 1,946; and is to be measured by their respective qualifications. Q. S.

Annunciator v. Sanderson, 3 Blatchf. 184, Fed. Cas. No. 16,790; Whipple v. Baldwin Mfg. Co., 4 Fish. 29, Fed. Cas. No. 17,514; Parhain v. American Mfg. Co., 4 Fish. 468, Fed. Cas. No. 10,713.

There are said to be two classes of patent experts, scientific and mechanical, each having a distinct sphere. The scientific expert is one familiarized by his studies and experiments with the principles of a science and qualified to understand, distinguish, and explain the subject-matter and application thereto of such science. His services are invoked to determine the character and scope of an invention with reference to the condition of the art at the date of its production. His testimony is directed to the question whether the alleged invention is the result of an inventive act; whether it embraces a different invention or is substantially the same in principle, function, or effect with any other. The mechanical expert represents the skilled workman in his art, who by practical training in it could comprehend and apply to it various instruments and methods. His evidence will bear upon the defence of want of novelty, prior patent, inutility of the invention, or ambiguity of the description in the specification of the patent. One person may appear in both capacities. 3 Rob. Pat. § 1013. See Curt. Pat. § 479.

Expert testimony is admissible upon questions for the court as well as upon those for the jury, where it can be properly applied to the subject-matter of the question as the construction of the patent and whether a

prior patent covers the same invention; ".
Rob. Pat § 1014. In dealing with sue!
tions the court is at liberty to admit expert
evidence, but cannot be compelled to i
and it is not error to refuse it; Id.; Day v.
Btellman, 1 Fish. 487, Fed. «
Winans v. R. Co.. 21 Bow. (U. S.) 88, 16 L.
Ed. 68

The opinions of experts are admissible to
prove insanity; U. S. V. Chlsholm, 153

to prove indebtedness by the general re-
sults shown by books of account; Brown v.
I. S., 11- Fed. 1. 73 C. C. A. 1S7; to show
whether a writing is genuine or disguised;
Pinker v. U. S., 151 Fed. 755, 81 O. C. A.
379; or whether a child had passed through

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the full period of gestation based upon the
appearance of the child at the age of 13
months ; People v. Johnson, 70 111. App. 634 ;
or the cause of a death from facts stated by
other witnesses and without personal exami-
nation; State v. Kammel, 23 S. D. 465, 122
N. W. 420 ; but such evidence is inadmissible
to destroy the plain and obvious meaning of
a contract where the words used are plain
and unambiguous; Bowers Dredging Co. v.
U. S., 211 U. S. 176, 29 Sup. Ct. 77, 53 L. Ed.
136; nor is it admissible upon the question
of damages; Lincoln v. R. Co., 23 Wend.

(N. Y.) 425; *Bain v. Cushman*, 60 Vt 343, 15 Atl. 171 ; *Chandler v. Bush*, 84 Ala. 102, 4 South. 207; nor as to whether they were caused by negligence; *East Tennessee, V. & G. R. v. Wright*, 76 Ga. 532; *International & G. N. Ry. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58; *Hankins v. Watkins*, 77 Hun 360, 28 N. Y. Supp. 867. See Opinion. It has been a matter of grave discussion whether an expert is bound to testify on matters of opinion without extra compensation, the weight of decisions being that he is not bound to do so ; 1 C. & K. 25; *Ex parte Roelker*, *Sprague* 276, Fed. Cas. No. 11,995; *Dills v. State*, 59 Ind. 15; *Clark County v. Kerstan*, 60 Ark. 50S, 30 S. W. 1040 ; contra, *Ex parte Dement*, 6 Cent. L. J. 11; *U. S. v. Cooper*, 21 D. C. 491; *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75 ; *Dills v. State*, 59 Ind. 15; 6 So. Law Rev. 706. In the absence of statutory authority, an expert for the state cannot demand extra compensation, at least when not compelled to make any preliminary examination or preparation, or to attend and listen to the testimony; *Flinn v. Prairie County*, 60 Ark. 204, 29 S. W. 459, 27 L. R. A. 009, 46 Am. St. Rep. 168 ; and when no demand is made in advance for special compensation, he can recover only the statutory witness fees; *Board of Com'rs of County of Larimer v. Lee*, 3 Colo. App. 177, 32 Pac. 841; *Tiffany v. Iron Works*, 59 Misc. 113, 109 N. Y. Supp. 754. When an expert is required to make a preliminary examination or to prepare specially for his testimony, he is allowed extra compensation in addition to the ordinary witness fees; *Keller v. Harrison*, 151 Ia. 320, 128 N. W. 851, 131 N. W. 53, Ann. CaS. 1913A, 300 ; *Gordon v. Conley*, 107 Me. 286, 78 Atl. 365, 33 L. R. A. (N. S.) 336; *Burnett v. Freeman*, 125 Mo. App. 683, 103 S. W. 121; *Schofield v. Little*, 2 Ga. App. 286, 58 S. E. 666; *Philler v. Waukesha County*, 139 Wis. 211, 120 N. W. S29, 25 L. R. A. (N. S.) 1040, 131 Am. St. Rep. 1055, 17 Ann. Cas. 712 ; and it has been

held that a physician testifying as an expert comes within such rule; *People v Board of Sup'rs*, 148 App. Div. 584, 132 N. Y. Supp. 808; but usually a physician is required to give expert testimony without extra compensation ; *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457; *State v. Bell*, 212 Mo. Ill, 111 S. W. 24 ; *North Chicago St. R. Co. v. Zeiger*,

78 111. App. 463, affirmed in 182 111. 9, 54 N. E. 1006, 74 Am. St. Rep. 157; especially when the physician is attending professionally one of the parties ; *Anderson v. Ry. Co.*, 103 Minn. 184, 114 N. W. 744 ; *Burnett v. Freeman*, 134 Mo. App. 709, 115 S. W. 488. It is held that an expert who testifies on a subject requiring special knowledge and skill is entitled only to the statutory fee; *Main v. Sherman County*, 74 Neb. . 155, 103 N. W. 1038 ; and so where a witness had knowledge common to persons in a particular neighborhood, not based on study or investigation, and in spite of a special contract for extra compensation ; *Ramschasel's Estate*, 24 Pa. Super. Ct 262. Expenses of expert witnesses cannot be allowed as between the parties at a rate exceeding the usual fees; [1900] 1 Ir. Rep. 22; *Randall v. Journal Ass'n*, 22 Misc. 715, 49 N. Y. Supp. 1064; *Linforth v. Gas Co.*, 9 Cal. App. 434, 99 Pac. 716.

Under equity rule 48 (S. C. of U. S., in effect Feb. 1, 1913, 33 Sup. Ct. xxxi) , the district court, in a case involving the scope or validity of a patent or trade-mark, may, upon petition, order that the examination in chief of the experts be set forth in affidavits and filed : Those of plaintiff within 40 days after the cause is at issue ; those of defendant 20 days after plaintiff's time has expired; and rebutting affidavits 15 days after the time for filing the originals has expired. The court or a judge may direct the cross-examination and any re-examination

before the court at the trial. If the expert be not produced, the affidavit shall not be used.

A statute providing for the appointment of expert witnesses by the court without notice to the respondent or prosecuting attorney in cases of homicide was declared unconstitutional in *People v. Dickerson*, 164 Mich. 148, 129 N. W. 199, 33 L. R. A. (N. S.) 917, Ann. Cas. 1912B, 688.

In Germany expert witnesses are appointed by the court and are regarded as assistants to the trial judge. The judge decides whether they shall be called or not ; he may inform himself from other sources upon the questions raised. There are lists of experts made under local laws; they are usually nominated by the various trades and professions. They are sworn in and need not be sworn in the particular case. If the parties have agreed upon an expert, he must be examined together with others designated by the judge if he so desires.

Frequently the experts furnish a written opinion and are not examined. The rules are the same in civil and criminal cases.

In France in civil cases each court selects expert witnesses and publicly announces their names. They are classified under 49 different categories. Usually three are examined; but the parties may agree to examine only one. If the parties cannot agree within three days on their choice of the ex-

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perts to be called, the court appoint. They report in writing signed by all. If they differ in opinion, the grounds of difference must be stated, but not the name of the dissident. The report need not be sworn to.

In criminal cases the experts are selected by the procureur (district-attorney) or they may be called by the examining magistrate or the trial judge.

Lists of experts of various professions are published by the official registrars of the courts and are appointed by the minister of justice with the advice of the presidents of the courts and the district attorney. They are entitled to ask for any fee they consider due for their services, there being no fixed schedule. Each profession is considered on its merits. Sometimes an expert not on the list may be selected by the judge. The rule that there must be an uneven number of experts does not apply in the criminal courts.

See Opinion ; Patent ; Hypothetical Question.

EXPILATION. In Civil Law. The crime of abstracting the goods of a succession.

This is said not to be a theft, because the property no longer belongs to the deceased, nor to the heir before he has taken possession. In the common law, the grant of letters testamentary, or letters of administration, relates back to the time of the death of the testator or intestate: so that the property of the estate is vested in the executor or administrator from that period.

EXPIRATION. Cessation; end: as, the

expiration of a lease, of a contract or statute.

In general, the expiration of a contract puts an end to all the engagements of the parties, but not to the obligations which arise from the non-fulfilment of obligations created during its existence. See Paetneeship ; Contbact.

The term is specially used to denote the day upon which the risk of an insurance policy terminates. When before the expiration of policies the companies agreed to "hold" the policies for renewal, and after the expiration the agent of the insured told them to continue to hold them until the form could be arranged, the policies were held to be in force; *Baker v. Assur. Co.*, 1G2 Mass. 358, 38 N. • E. 1124. Temporary insurance from one day "until" a certain other date, includes all of the day of expiration; *Thompson v. Ins. Co.*, 4 Pa. Dist. R. 382. See Insurance.

When a statute is limited as to time, it expires by mere lapse of time, and then it has no force whatever; and, if such a statute repealed or supplied a former statute. the first statute is, ipso facto, revived by the expiration of the repealing statute; *Collins v. Smith, G Whart. (Pa.)* 294, 36 Am. Dec. 22S; unless it appear that such was not the intention of the legislature; 3 East 212; *Bacon. Abr. Statute (D)*.

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which the subject of an adjudication may be

redeemed on payment of the debt adj

for. *Bell, Diet*; 3 *Jurid. Styles*, ;;d ed. llut.

EXPLICATIO (Lat.). In Civil Law. The

fourth pleading; equivalent to the sur-rejoinder of the common law. Calvinus, Lex.

EXPLOSION. A sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. United Life, Fire & Marine Ins. Co. v. Fool Ohio SL 348, 10 Am. Rep.

There is no difference in ordinary use between "explode" and "burst" The ordinary idea is that the explosion is the cause, while the rupture is the effect; Evans v. In 14 N. Y. 151, 4 Am. Rep. 050; Mitchell v. Ins. Co., 183 U. S. 42, 22 Sup. CL 22, 40 L. Ed. 74. See Insurance.

The insurer against fire is not liable for loss or damage to a building caused by explosion; Hustace v. Ins. Co., 175 N. Y. 292, 07 X. E. 592, 101 L. R. A. 051 ; Priggs v. Ins. Co., 53 X. Y. 446; German Fire Ins. Co. v. Roost, 55 Ohio St. 587, 45 N. E. 17, 36 L. R. A. 236, 10 Am. SL Rep. 711; Heuer v. Ins. Co., 144 Ill. 303, 33 N. E. 411, 101 L. R. A. 594; Phoenix Ins. Co. v. Greer, 61 Ark. 509, 33 S. W. 840. See Insurance; also as to liability for fire caused by explosions, and for explosions caused by fire; Fire.

EXPLOSIVES. The standard form of policy issued by the New York fire insurance companies includes benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 pounds in quantity, nitro-glycerin, or other explosives. Blast in powder is held to be included by the words "other explosives" within the meaning of such a policy; Penman v. Ins. Co., 216 Ill. S. 311, 30 Sup. Ct. 312, 54 L. Ed. 493; St Paul Fire & Marine Ins. Co. v. Penman, 151 Ill. 961, 81 C. C. A. 151.

A person in possession of dynamite is bound to exercise the highest degree of care to take every reasonable precaution to prevent explosion; *Sowers v. McMaus*, 214 Pa. 244, 63 Atl. 001.

The regulations of The Hague tribunal of 1899 forbid the throwing of explosives from balloons or other airships. Inasmuch as this provision is only binding upon the contracting powers, it is provided that, if either of the nations at war form an alliance with a non-contracting power, the prohibition shall be null.

See *Blasting*; *Dangerous Goods*; *Fire*.

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from one country to another. 2 M. ft *;. 1. "" :
;; *id.* 959.

While the word export technically Includes the landing in as well as the shipment to a foreign country, it is often used as meaning only the shipment from this country, and it will be so construed when used in a suit the manifest purpose of which would be defeated by limiting the word to its strict techni-

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cal meaning; *U. S. v. Chavez*, 228 U. S. 525,

33 Sup. Ct. 595, 57 L. Ed. , where the

word is construed as used in the joint resolution of March 14, 1912.

In order to preserve equality among (the states in their commercial relations, the constitution provides that "no tax or duty shall be laid on articles exported from any state." Art. 1," s. 9. And, to prevent a pernicious interference with the commerce of the nation, the tenth section of the first article of the constitution contains the following prohibition: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States ; and all such laws shall be subject to the revision and control of the congress." See *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. GTS ; Importation.

EXPOSE. A French word, sometimes applied to a written document containing the reasons or motives for doing a thing. The word occurs in diplomacy.

EXPOSE. To cast out to chance, to place abroad, or in a situation unprotected; *Shannon v. People*, 5 Mich. 90.

EXPOSURE OF PERSON. Such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals.

This offence is indictable on the ground that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. 1 Bish. Cr. Law § 1125 ; *State v. Rose*, 32 Mo. 560. An indecent exposure, though in a place of public resort, if visible by only one person, is not indictable as a common nuisance. An omnibus is a public place sufficient to support the indictment;

Clark, Cr. L. 306, n. ; 1 Den. 338; Tempi. & M. 23; 2 C. & K. 933; 2 Cox, Cr. Cas. 376; 3 id. 183; Dears. 207. But see State v. Roper, 18 N. C. 208; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637. An ordinance making it an offence to expose the person indecently without reference to the intent which accompanies the act, is a valid exercise of police power ; City of Grand Rapids v. Bateman. 93 Mich. 135, 53 N. W. 6.

See, generally, 1 Benn. & H. Lead. Cr. Cas. 442; Knowles v. State, 3 Day (Conn.) 103; Fowler v. State, 5 Day (Conn.) 81; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Com. v. Catlin, 1 Mass. 8; Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632; Miller v. People, 5 Barb. (N. Y.) 203

See Indecency.

EXPRESS. Stated or declared, as opposed to implied. That which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law ; expression facit cessare taciturn. Co. Litt 183.

EXPRESS ABROGATION. A direct repeal in terms by a subsequent law referring to that which is abrogated.

EXPRESS ASSUMPSIT. A direct undertaking. See Assumpsit ; Action.

EXPRESS COMPANIES. Companies organized to carry small and valuable packages expeditiously in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce. Southern Express Co. v. R. Co., 10 Fed. 213.

A common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight ; and also other articles and packages of any description which the shipper desires or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge of its own messenger on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights ; and within cities and towns or other defined limits, it collects from the consignors and delivers to the consignees at other places of business the goods which it carries. *Pacific Exp. Co. v. Seibert*, 44 Fed. 310. The right to use the facilities afforded by a railroad depends entirely on contract; *St. Louis, I. M. & S. R. Co. v. Express Co.*, 117 U. S. 3, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. In *St. Louis, I. M. & S. R. Co. v. Express Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791 ; it was held that a railroad company might make an exclusive contract with a single express company, and this has been followed by many state courts ; but it is held that under the anti-trust laws such exclusive contract is not valid ; *State v. R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

They are common carriers ; *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140 ; *U. S. Express Co. v. Backman*, 28 Ohio St. 144 ; notwithstanding a declaration in their bill of lading that they are not to be so considered ; *Bank of Kentucky v. Express Co.*, 93 U. S. 174, 23 L. Ed. 872 ; *Christenson v. Express Co.*, 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122.

In section 1 of the Railroad Rate Act (June 29, 1906), it is provided that the term

"common carrier" in that act should include express companies ; State v. Express Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A. (N. S.) 93, where it was said that congress has assumed jurisdiction over interstate traffic by express down to the point where the transit is entirely at an end; and a state statute requiring such companies to make free deliveries of parcels committed to their care was held void.

The Interstate Commerce Act and its amendments provide that the term "common

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carrier" as used in the act shall include express companies; U. S. Comp. St. Stat Supp. 1911, 1285; and in an indictment of express companies under that act it was held that where a joint stock company did a general interstate express business and had filed a schedule of its rates with the Interstate Commerce Commission it was a quasi corporation and subject to indictment as a legal entity; U. S. v. Am. Express Co., 199 Fed. 321.

See Common Carriers.

Like all other common carriers they must receive all goods offered for transportation, on being paid or tendered the proper charge ; Jordan v. R. Co., 5 Gush. (Mass.) 69, 51 Am. Dec. 44; and if they cannot transport them

within a reasonable time, must refuse them or be responsible for loss caused by the delay ; *Condict v. R. Co.*, 54 N. Y. 500 ; *Tierney v. R. Co.*, 70 N. Y. 305 ; *Illinois Cent. R. Co. v. Cobb*, 64 Illi 128. They may also refuse to receive dangerous articles for transportation; *Parrot v. Wells*, 15 Wall. (U. S.) 524, 21 L. Ed. 206 ; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568.

An express company insures the safe delivery of goods received at the destination, if on its own route; if not, safe delivery at the end of its route to the next carrier ; and will be relieved only by act of God or of the public enemy; *Stephens & C. Transp. Co. v. Tuckerman*, *Milligan & Co.*, 33 N. J. L. 543 ; *U. S. Exp. Co. v. Hutchins*, 5S 111. 44; *Southern Exp. Co. v. Craft*, 49 Miss. 480, 19 Am. Rep. 4; *Babcock v. Ry. Co.*, 49 N. Y. 491; *American Exp. Co. v. Bank*, 69 Pa. 394, 8 Am. Rep. 268 ; *Hadd v. Exp. Co.*, 52 Vt 335, 36 Am. Rep. 757.

An express company may by special contract limit its liability for the value of goods lost; *Oppenheimer v. Exp. Co.*, 69 111. 62, 18 Am. Rep. 596; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *Baldwin v. Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; except for losses due to its own negligence or misconduct ; *Bank of Kentucky v. Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872 ; *Boscowitz v. Exp. Co.*, 93 111. 523, 34 Am. Rep. 191 ; *Harvey v. R. Co.*, 74 Mo. 53S; *Whitworth v. Ry. Co.*, 87 N. Y. 413. A contract between an express company and its messenger exempting it from liability for injury to him by the negligence of the carrier, is valid and may extend so far as to authorize the express company to contract with the carrier against liability to the messenger; but such contract will not enure to the benefit of the carrier having no knowledge of it or not having availed itself of it by contracting

with the express company; Louisville, N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, 44 X. E. 796, 3S L. R. A. 93, 58 Am. St. Rep. 348.

An express company is liable for damages to perishable freight injured by delay: Adams Exp. Co. v. Williams (Ark.) 14 S. W.

40; but a delay, to create a liability, must be "an unreasonable delay which is such as involves some want of ordinary care or diligence" ; Adams Exp. Co. v. Bratton, 106 111. App. 563.

Where it was a habit to carry large sums of money for hire and keep the same for several hours after its transportation before called for, the liability for it warehouseman and not as a common carrier; President, etc., of Conway Lank v. Ex: 8 Allen (Mass.) 512. The liability of an express company as a common carrier terminates on the safe carriage of the goods to their destination and notice to the consignee; Hasse v. Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328; and where goods are sent C. O. D., and the consignee n to accept them, and the shipper on notice directs the company to hold them until called for, its liability is only that of a warehouseman; Byrne v. Fargo, 36 Misc. 54:.. 73 N. Y. Supp. 943; but it is held that in the absence of a special contract the duty of the company is not completed on the arrival of the goods, but includes delivery ; Burr v. Exp. Co., 71 N. J. L. 263, 58 At" 609; or constructive delivery by notice to the consignee; Rogers v. Fargo, 47 Misc. 155, 93 N. Y. Supp. 550; where there is such local usage; Hutchinson v. Exp. Co., 03 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393, and note on delivery.

An express company is not denied the

equal protection of the laws by classifying it with railroad and telegraph companies subject to the unit rule of taxation, which estimates the value of the whole plant, though situated in different states, as an entirety, for the purpose of determining the value of the property in one state; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct 305, 41 L. Ed. 683; *id.*, U. S. 185, 17 Sup. Ct. 604, 41 L. and a state statute, requiring express companies to file a statement before doing business and an agreement in reference to suits brought against them, did it not give them a vested right to carry on business subject to the then existing laws or exempt them from future legislative control: *Adams Exp. Co. v. State*, 161 Ind. 328, 67 N. E. 1033. Under a state statute providing that one who offers to carry persons, property or mes-

is a common carrier of what he thus offers to carry, an express company offering to carry money for hire is a common carrier

f; *Piatt v. Le Cocq*, 150 Fed where it was held that the railroad commissioners' order requiring it to receive money, of which it held itself out to be a common carrier, at all reasonable business hours preceding the departure of trains, was reasonable. A state statute regulating express companies by requiring equal terms to all, without discrimination, does not violate the XIVth amendment of the United States con-

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stitution; *Am. Express Co. v. Express Co.*, 1 G7 Ind. 292, 78 N. E. 1021.

In some states statutes relating to the transportation of property by railroad companies are applicable to express companies; *MacMiUan v. Express Co.*, 123 Ia. 236, 98 N. W. 629; but a statute prescribing the duties of railroads with reference to intersecting lines relates to the mere physical connection of the tracks and has no application to express companies; *Southern Ind. Express Co. v. Ex. Co.*, 92 Fed. 1022, 35 C. C. A. 172.

See an epitome of the law on this subject at that date by Judge Redfield in 5 *Am. Law Reg. N. S.* 1 ; and three articles on express companies as common carriers ; *id.* 449, 513, 648.

See Railroad; Common Carriers.

EXPRESS CONSIDERATION. A consideration expressed or stated by the terms of the contract.

EXPRESS CONTRACT. One in which the terms are openly uttered and avowed at the time of making. 2 *Bla. Com.* 443; 1 *Pars. Contr.* 4. One made in express words. 2 *Kent* 450. See Contract.

EXPRESS COVENANTS. Those stated in words more or less distinctly expressing the intent to covenant. *McDonough v. Martin*, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 343.

EXPRESS TRUST. One declared in express terms. See Trusts.

EXPRESS WARRANTY. One expressed by particular words. 2 *Bla. Com.* 300. The

statements in an application for insurance are usually construed to constitute an express warranty. 1 Phil. Ins. 346. See Warranty.

EXPROMISSIO (Lat). In Civil Law.

The species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. See Novation.

EXPROMISSOR. In Civil Law. The person who alone becomes bound for the debt of another, whether the latter were obligated or not. He differs from a surety, who is bound together with his principal. Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64. 4; 38. 1. 37. 8.

EXPROPRIATION. A taking of private property for public use upon providing compensation. *Brownsville v. Pavazos*, 2 Woods 293, Fed. Cas. No. 2,043. It corresponds to the right of eminent domain in our law. In Louisiana expropriation is used as is taking under eminent domain in most of the other states. In England "compulsory purchase" is used ; Halsbury, Laws of England.

In French Law. The compulsory realization of a debt by the creditor out of the lands of a debtor, or the usufruct thereof; confined first to lands (if any) in hypothec, and then extending to others. Black, L. Diet

EXPULSION (Lat. expellere, to drive out). The act of depriving a member of a body politic or corporate, or of a society, of his right of membership therein, by the vote of such body or society, for some violation of his duties as such, or for some offence which renders him unworthy of longer remaining a member of the same.

By the constitution of the United States, art. 1, s. 5, § 2, each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. In the case of John Smith, a senator from Ohio, who was expelled from the senate in 1807, the committee made a report which embraces the following points:

First. That the senate may expel a member for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

Second. That a previous conviction is not requisite in order to authorize the senate to expel a member from their body for a high offence against the United States.

Third. That although a bill of indictment against a party for treason and misdemeanor has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds that the party is guilty of a high misdemeanor it is sufficient ground of expulsion.

Fourth. That the fifth and sixth articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizens as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

Fifth. That before a committee of the senate, appointed to report an opinion relative to the honor and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, or to be confronted with his accusers. It is before the senate that the member charged is entitled to be heard.

Sixth. In determining on expulsion the senate is not bound by the forms of judicial proceedings or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must, in its nature, be discretionary, and its exercise of a more summary character. 1 Hall, .Law Journ. 459, 465 ; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242 ; Cooley, Const. Lim. 162.

Corporations have the right of expulsion in certain cases, as such power is necessary to the good order and government of corporate bodies; and the cases in which the inherent power may be exercised are classified by Lord Mansfield as follows: 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men; such as the offences of perjury, forgery, and the like. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury according to the law of the land. 2. When the offence is against his duty as a corporator, in which case he may be expelled on trial and conviction before the corporation. 3. The third is of a mixed nature, against the member's duty as a corpo-

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rator, and also indictable by the law of the

land ; 1 Burr. 517 ; Diligent Fire Co. v. Com., 75 Pa. 291 ; Evans v. Philadelphia Club, 50 Pa. 107; Gregg v. Medical Society, 111 Mass. 185, 15 Am. Rep. 27.

The decisions of any kind of a voluntary association in admitting, disciplining, suspending or expelling members are of a quasi-judicial character; the courts will not interfere in such cases except to ascertain whether or not the proceeding was pursuant to the rules of the society, in good faith, and not in violation of the law of the land. If so found, the proceeding is conclusive, like that of a judicial proceeding; Connelly v. Masonic Ass'n, 58 Conn. 552, 20 Atl. 671, L. R. A. 428, 18 Am. St. Rep. 296. Upon questions of doctrine and policy the society is the sole and exclusive judge ; Grand Lodge, K. P. v. People, 60 Ill. App. 550.

Rules enacted for the government of its members must be conformed to by it in all matters relating to the disciplining of the members ; Green v. Board of Trade, 174 Ill. 555, 51 N. E. 599, 49 L. R. A. 365 ; Lewis v. Wilson, 121 N. Y. 284, 24 N. E. 474 ; Farmer v. Board of Trade, 78 Mo. App. 557. When suspension or expulsion results necessarily in affecting the financial standing of the complainants as well as depriving them of the use of property that is common to all, however insignificant its value, there is no reason to deny relief by injunction; Huston v. Reutlinger, 91 Ky. 333, 15 S. W. 867, 34 Am. St. Rep. 225. So where it appears that the complainant, unless aided by the courts, will be expelled from an association for some cause which under no circumstances can justify his expulsion; Otto v. Tailors' Union, 75 Cal. 315, 17 Pac. 217, 7 Am. St. Rep. 156.

A mutual benefit society cannot expel a member or deprive him of his rights in the society without giving him notice and a full

opportunity to be heard in defence of the charges against him, and the proceeding for his expulsion must be conducted fairly and in good faith; *State v. Temperance Soc.*, 42 Mo. App. 485; *Berkhout v. Royal Arcanum*, 62 N. J. L. 103, 43 Atl. 1; *Wachtel v. Benev. Soc.*, 84 N. Y. 28, 38 Am. Rep. 478; *People v. Alpha Lodge*, 13 Misc. 077, 35 N. Y. Supp. 214, affirmed 8 App. Div. 591, 40 N. Y. Supp. 1147. Irregularities in the proceedings by which a member was suspended will not afford ground for relief in equity, where they were waived by the member's appearance and failure to raise them before the tribunals of the society; *Slurry's Appeal*, 116 Pa. 391, 9 Atl. 478. If the rules authorize the expulsion of a member, and he is given an opportunity to be heard, and the investigation is conducted in good faith, the decision of the association is conclusive upon the court in mandamus proceedings to compel his restoration; *Lewis v. Wilson*, 121 N.

Y. 284, 24 N. E. 474; *White v. Brownell*, 2 Daly (N. Y.) 329.

It is generally held that persons who join churches, secret societies, or temperance societies, voluntarily submit themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof subject themselves to the tribunals established by them.

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pass upon such questions; if decision against them, made in good faith by such judicatories, they must seek their redress within the organization, as provided by its laws and regulations; *Landbell*, 79 Mo. 433, 49 Am. L. 110.

v. Frost, 3 B. Monr. (Ky.) _
v. Society of Believers, 118 M

A complaining member should exhaust the remedies provided by the laws of the organization before applying to the courts; I Fraternal League of Boston v. Johnston, li'l Ga. 902, 53 S. E. 241; Beeman v. Supreme Lodge, 215 Pa. t.27, 04 Atl. 792; Weigand v. Fraternities Order, 97 Md. 443, 55 Atl. 530; but where those laws provide no remedy, and the organization provides none, it becomes a question for the courts to determine whether or not the member has done all that could reasonably be expected of him : Schneider v. Local Union No. GO, 116 La. UT' '. 40 South. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. Rep. 549, 7 Ann. Cas. 808. His conii tory remedies against an association which denies him some property right to which he is entitled are the same as if he were entitled to some right or property from a natural person or a private corporation which has refused to concede it. If the contingencies have arisen in which the association has agreed to pay him a sum of money, an action may be maintained therefor as in tin-case of any other creditor against a debtor: Supreme Sitting Order of Iron Hall v. Stein. 120 Ind. 270, 22 N. E. 136; Supreme Lodge of Ancient Order of United Workmen v. Zuhlke. 129 111. 298, 21 X. B. 7S9.

See Barbour on Parties; 2 L. R. A. (N. S.) 7^9, n. ; By-Law; Club; Religious Society; Curia ii ; BENEFICIAL SOCIETY; Association; Amotion; DISFRANCHISEMENT, The subject is treated with fulness in Thomps. Corp. 806-930. See State v. Chamber of Commerce, 47 Wis. 670.

EXTENSION. This term is applied among merchants to signify an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his eireuuistane,

retrieve his standing, agree to wait for a definite length of time after their several claims become due and payable, before they will demand payment. It is often done by the issue of notes of various maturities.

As the French, a similar agreement is known by the name of *attermoient*. Merlin, *Rupert*, *mot Attermoient* 77 *unt*.

EXTENSION OF PATENT

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EXTENT

EXTENSION OF PATENT (sometimes termed *Renewal of Patent*). Under the earlier patent acts (1836 and 1848) a patent was granted for the term of fourteen years. But the law made provision that when any patentee, without neglect or fault on his part, had failed to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, he might obtain an extension of such patent for the term of seven years longer. No extension could be granted after the patent had once expired. The extension was intended for the sole benefit of the inventor ; and where it was made to appear that he would receive no benefit therefrom, it would not be granted. The assignee, grantee, or licensee of an interest in the original patent retained no right in the extension, unless by reason of some stipulation to that effect. Where any person had a right to use a specific machine under the original

patent he still retained that right after the extension. By act March 2, 1861, it was provided that patents should be granted for the term of seventeen years and further extension was forbidden. Congress may still extend a patent.

EXTENT. A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.

It is so called because the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff. Fitzh. N. B. 131. The writ originally lay to enforce judgments in case of recognizances or debts acknowledged on statutes merchant or staple ; see stat. 13 Edw. I. de Mercatoribus ; 27 Edw. III. c. 9; and by 33 Hen. VIII. c. 39, was extended to debts due the crown. The term is sometimes used in the various states of the United States to denote writs which give the creditor possession of the debtor's lands for a limited time till the debt be paid. Roberts v. Whiting, 16 Mass. 186.

Extent in aid is an extent issued at the suit or instance of a crown-debtor against a person indebted to himself. This writ was much abused, owing to some peculiar privileges possessed by crown-debtors, and its use was regulated by stat. 57 Geo. III. c. 117. See 3 Bla. Com. 419.

Extent in chief is an extent issued to take a debtor's lands into the possession of the crown.

Manorial extent. A survey of a manor made by a jury of tenants, often of unfree men sworn to sit for the particulars of each tenancy, and containing the smallest details as to the nature of the service due.

These manorial extents "were made in the Interest of the lords, who were anxious that all due

services should be done; but they imply that other and greater services are not due, that the customary tenants, even though they be unfree men, owe these services for their tenements, no less and no more. Statements that the tenants are not bound to do services of a particular kind are not very uncommon ;" 1 Poll. & Maitl. 343. "Many admissions against their own (the lords) interests the extent of their manors may contain ; they suffer it to be re-

corded that a 'day's work' ends at noon, that in return for some works they must provide food, even that the work is not worth the food that has to be provided.; but they do not admit that for certain causes, and for certain causes only, may they take there tenements into their own hands. As a matter of fact it is seldom of an actual ejectionment that the peasant has to complain;" id. 359. Many examples of the manorial extents have been preserved in the monastic cartularies and elsewhere. "Among the most accessible are the Boldon Book (printed at the end of the official edition of the Domesday) ; the Black Book of Peterborough, the Domesday of St. Paul's, the Worcester Register, the Battle Cartulary, all published by the Camden Society ; the Ramsey, Gloucester, and Malmesbury Cartularies or registers published in the Rolls series ; the Burton Cartulary of the Salt Society and the Yorkshire Inquisitions of the Yorkshire Record Society;" id. 189.

The "extents" of manors are descriptions which give the numbers and names of the tenants, the size of their holdings, the legal kind of their tenure and the kind and amount of their service; Maitland, Material for Hist. E. L. in 2 Sel. Essays in Anglo-Amer. Leg. Hist. 87.

EXTENUATION. That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation.

In general, extenuating circumstances go in mitigation of punishment in criminal cas-

es, or of damages in those of a civil nature.

EXTERRITORIALITY. The exemption from the operation of the ordinary laws of the state accorded to foreign monarchs temporarily within the state and their retinue, to diplomatic agents and the members of their household, to consuls in non-Christian states, and to foreign men of war in port. 1 Opp. 460-469. See Ambassador; Conflict of Laws ; Privilege from Arrest.

EXTINGUISHMENT. The destruction of a right or contract. The act by which a contract is made void. The annihilation of a collateral thing or subject in the subject itself out of which it is derived. Prest. Merg. 9. For the distinction between an extinguishment and passing a right, see 2 Sharsw. Bla. Com. 325.

An extinguishment may be by matter of fact and by matter of law. It is by matter of fact either express, as when one receives satisfaction and full payment of a debt and the creditor releases the debtor; *Jackson v. Shaffer*, 11 Johns. (N. Y.) 513; or implied, as when a person hath a yearly rent out of lands and becomes owner, either by descent or purchase, of the estate subject to the payment of the rent, and the latter is extinguished; *Martin v. Searcy*, 3 Stew. (Ala.) 50, 20 Am. Dec. 64; but the person must have as high an estate in the land as in the rent, or the rent will not be extinct; *Co. Litt.* 147 b.

There are numerous cases where the claim is extinguished by operation of law: for example where two persons are jointly but not severally liable for a simple contract-debt, a judgment obtained against one is at common

EXTINGUISHMENT

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law an extinguishment of the claim on the other debtor ; Willings v. Consequa, 1 Pet. C. €. 301, Fed. Cas. No. 17,767; Tom v. Goodrich, 2 Johns. (N. Y.) 213.

A conveyance of mortgaged land by the mortgagor to the mortgagee extinguishes the mortgage; Lyman v. Gedney, 114 111. 388, 29 X. E. 2S2, 55 Am. Rep. 871. Taking a note for the amount due does not deprive a claimant of his right to a lien, but merely suspends its enforcement until the note is payable; Keogh Mfg. Co. v. Eisenberg, 7 Misc. 79, 27 N. Y. Supp. 356.

See Co. Litt. 147 b; Morris v. Brady, 5 Whart. (Pa.) 541; Derby Rank v. Landon, 3 Conn. 62; Jackson v. Shaffer, 11 Johns. (N. Y.) 513; Cattell v. Warwick, 6 X. J. L. 190; McMurphy v. Minot, 4 X. II. 251; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 700; Boston & P. R. Corp. v. Doherty, 154 Mass. 314, 28 N. E. 277; Fitzpatrick v. R. R., 54 Me. 33, 24 Atl. 432; Sowles v. Witters, 54 Fed. 568; I. Smith & Son Co. v. Parsons, 37 Neb. 677, 56 N. W. 320.

EXTINGUISHMENT OF COMMON. Loss of the right to have common. This may happen from various causes ; by the owner of the common right becoming owner of the fee;"by severance from the land; by release; by approvement; 2 Steph. Com. 41; Co. Litt. 280 ; 1 Bacon, Abr. 628 ; Cro. Eliz. 594.

EXTINGUISHMENT OF COPYHOLD.

This takes place by a union of the copyhold and freehold estate in the same person ; also

by an act of the tenant showing an intention not to hold any longer of his lord ; Ilutt. 81 ; Cro. Eliz. 21 ; Wms. R. P. 2S7 ; Watk. Copyh.

EXTINGUISHMENT OF A DEBT. Destruction of a debt. This may be by the creditor's accepting a higher security ; 1 Salk. 304; Davidson v. Kelly, 1 Md. 492; Brewer v. Branch Bank, 24 Ala. 439. A judgment recovered extinguishes the original debt; Gihbs v. Bryant, 1 Pick. (Mass.) 118. A trust deed given to secure the payment of a bond is not affected by the rendition of a judgment on the bond, since the original debt is not thereby merged, but only the form of the evidence of the debt charged ; Gibson v. Green's Adm'r, SO Va. 524, 16 S. E. 661, 37 Am. St. Rep. 8SS. A debt evidenced by a note may be extinguished by a surrender of the note; Bryant v. Smith, 10 Cush. (Mass.) 169; Albert's Ex' is v. Zlegler's Ex'rs, 29 Pa. 50; Sherman v. Sherman, 3 Ind. 337. As to the effect of payment in extinguishing a debt, see PAYMENT.

EXTINGUISHMENT OF RENT. A destruction of the rent by a union of the title to the lands and the rent in the same person. Termes de la Ley; Cowell ; 3 Sharsw. Bla. Com. 325, note. A ground rent in Pennsylvania is usually extinguished by a conveyance thereof from the owner of the ground rent to the terre-tenant.

EXTINGUISHMENT OF WAYS. Destruction of a right of v* ed usually by a purchase of the close over which it lit the owner of the right of way. 2 Washb. R. P.

EXTORSIVELY. A technical word used in indictments for extortion.

When a person is charged with •

ly taking, the very import of the word shows that he is not acquiring of his

own; 4 Cox, Cr. Cas. 387. in North i
Una the crime may be Charged without using this word; State v. Dickens, 2 X. C. •■

EXTORTION. • The unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it
Bla. Com. 141; Com. v. Saulsbury, 152 Pa. 554, 25 Atl. G10; 1 Hawk. PL I s. 1 ;

1 Russ. Cr.* 144; 2 Bish. Cr. L. 390; U. Deaver, 14 Fed. 595.

At common law, any oppression by color of right; but technically the taking of money by an officer, by reason of his office, where none at all was due, or when it was not yet due. The obtaining of money by force or fear is not extortion; People v. Baroi
Gl Hun 571, 16 X. Y. Supp. 430; Whart Cr. L. 833.

In a large sense the term includes any oppression under color of right ; but it is generally and constantly used in the more limited technical sense above given.

The incumbent of an office, which it was attempted to create by an unconstitu statute, cannot be guilty of extortion, as he is neither a de jure nor a de facto officer; Kitby v. State, 57 X. J. L. 320, 31 Atl. 21&

To constitute extortion, there must be the receipt of money or something of value; the taking a promissory note which is void is not sufficient to make an extortion; Coin. v. Cony, 2 Mass. 523; Com. v. Pease, 1G Mass. 93. See Bacon, Abr.; Co. Litt. 168. It
tortion and oppression for an officer to take money for the performance of his duty, though it be in the exercise of a disc:

ary power; 2 Burr. '27. See Peo;
 Wnaley, 6 Cow. 661; Ilelser v. P<>tt. 3 Pa.
 183; Com. v. Saulsbury, 152 Pa. 554, 2". A.;.
 610; Com. v. Bagley, 7 Pick. (Mass.) 27'':
 4 Cox. Cr. Cas. 387. See Brackenrid
 State, 27 Tex. App. 513, 11 S. W. 630, 1 L..
 i;. a 360; People v. Barondess, 133 X. Y.
 049, 31 X. E. 240.

EXTRA-DOTAL PROPERTY. In Louisi-
 ana this term designates that property which
 forms no part of the dowry of a woman,
 and which is also called paraphernal pi
 ;y. Civ. Code, a:-;. -

EXTRA-JUDICIAL. That which does not
 belong to the judge or his jurisdiction, not-
 withstanding which he takes cognizance of it.
 Extra-judicial judgments and acts air
 lutely void. See Coram Xon Judice; Merliu,
 1 1., Exces dc Pouvoir,

EXTRA QUATUOR MARIA

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EXTRA QUATUOR MARIA (Lat. beyond
 four seas). Out of the realm. 1 Bla. Com.
 157. See Beyond Sea.

EXTRA SERVICES. When used with ref-
 erence to officers it should be construed to
 embrace all services rendered by such for
 which no compensation is given by law.
 Board of Com'rs of Miami Co. v. Blake, 21
 Ind. 32.

EXTRA TERRITORIUM. Beyond or outside of the territorial limits of a state. *Milne v. Moreton*, 6 Binn. (Pa.) 353, 6 Am. Dec. 466.

EXTRA VIAM. Out of the way. When, in an action of trespass, the defendant pleads a right of way, the defendant may reply *extra viam*, that the trespass was committed beyond the way, or make a new assignment. 16 East 343, 349.

EXTRACT. A part of a writing. In general, an extract is not evidence, because the whole of the writing may explain the part extracted, so as to give it a different sense; but sometimes extracts from public books are evidence, as extracts from the registers of births, marriages, and burials, kept according to law, when the whole of the matter has been extracted which relates to the cause or matter in issue.

EXTRADITION. (Lat. *ex*, from, *traditio*, handing over) . The surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws; the surrender of persons by one federal state to another, on its demand, pursuant to their federal constitution and laws.

Without treaty stipulations. Public jurists are not agreed as to whether extradition, independent of treaty stipulations, is a matter of imperative duty or of discretion merely. Some have maintained the doctrine that the obligation to surrender fugitive criminals is perfect, and the duty of fulfilling it is, therefore, imperative, especially where the crimes of which they are accused affected the peace and safety of the state; but others regard the obligation as imperfect in its nature, and a refusal to surrender such fugitives as affording no ground of of-

fence. Of the former opinion are Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent; the latter opinion is maintained by Puffendorf, Voet, Martens, Kliiber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, Heffter, and Wheaton.

Except under the provisions of treaties, the delivery by one country to another of fugitives from justice is a matter of comity, not of obligation; *TJ. S. v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425.

Many nations have practised extradition without treaty engagements to that effect, as the result of mutual comity and convenience; others have refused. The United

States has always declined to surrender criminals unless bound by treaty to do so ; 1 Kent 39 n. ; 1 Opin. Attys. Gen. 511; 6 id. 85, 431 ; *People v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483 ; *Holmes v. Jennison*, 14 Pet (U. S.) 540, 10 L. Ed. 579; *Ex parte Holmes*, 12 Vt. 631. The existence of an extradition treaty does not prohibit the surrender by either country of a person charged with a crime not enumerated in the treaty ; *Ex parte Foss*, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, 41 Am. St. Rep. 182. No state has an absolute right to demand of another the delivery of a fugitive criminal, though it has what is called an imperfect right, but a refusal to deliver the criminal is no just cause of war. Per *Tilghman*, C. J., in *Com. v. Deacon*, 10 S. & R. (Pa.) 125.

Under treaty stipulations. The sovereignty of the United States, as it respects foreign states, being vested by the constitution in the federal government, it appertains to it exclusively to perform the duties of extradition which, by treaties, it may assume; *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 10

L. Ed. 579 ; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425 ; and, to enable the executive to discharge such duties, congress passed the acts of Aug. 12, 1848, July 12, 1889, and June 6, 1900. The general government alone has the power to enact laws for the extradition of foreign criminals. It possesses that power under the treaty power in the constitution ; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. Ed. 579; People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483 ; In re De Giacomo, 12 Blatch. 391, Fed. Cas. 3,747.

While a violation of an extradition treaty with Italy might render the treaty denounceable by the United States, it does not render it void and of no effect. The refusal of Italy to surrender its nationals has not had the effect of abrogating the treaty but of merely placing the government in the position of having the right to denounce it; Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. .

In the absence of a treaty, it has been said the president has no power as well as no duty to surrender a fugitive; Ex parte McCabe, 46 Fed. 363, 12 L. R. A. 589. As to whether congress has this power was said in Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448, to be an undecided question. It was there said to be competent for congress to enforce or give efficacy to the provisions of the treaty between the U. S. and Spain with respect to Cuba, and that the act of June 6, 1900, providing for the extradition of criminals in certain cases "to foreign countries or territories" occupied by or under the control of the United States was constitutional. See 14 Harv. L. Rev. 607.

Treaties have been made between the United States and many foreign powers for the

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mutual surrender of persons charged with

certain crimes. These treaties may be found in full in the United States Statutes at Large, in 2 Moore on Extradition 1072; I Laswell, *Treaties, etc.*, U. S. ; see 4 Moore, *Int. L. Dig.*

The United States interstate extradition laws extend to Porto Rico; *People v. Bingham*, 211 U. S. 4GS, 29 Sup. Ct. 190, 53 L. Ed. 28G; and to any portion of the country not within the limits of a state, but organized under the laws of congress, with an executive, legislative and judicial system of its own; *In re Lane*, 135 U. S. 443, 10 Sup. Ct. 7G0, 34 L. Ed. 219 ; this does not include the Cherokee Nation ; *Ex parte Morgan*, 20 Fed. 298, approved in *People v. Bingham*, 211 U. S. 4G8, 29 Sup. Ct. 190, 53 L. Ed. 28G; nor (at that time) Oklahoma ; *In re Lane*, 135 U. S. 443, 10 Sup. Ct. 7G0, 34 L. Ed. 219.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both countries. For nearly all crimes, the laws of the states, and not the enactments of congress, must be looked to for the definition of the offence; *Wright v. Ilcnkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 94S; *Pettit v. Walshe*, 194 U. S. 210, 24 Sup. Ct. 057, 48

L. Ed. 938. Where a British fugitive was demanded in New York, and the British and New York statutes both covered the publication of fraudulent statements by corporate officers, it was held that the two statutes were substantially analogous under an extradition treaty relating to fraud by corporate officers; *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 94S.

In the construction and carrying out of such treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Proceedings for surrender simply demand of the accused that he shall do what all good citizens are required and ought to be willing to do, viz. submit themselves to the law of their country. Care should be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders ; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality should not be allowed to stand in the way of a faithful discharge of our obligations; *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct 98, 47 L. Ed. 130.

When a person is held in custody as a fugitive from justice under an extradition warrant in proper form and showing upon its face all that is required by law to be shown. he should not be discharged from custody until it is made clearly to appear that he is not a fugitive from justice within the meaning of the constitution and laws of the United States ; *People v. Pease*, 207 U. S. 100, 2S Bouv.— 74

Sup. Ct. 58, 52 L. Ed. 121 ; *Ex parte Massee*, 95 S. C. 315, 79 S. E. 97.

The extradition act of Canada pr

that a person shall be surrendered only

upon such evidence of criminality as would,

under the Canadian law, justify his commitment for trial if the crime had been committed in Canada. Canadian law should determine whether the act alleged constituted the extradition crimes; 6 P. & S. 4 V. C. P. R. 215. The further as to

whether the act must also be shown to be a crime according to the laws of the demanding country was raised but not decided in 111 Can. L. J. 594.

The preliminary examination of a person sought to be extradited under the treaty of August 9, 1842, and July 12, 1850

the United States and Great Britain on a conviction of murder, must be had in the state where he was arrested, in view of the tenth article of the earlier treaty providing that the alleged fugitive criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where he is found, would justify his arrest and commitment for trial if the crime had been committed there, and of the proviso in the sundry civil appropriations act of August 15, 1894, by which it is made the duty of a marshal arresting a person charged with any offence to take him before the nearest United States commissioner, or judicial officer having jurisdiction, for a hearing, commitment, or taking for trial, notwithstanding those parts of the act of August 12, 1848, and of R. S. § 5270, which provide for bringing the accused in extradition proceedings before the justice, judge or commissioner who issued the warrant of arrest; *Pettit v. Walshe*. 194 U. S. 207. 24 Sup. Ct. 657, 48 L. Ed.

Desertion from a foreign army or navy is

said not to be an extraditable offense. *Ilarv. L. Rev.* 657; but in *Tucker v. Alexandroff*, 183 U. S. 424, 22 Sup. Ct 195, 46 L. Ed. 264, where the provisions of the treaty with Russia for the extradition of deserters from ships of war and merchant vessels were under consideration, it was held that a deserting seaman might be extradited, though the vessel to which he had been assigned was in the course of building and had not yet been accepted by the Russian government.

The treaties enumerate the crimes for which persons may be surrendered, and in some other particulars limit their own application. They also contain some provisions relating to the mode of procedure; but, as it was doubted whether such stipulations had the force of law: *Park. Cr. Oas.* 108; congress passed the act of August 1-entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders." 9 Stat L.

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302. This has since been amended; and the statutes on the subject are found in U. S. R. S. §§ 5270-5277, as amended June 6, 1900.

These acts embody those provisions contained in the treaties relating to the proce-

dure, and contain others designed to facilitate the execution of the duty assumed by treaty.

The following are the main provisions of the law relating to the practice : 1. A complaint under oath or affirmation charging the person with the commission of one of the enumerated crimes. 2. A warrant may be issued by any of the justices of the supreme court or judges of the several circuit or district courts of the United States, or of a court of record of general jurisdiction of any state, or the commissioners authorized so to do by any of the courts of the United States. 3. The person arrested is to be brought before the officer issuing the warrant, to the end that the evidence of criminality may be considered. 4. Copies of the depositions upon which an original warrant in the country demanding the fugitive may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. 5. The degree of evidence must be such as, according to the laws of the place where the person arrested shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed. 6. If the evidence is deemed sufficient, the officer hearing it must certify the same, together with a copy of all the testimony taken before him, to the secretary of state, and commit the prisoner to the proper gaol until the surrender be made, which must be within two calendar months. 7. The secretary of state, on the proper demand being made by the foreign government, orders, under his hand and seal of office, in the name and by authority of the president, the person so committed to be delivered to such person as may be authorized, in the name and on behalf of such foreign government, to receive

him. 8. The demand must be made by and upon those officers who represent the sovereign power of their states. 7 Op. Attys. Gen. 6; 8 id. 521. By act of Aug. 3, 1882, it is directed that all extradition cases under treaties shall be heard publicly ; 22 Stat. 215.

The usual method is for some police officer or other special agent, after obtaining the proper papers in his own country, to repair to the foreign country, carry the case through with the aid of his minister, receive the fugitive, and conduct him back to the country having jurisdiction of the crime; 8 Op. Attys. Gen. 521. In all the treaties the parties stipulate upon mutual requisitions, etc., to deliver up to justice all persons who, being charged with crime, shall seek an

asylum or shall be found in the territories of the other. The terms of the stipulation embrace cases of absence without flight as well as those of actual flight; 8 Op. Attys. Gen. 306.

The treaties of the United States do not guarantee an asylum to a fugitive from any foreign country. They only provide how he shall be deprived of an asylum ; *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct 225, 30 L. Ed. 421. See as to the right of asylum 6 L. Mag. & Rev. 4th, 262. If the prisoner escapes, he may be retaken in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape shall be retaken on an escape; U. S. R. S. § 5272. The expense of the apprehension and delivery shall be borne by the party making the requisition.

Between the several states. By art. iv. sec. ii. of the constitution of the United States, it is provided that "a person charged in any

state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having the jurisdiction of the crime."

The act of congress of Feb. 12, 1793, U. S. R. S. §§ 5278, 5279, prescribed the mode of procedure in such cases. It requires, on demand of the executive authority of a state and production of a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged fled, that the executive authority of the state or territory to which such person shall have fled shall cause the person charged to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and cause the fugitive to be delivered to such agent when he shall appear; but if such agent do not appear within six months, the prisoner shall be discharged. It further provides that if any person shall by force set at liberty or rescue the fugitive from such agent while transporting the fugitive to the state or territory from which he fled, the person so offending shall, on conviction, be fined not exceeding five hundred dollars and be imprisoned not exceeding one year, and that all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive shall be paid by the state or territory making the demand. U. S. Rev. Stat § 5278-9.

In the execution of the obligation imposed by the constitution, the following points deserve attention : —

The crime, other than treason or felony,

for which a person may be surrendered.

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criminal laws of the several states 3 , ^ on . i

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of the constitution extend to all acts whicuj ac '° of th e ' "' and i. s ...

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by the laws of the state where committed
are made criminal ; 1 Kent 42 ; Johnston
v. Riley, 13 Ga. 97; In re Fetter, 23 N. J. L.

311, 57 Am. Dec. 382; *Kentucky v. Dennison*, 2-1 How. (U. S.) 107, 16 L. Ed. 717; *People v. Brady*, 56 N. Y. 187. The word "crime" embraces every species of indictable offence; *Kentucky v. Dennison*, 24 How. (U. S.) 99, 16 L. Ed. 717; including an act not criminal at the time the constitution was adopted but made so afterwards; *Howe v. Treasurer*, 37 N. J. L. 147 ; *People v. Brady*, 56 N. T. 182 ; and an act which is criminal under the law of the state from which the accused has fled, but is not so under the law of the state into which he has fled; *Kentucky v. Dennison*, 24 How. (U. S.) 103, 16 L. Ed. 1717.

That the courts of the asylum state have jurisdiction to pass upon the sufficiency of the requisition papers has been held ; *Jones v. Leonard*, 50 Ia. 110, 32 Am. Rep. 116 ; *People v. Hyatt*, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706, affirmed *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657 ; *In re Waterman*, 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.) 424, 13 Ann. Cas. 926 ; that the accused should be permitted to show that the indictment or affidavit accompanying the requisition charged no crime under the laws of the demanding state, see *Barriere v. State*, 142 Ala. 72, 39 South. 55 ; *Ex parte Slauson*, 73 Fed. 666.

In *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, it is said: Upon the executive of the state in which the accused is found rests the responsibility of determining whether he is a fugitive from the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him by competent proof that the accused is in fact a fugitive from the justice of the demanding state; and in *People v. Brady*, 50 N. Y. 182, that the courts have jurisdiction to interfere by habeas corpus, and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugi-

tive from justice from another state is issued, and in case the papers are defective and insufficient, to discharge the prisoner.

It must appear to the governor of the asylum state, before he can lawfully comply with it: First, that the person demanded is substantially charged with a crime against the laws of the demanding state, by an Indictment or an affidavit certified as authentic by the governor of the demanding state; and, second, that the person demanded is a fugitive from the justice of the demanding state; Roberts v. Reilly, 116 U. S. 506, 6 Sup. Ct. 291, 29 L. Ed. 544. The first of these prerequisites

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 chusetts, 203 U. S. 1^11
 L. Ed. 161; but it is concede^ 31 * 1 <<•
 termination of the fact by the e&iciaj
 the state in issuing his warrant of t
 upon a demand made on that ground, \
 er the writ contains a recital of an express
 finding to that effect or not, must be r<
 ed as sufficient to justify the removal, until
 the presumption in its favor is overthrown ;
 In re Reggel, ill D. S. <;il\ 5 Sup. Ct. 1148,
 29 L. Ed. 250; Appleyard v. Massach
 203 U. S. 222, 27 Sup. Ct. 122, HI I, Ed. 161.

The motives which prompt the govern
 issue his warrant are held not proper sub-
 jects of judicial inquiry; In re Meyer, 12
 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227,
 IIS Am. St. Rep. 214; Com. v. Supori
 ent of Philadelphia County Prison, 220 Pa.
 401, 69 Atl. 916, 21 L. R. A. (X. S.) 939. Ju-
 risdiction to take the action complained of is
 the test; id. The governor n<
 independent proof, apart from the requisition
 papers, that accused was a fugitive from jus-
 tice ; Pettibone v. Nichols, 203 U. S. 1
 Sup. Ct. Ill, 51 L. Ed. 148. When the |
 for whom a requisition is made is in prison
 in the asylum state under conviction of crime,
 the governor cannot deliver him up ; Opinion
 of Justices, 201 Mass. 609, SO X. E. 174, 21
 L. R. A. (N. S.) 799, and note.

An indictment is not a prerequisite to extradition; *Pierce v. Creecy*, 210 U. S. 387, 28 Sup. Ct. 711, 52 L. Ed. 1113. Extradition is a mere proceeding in securing arrest and attention; a complaint before a committing magistrate is a charge of crime; *In re Strauss*, 197 U. S. 324, 25 Sup. Ct. 535, 49 L. Ed. 774.

Indictment, in order to constitute a sufficient charge of crime to warrant interstate rendition, need show no more than that the accused was substantially identical with

-Mime; *Pierce v. Creecy*, 210 U. S. 387, 28 Sup. Ct. 711, 52 L. Ed. 1113. if more were required, it would impose upon courts at the trial under writs of habeas corpus the duty of a critical examination of the laws of the states with whose jurisprudence and criminal procedure they can have but a general acquaintance.

If it is by affidavit, it should

be sufficiently full and explicit to justify arrest and commitment for hearing: *Ex parte Smith*, 3 McLean 121, Fed. Cas. No. 12; *In re Heyward*, 1 Sandf. (X. Y.) 701; *In re*

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Fetter, 23 N. J. L. 311, 57 Am. Dec. 382;

State v. Patterson, 116 Mo. 505, 22 S. W. 696 ;
In re Hooper, 52 Wis. 699, 58 N. W. 741. The
demand must be made by the governor of the
state; Com. v. Hall, 9 Gray (Mass.) 262, 69
Am. Dec. 2S5.

The accused must have fled from the state
in which the crime was committed; and of
this the executive authority of the state up-
on which the demand is made should be rea-
sonably satisfied. This is sometimes done by
affidavit. The governor upon whom the de-
mand is made acts judicially, so far as to see
whether the case is a proper one; In re
Greenough, 31 Vt. 279 ; but he cannot look
behind the indictment in which the crime is
charged ; In re Voorhees, 32 N. J. L. 145 ;
Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L.
Ed. 2S7. The duty to surrender the fugitive
is obligatory ; Kentucky v. Dennison, 24 How.
(U. S.) 103, 16 L. Ed. 717; Taylor v. Taintor,
16 Wall. (U. S.) 370, 21 L. Ed. 2S7. But in
the case of a conflict of jurisdiction between
the two states the surrender may be post-
poned; Taylor v. Taintor, 16 Wall. (U. S.)
366, 21 L. Ed. 287 ; In re Briscoe, 51 How. Pr.
(N. Y.) 422; Com. v. Wright, 15S Mass. 149,
33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep.
473.

It is not necessary that the party charged
should have left the state in which the crime
is alleged to have been committed, after an
indictment found or for the purpose of es-
caping a prosecution anticipated or begun ;
Ex parte Brown, 28 Fed. 653; but simply
that having committed a crime within a
state, when he is sought to be subjected to
its criminal process, he has left its jurisdic-
tion and is found within another state ; In re
Reggal, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L.
Ed. 250 ; Renaud v. Abbott, 116 U. S. 287, 6
Sup. Ct. 1194, 29 L. Ed. 629 ; Streep v. U. S.,
160 U. S. 12S, 16 Sup. Ct. 244, 40 L. Ed. 365 ;
Moyer v. Nichols, 203 TL S. 221, 27 Sup. Ct.
121, 51 L. Ed. 160 ; Ex parte Brown, 28 Fed.

653 ; In re Cook, 49 Fed. 833 ; In re White, 55 Fed. 54, 5 C. C. A. 29; In re Bloch, 87 Fed. 9S1; Kingsbury's Case, 106 Mass. 223. Whether the motive for leaving was to escape prosecution or not, his return to answer the charges against him is equally within the spirit and purpose of the statute ; and the simple fact. that he was not within the state to answer its criminal process, when required, renders him a fugitive from justice, regardless of his purpose in leaving; State v. Richter, 37 Minn. 436, 35 N. W. 9. That the accused did not believe he had committed any crime against the demanding state will not prevent his being a fugitive from justice ; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073 ; or that he commits a crime within a state and then simply returns to his own home in another state; Ex parte Swearingen, 13 S. C. 74 ; In re Mohr, 73 Ala.

503, 49 Am. Rep. 63. He is held not to be a fugitive from justice if he has never been in the demanding state, but is alleged to have obtained money by false pretences through the mails ; State of Tennessee v. Jackson, 36 Fed. 258, 1 L. R. A. 370. In In re Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 39S, 26 Am. St. Rep. 378, the court ordered the discharge of a prisoner because he had been forcibly brought into the state without requisition papers ; and to the same effect, State v. Simmons, 39 Kan. 262, 18 Pac. 177. Crimes which are not actually, but only constructively, committed within the demanding state do not fall within the class of cases embraced by the constitution or acts of congress. Not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a state in which he has never been corporally present since the commission of the crime ; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63; In re

Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250 ; State v. Hall, 115 N. C. 811, 20 S. E. 729, 28 L. R. A. 289, 44 Am. St. Rep. 501, where the constructive presence of a murderer in the state, where the victim was struck by a bullet fired across the state boundary, was held not sufficient to make him a fugitive from that state when found in the state from which the shot was fired.

In criminal cases, a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such offence, and presents no valid objection to his trial in such court; Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421 ; Ex parte Scott, 9 Barn. & C. 446 ; State v. Smith, 1 Bail. (S. C.) 283, 19 Am. Dec. 679; Dows' Case, 18 Pa. 37. Although it has been frequently held that if a defendant in a civil case be brought within the presence of the court by a trick or a device, the service will be set aside, and he will be discharged from custody; Wells v. Gurney, 8 Barn. & C. 769; Metcalf v. Clark, 41 Barb. (N. Y.) 45. The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest ; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103.

As between the states, fugitives from justice have no right of asylum, in the international sense ; and a fugitive who has been returned by interstate rendition may be tried for other offences than that for which his return was demanded, without violating any rights secured by the constitution or laws of the United States; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283 ; Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 657, 37 L. Ed. 549, affirming *id.*, 90 Ga. 347, 16 S. E. 945,

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35 Am. St. Rep. 216; State v. Glover, 112 N. C. 59C, 17 S. E. 525 ; People v. Cross, 135 N. Y. 5; <, , ; 2 X. E. 246, -"1 Am. St. Rep Com. v. Wright, 158 Mass. 110, ;:;! N. E. 82, 19 L. R. A. 206, •';•". Am. St. Rep. 175 ; State v. Patterson, 110 Mo. 505, 22 S. W. <i'JG : Waterman v. State, 116 Ind. 51, IS N. E. 63; State v. Kealy, SO la. 01, 5G X. W. 2S3 ; Carr v. State, 104 Ala. 4, 10 South. 150; State v. Stewart, 00 Wis. 587, 10 X. W. 420, 50 Am. St. Rep. 388; Ham v. Slate, 4 Tex. App. 015; Williams v. Weber, 1 Colo. App. 101. 28 Pac. 21; In re Brophy, 2 Ohio X. P. 230; Harland v. Territory, 3 Wash. Ty. 131, 13 Pac. 453 ; contra, In re Baruch, 41 Fed. 472 ; In re Fitton, 45 Fed. 471 ; State v. Hall. 40 Kan. .';;;S, 10 Pac. 918, 10 Am. St. Rep. 200; Stale v. Meade, 50 Kan. 000, 44 Pac. 619; In re Cannon, 47 Mich. 481, 11 X. W. 280. In some states the courts have overruled former decisions, bringing themselves in accord with the United States supreme court ; Petry v. Leidigh, 47 Neb. 126, 00 X. W. 308; see In re Robinson, 29 Neb. 135, 45 N. W. 207, S L. R. A. 398, 26 Am. St. Rep. 37S ; In re Brophy, 2 Ohio X. P. 230; Ex parte McKnight, 3 Ohio X. P. 255; id., 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 12S. See 12 Harv. L. Rev. 532.

Habeas corpus will not lie to release from

custody one who has been forcibly abducted from another state and brought to trial into the jurisdiction of a tribunal having jurisdiction of the offence charged; *Ex parte Davis*, 51 Tex. Cr. R. 00S, 103 S. W. 891, 12 L. R. A. (X. S.) 225, 14 Ann. Cas. 522; and to the same effect *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, where the prisoner was kidnapped in Peru, without any pretence of authority under the treaty or from the United States, and brought to Illinois; his trial in the state courts was held not to involve a violation of the due process clause of the constitution, nor of the treaty with Peru. The principle upon which the judgment rested was that when a criminal is brought into, or is in fact within, the custody of the state, charged with a crime against its laws, the state may, so far as the constitution and laws of the United States are concerned, proceed against him for the crime, and need not inquire as to the particular methods employed to bring him into the state. In meeting the contention that the accused, by virtue of the treaty with Peru, acquired by his residence a right of asylum, it was said: "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled." The right of a government voluntarily to give an asylum is different from the right to demand security in such asylum. The trea-

ty, so far as it regulates tin- right of a at all. i- Intended to limit this right in one who is proved to be a criminal fleeing from justice, so that on proper demand and ceedings had therein the tent of the

country of the asylum -hall deliver him up to

the country where the crime
 To this extent, and to this alone, the •
 does regulate or Impose a i-
 the right of the government of the country of
 the asylum to protect the criminal f i ■
 moval therefrom, in Mahon v. i
 U. S. 7(/U, 8 Sup. Ct. 12< p 82 L. Ed. 2fi
 governor of Kentucky made a requisition up-
 on the governor of West VI
 charged with t he crime of murder iii
 tucky, alleged to have fled from its Juri
 tion ami taken refuge in West Virj
 While the two governors were in a
 ence on the subject, a body of armed
 without warrant or other legal pi
 rested the accused in West Virginia and
 delivered him to the jailor of Pike county,
 Kentucky, in the courts of which he stood In-
 dicted for murder. Thereupon the gov.
 of West Virginia, on behalf of that stab
 plied to the district < ourt of the 1
 States for the Kentucky district for a writ
 of habeas corpus and his return to the juris-
 diction of West Virginia. Tie- supreme court
 held that no mode is provided by wl

unlawfully abducted from one state
 to another can be restored to the
 which he was taken, if held upon any pi
 of law for offences against the state to which
 ■ ii carried. The decision was by a
 divided court, but its authority is said to be

:i the less controlling; Moyer v. Ni<

203 D. s. 221, 27 Sup. ct. 121, 51 L. Ed L60;

affirming In re Moyer, 12 Idaho 2"

897, 12 L. R. A. (X. s.i 227, L18 Am. St R<

214. In Cook v. Hart, lid O. 5

Ct. 40, 36 1.. Ed. 934, it was

cases of Ker v. Illinois, 119 U. B. 136, :

Ct 225, 'I' I -1. and Mahon V

127 D. s. 700, 8 Sup. Ct 1204, 32 1-. 11. 28S,

established two propositions: 1. That that

court will not interfere to relkv

who have been arrested and tak<

lence from one state to another, '••

are held under prO< from

the . the latter tate. 2. That the

m .if the applicability nf thl
to a particular case is as much th(
of the state courts as a question of
law, or of the law of nations, as it Is "f the
courts Of the Dnited States. If a f(

duction from another state and •
within the jurisdiction of the Court holding
him is no objection to his detention and trial
for the offence charged, i

tion allowed if the abduction lias 1 •
plished under the forms of law. The a<-
plained of does not relate I traint

from which the petitioner seeks to he n

ed, but to the means by which he w

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within the jurisdiction of the court under whose process he is held ; *Pettibone v. Nichols*, 203 U. S. 192, 27 Sup. Ct. Ill, 51 L. Ed. 148, where conspiracy was charged against the governors of the states of Idaho and Colorado and other officers to secure the presence of Pettibone in the former state. It was held that the fundamental question was whether a United States circuit court, when asked upon habeas corpus to discharge a person held in actual custody by a state for trial in one of its courts, under an indictment charging a crime against its laws, can properly take into account the methods whereby the state obtained such custody, and that that question had been determined in the negative in *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, and *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, *supra*.

See 15 L. R. A. 177 n. ; 12 L. R. A. (N. S.) 225 n.

The constitutional provision for interstate rendition warrants a surrender after conviction ; *In re Hope*, 7 N. Y. C. R. R. 406, 10 N. Y. Supp. 28 ; but after serving his sentence the convict cannot be surrendered under a requisition from another state until he has had reasonable time to return to the state from which he was extradited ; *id*.

Extradition proceedings may be made the basis of a suit for malicious prosecution; *Castro v. De Uriarte*, 16 Fed. 93.

See Fugitive from Justice.

EXTRA JUDICIUM. Extra-judicial; out of the proper cause. Judgments rendered or acts done by a court which has no jurisdic-

tion of the subject, or where it has no jurisdiction, are said to be extra-judicial.

EXTRANEUS. In Old English Law. One

foreign born ; a foreigner. 7 Rep. 16.

In Roman Law. An heir not bom in the family of the testator. Those of a foreign state. The same as alienus. Vicat, Yoc. Jur. ; Du Cange.

EXTRAORDINARY. Beyond or out of the common order or rule ; not usual, regular, or of a customary kind ; not ordinary ; remarkable ; uncommon ; rare. Ten Eyck v. Episcopal Church, 29 Abb. N. C. (N. Y.) 154, 20 N. Y. Supp. 157 ; The Titania, 19 Fed. 103.

EXTRATERRITORIALITY. A term formerly used to express the exemption from the obligation of the laws of a state granted to foreign diplomatic agents, war-ships, etc. Wheaton, § 224. It has now been generally replaced by the term "Exterritoriality" (q. v.). See also Foreign Judgment ; Foreign Law ; Equity. The term is used to indicate jurisdiction exercised by a nation in other countries, by treaty, as, by the United States in China or Egypt; or by its own ministers or consuls in foreign lands. Crime is said to be extraterritorial when committed in a country other than that of the forum in which the party is tried. See 2 Moore, Int. L. Dig.

EXTRAVAGANTES. In Canon Law. The

name given to the constitutions of the popes posterior to the Clementines.

They are thus called, quasi vagantes extra corpus juris, to express that they were out of the canonical law, which at first contained only the decrees of

Gratian: afterwards the Decretals of Gregory IX., the Sexte of Boniface VIII., the Clementines, and at last the Extravagantes, were added to it. There are the Extravagantes of John XXII., and the common Extravagantes. The first contain twenty epistles, decretals, or constitutions of that pope, divided under fifteen titles, without any subdivision into books. The others are epistles, decretals, or constitutions of the popes who occupied the holy see either before or after John XXII. They are divided into books, like the decretals.

EXTREMIS (Lat. in extremity). When a person is sick beyond the hope of recovery, and near death, he is said to be in extremis.

A will made in this condition, if made without undue influence, by a person of sound mind, is valid. As to the effect of declarations of persons in extremis, see Dying Declarations; Declarations.

EYE-WITNESS. One who saw the act or fact to which he testifies. When an eye-witness testifies, and is a man of intelligence and integrity, much reliance must be placed on his testimony.

EYOTT. A small island arising in a river. Fleta, 1. 3, c. 2, s. b; Bracton, 1. 2, c. 2. See

Island.

EYRE. A journey; a court of itinerant justices. In old English law applied to the judges who traveled on circuit to hold courts in the different counties. See Justices in Eyre.

EYRER. To go about. See Eyre.