BOUVIER'S

LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

BY JOHN BOUVIER

Ignoratis terminis ignoratur et ars.—Co. Litt. 2a

Je sais que chaque science et chaque art a ses termes propres, inconnus au commun des hommes.—Fleury

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BY FRANCIS RAWLE

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their tickets in exchange for the conductor's checks, are liable to be expelled from the cars for a refusal to comply with such regulation, or to pay fare again; Northern R. Co. v. Page, 22 Barb. (N. Y.) 130; or for refusal to exhibit a ticket at the request of the conductor in compliance with the standing regulations of the company; Hibbard v. R. Co., 15 N. Y. 455. See TICKET.

Railway companies may exclude merchandise from their passenger trains. It is not the duty of a company to search every parcel carried by a passenger, and it is not guilty for the death of a fellow passenger resulting from an explosion of fire works carried by another; [1901] A. C. 396. The company is not bound to carry a passenger daily whose trunk or trunks contain merchandise, money, or other things known as "express matter"; 5 Am. Law Reg. 364.

COMMON CONDIDIT. See CONDIDIT, COMMON.

COMMON COUNCIL. See COUNCIL.

COMMON COUNTS. Certain general counts, not founded on any special contract, which are introduced in a declaration, for the purpose of preventing a defeat of a just right by an accidental variance in the evidence.

These are, in an action of assumpsit, counts founded on implied promises to pay money in consideration of a precedent debt, and have been variously classified. Those usually comprehended under the term are:—

1. *Indebitatus assumpsit,* which alleges a debt founded upon one of the several causes of action from which the law implies a promise to pay, and this is made the consideration for the promise to pay a sum of money equivalent to such indebtedness. This covers two distinct classes:—

a. Those termed money counts, because they related exclusively to money transactions as the basis of the debt alleged:

(1) Money paid for defendant's use.
(2) Money had and received by defendant for the plaintiff's use.
(3) Money lent and advanced to defendant.
(4) Interest.
(5) Account stated.

b. Any of the usual states of fact upon which the debt may be founded, the most common being:

(1) Use and occupation.
(2) Board and lodging.
(3) Goods sold and delivered.
(4) Goods bargained and sold.
(5) Work, labor, and services.
(6) Work, labor, and materials.

2. *Quantum meruit.*
3. *Quantum valebant.*

See ASSUMPSIT.

COMMON FINE. A small sum of money paid to the lords by the residents in certain leets. Fleta; Wharton.

COMMON FISHERY. A fishery to which all persons have a right. A common fishery is different from a *common of fishery,* which is the right to fish in another's pond, pool, or river. See FISHERY.

COMMON HIGHWAY. By this term is meant a road to be used by the community at large for any purpose of transit or traffic. Hammond, N. P. 239. See HIGHWAY.

COMMON INFORMER. One who, without being specially required by law or by virtue of his office, gives information of crimes, offences, or misdemeanors which have been committed, in order to prosecute the offender; a prosecutor.

COMMON INTENT. The natural sense given to words.

It is the rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which have been omitted; 2 H. Blackst. 530. In pleading, certainty is required; but certainty to a common intent is sufficient—that is, what upon a reasonable construction may be called certain, without recurring to *possible* facts; Co. Litt. 203 *a;* Dougl. 163. See CERTAINTY.

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or civil law.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that under the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden changes of a present arbitrary power, are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other; so that the will of the people, as it is gathered both from long established custom and from the expression of the legislative power, gradually forms a system—just, because it is the deliberate will of a free people—stable, because it is the growth of centuries—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used.

Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law.

When it is spoken of as the *lex non scripta*, it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law; it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible; Bell v. State, 1 Swan (Tenn.) 42; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587, 628, 632.

It naturally results from the inflexible form of the statute or written law, which has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence supports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law technically so called in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. There is an express constitutional adoption of it in Delaware, New York, Michigan, Wisconsin, and West Virginia, and an implied adoption of it in the constitutions of Kentucky and West Virginia. It has been adopted by statute in Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Washington and Wyoming. It was extended to Alabama by the ordinance of 1787 and the recognition of the latter in the state constitution; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; Barlow v. Lambert, 28 Ala. 707, 65 Am. Dec. 374. It is recognized by judicial decision without any statute in Iowa; State v. Twogood, 7 Ia. 252; Mississippi; Hemingway v. Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586. See 1 Bish. Crim. Law § 15, note 4, § 45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state; Abell v. Douglass, 4 Denio (N. Y.) 305; Schurman v. Marley, 29 Ind. 458; Kermot v. Ayer, 11 Mich. 181; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; *contra*, in Pennsylvania, in cases where that state has changed from the common law; the presumption being that the law of the sister state has made the same change, if there is no proof to the contrary. The term common law as thus used may be deemed to include the doctrine of equity; Williams v. Williams, 8 N. Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state; U. S. v. Wonson, 1 Gall. 20, Fed. Cas. No. 16,750; Bains v. The Catherine, 1 Baldw. 554, Fed. Cas. No. 756; Robinson v. Campbell, 3 Wheat. (U. S.) 223, 4 L. Ed. 372; Parsons v. Bedford, 3 Pet. (U. S.) 446, 7 L. Ed. 732. See Patterson v. Winn, 5 Pet. (U. S.) 241, 8 L. Ed. 108; Com. v. Leach, 1 Mass. 61; Coburn v. Harvey, 18 Wis. 147. The term is used in contradistinction to equity, admiralty, and maritime law; Parsons v. Bedford, 3 Pet. (U. S.) 446, 7 L. Ed. 732; Bains v. The Catherine, 1 Baldw. 554, Fed. Cas. No. 756.

The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation, and the principles upon which courts discriminate between what is to be taken and what is to be left have been much the same whether the common law was adopted by constitu-

tion, statute, or decision. While no hard and fast rule can be laid down which will at once differentiate every case, a very discriminating effort was made by Chancellor Bates, in Clawson v. Primrose, 4 Del. Ch. 643, to formulate the result of the decisions and ascertain the criterion which they had in most instances applied to the subject. In this discussion, which was characterized by Professor Washburn as having great value, the conclusion reached is thus stated:

"It cannot be overlooked that, notwithstanding the broad language of the constitution ('the common law of England as well as so much of the statute law as has been heretofore adopted in practice, . . . such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights') there were many parts of the common law of England, as it stood prior to 1776, which never have in fact been regarded by our courts as in force in this country; yet it is to be observed that the courts have not herein acted arbitrarily in adopting some parts of the common law and rejecting other parts, according to their views of the policy of particular rules or doctrine. On the contrary, those parts of the common law of England which have not been here practically administered by the courts will be found on examination to reduce themselves to two classes, resting upon grounds which render them proper to be treated as *implied* exceptions to the constitutional provision in addition to the *expressed* exception of such parts of the common law as were repugnant to the rights and privileges contained in the constitution. One of these classes of exceptions may be briefly disposed of. It embraces those parts of the rules and practice of the common law which had become superseded by long settled usages of trade, or business, or habits of dealing among our people, such as could not be unsettled or disturbed without serious inconvenience or injury. In such cases, upon the necessary maxim that *communis error facit jus*, the courts accepted these departures as practical modifications of the common law. . . .

"The other class of rules which, though parts of the common law of England, have never been administered by the courts under the constitution of 1776, embraces those parts of the common law which in the terms usually employed were, at the period of our independence, inapplicable to the existing circumstances and institutions of our people.

"There is less difficulty in applying the limitation practically than in attempting to define it. I understand it as excluding those parts of the common law of England which were applicable to subjects connected with political institutions and usages peculiar to the mother country, and having no existence in the colonies, such for example as officers, dignities, advowsons, titles, etc.; also, as excluding some of the more artificial rules of the common law, springing out of the complicated system of police, revenue, and trade, among a great commercial people and not therefore applicable to the more simple transactions of the colonies or of the states in their early history; also it may be understood as excluding or modifying many rules of what is known as the common law of practice, and possibly of evidence, which the greater simplicity in our system for the administration of justice, would render unnecessary or inconvenient.

"But, on the other hand, our legislative and judicial history shows conclusively that what may be termed the common law of property was received as an entire system, subject to alterations by the legislature only. Rights of property and of person are fundamental rights necessary to be defined and protected in every civil society. The common law, as a system framed to this very end, could not be deemed inapplicable in the colonies for want of a subject matter, or as being needless or superfluous, or unacceptable, which is the true sense of the limitation in question. Certain it is, as a matter of history, that our ancestors did not so treat it."

Among the other cases in which the subject is treated are Van Ness v. Pacard, 2 Pet. (U. S.) 144, 7 L. Ed. 374; Town of Pawlet v. Clark, 9 Cra. (U. S.) 333, 3 L. Ed. 735; Lyle v. Richards, 9 S. & R. (Pa.) 330; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 628; Doe v. Winn, 5 Pet. (U. S.) 241, 8 L. Ed. 108; Wheaton v. Peters, 8 Pet. (U. S.) 658, 8 L. Ed. 1055; U. S. v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; U. S. v. Coolidge, 1 Wheat. (U. S.) 415, 4 L. Ed. 124; Robinson v. Campbell, 3 Wheat. (U. S.) 223, 4 L. Ed. 372; U. S. v. Ravara, 2 Dall. (U. S.) 297, 1 L. Ed. 388; U. S. v. Worrall, 2 Dall. (U. S.) 384, 1 L. Ed. 426; Com. v. Leach, 1 Mass. 61; Boynton v. Rees, 9 Pick. (Mass.) 532; Winthrop v. Dockendorff, 3 Greenl. (Me.) 162; Colley v. Merrill, 6 Greenl. (Me.) 55; Sibley v. Williams, 3 Gill. & J. (Md.) 62; U. S. v. Coolidge, 1 Gall. (U. S.) 489, Fed. Cas. No. 14,857; State v. Danforth, 3 Conn. 114; Johnson v. Terry, 34 Conn. 260; Dawson v. Coffman, 28 Ind. 220; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629; Lansing v. Stone, 37 Barb. (N. Y.) 16; Barlow v. Lambert, 28 Ala. 704, 65 Am. Dec. 374. See Sampson's Discourse before the N. Y. Hist. Soc.

The adoption of the common law has been held to include the construction of common-law terms; Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116; Buckner v. Bank, 5 Ark. 536, 41 Am. Dec. 105; statutes; Com. v. Churchill, 2 Metc. (Mass.) 118; and constitutional provisions; McGinnis v. State, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697; curtesy; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; dower; Davis v. O'Ferrall, 4 G. Greene (Ia.) 168; husband and wife; Van Maren v. Johnson, 15 Cal. 308; champerty; Key v. Vattier, 1 Ohio 132; real property, title, estate, and tenures; Hemingway v. Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Powell v. Brandon, 24 Miss. 343; sureties; Vidal v. Girard, 2 How. (U. S.) 127, 11 L. Ed. 205; charitable uses; Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154; Williams v. Williams, 8 N. Y. 541; Witman v. Lex, 17 S. & R. (Pa.) 88, 17 Am. Dec. 644; decedent's estates; Cutting v. Cutting, 86 N. Y. 529; remedies and practice; Straffin's Adm'r v. Newell, T. U. P. Charlt. (Ga.) 172, 4 Am. Dec. 705; U. S. v. Wonson, 1 Gall. 20, Fed. Cas. No. 16,750; Hightower v. Fitzpatrick's Heirs, 42 Ala. 597; Grande v. Foy, 1 Hemp. 105, Fed. Cas. No. 5,682a; Fisher v. Cockerell, 5 Pet. (U. S.) 253, 8 L. Ed. 114; Wiley v. Ewing, 47 Ala. 424.

In actions in the federal courts in a territory, the common law is the rule of decision, in the absence of statutes or proof of laws or customs prevailing in the territory; Pyeatt v. Powell, 51 Fed. 551, 2 C. C. A. 367. The common-law rule of decision in a federal

court is that of the state in which it is sitting; Lorman v. Clarke, 2 McLean 568, Fed. Cas. No. 8,516.

Illustrations of what it has been held not to include are the rule respecting conveyance by parol; Lindsley's Lessee v. Coats, 1 Ohio 245; but see Lavelle v. Strobel, 89 Ill. 370; shifting inheritances; Drake v. Rogers, 13 Ohio St. 21; Cox v. Matthews, 17 Ind. 367; Bates v. Brown, 5 Wall. (U. S.) 710, 18 L. Ed. 535; mere possession of land as against miners; McClintock v. Bryden, 5 Cal. 100, 63 Am. Dec. 87; newspaper communications respecting a judge considered as a contempt in England; Stuart v. People, 3 Scam. (Ill.) 404; cutting timber; Dawson v. Coffman, 28 Ind. 220; easement by use in party-wall; Hieatt v. Morris, 10 Ohio St. 523, 78 Am. Dec. 280; estates in joint tenancy; Sergeant v. Steinberger, 2 Ohio 305, 15 Am. Dec. 553; rule as to partial reversal of a judgment against an infant and another; Wilford v. Grant, Kirby (Conn.) 117; *cy près* doctrine; Grimes' Ex'rs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; riparian rights to soil under water; Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; overruling Vansickle v. Haines, 7 Nev. 249; to running water; Martin v. Bigelow, 2 Aik. (Vt.) 187, 16 Am. Dec. 696; the definition of a navigable river; Fulmer v. Williams, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88; the law of waters as applied to large lakes, or to a river which is a national boundary; Champlain & St. L. R. Co. v. Valentine, 19 Barb. (N. Y.) 484.

In criminal law the common law is generally in force in the states to some extent, and while it is in some states held that no crime is punishable unless by statute, there are in many states general statutes resorting to the common law for all crimes not otherwise enumerated, and for criminal matters generally. When there is no statutory definition of a crime named, the common-law definition is generally resorted to; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; as also are its rules of evidence in criminal cases, and of practice as well as principle in the absence of statutes to the contrary; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; and in Louisiana, although not recognized in civil matters, the common law in criminal cases is expressly adopted; State v. McCoy, 8 Rob. 545, 41 Am. Dec. 301. It has been held to prevail in the District of Columbia as to theft; State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208; as to conspiracy in Maryland; State v. Buchanan, 5 Harr. & J. 358, 9 Am. Dec. 534; kidnapping in New Hampshire; State v. Rollins, 8 N. H. 550; homicide without intent to kill in Maine; State v. Smith, 32 Me. 369, 54 Am. Dec. 578; and in Tennessee; Jacob v. State, 3 Humph. 493; capacity to commit rape in New York; People v. Randolph, 2 Park. Cr. Rep. 174; but not in Ohio; Williams v. State, 14 Ohio 222, 45 Am. Dec. 536.

There is no common law of the United States, as a distinct sovereignty; Swift v. R. Co., 64 Fed. 59; Gatton v. Ry. Co. (Ia.) 63 N. W. 589; Wheaton v. Peters, 8 Pet. (U. S.) 658, 8 L. Ed. 1055; People v. Folsom, 5 Cal. 374; Forepaugh v. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; and therefore there are no common-law offences against the U. S.; U. S. v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; In re Greene, 52 Fed. 104; U. S. v. Lewis, 36 Fed. 449; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 525, 27 L. Ed. 703; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. There is a rare and valuable pamphlet on this subject, by St. George Tucker Campbell, of the Philadelphia Bar, which contains a full discussion of this question. For earlier cases before the question was fully settled, see U. S. v. Worrall, 2 Dall. (U. S.) 384, Fed. Cas. No. 16,766; U. S. v. Coolidge, 1 Gall. 488, Fed. Cas. No. 14,837; *id.*, 1 Wheat. (U. S.) 415, 4 L. Ed. 124. But the common law is resorted to by federal courts for definition of common-law crimes not defined by statute; U. S. v. Armstrong, 2 Curt. C. C. 446, Fed. Cas. No. 14,467; U. S. v. Coppersmith, 4 Fed. 198. See COMMERCIAL LAW.

The admiralty law is distinct from the common law and the line of demarcation is to be sought in the English decisions before the Revolution and those of the state courts prior to the constitution. See La Amistad de Rues, 5 Wheat. (U. S.) 391, 5 L. Ed. 115; Bains v. The James and Catherine, Baldw. 558, Fed. Cas. No. 756; Sawyer v. Steamboat Co., 46 Me. 400, 74 Am. Dec. 463. And as to the adoption of the English ecclesiastical law, see Le Barron v. Le Barron, 35 Vt. 365; Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447; Perry v. Perry, 2 Paige Ch. (N. Y.) 501; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460. New York has adopted only so much of the common law as is applicable to the circumstances of the colonies and conformable to her institutions; Cutting v. Cutting, 86 N. Y. 522; Shayne v. Publishing Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654. In adopting the common law in New York, principles inconsonant with the circumstances or repugnant to the spirit of American institutions were not adopted; Barnes v. Terminal Co., 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962.

It does not become a part of the law of a state of its own vigor, but is adopted by constitutional provision, statute or decision; Western Union Tel. Co. v. Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815. As to Indiana, see Sopher v. State, 169 Ind. 177, 81 N. E. 913, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27.

"There is no body of federal common law separate and distinct from the common law

existing in the several states in the sense that there is a body of statute law enacted by congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of congress;" Western Union Tel. Co. v. Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, following Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 308; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627. There is an elaborate opinion in Murray v. Ry. Co., 62 Fed. 24, on this subject. See also 36 Amer. L. Rev. 498; 18 Harv. L. Rev. 134.

Sir F. Pollock expresses the opinion that there is a common law of the United States as distinguished from that of a state. 3 Encycl. of Laws of England 142.

In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. Those passed since the settlement of the particular colony are not in force, unless specially accepted by it, or expressly made to apply to it; if these were suitable to the condition of the colony they were usually accepted; Baker v. Mattocks, Quincy (Mass.) 72; Cathcart v. Robinson, 5 Pet. (U. S.) 280, 8 L. Ed. 120; Morris v. Vanderen, 1 Dall. (U. S.) 64, 1 L. Ed. 38.

There cannot be said to be a settled rule as to what date is to be fixed as determining what British statutes were received as part of the common law. Many states fix July 4, 1776. This is provided by constitution in Florida, Maryland and Rhode Island, and by statute in Kentucky; in other states 4th Jac. I. is the period named after which English statutes are not included, as Arkansas, Colorado, Illinois, Indiana, Missouri, Virginia, Wyoming (but the last four except stats. 43 Eliz. c. 6, § 2; 13 Eliz. c. 8 and 37 Hen. VIII. c. 9); McCool v. Smith, 1 Black (U. S.) 459, 17 L. Ed. 218; Scott v. Lunt, 7 Pet. (U. S.) 596, 8 L. Ed. 797; Baker's Adm'r v. Crandall, 78 Mo. 587, 47 Am. Rep. 126; Herr v. Johnson, 11 Colo. 393, 18 Pac. 342. As to English statutes in force in Pennsylvania, see Report of the Judges in Roberts, Eng. Stat.; Boehm v. Engle, 1 Dall. (U. S.) 15, 1 L. Ed. 17; Biddle v. Shippen, 1 Dall. (U. S.) 19, 1 L. Ed. 19; Respublica v. Mesca, 1 Dall. (U. S.) 73, 1 L. Ed. 42; Shewel v. Fell, 3 Yeates (Pa.) 17; *id.*, 4 Yeates (Pa.) 47; Johnson v. Hessel, 134 Pa. 315, 19 Atl. 700. Generally, it may be stated that the statutes adopted prior to the Revolution, and held applicable under rules stated, are accepted as part of the common law; Hamilton v. Kneeland, 1 Nev. 40; Sackett v. Sackett, 8 Pick. (Mass.) 309; Coburn v. Harvey, 18 Wis. 148. But see Matthews v. Ansley, 31 Ala. 20; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178; Crawford v. Chapman, 17 Ohio 452; In re Lamphere, 61 Mich. 105, 27 N. W. 882. Upon the subject of English statutes as part of the common law see an able note on the whole subject of this title in 22 L. R. A. 501. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

See works of Franklin, by Sparks, vol. 4, p. 271, as to the adoption of the common law in America; see also Cooley, Const. Lim. (2d ed.) 34, n. 35; Pierce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; 2 Wait, Actions and Defences, 276; Reinsch, English Common Law in the Early American Colonies, 1 Sel. Essays in Anglo-Amer. L. H. 367; Sioussat, Extension of English Statutes to the Plantations, *id.* 416; Jenks, Teutonic Law, *id.* 49; Ed. Combinations 216; James C. Carter, The Law, etc.; O. W. Holmes, The Common Law; Gray, Sources of the Law; 23 Q. B. D. 611, where Bowen, L. J., speaks of it as "an arsenal of sound common sense."

A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances; Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77; quoted and approved, Second Employers' Liability Cases, 223 U. S. 1, 50, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

See LAW MERCHANT.

COMMON LAW MARRIAGE. See MARRIAGE.

COMMON LAW PROCEDURE ACTS. See PROCEDURE ACTS.

COMMON NUISANCE. One which affects the public in general, and not merely some particular person. 1 Hawkins, Pl. Cr. 197 See NUISANCE.

Its sessions are, in general, held at the same time and by the same judges as the *court of oyer and terminer and general gaol delivery.*

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RECORD. A judicial organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. Ex parte Gladhill, 8 Metc. (Mass.) 171, per Shaw, C. J.

A court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony. 3 Bla. Com. 24.

A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil causes above forty shillings, and proceeding according to the course of the common law. Woodman v. Somerset County, 37 Me. 29.

All courts are either *of record* or *not of record.* The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record; Co. Litt. 117 *b*, 260 *a*; 1 Salk. 144; 12 Mod. 388; 2 Wms. Saund. 101*a*; Viner, Abr. *Courts*; and it is said that the erection of a new tribunal with this power renders it by that very fact a court of record; 1 Salk. 200; 12 Mod. 388; 1 Woodd. Lect. 93; 3 Bla. Com. 24, 25; but every court of record does not possess this power; 1 Sid. 145; 3 Sharsw. Bla. Com. 25, n. The mere fact that a permanent record is kept does not, in modern law, stamp the character of the court; since many courts, as probate courts and others of limited or special jurisdiction, are obliged to keep records and yet are held to be courts not of record. See Smith v. Rice, 11 Mass. 510; Smith v. Morrison, 22 Pick. (Mass.) 430; Scott v. Rushman, 1 Cow. (N. Y.) 212; Thomas v. Robinson, 3 Wend. (N. Y.) 268; Snyder v. Wise, 10 Pa. 158; Silver Lake Bank v. Harding, 5 Ohio, 545; Bancroft v. Stanton, 7 Ala. 351; Ellis v. White, 25 Ala. 540. The definition first given above is taken from the opinion of Shaw, C. J., in Ex parte Gladhill, 8 Metc. (Mass.) 171, with an additional element not required in that case for purposes of distinction, and is believed to contain all the distinctive qualities which can be said to belong to all courts technically of record at modern law. To be a court of record, a court must have a clerk and a seal; Lewis Co. v. Adamski, 131 Wis. 311, 111 N. W. 495. As to what are courts of record and courts not of record in England, see 2 Odgers, C. L. 1021.

Courts may be at the same time of record for some purposes and not of record for others; Wheaton v. Fellows, 23 Wend. (N. Y.) 376; Lester v. Redmond, 6 Hill (N. Y.) 590; Ex parte Gladhill, 8 Metc. (Mass.) 168.

Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; but such rules must not contravene the law of the land; Fullerton v. Bank, 1 Pet. (U. S.) 604, 7 L. Ed. 280; Boas v. Nagle, 3 S. & R. (Pa.) 253; Snyder v. Bauchman, 8 S. & R. (Pa.) 336; Risher v. Thomas, 2 Mo. 98. They can be deprived of their jurisdiction by express terms of denial only; Kline v. Wood, 9 S. & R. (Pa.) 298; 2 Burr. 1042; 1 W. Bla. 285. Actions upon the judgments of such courts may, under the statutes of limitations of some of the states of the United States, be brought after the lapse of the period of limitation for actions on simple contracts; and this provision has given rise to several determinations of what are and what are not courts of record. See Smith v. Morrison, 22 Pick. (Mass.) 430; Mowry v. Cheesman, 6 Gray (Mass.) 515; Lester v. Redmond, 6 Hill (N. Y.) 590; Scott v. Rushman, 1 Cow. (N. Y.) 212; Ellis v. White, 25 Ala. 540; Woodman v. Somerset County, 37 Me. 29.

Under the naturalization act of the United States, "every court of record in a state having common-law jurisdiction and a seal and a clerk or prothonotary" has certain specified powers. As to what the requirements are to constitute a court of record under this act, see Carter v. Gregory, 8 Pick. (Mass.) 168; Wheaton v. Fellows, 23 Wend. (N. Y.) 375.

A writ of error lies to correct erroneous proceedings in a court of record; 3 Bla. Com. 407; Gay v. Richardson, 18 Pick. (Mass.) 417; but will not lie unless the court be one, technically, of record; Smith v. Rice, 11 Mass. 510. See WRIT OF ERROR.

COURT OF REFEREES. See REFEREES, COURT OF; LOCUS STANDI.

COURT OF REGARD. See REGARD.

COURT OF REQUESTS (called otherwise *court of conscience*). A court of equity for poor suitors, or for the king's servants privileged to sue there. The first record of a case is in 8 Henry VIII. Originally a standing committee of the Council, its members being the same as those of the Star Chamber. Later it became a separate court and its regular judges were styled Masters of Request. It was virtually abolished by Act of 1640; 1 Holdsw. H. E. L. 208. See 3 Steph. Com. 449; Bac. Abridg.; Select Cases in the Court of Requests (Selden Society, Publ. vol. 12).

In the 17th and 18th centuries Courts of Request were established in different parts of England for the collection of small debts; by 1800, fifty-four such courts had been created by fifty-four acts of Parliament.

COURT ROLLS. The rolls of a manor court. In the 13th century landowners were beginning to catalogue their possessions and enrol the proceedings of their courts. The court rolls show that there was a large body of law systematically and regularly administered in these local Courts; 2 Holdsw. Hist. E. L. 272. See COPYHOLD; ROLL.

COURTS OF SCOTLAND. The *Court of Session* consists of the Inner House and the Outer House. The former has two divisions; the Lord President and three judges constitute the first division; the Lord Justice Clerk and three judges constitute the second division. In the Outer House are five permanent Lords Ordinary, attached equally to both divisions of the court.

sheriff's patent of assistance; 4 Doug. 347; these writs authorized the person to whom they were issued, with the assistance of the sheriff, justice of the peace, or constable, to enter into any house where the goods were suspected to be concealed. One acting under this writ and finding nothing was not justified; 4 Dougl. 347. See Quincy, Mass. Rep. Appx.; 1 Thayer, Cas. Const. L.; 2 Dan. Ch. Pr. 1062.

WRIT OF ASSOCIATION. In English Practice. A writ whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and sergeants; and they are required to admit the said persons into their society in order to take the assizes. 3 Bla. Com. 59. See ASSIZE.

WRIT OF CONSPIRACY. The name of an ancient writ now superseded by the more convenient remedy of an action on the case, which might have been sued against parties guilty of a conspiracy. Fitzh. N. B. 260.

It did not lie at common law, in any case, except when the conspiracy was to indict the party either of treason or felony; all the other cases of conspiracy in the books were but actions on the case; Hutchins v. Hutchins, 7 Hill (N. Y.) 104.

WRIT OF COVENANT. A writ which lies where a party claims damages for breach of covenant, *i. e.* of a promise under seal.

WRIT OF DEBT. A writ which lies where the party claims the recovery of a debt, *i. e.* a liquidated or certain sum of money alleged to be due to him.

This is debt *in the debet*, which is the principal and only common form. There is another species mentioned in the books, called the debt *in the detinet*, which lies for the specific recovery of *goods* under a contract to deliver them. 1 Chitty, Pl. 101.

WRIT OF DECEIT. The name of a writ which lies where one man has done anything in the name of another, by which the latter is damnified and deceived. Fitzh. N. B. 217.

The modern practice is to sue a writ of trespass on the case to remedy the injury. See DECEIT.

WRIT OF DETINUE. See DETINUE.

WRIT OF DOWER. A writ which lies for a widow claiming the specific recovery of her dower, no part having been yet assigned to her. It is usually called a writ of dower *unde nihil habet*. 3 Chitty, Pl. 393. There is another species, called a *writ of right of dower*, which applies to the particular case where the widow has received a part of her dower from the tenant himself; and of land lying in the same town in which she claims the residue. This latter writ is seldom used in practice. See DOWER.

WRIT OF EJECTMENT. See EJECTMENT.

WRIT OF ENTRY. See ENTRY, WRIT OF.

WRIT OF ERROR. A writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them, in some cases, themselves to examine the record, in others to send it to another court of appellate jurisdiction, therein named, to be examined, in order that some alleged error in the proceedings may be corrected. Steph. Pl. 138; 2 Saund. 100, n. 1; Bac. Abr. *Error*.

The first is called a writ of error *coram nobis* or *vobis*. When an issue in fact has been decided, there is not, in general, any appeal except by motion for a new trial; and although a matter of fact should exist which was not brought into the issue, as, for example, if the defendant neglected to plead a release, which he might have pleaded, this is no error in the proceedings, though a mistake of the defendant; Steph. Pl. *118. But there are some facts which affect the validity and regularity of the proceeding itself; and to remedy these errors the party in interest may sue out the writ of error *coram vobis*. The death of one of the parties at the commencement of the suit, the appearance of an infant in a personal action by an attorney and not by guardian, the coverture of either party at the commencement of the suit, when her husband is not joined with her, are instances of this kind; 1 Saund. 101; Steph. Pl. *119; Day v. Hamburgh, 1 Browne, Pa. 75. The writ of error *coram vobis* is used to correct errors of fact and not of law; Maple v. Havenhill, 37 Ill. App. 311.

The second species is called, generally, writ of error, and is the more common. Its object is to review and correct an error of the law committed in the proceedings, which is not amendable or cured at common law or by some of the statutes of amendment or jeofail. See, generally, 1 Vern. 169; 1 Salk. 322; 2 Saund. 46, 101; 3 Bla. Com. 405.

It is the usual way of bringing up a case; an appeal is an exception; Carino v. Insular Government, 212 U. S. 456, 29 Sup. Ct. 334, 53 L. Ed. 594. There cannot be two in the same case at the same time; Columbus Const. Co. v. Crane Co., 174 U. S. 600, 19 Sup. Ct. 721, 43 L. Ed. 1102.

See APPEAL AND ERROR; BILL OF EXCEPTION.

WRIT OF EXECUTION. A writ to put in force the sentence that the law has given. See EXECUTION.

WRIT OF EXIGI FACIAS. See EXIGENT; EXIGI FACIAS; OUTLAWRY.

WRIT OF FORMEDON. This writ lies where a party claims the specific recovery of lands and tenements as issue in tail, or as remainder-man or reversioner, upon the determination of an estate in tail. Co. Litt. 236 *b*. See FORMEDON.